

No. 13-7120

IN THE
Supreme Court of the United States

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

**BRIEF OF *AMICI CURIAE* THE BRADY
CENTER TO PREVENT GUN VIOLENCE
and INTERNATIONAL BROTHERHOOD
OF POLICE OFFICERS IN SUPPORT OF
THE RESPONDENT**

JONATHAN E. LOWY
KELLY N. SAMPSON
BRADY CENTER TO PREVENT GUN
VIOLENCE LEGAL ACTION PROJECT
840 First Street, NE, Suite 400
Washington, DC 20002

GREGORY G. LITTLE
Counsel of Record
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200
glittle@whitecase.com

Counsel for Amici Curiae

255262



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether unlawful possession of a firearm poses a serious potential risk of physical injury so as to constitute a “violent felony” within the meaning of the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(b)(ii).

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	5
I. Weapons Possession Offenses Demonstrate Disregard For Societal Decisions To Regulate The Risks Of Physical Injury Created By The Presence Of Firearms.....	7
A. The Illegal Presence Of Guns Increases Potential For Violence	9
B. The Risk Created By Illegal Weapons Possession Is Comparable To The Enumerated Violent Felonies	12
C. Illegal Weapons Possession Purposefully Introduces The Risk Of Gun Violence Where A Legislature Has Determined It Is Impermissible.....	13

Table of Contents

	<i>Page</i>
II. Each Category Of Weapons Possession Offenses Poses Risks Such That They Should Be Classified As Violent Felonies.	15
A. Illegal Weapons Possession By Groups Of People Who Cannot Be Trusted To Wield Firearms Creates A Serious Potential Risk Of Physical Injury.	16
B. Possession In Violation Of Laws Restricting Carrying Guns In Certain Places Or Manners Creates A Serious Potential Risk Of Physical Injury.	21
1. Banning Firearms In Sensitive Locations Aims To Reduce Risks Of Violence	21
2. Unlawful Concealed Carry Creates A Risk That Guns Will Be Used To Inflict Injury	24
C. Bans On Sawed-Off Shotguns Are One Example Of Laws Outlawing Particularly Dangerous Types Of Firearms.	25
CONCLUSION	27

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Abramski v. United States</i> , 134 S. Ct. 2259 (2014).....	1, 4
<i>Begay v. United States</i> , 553 U.S. 137 (2008).....	13, 14
<i>Cook v. Wiley</i> , 208 F.3d 1314 (11th Cir. 2000).....	16
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	1, 2, 15, 21
<i>Huddleston v. United States</i> , 415 U.S. 814 (1974)	2-3
<i>James v. United States</i> , 550 U.S. 192 (2007).....	5, 9, 12, 19
<i>McDonald v. City of Chicago</i> , 130 S. Ct. 3020 (2010).....	1, 2, 15
<i>Moore v. Warden, FCC Coleman-Medium</i> , No. 10-12424, 2014 WL 2599762 (11th Cir. June 10, 2014).....	24
<i>Scarborough v. United States</i> , 431 U.S. 563 (1977).....	2, 18

Cited Authorities

	<i>Page</i>
<i>State v. Chippey</i> , 33 A. 438 (Del. Ct. Gen. Sess. 1892).....	24
<i>Sykes v. United States</i> , 131 S. Ct. 2267 (2011).....	<i>passim</i>
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	<i>passim</i>
<i>United States v. Castleman</i> , 134 S. Ct. 1405 (2014).....	1, 4, 9
<i>United States v. Dillard</i> , 214 F.3d 88 (2d Cir. 2000)	16, 17, 18, 19
<i>United States v. Doe</i> , 960 F.2d 221 (1st Cir. 1992).....	20
<i>United States v. Green</i> , 414 F. Supp. 2d 1029 (N.D. Okla. 2006)	19
<i>United States v. Hall</i> , 77 F.3d 398 (11th Cir. 1996).....	24
<i>United States v. Hayes</i> , 555 U.S. 415 (2009).....	1
<i>United States v. Huddleston</i> , 415 U.S. 814 (1974)	16

Cited Authorities

	<i>Page</i>
<i>United States v. Johnson</i> , 526 F. App'x 708 (8th Cir. 2013)	3
<i>United States v. Lane</i> , 252 F.3d 905 (7th Cir. 2001).....	16, 19
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	14
<i>United States v. Rogers</i> , 371 F.3d 1225 (10th Cir. 2004)	16
<i>United States v. Stinson</i> , 943 F.2d 1268 (11th Cir. 1991), <i>rev'd</i> , <i>Stinson v. United States</i> , 508 U.S. 36 (1993).....	16

STATUTES AND RULES

18 U.S.C. § 922(g)	14
18 U.S.C. § 922(q)	21, 23
18 U.S.C. § 924(e)(2)(B)(i)	17
18 U.S.C. § 924(e)(2)(B)(ii)	<i>passim</i>
18 U.S.C. § 3156	17
26 U.S.C. § 5801	26

Cited Authorities

	<i>Page</i>
Ark. Code Ann. § 5-73-104 (West 2014)	25
Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993)	2
Colo. Rev. Stat. Ann. § 18-12-102 (West 2014)	26
Colo. Rev. Stat. Ann. § 18-12-105.5 (West 2014) . . .	21-22
Fla. Stat. Ann. § 790.115 (West 2014)	22
Fla. Stat. Ann. § 790.145 (West 2014)	22
Fla. Stat. Ann. § 790.221 (West 2014)	26
Mass. Gen. Laws Ann. Chapter 269, § 10 (West 2014) . .	26
Minn. Stat. Ann. § 609.1095 (West 2014)	20
Minn. Stat. Ann. § 624.713 (West 2014)	20
Miss. Code Ann. § 97-37-17 (West 2014)	22
N.Y. Penal Law § 70.02 (McKinney)	20
N.Y. Penal Law § 265.02 (McKinney)	20
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009 (1996)	23

Cited Authorities

	<i>Page</i>
18 Pa. Cons. Stat. § 908 (2014)	26
Tex. Penal Code Ann. § 46.03 (West 2014)	22
Tex. Penal Code Ann. § 46.05 (West 2014)	26
Utah Code Ann. § 76-3-203.5 (West 2014)	20
Utah Code Ann. § 76-10-503 (West 2014)	20
MISCELLANEOUS	
1998 N.Y. Sess. Laws 1799 (McKinney)	26
2013 N.Y. Sess. Laws 1554 (McKinney)	9
2013 N.Y. Sess. Laws 1556 (McKinney)	23
Ian Ayres & John J. Donohue III, <i>Shooting Down the “More Guns, Less Crime” Hypothesis</i> , 55 Stan. L. Rev. 1193 (2003)	25
Jeffrey C. Bright, <i>Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony</i> , 48 Duq. L. Rev. 601 (2010)	11

Cited Authorities

	<i>Page</i>
Centers for Disease Control & Prevention, <i>Deaths: Final Data for 2011</i> , 63 Nat'l Vital Statistics Reports, No. 1 (forthcoming 2014), <i>available at</i> http://www.cdc.gov/nchs/data/ nvsr/nvsr63/nvsr63_03.pdf	7
Comm. on Injury & Poison Prevention, Am. Acad. of Pediatrics, <i>Firearm-Related Injuries Affecting the Pediatric Population</i> , 105 Pediatrics 888 (2000)	7, 23
Philip J. Cook et al., <i>Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective</i> , 56 UCLA. L. Rev. 1041 (2009)	7, 8
Philip J. Cook et al., <i>Underground Gun Markets</i> , 117 Econ. J. F558 (2007)	3
Philip J. Cook & Jens Ludwig, <i>The Social Costs of Gun Ownership</i> , J. Pub. Econ. 379 (2006)	9
Philip J. Cook, <i>The Technology of Personal Violence</i> , 14 Crime & Just. 1 (1991)	8, 25
Hashem Dezhbakhsh & Paul Rubin, <i>Lives Saved or Lives Lost? The Effects of Concealed- Handgun Laws on Crime</i> , 88 Am. Econ. Rev. 473 (1998)	24

Cited Authorities

	<i>Page</i>
John J. Donohue, <i>The Impact of Concealed-Carry Laws, in Evaluating Gun Policy Effects on Crime and Violence</i> 289 (2003)	24
Mark Duggan, <i>More Guns, More Crime</i> , 109 <i>J. Pol. Econ.</i> 1086 (2001)	10
Everytown for Gun Safety, <i>Analysis of School Shootings</i> (Feb. 2014), http://everytown.org/article/schoolshootings/ (last visited Aug. 24, 2014)	22
Caroline Wolf Harlow, <i>Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders</i> (2001), available at http://bjs.gov/content/pub/pdf/fuo.pdf	18, 21
Peter Hermann, <i>Delving More Deeply Into Shooting Stats</i> , <i>The Baltimore Sun</i> , Sept. 24, 2009, available at http://articles.baltimoresun.com/2009-09-24/news/0909230076_1_nonfatal-shootings-arrests-numbers	6
Chris Kirk, <i>Since 1980, 297 People Have Been Killed in School Shootings</i> , <i>Slate</i> (Dec. 19, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/12/sandy_hook_a_chart_of_all_196_fatal_school_shootings_since_1980_map.html	22

Cited Authorities

	<i>Page</i>
Evan Tsen Lee et al., <i>Which Felonies Pose a “Serious Potential Risk of Injury” for Federal Sentencing Purposes?</i> , 26 Fed. Sent’g Rep. 118 (2013)	6, 12-13
Matthew Miller et al., <i>State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003</i> , 64 Soc. Sci. & Med. 656 (2007)	10
Matthew Miller et al., <i>Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997</i> , 92 Amer. J. Pub. Health 1988 (2002)	7
Craig Perkins, <i>National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime</i> (2003), available at http://www.bjs.gov/content/pub/pdf/wuvc01.pdf	22
1 Albert J. Reiss, Jr. & Jeffrey A. Roth, <i>Understanding and Preventing Violence</i> (1993)	8
Michael Siegel et al., <i>The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010</i> , 103 Am. J. Pub. Health, no. 11, 2013.	10

Cited Authorities

	<i>Page</i>
Katherine A. Vittes et al., <i>Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis</i> 65 (Daniel W. Webster & Jon S. Vernick eds., 2013)	18
William Wells & Julie Horney, <i>Weapon Effects and Individual Intent To Do Harm: Influences on the Escalation of Violence</i> , 40 <i>Criminology</i> 265 (2002)	8
Garen J. Wintemute, <i>Comprehensive Background Checks: New Evidence and Rethinking “Comprehensive,” in Updated Evidence and Policy Developments on Reducing Gun Violence in America</i> 17 (Daniel W. Webster & Jon S. Vernick eds., 2014)	21
Mona A. Wright et al., <i>Effectiveness of Denial of Handgun Purchase to Persons Believed To Be at High Risk for Firearm Violence</i> , 89 <i>Am. J. Pub. Health</i> 88 (1999)	18-19
Marianne W. Zawitz, <i>Firearms, Crime, and Criminal Justice: Firearm Injury from Crime</i> (1995), available at http://www.bjs.gov/content/pub/pdf/FIFC.PDF	11

Cited Authorities

	<i>Page</i>
Franklin E. Zimring & Gordon Hawkins, <i>The Citizen's Guide to Gun Control</i> (1987)	11
Franklin E. Zimring & Gordon Hawkins, <i>Crime is not the Problem: Lethal Violence in America</i> (1997).....	11

INTEREST OF AMICI CURIAE¹

The Brady Center to Prevent Gun Violence is the nation's oldest and largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus* briefs in cases before this Court involving the interpretation and application of firearms regulations including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *United States v. Castleman*, 134 S. Ct. 1405 (2014), and *Abramski v. United States*, 134 S. Ct. 2259 (2014). The Brady Center's Legal Action Project has studied and published reports on the dangers posed by felons in possession of firearms and has a substantial interest in the proper interpretation of federal gun laws to prevent gun violence.

The International Brotherhood of Police Officers (IBPO) is one of the largest police unions in the country, representing a significant number of members across the nation. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers from persons who cannot be trusted to possess firearms.

1. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Possession offenses—laws that keep guns out of the hands of people who, because of their potential danger, are prohibited from possessing them—form a core of gun violence prevention laws. Federal law has established a system of background checks that seeks to prevent individuals who should not acquire a firearm from purchasing one from licensed dealers, and some state laws also require background checks for some or all gun purchases from unlicensed sellers. The Brady Law, which was signed into law two decades ago, established mandatory verification of statements on applications to buy firearms, including whether the purchaser is a prohibited person. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Brady background checks have prevented over two million purchases by individuals who are not legally permitted to own a gun. Background checks alone, however, cannot accomplish regulation of possession.

Firearms pose unique risks to people and property in the United States. They may be used for recreational purposes such as hunting. They also play a role in lawful self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The force that makes them useful for those purposes, however, also makes them a tool of crime. In the wrong place or in the wrong hands, they become an instrument of destructive violence. This Court's jurisprudence has both recognized the right to lawful uses of guns, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and upheld legislation restricting possession by individuals who have proven themselves untrustworthy or dangerous. *Scarborough v. United States*, 431 U.S. 563 (1977); *Huddleston v. United States*, 415 U.S. 814

(1974). This case raises a question about the appropriate penalty for people who repeatedly break laws, including by illegally possessing a firearm.

Criminals and individuals intent on crime can still obtain weapons through backchannels. As federal law and the law of most states allow guns to be sold by unlicensed sellers without a Brady background check, an estimated forty percent of firearm purchases occur outside the system of background checks. Shadowy transactions include those for illegal weapons, without a record, that are particularly attractive to criminals. “Underground gun markets have developed in the U.S. in response to federal regulations that seek to prohibit ownership and possession by that sub-set of the population deemed to be at unacceptably high risk of misusing guns—primarily youth and adults with serious prior criminal records—while preserving easy access for everyone else.” Philip J. Cook et al., *Underground Gun Markets*, 117 *Econ. J.* F558, F558 (2007).

The Petitioner in this case, for example, was an active participant in the black market for weapons and was apprehended after disclosing to an FBI officer that he had manufactured napalm and other explosives for the Aryan movement, and admitted to possessing an AK-47 rifle and a semi-automatic handgun, along with a large cache of ammunition. *United States v. Johnson*, 526 F. App’x 708, 709 (8th Cir. 2013). He had been previously convicted for two robberies and possessing a sawed-off shotgun.

Possession offenses target offenders who skirted the controls on acquisition of guns. These laws recognize the risks to society posed by lawbreakers possessing such potent weapons, and use the criminal justice system to remove or minimize those risks. They are not concerned

with firearms in the abstract, but rather gun possession in combination with other factors that create a likelihood of misuse of firearms. They complement mechanisms such as background checks by combatting illegal possession when laws restricting firearms purchases have been circumvented.

Laws criminalizing dangerous firearms possession form part of a network of regulations and crimes that outline the permissible use of firearms in American society. This Court recently recognized the role of two other parts of that network in preventing gun violence in *United States v. Castleman*, 134 S. Ct. 1405 (2014) (possession by domestic violence offenders), and *Abramski v. United States*, 134 S. Ct. 2259 (2014) (straw purchasing). This case arises from another facet of controls on the presence of weapons in society: possession of a sawed-off shotgun, widely considered to be a particularly dangerous form of firearm.

In particular, this case raises the question of the appropriate punishment under the Armed Career Criminal Act (“ACCA”) for a repeat offender whose prior crimes include defying restrictions on firearm possession. As context for determining the applicability of the sentencing enhancement provision to the particular offense of possessing a sawed-off shotgun, this brief explores the broader landscape of criminal possession of firearms. Through the lens of the ACCA, it demonstrates the critical role of these laws in preventing gun violence. This analysis supports amici’s position that illegal possession of firearms should fit within the “violent felony” framework of the ACCA.

ARGUMENT

The ACCA establishes enhanced sentences for any repeat offender who is “the kind of person who might deliberately point the gun and pull the trigger.” *Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011). Congress did not limit the ACCA “to offenders who had actually been convicted of crimes against violence against persons.” *Taylor v. United States*, 495 U.S. 575, 588 (1990). From its origins, instead, the ACCA has aimed to identify criminals whose actions evince a likelihood that they will commit gun violence in the future—and keep them off the streets before they do so. The provision at issue in this case does so by establishing fifteen-year mandatory minimum sentence for repeat offenders who have committed three violent felonies, defined in part as a felony 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). The final clause of this provision is known as the “residual clause” of the ACCA.

Rather than an exact test, the ACCA “states a normative principle.” *Sykes*, 131 S. Ct. at 2277 (“Congress chose to frame ACCA in general and qualitative, rather than encyclopedic, terms.”). The residual clause of the ACCA does not look at whether the elements of the offense necessarily include causing physical injury, but rather whether the events set in motion by the offense may entail a risk of physical injury. *James v. United States*, 550 U.S. 192, 199 (2007) (“[T]he most relevant common attribute of the enumerated offenses . . . 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.”). In *Sykes*, this Court started the residual clause

analysis by looking at how the “perpetrator’s indifference to the[] collateral consequences” of the predicate offense had “violent—even lethal potential for others.” 131 S. Ct. at 2273. The *Sykes* Court, holding that intentional vehicular flight constitutes a violent felony, determined that the residual clause analysis encompassed the risks created where “[e]ven if the criminal attempting to elude capture drives without going full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody.” *Id.* The residual clause thus focuses on setting in motion “destructive forces.”

The link between weapons offenses and other violent crimes supports holding that illegal possession of firearms fits into the “violent felony” framework of the ACCA. For example, a study conducted in Baltimore, Maryland, found that “firearms violations are a stronger indication than drug arrests of a person’s likelihood to commit murder.” Peter Hermann, *Delving More Deeply Into Shooting Stats*, *The Baltimore Sun*, Sept. 24, 2009, at 1, available at http://articles.baltimoresun.com/2009-09-24/news/0909230076_1_nonfatal-shootings-arrests-numbers. Another study found evidence that “weapons law violations not uncommonly co-occur with such forcible crimes as robbery, simple assault, and aggravated assault.” Evan Tsen Lee et al., *Which Felonies Pose a “Serious Potential Risk of Injury” for Federal Sentencing Purposes?*, 26 *Fed. Sent’g Rep.* 118, 120 (2013). Part I of this brief explores the interaction of the risks posed by firearms possession and the logic of the ACCA. Part II then examines how the rationales for specific laws banning firearms possession by certain people, in particular places or manners, or of specific types of weapons, are consistent with the named felonies in § 924(e)(2)(B)(ii).

I. Weapons Possession Offenses Demonstrate Disregard For Societal Decisions To Regulate The Risks Of Physical Injury Created By The Presence Of Firearms

According to the Center for Disease Control, firearms were used to cause over 32,351 deaths in 2011, 11,068 of which were homicides. Those 11,068 firearm homicides represent more than two-thirds of the 16,238 homicides committed in 2011. Centers for Disease Control & Prevention, *Deaths: Final Data for 2011*, 63 Nat'l Vital Statistics Reports, No. 1, Table 18 (forthcoming 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf. This level of violence is consistent with previous years. See, e.g., Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA. L. Rev. 1041, 1047 (2009) (including homicide, suicide, and accidental deaths, 30,694 Americans died by gunfire in 2005, amounting to a gun-related mortality rate of 10.4 deaths per 100,000 people for the year); Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 Amer. J. Pub. Health 1988, 1988 (2002) (noting that of the 233,251 people who were homicide victims in the United States between 1988 and 1997, 68% were killed with guns). Gun violence takes a heavy toll on young people. Comm. on Injury & Poison Prevention, Am. Acad. of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 Pediatrics 888, 888 (2000) (“In 1997 firearm-related deaths accounted for 22.5% of all injury deaths of individuals between 1 and 19.”). The United States incurs a substantial financial cost due to gun violence, particularly gunshot wounds related to crime. Philip Cook, et al., *Gun Control After Heller*, 56 UCLA.

L. Rev. at 1049 (citing a survey which found that the costs of gun violence were on the order of \$100 billion in 1995, \$80 billion of which came from crime-related violence).

Guns present a unique danger because they enhance the power of an individual to inflict physical harm more than other weapons. They enable “killing [to] be accomplished from a distance without much risk of effective counterattack by the victim, and the killing can be completed quickly, without sustained effort, and in a relatively impersonal fashion.” Philip J. Cook, *The Technology of Personal Violence*, 14 *Crime & Just.* 1, 28-29 (1991); *see also* William Wells & Julie Horney, *Weapon Effects and Individual Intent To Do Harm: Influences on the Escalation of Violence*, 40 *Criminology* 265, 286, 291 (2002) (explaining that guns are believed to produce more serious injuries and a greater likelihood of death than other weapons because of their technical properties and because doing serious harm with a gun requires less strength and sustained effort on the part of an assailant) In addition, due to knowledge of these attributes, “the mere display of a gun communicates a highly effective threat.” Cook, *Technology of Personal Violence*, 14 *Crime & Just.* at 28–29. Unsurprisingly, the number of fatal injuries from guns has been reported to be five times greater than for injuries caused by knives, the second most lethal weapon. 1 Albert J. Reiss, Jr. & Jeffrey A. Roth, *Understanding and Preventing Violence* 260 (1993); *see also* Cook, *Gun Control After Heller*, 56 *UCLA. L. Rev.* at 1073 (“With a gun, unlike a knife, one individual can kill another quickly, at a distance, on impulse.”). Studies also link higher rates of gun ownership with higher homicide rates, which indicates that guns

intensify violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. Pub. Econ. 379, 387 (2006). This Court recently recognized the risk of violence posed by guns. *Castleman*, 134 S. Ct. at 1409 (“[A]ll too often,’ as one Senator noted during the debate over § 922(g)(9), ‘the only difference between a battered woman and a dead woman is the presence of a gun.’” (quoting 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone))). As the New York legislature explained while recently strengthening penalties for illegal firearm possession and sales, “[i]n the wrong hands, guns are weapons of untold destruction and heart-break: family and community members are taken from us in an instant; mass shootings shatter our sense of safety in public spaces; street crimes plague our neighborhoods.” 2013 N.Y. Sess. Laws 1554 (McKinney) (emphasis added).

A. The Illegal Presence Of Guns Increases Potential For Violence

The residual clause looks to the universe of possibilities for violence created by the offense to determine whether it poses a risk within the meaning of the clause. The residual provision is stated in terms of “potential risk” which is an inherently probabilistic concept. *James*, 550 U.S. at 207-08. Among property crimes, Congress focused on burglary “because of its inherent potential for harm to persons.” *Taylor*, 495 U.S. at 588 (contrasting burglary with larceny and auto theft). That potential develops out of two dimensions. First, “enter[ing] a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.” *Id.* Second, “the

offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Id.*²

The Senate report on the ACCA explained that while burglary can be "a non-violent crime, its character can change rapidly, depending on the *fortuitous presence* of the occupants of the home when the burglar enters, or their

2. Although not distinguishing between legal and illegal possession, studies show that as a general matter, higher rates of gun possession are associated with higher rates of firearm violence. A 2007 survey found that states in the highest quartile of firearm prevalence exhibited firearm homicide rates 114% higher and overall homicide rates 60% higher than states in the lowest quartile of firearm prevalence. Matthew Miller et al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 Soc. Sci. & Med. 656, 659-60 (2007) (observing further that the increase in homicide rates was due to gun-related violence as homicides not related to firearms were not significantly correlated with gun ownership). Another study showed that for each percentage point increase in gun ownership, the firearm homicide rate increased by 0.9%. Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, 103 Am. J. Pub. Health, no. 11, 2013, at 1. Although it has been theorized that gun ownership may rise in response to crime, one study found that the correlation between homicide and gun ownership found that gun ownership increased *before* increases in the homicide rate in a locality. Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1088 (2001) ("[C]hanges in homicide and gun ownership are significantly positively related. This relationship is almost entirely driven by the relationship between lagged changes in gun ownership and current changes in homicide, suggesting that the relationship is not driven simply by individuals' purchase of guns in response to increases in criminal activity.").

arrival while he is still on the premises.” *Taylor*, 495 U.S. at 581 (quoting S. Rep. No. 98–190, at 4–5 (1983)) (emphasis added). Similarly, although possessing a gun does not immediately cause violence in all cases, its “fortuitous presence” in an interaction creates the possibility for violence. Studies show, for example, that people are more likely to be the victim of gun violence during the course of an argument than during the commission of another crime. Marianne W. Zawitz, *Firearms, Crime, and Criminal Justice: Firearm Injury from Crime*, at 4 (1995), available at <http://www.bjs.gov/content/pub/pdf/FIFC.PDF> (noting that of the firearm homicide victims killed between June 1992 and May 1993, 29% were killed because of an argument compared to 21% who were killed during the commission of another crime); Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 *Duq. L. Rev.* 601, 605 (2010) (“[A] person is far more likely to be killed by a handgun in connection with a brawl or argument than from a rape, robbery, or burglary.”). The decision to possess a firearm creates the risk of gun violence whenever a tense situation arises and not simply where the owner already intends to use it to commit a crime. See Franklin E. Zimring & Gordon Hawkins, *The Citizen’s Guide to Gun Control* 16 (1987) (finding that the circumstances in which most homicides were committed suggested that they occurred in a moment of rage and were not the result of a single-minded intent to kill); Franklin E. Zimring & Gordon Hawkins, *Crime is not the Problem: Lethal Violence in America* 122-23 (1997) (“The combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the

high U.S. death rate from violence). When firearms are illegally possessed by persons prohibited to have them because of their dangerousness, these risks of violence can only be greater.

B. The Risk Created By Illegal Weapons Possession Is Comparable To The Enumerated Violent Felonies

An offense poses a serious risk for the purposes of the residual clause where the risk of potential violence is comparable to those of the offenses enumerated in § 924(e)(2)(B)(ii): burglary, arson, extortion, and use of explosives. *James*, 550 U.S. at 203. Congress did not only include felonies that always create an extraordinary level of risk. As the *Taylor* Court noted with regard to burglary, “[t]here never was any proposal to limit the predicate offense to some special subclass of burglaries that might be especially dangerous, such as those where the offender is armed, or the building is occupied, or the crime occurs at night.” *Taylor*, 495 U.S. at 588; *see also James*, 550 U.S. at 207-08 (“The ACCA does not require metaphysical certainty.”).

Statistical evidence provides useful guidance in comparing the seriousness of the offense to the enumerated felonies. *See Sykes*, 131 S. Ct. at 2274 (“Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.”). One study analyzed the relationship between physical injury and over forty different offenses, including weapon law violations, in the Uniform Crime Reporting Program’s National-Incident Based Reporting System (NIBRS). Evan Tsen Lee et al., *Which Felonies*

Pose a “Serious Potential Risk of Injury for Federal Sentencing Purposes, 26 Fed. Sent’g Rep. 118 (2013).³ Weapon law violations were defined as “[t]he violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.” *Id.* at 122. According to the NIBRS statistics, weapon law violations were more strongly associated with physical injury (5.36%) than extortion (4.41%), arson (1.11%), and burglary (1.02%). *Id.* at 119-20.

C. Illegal Weapons Possession Purposefully Introduces The Risk Of Gun Violence Where A Legislature Has Determined It Is Impermissible

The decision to possess a firearm in contravention of laws designed to minimize the risk posed by guns falls within the zone of “purposeful, violent, or aggressive” conduct identified by this Court in *Begay v. United States*, 553 U.S. 137, 145 (2008). Although that gloss on the statute is not dispositive, *Sykes*, 131 S. Ct. at 2275, it provides further insight into how illegal weapons possession fits into the residual clause. The *Begay* gloss provides a lens for distinguishing crimes that “reveal

3. The NIBRS statistics are based on the offenses originally reported rather than the charges ultimately pressed by the prosecutor. The NIBRS database does not draw from a statistically representative sample of federal and state law enforcement agencies because participation is both voluntary and involves a certification process. As of 2010, however, the agencies reporting data covered approximately thirty percent of the U.S. population, so the results are still instructive for the purposes of the residual clause analysis. *Id.*

a degree of callousness toward risk” but do not “show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.” *Begay*, 553 U.S. at 146. Unlike driving under the influence in *Begay*, which bore no qualitative relationship to the concerns addressed by the ACCA, illegal weapons possession demonstrates a willingness to violate laws intended to reduce gun violence, and preparation to be able to wield the violent force of a gun. *See Taylor*, 495 U.S. at 588 (explaining that the risk of violence from burglary in part comes from offender’s “preparation to use violence if necessary”). Even if a possession offense does not, on its face, appear purposeful, it is more like burglary than drunk driving for ACCA purposes. As the Tenth Circuit has explained, a person possessing a weapon in violation of 18 U.S.C. § 922(g)(8) or (9) “is reckless of the risk of committing an intentional act of violence; a drunk driver is reckless of the risk that he will accidentally cause harm.” *United States v. Rogers*, 371 F.3d 1225, 1232 (10th Cir. 2004) (citing *United States v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003)).

Illegally possessing guns purposefully embraces these risks despite society’s decision that they are unacceptable in the circumstances defined by the possession offense. The rationales supporting specific firearms possession offenses illustrate in detail how the choice to break laws controlling the presence of guns in society falls within the residual clause of the ACCA.

II. Each Category Of Weapons Possession Offenses Poses Risks Such That They Should Be Classified As Violent Felonies

In its Second Amendment jurisprudence, this Court has recognized categories of “presumptively lawful” regulations of firearms. *Heller*, 554 U.S. at 627 n.26. These laws include “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27. Communities may choose to legislate differently within that zone. *McDonald*, 130 S. Ct. at 3046 (“As noted by the 38 States that have appeared in this case as amici supporting petitioners, ‘[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.’”); *see also id.* at 3095 (Stevens, J., dissenting) (explaining that “the relevant regulatory interests vary significantly across localities”). These legislative decisions represent an effort to balance the benefits and dangers of firearms. *See id.* at 3108 (Stevens, J., dissenting) (explaining that it would be reasonable for a legislature, “in considering what sorts of regulations would best serve the public welfare,” to weigh a firearm’s “marginal contribution to self-defense” against “its marginal contribution to the risk of accident, suicide, and criminal mischief” because it could make the community “less safe overall”). Illegal possession of a firearm defies a community’s calibration of the risk of firearms by augmenting the possibility of injury and violence. Examination of the different areas of presumptively lawful regulations identified in *Heller* further shows how the act of illegal gun possession is a violent felony under the ACCA.

A. Illegal Weapons Possession By Groups Of People Who Cannot Be Trusted To Wield Firearms Creates A Serious Potential Risk Of Physical Injury

Keeping firearms out of the hands of “those whose possession thereof was contrary to the public interest” is a core purpose of federal gun violence prevention laws. *United States v. Huddleston*, 415 U.S. 814, 824 (1974). Such legislation recognizes the link between the ability of individuals who should not possess firearms “because of age, criminal background, or incompetency,” and “the prevalence of lawlessness and violent crime in the United States.” *Id.* (noting that the effort to restrict possession was intended to “curb crime”). In the context of sentencing laws, whether the crime of possession of a firearm by a felon is a “violent” crime has particularly provoked debate under various statutes. Compare *United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000) (Leval, J.) (holding that illegal firearm possession by a convicted felon constitutes a crime of violence under the Bail Reform Act), with *United States v. Lane*, 252 F.3d 905 (7th Cir. 2001) (disagreeing with *Dillard*); *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991) (holding that illegal firearm possession by a convicted felon constitutes a crime of violence under the U.S Sentencing Guidelines and disagreeing with the official commentary on the Sentencing Guidelines), *rev’d*, *Stinson v. United States*, 508 U.S. 36 (1993) (reversing the Eleventh Circuit because the commentary on the Sentencing Guidelines is authoritative); *Cook v. Wiley*, 208 F.3d 1314 (11th Cir. 2000) (holding that the Bureau of Prison’s determination that being a felon in possession of a firearm is not a nonviolent offense was reasonable).

The Second Circuit’s interpretation of the Bail Reform Act in *Dillard* articulates how a statute addressing substantial risks of violence should include felon-in-possession offenses. The Bail Reform Act defines “crime of violence” in a form similar to the ACCA. The first provision tracks § 924(e)(2)(B)(i), as it looks to whether the offense includes “the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 3156(a)(4)(A). The second part of the definition resembles the residual clause in that it encompasses “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense.” § 3156(a)(4)(B). Like the residual clause of the ACCA, § 3156(a)(4)(B) “speaks to offenses that give rise to a possibility, rather than a certainty, that force may be used” and “[f]orce need not be an inevitable concomitant of the offense.” *Dillard*, 214 F.3d at 92. Within this framework, Judge Leval reasoned for the Second Circuit that a felon illegally in possession of a firearm poses such a risk.

Dillard recognizes that firearms are “designed for the use of violent physical force” and “are undoubtedly the instrument of choice among the vast majority of violent criminals” because they are “the most potent and efficient instrument for violent crime.” *Id.* at 93. “Possession of a gun greatly increases one’s ability to inflict harm on others and therefore involves some risk of violence.” *Id.*

Dillard determined that the risk entailed by a felon possessing a gun is “substantial” since “the issue arises only with respect to persons possessing a gun notwithstanding the illegality of doing so.” *Id.* at 94. As this Court has previously recognized, felon-in-possession

statutes address the fact that felons possessing weapons create an unacceptable risk of violence. *Scarborough v. United States*, 431 U.S. 563, 573 (1977) (“The legislative history [of a previous felon-in-possession statute] in its entirety, while brief, further supports the view that Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that ‘they may not be trusted to possess a firearm *without becoming a threat to society.*’” (emphasis added) (citation omitted)). As *Dillard* noted, “[c]riminals who are intent on committing bank robberies, murders, extortions and other crimes of violence characteristically possess guns to aid them in such criminal acts.” Bans on firearm possession by felons “seek to protect society by reducing the risk of violence that may result from the possession of guns by persons inclined to crime,” so in violating these laws, felons “increase the risk that they may engage in violent acts.” 214 F.3d at 93. Research demonstrates the existence of this risk of subsequent violent criminal activity. See Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 65, 66 (Daniel W. Webster & Jon S. Vernick eds., 2013) (noting that convicted felons are much more likely to commit subsequent violent crimes—including homicide—than are non-felons); Caroline Wolf Harlow, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders*, at 10 (2001), available at <http://bjs.gov/content/pub/pdf/fuo.pdf> (finding that a higher percentage of inmates who used guns in their most recent offense compared to those without a gun had a prior incarceration: 55% versus 37%). Statistics confirm that restrictions on firearm possession by felons effectively combat such recidivism. See Mona

A. Wright et al., *Effectiveness of Denial of Handgun Purchase to Persons Believed To Be at High Risk for Firearm Violence*, 89 Am. J. Pub. Health 88, 89 (1999) (denying a handgun purchase to those convicted of a felony is associated with a reduction in risk for later criminal activity of approximately 20-30%).

The Seventh Circuit disagreed with *Dillard* on the ground that a “crime that increases the likelihood of a crime of violence need not itself be a crime of violence.” *Lane*, 252 F.3d at 907. (holding that felon-in-possession is not a crime of violence under the Bail Reform Act); *but see United States v. Green*, 414 F. Supp. 2d 1029, 1032 (N.D. Okla. 2006) (finding that *Dillard* “is, by far, the most well-reasoned and thoroughly researched opinion on the issue”). While that point may be debatable regarding the Bail Reform Act due to the phrase of “in the course of committing the offense,” such a narrow view of the violent nature of felon-in-possession offenses would be incompatible with the residual clause’s broader view of risk-creation. This Court’s jurisprudence has repeatedly recognized that the residual clause encompasses not only the possibility of a crime of violence by the perpetrator, but also justifiable violence by third parties in response to the underlying felony. *See Sykes*, 131 S. Ct. at 2273 (explaining that vehicular flight may lead to physical injury resulting from actions of police while pursuing the offender); *James*, 550 U.S. at 211 (noting that a homeowner might chase a would-be burglar resulting in a violent encounter). Felon-in-possession offenses thus constitute one species of “presumptively lawful” restrictions on gun possession that are within the meaning of “violent felony” under the ACCA residual clause.

One case interpreting the residual clause relied, in part, on state sentencing schemes that did not classify possession by a felon as a violent felony to hold that being a felon in possession of a firearm was not an ACCA violent felony. *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (“[M]any states have similar statutes with language that defines terms such as ‘crime of violence’ or ‘violent felony.’ These definitions normally include crimes such as burglary and arson; they nowhere include a crime like felon-in-possession.”). Since that decision, however, several states have classified felon-in-possession as a “violent felony” in their sentencing schemes. *See* Minn. Stat. Ann. § 609.1095 (West 2014) (classifying Minn. Stat. Ann. § 624.713, which criminalizes firearm possession by a felon, as a “violent crime” for the purposes of sentencing enhancements for repeat offenders); N.Y. Penal Law § 70.02(c) (McKinney) (classifying N.Y. Penal Law § 265.02(5)(ii), which criminalizes firearm possession by certain felons, as a “violent felony offense”); Utah Code Ann. § 76-3-203.5(1)(c)(i)(JJ) (West 2014) (classifying Utah Code Ann. § 76-10-503, which criminalizes firearm possession by a felon, as a “violent felony” for the identification of “habitual violent offenders”). In fact, two of these states—Minnesota and Utah—were among those cited by *Doe*. 960 F.2d at 225. Of further note, although Petitioner emphasizes that the residual clause refers to “use” and not “possession” of explosives as grounds for excluding all possession offenses, in New York, unlike felon-in-possession crimes, possession of *explosives* is not a “violent felony.” *See* N.Y. Penal Law § 265.02(2) (McKinney).

Although Petitioner refers to illegal gun possession as “mere possession,” that ignores the fact that in order

to take possession of a gun a convicted felon must evade a network of laws designed to prevent exactly that kind of acquisition. *See* Garen J. Wintemute, *Comprehensive Background Checks: New Evidence and Rethinking “Comprehensive,”* in *Updated Evidence and Policy Developments on Reducing Gun Violence in America* 17, 18 (Daniel W. Webster & Jon S. Vernick eds., 2014) (noting that of felons convicted for firearm-related crimes who were already prohibited persons when they acquired the weapon, only 4.8% bought them from a licensed retailer). A study in 2001 found that 83% of inmates who had a firearm would have been disqualified by federal law from lawfully purchasing the weapon. Further, recidivists were more likely to obtain their weapons “through illegal activities or from the street or a black market source.” Harlow, *Firearm Use by Offenders*, at 8 (42% of recidivists and 31% of first timers). The vast majority of “firearm acquisitions made with criminal intent” occur between private parties. Wintemute, *Comprehensive Background Checks*, at 17.

B. Possession In Violation Of Laws Restricting Carrying Guns In Certain Places Or Manners Creates A Serious Potential Risk Of Physical Injury

1. Banning Firearms In Sensitive Locations Aims To Reduce Risks Of Violence

This Court in *Heller* recognized that “laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings” are “presumptively lawful.” Federal law and many states forbid bringing a gun into these and similar locations. *See, e.g.*, 18 U.S.C. § 922(q)(2)(A) (school zone); Colo. Rev. Stat. Ann. § 18-12-

105.5 (West 2014) (school zone); Fla. Stat. Ann. § 790.115 (West 2014) (school zone); Fla. Stat. Ann. § 790.145 (West 2014) (pharmacy); Miss. Code Ann. § 97-37-17 (West 2014) (school zone); Tex. Penal Code Ann. § 46.03 (West 2014) (possession in school, polling place, government court, racetrack, or airport). As with prohibited persons possessing firearms, having a firearm in one of these locations creates a risk of gun violence where society has decided none should exist.

For example, guns have been used in an epidemic of school shootings in recent years. There were seventy-four total incidents between December 15, 2012 and June 10, 2014 where a firearm was discharged inside a school building or on school or campus grounds out of which twenty incidents resulted in the death of at least one person and fifty-eight incidents injured at least one person. Everytown for Gun Safety, *Analysis of School Shootings* (Feb. 2014), <http://everytown.org/article/schoolshootings/> (last visited Aug. 24, 2014); *see also* Chris Kirk, *Since 1980, 297 People Have Been Killed in School Shootings*, Slate (Dec. 19, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/12/sandy_hook_a_chart_of_all_196_fatal_school_shootings_since_1980_map.html (finding that out of 196 school-shooting incidents, 137 were fatal, killing a total of 297 victims, and that each decade had more fatalities than the previous one); Craig Perkins, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* (2003), available at <http://www.bjs.gov/content/pub/pdf/wuvc01.pdf> (“From 1994 through 1999 . . . about 7 in 10 murders at school involved some type of firearm, and approximately 1 in 2 murders at school involved a handgun.”). “The carrying of guns at school was found to be strongly associated with

the use of violence and illicit drugs at school.” Comm. on Injury & Poison Prevention, *Firearm-Related Injuries*, 105 Pediatrics at 892.

Laws that criminalize weapons possession in school zones respond to the risk of school shootings and other violence. When conforming 18 U.S.C. § 922(q) to this Court’s decision in *United States v. Lopez*, 514 U.S. 549 (1995), Congress explained that “parents may decline to send their children to school” out of “concern about violent crime and gun violence” and that “the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country.” Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-371 (1996). Similarly, New York enhanced criminal penalties for those who put “children at risk by, among other dangerous and illegal activities, possessing guns near school grounds.” 2013 N.Y. Sess. Laws 1556 (McKinney).

An individual who enters one of these sensitive locations while illegally possessing a gun creates the extreme risk of physical violence posed by firearms. That offender demonstrates preparation to use that weapon, which creates the potential for physical injury. As the spate of school shootings illustrates, the risk of violence associated with this form of illegal possession is substantial. Possession of a weapon in a sensitive location would constitute a “violent felony” for the purposes of the residual clause.

2. Unlawful Concealed Carry Creates A Risk That Guns Will Be Used To Inflict Injury

Violating a restriction on concealed carry of firearms also fits within the residual clause. These statutes target the risk that “persons becoming suddenly angered, and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person.” *State v. Chippey*, 33 A. 438 (Del. Ct. Gen. Sess. 1892). Although some courts have concluded that violating a concealed carry regulation is not a violent felony, *see Moore v. Warden, FCC Coleman-Medium*, No. 10-12424, 2014 WL 2599762 (11th Cir. June 10, 2014), *abrogating United States v. Hall*, 77 F.3d 398 (11th Cir. 1996), the risks associated with illegal concealed carry actually bring this genre of offenses within the crimes address by the ACCA.

Studies have found that even increases in legal concealed carry are associated with increases in gun violence and crime. John J. Donohue, *The Impact of Concealed-Carry Laws, in Evaluating Gun Policy Effects on Crime and Violence* 289, 320 (2003) (noting that data suggests that the clear majority of states experience *increases* in violent crime, murder, and robbery when shall-issue laws are adopted); Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 Am. Econ. Rev. 473 (1998) (interpreting data to find that many states experience increases in robbery after concealed carry laws are enacted). In fact, one study found that during the time period examined, “[t]he only group of states to have experienced a substantial drop in robbery . . .

(albeit one punctuated by two sharp upturns) was the group of twenty-two states that never adopted shall-issue legislation.” Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *Stan. L. Rev.* 1193, 1214 (2003).

Some legislatures may choose to accept the risks created by concealed carry when regulating firearm possession. The decision to defy a legislative restriction of concealed carry, however, demonstrates the offender’s willingness to create those risks. That kind of conduct indicates the greater likelihood that the offender would pull the trigger in the future.

C. Bans On Sawed-Off Shotguns Are One Example Of Laws Outlawing Particularly Dangerous Types Of Firearms

The offense at issue in this case, a Minnesota law criminalizing possession of a sawed-off shotgun, belongs to a third form of possession offenses: restrictions on particularly dangerous weapons. There “is a consensus among the researchers in this area that the type of weapon matters.” Cook, *Technology of Personal Violence*, 14 *Crime & Just.* at 24 (“Whether a shooting victim lives or dies depends in part on the length of the gun barrel and the size of the bullet.”). In addition to federal law, which requires registration of a number of different particularly dangerous weapons, state laws often outlaw possession of firearms deemed to pose impermissible risks of criminal violence because they have no other purpose. *See, e.g.*, Ark. Code Ann. § 5-73-104 (West 2014) (bomb, machine gun, sawed-off shotgun or rifle, firearm specially made or specially adopted for silent discharge, metal knuckles,

or other implement for infliction of serious physical injury or death); Colo. Rev. Stat. Ann. § 18-12-102 (West 2014) (firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife); Fla. Stat. Ann. § 790.221 (West 2014) (short-barreled rifle, short-barreled shotgun, machine gun); Mass. Gen. Laws Ann. ch. 269, § 10 (West 2014) (criminalizing possession of machine guns and sawed off shotguns along with other dangerous weapons); 18 Pa. Cons. Stat. § 908 (2014) (criminalizing possession of various offensive weapons, with an exception for weapons—other than bombs, grenades, and incendiary devices—that have been registered in compliance with the National Firearms Act, 26 U.S.C. § 5801 et seq.); Tex. Penal Code Ann. § 46.05 (West 2014) (explosive weapon, machine gun, short-barrel firearm, silencer, knuckles, armor piercing ammunition, chemical dispensing device, zip gun, tire deflation device). In 1998, when outlawing “disguised guns,” the New York legislature recognized “these guns serve no legitimate sporting or law enforcement purpose and should be banned” because they “compromise security at airports, courtrooms or other places that use metal detectors.” 1998 N.Y. Sess. Laws 1799 (McKinney). Outlawing specific, particularly dangerous firearms represents a legislative judgment that they present too substantial a risk of criminal violence.

CONCLUSION

The illegal possession of firearms—by persons deemed too dangerous to possess guns, in places where the risks of gun possession are too great, or possession of unusually dangerous guns—creates grave and unacceptable risks of death and injury. Despite the Petitioner’s emphasis on these offenses as involving “mere” possession, gun possession offenses include an element, such as the identity of the offender or the place where the weapon was carried, in addition to the possession. Each of these elements describes a factor that transforms the potential for physical injury inherent in firearms into a “substantial potential risk of physical injury.” This Court should find that a firearm possession offense—including illegally possessing a sawed-off shotgun—is a violent felony under the Armed Career Criminal Act.

Respectfully submitted,

JONATHAN E. LOWY
KELLY N. SAMPSON
BRADY CENTER TO PREVENT GUN
VIOLENCE LEGAL ACTION PROJECT
840 First Street, NE, Suite 400
Washington, DC 20002

GREGORY G. LITTLE
Counsel of Record
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200
glittle@whitecase.com

Counsel for Amici Curiae