No. 07-608

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDY EDWARD HAYES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF SECOND AMENDMENT FOUNDATION, INC. IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICUS CURIAE[1]

Second Amendment Foundation ("SAF"), a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every state of the Union.

SAF files this amicus curiae brief to highlight the fact that the decision below is consistent with the concepts of federalism underlying and inherent in the basic federal gun control law.[2] The Fourth Circuit's decision is also consistent with this Court's "categorical approach" to examining the impact of prior convictions in applying the Gun Control Act, and sound considerations of public policy. Finally, this case provides an instructive view as to the interplay between Second Amendment rights and traditional notions of due process. This Court should take such

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members or its counsel made a monetary contribution to its preparation or submission.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioner and Respondent have consented to the filing of this brief in letters that have been lodged with the Clerk.

considerations into account in applying the rule of lenity.

SUMMARY OF ARGUMENT

Disarming violent domestic abusers is a laudable public policy goal, achievable in a manner consistent with the Constitution. Like other valuable civil rights, the right to keep and bear arms may be forfeited by engaging in violent criminal activity. Individuals convicted of violently abusing those closest to them may be barred access to firearms.

Whether Congress possesses constitutional authority to disarm violent individuals is not an issue in this case. But when Congress itself adopts federalist limitations on its powers, this Court should not impose a broader view of congressional authority upon an allegedly ambiguous legislative text. The provision before the Court, however it might be interpreted standing alone, is embedded within a statutory scheme that unmistakably rejects uniform federal standards governing the possession of firearms.

This Court has recently had occasion to examine the impact of prior convictions on application of the Armed Career Criminal Act, and settled on a "categorical approach" to the task. Extrinsic evidence of the offense, including evidence as to the manner in which the offense was committed, is barred by this approach. Rather, this Court looks primarily to the

legal definition of the predicate offense to determine its future impact. The Government's proposed interpretation of Section 922(g)(9) contradicts this settled doctrine.

Respecting the Gun Control Act's traditional limitations would also better serve the public policy goal of combating domestic violence. It would encourage states to enact stronger laws targeting domestic violence, discourage plea bargaining serious assault cases to yet lower level offenses, and preserve the discretion needed by local prosecutors to perform their tasks in a just and efficient manner.

That the Government seeks to find an individual's fundamental, enumerated rights extinguished by a guilty plea is also significant. Like other enumerated fundamental rights, Second Amendment rights may be relinquished only upon a voluntary, knowing, and intelligent waiver. Respondent cannot now be deprived of a fundamental right as a consequence of his voluntary plea, where such loss could not have been contemplated at the time he pled guilty.

ARGUMENT

I. THE GUN CONTROL ACT RESPECTS BASIC PRINCIPLES OF FEDERALISM IN ASSIGNING THE DETERMINATION OF PREDICATE OFFENSES TO THE STATES.

A. The Gun Control Act's Plain Text Leaves the States Ample Room for Determining the Applicability of Federal Gun Penalties.

The Government's claim that Congress "could [not] have intended to address what it regarded as a nationwide problem by enacting a law that would inevitably operate in a patchwork and haphazard manner," Pet. Br. 9, underlies much of its reasoning. The claim does not withstand scrutiny.

The existence of federal gun laws speaks to Congressional understanding that gun violence is a national problem. But the plain text of the Gun Control Act of 1968, as amended, 18 U.S.C. § 921 *et seq.*,[3] acknowledges that federal solutions would indeed be applied differently in each state. This Court has rejected "hypertechnical reading" of statutory language that, while "not inconsistent with the language of [the] provision examined in isolation," nonetheless fails to account for the fact that "statutory language cannot be construed in a vacuum." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803,

[3] All further statutory references are to Title 18 of the United States Code unless otherwise indicated.

809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (citation omitted); *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 434 (2002). Section 922(g)(9) must be read in context.

The Government acknowledges that Section 922(g)(9) was enacted to extend the reach of Section 922(g)(1)'s prohibition on gun possession by felons. Pet. Br. 9. But application of that latter prohibition depends largely upon variations in state criminal laws, yielding the very patchwork of different results that the Government decries.

For purposes of Section 922(g)(1), an offense the conviction of which disqualifies individuals from gun possession "does not include – any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." Section 921(a)(20)(B). "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *Id.*

Thus identical conduct that is felonious in one state but only a misdemeanor in another earn individuals inconsistent treatment, nationwide, under Section 922(g)(1). For example, possessing four ounces of marijuana is a felony in Idaho, but only a misdemeanor in Texas. *Compare* Idaho Code § 37-2732(e) (2008) *with* Tex. Health & Safety Code

§ 481.121(b)(2) (2007). A Nevada madam, operating a lawful business in that state, could purchase a gun anywhere in America; an Arizonan convicted of engaging in the same conduct is barred from possessing guns under Section 922(g)(1), even were she to relocate her business across the Colorado River. Ariz. Rev. Stat. § 13-3208(B) (2008).

Deliberately inconsistent application of the federal ban on gun possession by felons for identical conduct occurs even within a single state. For example, "[u]nder California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as 'wobblers.'" *Ewing* v. *California*, 538 U.S. 11, 16 (2003); *see* Cal. Penal Code § 17(b) (2008). The maximum term of imprisonment for a misdemeanor under California law is one year. Cal. Penal Code § 19.2. Accordingly, "wobbler" convictions classified as felonies are predicate offenses under Section 922(g)(1), but identical "wobbler" convictions classified as misdemeanors are not. Section 921(a)(20)(B). The application of federal law often turns on such inconsistent applications of state law to yield inconsistent results within the same state. *See*, *e.g. Garcia-Lopez* v. *Ashcroft*, 334 F.3d 840, 845 (9th Cir. 2003) (alien not deportable under federal law where California wobbler status is misdemeanor).

That states retain flexibility to determine whether identical conduct within their borders carries with it felony or misdemeanor consequences, including such consequences under the Gun Control

Act, is confirmed in Section 921(a)(20)(B)'s instruction that each state retains the right to restore federal gun rights to prohibited persons by virtue of pardon, expungement, or civil rights restoration. Notably, Section 921(a)(33)(B)(ii) reserves identical autonomy to the states with respect to crimes of domestic violence, acknowledging a role for state officials in determining whether domestic violence misdemeanants may continue to possess firearms.

The state's flexibility in determining application of the Gun Control Act extends to Section 922(q)(2)'s prohibition on carrying a gun within a school zone. "The term 'school' means a school which provides elementary or secondary education, *as determined under State law.*" Section 921(a)(26) (emphasis added).

The prohibitions of gun possession by drug users and mental incompetents likewise depend on differing state laws. Section 922(g)(3), barring gun possession by any person who is "an unlawful user of or addicted to any controlled substance," provides a federal definition of the latter category, but is silent as to the meaning of "unlawful user." *Cf. United States* v. *Bennett*, 329 F.3d 769, 776 (10th Cir. 2003) ("unlawful user" and "addicted" to be read disjunctively). Presumably, the lawfulness of "use" of controlled drugs is a question of state law.[4] Section

[4] Lawful use under state law may not provide a defense to federal drug violations, *United States* v. *Oakland Cannabis*

(Continued on following page)

922(g)(4)'s prohibition requires an "adjudication" or "commitment" relating to mental illness – actions undertaken primarily by state courts, which presumably employ varying approaches to mental health issues.

In sum, Congress's consistent approach under the Gun Control Act is to prohibit certain classes of dangerous or untrustworthy people from having firearms, but in many instances to leave determination of whether an individual qualifies as a prohibited person up to state law, even where doing so would cause inconsistent results among the states or within a state. Even some federally-prohibited conduct, such as that proscribed by Section 922(q), may also be defined differently from state to state.

If Congress wished to broadly prohibit all individuals who have committed an act of domestic violence from possessing guns, it would have done so directly. The Government could then proceed to prosecute Respondent in the manner it suggests, by proving the prior act of domestic violence within its prosecution on a charge of unlawful firearm possession by a person who has engaged in domestic violence.

But that is not the choice made by Congress in enacting Section 922(g)(9). Congress knows how to

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Buyers' Coop., 532 U.S. 483 (2001), but federal law generally does not reach individual drug *use* per se, focusing instead on the manufacture and distribution of drugs in interstate commerce.

directly regulate firearms possession by individuals disqualified from firearm possession in some way, without requiring prior adjudication of the disqualifying condition. *Compare* Sections 922(g)(1) ("has been convicted in any court"), 922(g)(4) ("has been adjudicated" or "has been committed"), 922(g)(8) ("is subject to a court order"), 922(g)(9) ("has been convicted in any court") *with* 922(g)(2) ("is a fugitive from justice"), 922(g)(3) ("is an unlawful user of or addicted"), 922(g)(5)(A) ("is illegally or unlawfully in the United States").

Like its analogs in Section 922(g)(1), (3) and (4), Section 922(g)(9) operates only against individuals previously subjected to adjudicative process. When that process is left to the states, state law controls whether an individual is a felon or misdemeanant, whether an individual's drug use is lawful, whether an individual is mentally fit – and with respect to Section 922(g)(9), whether an individual committed an act of domestic violence.

The Government complains that the Fourth Circuit's decision "undermines the consistent application of federal law." Pet. Br. 27. But the true anomaly would be to hold that Section 922(g)(9) operates as an island of nationalized criminal law amongst a sea of federalism-based deference to the states in determining fitness for firearm possession.

B. Congress's Choice to Base Section 922(g)(9) Prohibition on State Law Is Consistent with Constitutional Limits on Federal Power.

The Government would ignore Section 921(a)(33)'s requirement that a domestic relationship be an element of the predicate misdemeanor offense because not all states define such offenses, and "[n]o distinctly federal misdemeanor has, as an element, a domestic relationship between the offender and the victim." Pet. Br. 9.

But the Constitution's federalist structure is not an irrationality for Congress to override. Nor are differences among the states' approaches to the suppression of crime "loopholes" for the Congress to close as it sees fit. Lautenberg Br. 10.[5]

The assumption that there must be national, uniform standards in the definition and enforcement of basic criminal laws is foreign to the federalist structure of the United States. *Cf. Printz* v. *United States*, 521 U.S. 898 (1997) (Congress cannot conscript

[5] The concept of a "loophole" depends upon one's perspective. The absence of a criminal prohibition may be a "loophole" from the standpoint of a prosecutor wishing to bring charges. But from an individual's perspective, the existence of a particular criminal prohibition may be a "loophole" through which an indictment reaches otherwise lawful or, at least, less sanctionable conduct. Our legal system proceeds on the assumption that people are generally free to engage in conduct that is not criminally proscribed, and not the other way around.

state officials to implement federal gun laws); *New York* v. *United States*, 505 U.S. 144 (1992) (Congress cannot commandeer sovereign state functions). Indeed, this assumption is expressly disavowed by Section 927. Where "under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States," this Court has "refuse[d] to adopt the broad reading in the absence of a clearer direction from Congress." *United States* v. *Bass*, 404 U.S. 336, 339 (1971).

The absence of a distinctly federal domestic violence misdemeanor flows from the absence of any constitutionally enumerated federal police power reaching domestic relationships.[6] "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). But "[t]he Constitution . . . withholds from Congress a

[6] Congress has utilized its power "[t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia, U.S. Const. art. I, sec. 8, cl. 17, to enact D.C. Code § 16-1001 (2008), classifying certain criminal offenses as "intrafamily offenses." Pub. Law 91-358 (July 29, 1970), 84 Stat. 546. However, Congress has not seen fit to legislate for the District a distinct misdemeanor offense that has, as an element of proof, a domestic relationship between perpetrator and victim. Congress's failure to enact such a law in the one part of the nation where it possesses the greatest power to do so belies the claims that such a uniform national standard, however desirable, was intended.

plenary police power." *Id.*, at 618 (quoting *United States* v. *Lopez*, 514 U.S. 549, 566 (1995)). "It is clear, that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821).

It is equally clear that each state retains great latitude in enacting its criminal laws. The legislative history cited by amici Senators is therefore of limited use. Senator Lautenberg looks to his statement decrying the states' "outdated laws or thinking," and plea bargain practices, to advance his reading of Section 922(g)(9) as compensating for an approach to the states' administration of criminal justice that he found deficient. Lautenberg Br. 10. Senator Feinstein likewise invokes her condemnation of "outdated or ineffective laws [that] often treat domestic violence as a lesser offense." *Id.*, at 11 (citation omitted).

To be sure, Congress might pursue policy goals within its legislative sphere regardless of contrary or inconsistent state practices it deems ineffective or based on "outdated thinking." But "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. The legislative text strongly suggests Congress deferred to the states in defining and prosecuting domestic violence offenses. That construction is more consistent with the Constitution's federalist structure than are isolated floor statements decrying the states' manner of exercising their sovereign functions.

II. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S "CATEGORICAL APPROACH" TO THE APPLICATION OF PRIOR CONVICTIONS.

In a string of recent decisions, this Court has adopted a "categorical approach" to the interpretation of prior convictions for purposes of applying Section 924(e), the Armed Career Criminal Act. This Act, included within the same statutory scheme as the Lautenberg Amendment, functions in much the same way. The two provisions should be read in pari materia. The "categorical approach" to Section 924(e) all but forecloses the Government's proposed application of Section 921(a)(33).

Upon a finding that a felon in possession of a firearm has a certain criminal history, Section 924(e) visits upon him significant sentencing enhancements. One type of predicate offense is a "violent felony" as specifically listed in Section 924(e)(2)(B)(ii), or an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Section 924(e)(2)(B)(i).

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court considered the question of whether a sentencing court applying Section 924(e) "must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes." *Taylor*, 495 U.S. at 600. This Court soundly rejected the latter

form of analysis, and adopted the more limited "categorical" approach. The Court held Section 924(e) "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602 (footnote omitted).

Refining the categorical approach, this Court instructed that

> a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Shepard v. *United States*, 544 U.S. 13, 16 (2005). This Court specifically barred consideration of "police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary." *Id.*

Under the categorical approach, "we consider whether *the elements of the offense* are of the type that would justify its inclusion within [Section 924(e)], without inquiring into the specific conduct of this particular offender." *James* v. *United States*, 127 S. Ct. 1586, 1594 (2007) (emphasis in original).

> In determining whether this crime is a violent felony, we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in

> terms of how an individual offender might have committed it on a particular occasion.

Begay v. *United States*, 128 S. Ct. 1581, 1584 (2008) (citation omitted). As explained in *Taylor*, the categorical approach is based in part on Section 924(e)'s reference to convictions, rather than to the fact that a person has committed certain crimes. *Taylor*, 495 U.S. at 600. This Court also noted that "[t]he practical difficulties and potential unfairness of a factual approach are daunting." *Id.*, at 601.

In *Begay*, this Court demonstrated the limits of the "categorical approach" in rejecting the notion that New Mexico's law prohibiting driving under the influence is a "violent felony" for purposes of Section 924(e). This Court accepted "as a given" that the DUI offense was not a "violent felony," because "DUI, as New Mexico defines it, nowhere 'has as an element the use, attempted use, or threatened use of physical force against the person of another'" as required by Section 924(e)(2)(B)(i). *Begay*, 128 S. Ct. at 1584.[7]

The Government recognizes that the "categorical approach" is at least instructive in interpreting Section 921(a)(33). In determining whether a conviction

[7] Allowing that "[d]runk driving is an extremely dangerous crime," *Begay*, 128 S. Ct. at 1584, this Court nonetheless found DUI to be qualitatively too different from Section 924(e)(2)(B)(ii)'s enumerated violent felonies to fall into the statute's catch-all provision for crimes "present[ing] a serious potential risk of physical injury to another."

qualifies as a predicate offense under the Lautenberg Amendment, "[o]ne must determine what the convicting court found, not what the defendant did." *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence,"* 31 Op. Off. Legal Counsel 1, 2 (2007). Notably, in seeking OLC's opinion, BATFE did not ask about, and thus OLC did not address, the domestic relationship requirement. *Id.*, at 2 n.1.

III. PUBLIC POLICY SUPPORTS THE FOURTH CIRCUIT'S CONSTRUCTION OF SECTION 922(g)(9).

The Fourth Circuit's opinion is not merely correct in terms of statutory construction. It is also more consistent with good public policy – including recognition of domestic violence offenses as more significant than ordinary misdemeanor assaults and thus warranting specific legislative attention.

Blurring the distinction between simple and domestic violence assault offenses would remove Section 922(g)(9)'s incentive to enact and enforce domestic violence offenses. Moreover, if criminal defendants learn that misdemeanor assault convictions could, years later, be interpreted as domestic violence offenses rendering them federal felons on the basis of gun possession, prosecutors might find it considerably more difficult to elicit plea bargains for assault. Serious assault cases might be bargained down to even less severe offenses, such as disturbing the peace or disorderly conduct, lest prosecutors be

forced to try cases that otherwise would not merit the expenditure of scarce prosecutorial resources.

There is a "sentence first – verdict afterwards" aspect to amicus NNED's plea that affirming the Fourth Circuit "would put the federal misdemeanor firearm ban at the mercy of the vagaries of prosecutorial discretion." NNED Br. 19. The imposition of criminal disabilities must always be withheld in the absence of an appropriate conviction. It is not too much to ask that before depriving an individual of a fundamental constitutional right, the individual first be duly charged with and convicted of committing the requisite offense.[8]

Prosecutorial discretion is an indispensable feature of our criminal justice system. Prosecutors are expected to use their best judgment to balance the likelihood, ease, and merit of obtaining a conviction against the severity of the conduct in each particular case. Prosecutorial discretion play a valuable role in the domestic violence arena, where the facts, credibility, and motivations of the various participants can be

[8] Accordingly, it is not obvious that affirming the Fourth Circuit would lead to the purging of "thousands of convicted domestic batterers" from the National Instant Check System database, Brady Br. 35, since these individuals were by definition not convicted of domestic violence and may not have even been convicted of battery. Removing people from the list of prohibited firearms buyers is perfectly appropriate where, by law, their names should never have appeared on the list in the first place. *See* Section 925A.

hazy.[9] Many cases of domestic violence are obvious. But not every individual accused of domestic violence is a fortiori guilty. A prosecutor unwilling to pursue serious charges against a criminal defendant might well have good and sufficient reasons for holding back.

Prosecutors who are too lax in their approach to crime can be, and are, replaced by the impacted voters. And if prosecutors lack sufficient tools with which to fight crime, it is the primary role of state and local legislatures – not Congress – to remedy the situation. It is not the role of Congress to legislate severe federal penalties as compensation for a permissive attitude toward domestic violence allegedly prevalent among the nation's prosecutors. If Congress truly intended to second-guess or dispense entirely with the judgments of local prosecutors in particular cases, such intent was improper.

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[9] One need only look to the facts of the Fifth Circuit's landmark opinion in *United States* v. *Emerson*, 270 F.3d 203 (5th Cir. 2001) to recall that allegations of domestic violence may be easier to make than to prove. The Fifth Circuit held the Second Amendment did not bar Emerson's prosecution under Section 922(g)(8) for possessing a gun while subject to a restraining order. But Emerson was acquitted of the underlying charge of domestic violence. *Emerson*, 270 F.3d at 264 n.66.

IV. THE GOVERNMENT BEARS THE BURDEN OF PROVING SECOND AMENDMENT RIGHTS HAVE BEEN VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVED.

The Second Amendment is no obstacle to the disarmament of dangerous, violent individuals. Indeed, Second Amendment rights are based largely upon the inherent right of law-abiding individuals to defend themselves from violent crime. The right to keep and bear arms would be self-defeating were it retained by violent criminals.[10]

However, an individual admitting criminal guilt must ordinarily be made aware of the consequences of such an admission. "We should indulge every reasonable presumption against waiver of fundamental

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[10] Amicus does not agree that domestic violence convictions might not warrant disarmament because these crimes are classified as misdemeanors. Resp. Br. 51. In determining whether an individual should be disarmed, the key question should be whether the individual is dangerous. The formalistic distinction between misdemeanors and felonies may not always serve the interests of society or of individuals when used to determine firearms disabilities.

In proposing a remand to consider Section 922(g)(9)'s constitutionality, Respondent cites but does not actually endorse the "heightened scrutiny" standard of review recently advanced by the Government for resolution of Second Amendment claims. Resp. Br. 51-52. Although amicus curiae believes Section 922(g)(9) would survive Second Amendment scrutiny as applied to individuals convicted of violent crimes, the test to be applied must be more robust than the mere "heightened" scrutiny proposed by the Government. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2817 n.27 (2008).

constitutional rights. For that reason, it is the State that has the burden of establishing a valid waiver. Doubts must be resolved in favor of protecting the constitutional claim." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986) (citations omitted). To establish that a constitutional right has been waived, the Government must prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial," including the Fifth Amendment right against self-incrimination, and the Sixth Amendment jury trial and confrontation rights. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). "We cannot presume a waiver of these three important federal rights from a silent record." *Id.*

To these fundamental rights waived by guilty plea, Section 922(g)(9) adds another: the Second Amendment right to keep and bear arms. But as with other valuable civil rights, relinquishment of Second Amendment rights cannot be made unknowingly. Where the consequences of pleading guilty include the loss of Second Amendment rights, the accused should be advised as much so that he or she may make an informed decision in agreeing to the plea.

A waiver of fundamental rights is valid if the defendant "knows what he is doing and his choice is made with eyes open." *Iowa* v. *Tovar*, 541 U.S. 77, 88 (2004) (quoting *Adams* v. *United States ex rel.*

McCann, 317 U.S. 269, 279 (1942)). To conclude that a fundamental right has been waived, courts must make two findings:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. *Burbine*, 475 U.S. 412, 421 (1986). "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.*, at 422.

In *Schneckloth* v. *Bustamante*, 412 U.S. 218 (1973), this Court sought to distinguish between the waiver of constitutional rights in the context of a criminal trial, to which it would continue to apply the stricter "knowing and intentional" standard, and the waiver of constitutional rights in other contexts, which might be valid provided they met a lower standard of voluntariness. *Id.*, at 237.

Schneckloth rejected the claim that a knowing and intelligent waiver of Fourth Amendment rights is necessary in consenting to a search. This Court nonetheless reaffirmed that "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent

was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (citations omitted). But the waiver proposition is poorly framed in this context. A person who consents to a search is not thereby waiving his Fourth Amendment rights, rather, he merely renders the search reasonable within the Fourth Amendment's requirements. *See Samson* v. *California*, 547 U.S. 843, 852 n.3 (2006); *United States* v. *Knights*, 534 U.S. 112, 118-19 (2001).

The distinction between Fourth Amendment waiver or consent, and the waiver of other rights, is based upon the context in which such rights might be invoked or lost:

> The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights.

Schneckloth, 412 U.S. at 232.

It would be anomalous to hold that the waiver of Fifth and Sixth Amendment rights "in the context of the safeguards of a fair criminal trial," *id.*, at 235, be found only upon the stricter standard of a "knowing and intelligent waiver," while in the same breath the accused can be deemed to have permanently waived

his Second Amendment rights under the more relaxed standard of voluntariness.[11]

The governmental interest in obtaining a waiver of Second Amendment rights is co-extensive with its interest in obtaining a waiver of Fifth and Sixth Amendment trial rights. No exigencies warrant that the accused be rushed into making an uninformed decision. Indeed, a conviction cannot qualify as a predicate domestic violence offense unless the accused was either represented by counsel or "knowingly and intelligently waived" his Sixth Amendment rights. Section 921(a)(33)(B)(i)(I). Jury rights, where available, must also have been waived in a knowing and intelligent fashion in order for the conviction to be considered a predicate domestic violence offense. Section 921(a)(33)(B)(i)(II)(bb). Congress would apparently not impose the domestic violence gun disability upon individuals not fully aware of their rights.

But while the Government has no valid interest in depriving defendants of information about the consequences of their pleas, the loss of Second Amendment rights under Section 922(g)(9) may be the most, perhaps the only, severe consequence facing an accused in pleading guilty. That much is plainly demonstrated by the facts of this case. Respondent's

[11] To be sure, however, the relinquishment of Second Amendment rights in this case would fail even the less-stringent voluntariness test, as the disqualifying statute had not been enacted at the time the plea was entered and could not have been contemplated by Respondent.

initial plea of guilty to misdemeanor assault cost him a term of probation, whereas contesting the prosecution would have risked more significant criminal penalties on a fact finder's unpredictable assessment of witness testimony. Respondent might have made the same decision were he informed that pleading guilty would permanently cost him his Second Amendment rights. But "[w]e do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

CONCLUSION

Section 922(g)(9) is consistent with other provisions of the federal Gun Control Act predicating firearms disabilities on state court adjudication, and thus assuming disparate results among and even within the states. The accepted "categorical approach" to application of predicate convictions likewise indicates the Fourth Circuit reached the correct conclusion in this case.

Requiring that the domestic violence disqualification attach only to convictions where a domestic relationship was an element of proof serves the important public policies of encouraging states to enact laws targeting domestic violence, while preserving the prosecutorial discretion necessary to the fair and efficient administration of criminal justice.

Finally, the Second Amendment does not stand in the way of Congress disarming violent criminals, including dangerous domestic abusers. But when an individual prepares to admit guilt to a crime, the conviction of which would cause a loss of Second Amendment rights, courts should enquire whether the accused has made a voluntary, knowing and intelligent waiver of *all* fundamental constitutional rights at stake – including Second Amendment rights.

For the foregoing reasons, amicus curiae SAF respectfully requests that the opinion below be affirmed.

Respectfully submitted,

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