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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 OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Amicus Curiae Eagle Forum ELDF

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong interest in protecting the right of individuals to keep and bear arms, as set forth in the Second Amendment, and requiring Congress to adhere to the constitutional limits on its authority under the Commerce Clause. Eagle Forum ELDF also believes that the family rights of women are best defended and strengthened by maintaining jurisdiction over family law at the state, rather than the federal, level.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that Section 921(a)(33)(A)'s plain language requires that, in order for a predicate offense to constitute a "misdemeanor crime of domestic violence" ("MCDV"), it must require the government to demonstrate a domestic relationship between the perpetrator and the victim. This conclusion is compelled by the text and structure of the statute. To interpret the statute as the government advocates would require adding words and rearranging paragraphs, while essentially ignoring large portions of the statute, contrary to settled principles of statutory construction. While the debate in the proceedings

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

below focused on whether the domestic relationship requirement is an "element" of the predicate offense, whether this requirement is described as its own separate "element", a "sub-element", or a necessary part of the singular "element" the government claims is described in Section 921(a)(33)(A), the fact remains that the statutory text identifies this as a requirement of the predicate offense required under Section 922(g)(9). In sum, the government's interpretation would require the Court to ignore the plain language of the statute.

Nonetheless, to the extent the Court concludes that the statute is ambiguous, settled principles of statutory interpretation warrant affirmance. While the court of appeals found that the rule of lenity requires that the predicate offense have as an element a domestic relationship between the perpetrator and the victim, other principles of statutory construction dictate the same result. This Court has repeatedly held, for example, that statutes should be interpreted to avoid reaching significant constitutional questions. Like the rule of lenity, this principle of statutory construction has an important role in guaranteeing individual liberties.

Here, this Court's recent ruling in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) raises a significant question regarding the constitutionality of Section 922(g)(9) as applied to Mr. Hayes. While the Court in *Heller* suggested that prohibiting gun ownership by felons may be constitutional given its sound footing in our nation's tradition and history, prohibiting gun ownership for *misdemeanors* is another matter. Such prohibitions raise significant constitutional concerns given the traditional distinction between felony and misdemeanor crimes. Moreover, affirming the constitutionally of a prohibition on gun ownership for misdemeanor crimes would have profound and decidedly negative practical consequences,

particularly in light of the government's expansive interpretation of Section 922(g)(9).

Likewise, it is questionable whether Congress had the authority under the Commerce Clause to enact Section 922(g)(9). The statute seeks to regulate criminal behavior within the context of domestic relationships. As this Court observed in *Morrison* and *Lopez* both are matters that were traditionally reserved to the States. The dubious constitutionality of the statute warrants a narrow interpretation, particularly given that the government's expansive interpretation would impose a federal prohibition on gun ownership for all individuals convicted of misdemeanors that happen to involve a domestic relationship, rather than allowing the states to determine whether such a prohibition should apply by defining specific crimes having as an element a domestic relationship between the perpetrator and the victim.

In addition, the government's interpretation would render the statute unconstitutionally vague and violate defendants' due process rights. If misdemeanor crimes other than those specifically targeting domestic violence are brought within the statute's scope, many misdemeanants will lack sufficient notice that they are subject to the statute's restriction on the fundamental right to bear arms. The lack of notice is particularly troubling given the retroactive effect of the statute, which raises additional constitutional concerns under the Ex Post Facto clause.

Finally, the policy arguments amici raise in support of the government's interpretation are both incomplete and irrelevant. Policy concerns cannot override the clear text of a statute or well-established principles of statutory construction. Moreover, amici ignore the significant policy concerns embodied in the Second Amendment as well as the important state concerns in regulating criminal conduct without intrusive federal intervention. While prevention of

domestic violence is a laudable goal, it is far from clear that the court of appeals' decision here is inconsistent with that end.

ARGUMENT

I. The Court of Appeals Correctly Held That the Plain Language of Section 921(a)(33)(A) Requires That The Predicate Offense Have, As An Element, A Domestic Relationship.

Under 18 U.S.C. § 922(g)(9), any person "who has been convicted in any court of a misdemeanor crime of domestic violence" is prohibited from transporting, possessing, or receiving a firearm. A "misdemeanor crime of domestic violence" ("MCDV") is defined in 18 U.S.C. § 921(a)(33)(A) as follows:

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

The court of appeals correctly held that the "committed by" clause in sub-section (ii) modifies the clause immediately preceding it, and thus, only a criminal offense that includes a domestic relationship among its required elements may qualify as an MCDV.

A. The Court Of Appeals' Interpretation Is Consistent With The Plain Language of Section 921(a)(33)(A).

The starting point for interpreting any statute is "the language of the statute" itself. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). "[W]here the statutory language provides a clear answer," the inquiry "ends there as well." *Id.* In this instance, the text and structure of Section 921(a)(33)(A) plainly support the court of appeals' interpretation.

The heart of the dispute is whether the "committed by" phrase modifies the immediately preceding phrase, as the court of appeals held, and thus refers to the elements of the predicate crime under the applicable law, or whether it is a stand-alone characteristic of "an offense" constituting an MCDV, as the government argues, thus including as predicate offenses misdemeanors with no domestic relationship element. Several aspects of the statutory text make clear that the court of appeals' reading of the MCDV definition is correct.

First, the plain language of Section 921(a)(33)(A) requires that the predicate offense have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." A straightforward reading of this text includes as "an element" a crime involving the use of force by an individual having a particular domestic relationship to the victim. The MCDV definition simply contains no restrictions or limitations on

the "has, as an element" language that precedes the domestic relationship requirement.

Second, the paragraph structure and punctuation of the statute is an important consideration in interpreting the text. *See, e.g.*, *Int'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 (1991). The punctuation and paragraph structure of Section 921(a)(33)(A) indicate that Congress established two separate requirements, set forth in two separate sub-sections, that must be met in order for a predicate offense to be considered an MCDV: (i) the offense must be a misdemeanor under federal, state, or tribal law, and (ii) it must have, as an element, certain violent behavior committed within certain defined domestic relationships.

Third, the "grammatical rule of the last antecedent," which provides that "a limit[ed] clause or phrase … should ordinarily be read as modifying only the noun or phrase that precedes it immediately," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), further bolsters the court of appeals' interpretation. Under this well-established rule of construction, the "committed by" clause in sub-section (ii) most naturally modifies the phrase immediately preceding it ("has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"), rather than a noun that is not even part of the same sub-paragraph (the noun "offense" appearing at the beginning of the MCDV definition). Thus, the domestic relationship requirement in the "committed by" clause is expressly linked to the "has, as an element" language.

Finally, while not specifically addressed in the court of appeals' decision, another grammatical rule may be relevant here. Under the Dictionary Act, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1. Thus,

while the government argues that the term "element" is used "in the singular" (Pet. Br. at 8), even if that were true, under 1 U.S.C. § 1, the term "element" would "include and apply to" both the "use or attempted use of physical force" requirement *and* the domestic relationship requirement contained in sub-section (ii). *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979) (term "Indian" in 25 U.S.C. § 194 means the same as, and encompasses, "Indians" and thus "Indian tribes"); *Barr v. United States*, 324 U.S. 83, 91 (1945) (singular term "buying rate" used in tariff act did not preclude use of multiple "buying rates" for a particular foreign currency).[2]

The government's interpretation would require the Court to rearrange the plain language of the statute. *See* Pet. Br. at 13, 17. The government first revises the statute by moving the "committed by" language describing the domestic relationship requirement so that it immediately follows the phrase "an offense." *Id.* However, Congress specifically set the "committed by" language apart from the phrase "an offense", and placed it in a paragraph that begins "that has, as an element," thereby making clear that a domestic relationship is a necessary element of the predicate offense. The government next inserts a hard paragraph break where none exists, removing the "committed by" clause from sub-section (ii) of the statute. *Id.* at 17. However, Congress specifically chose to incorporate the "committed by" clause in the sub-section describing the requisite elements of the predicate offense. Finally, the government's construction

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[2] This provision likewise has been ignored by courts holding that the predicate offense need not have as an element a domestic relationship, many of which have relied heavily on the notion that the term element is used in the "singular". *E.g., United States v. Meade*, 175 F.3d 215, 218-19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999); *United States v. Barnes*, 295 F.3d 1354, 1362 (D.C. Cir. 2002) (collecting cases finding "use of the singular 'element' rather than 'elements' determinative").

would require the Court to ignore the last antecedent rule, even though that rule is a well-accepted cannon of construction.

More fundamentally, the government's reading of the statute would in effect require the Court to ignore large portions of the statutory text. The statute specifically describes the predicate offense as having "as an element, [a particular domestic relationship] with the victim." Whether the language describing the domestic relationship is characterized as its own separate "element", a "sub-element", or a necessary part of the singular "element" in the statute under the government's interpretation (*id.* at 8), there can be no dispute that it is a requirement of the predicate offense specifically stated in the statutory text. *See Barnes*, 295 F.3d at 1369 (Sentelle, J., dissenting) (at bottom, the "argument … is not how many elements are involved, but what the singular element is"). The government's interpretation would effectively read this language out of the statute contrary to settled principles of statutory construction. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

B. The Limited Legislative History Supports The Court Of Appeals' Interpretation.

As the government concedes, "it is not necessary to go beyond the text of the statute in answering the question presented." Pet. Br. at 8. Indeed, this Court has made clear that legislative history "cannot amend the clear and unambiguous language of a statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002). Such reliance is particularly unwarranted here given that the MCDV definition "was ultimately passed as part of a last minute series of congressional maneuvers," "neither the House nor the statute held hearings on the statute," and "the legislative

history concerning the statute is sparse." *United States v. Hartsock*, 347 F.3d 1, 5 n.4 (1st Cir. 2003).[3]

Nonetheless, to the extent the legislative history is useful at all, it supports the court of appeals' interpretation of the statute. Thus, for example, the bill's sponsor Senator Lautenberg stated that "[t]he amendment would prohibit any person *convicted of domestic violence* from possessing a firearm." 142 Cong. Rec. 22,988 (1996) (emphasis added). Likewise, in advocating for the bill, Senator Feinstein stated that it was designed to remedy the "unfortunate fact that many *domestic violence offenders* are never convicted of a felony" and therefore are not subject to the laws that "prohibit convicted felons from possessing a firearm" and that "[o]utdated or ineffective laws often treat *domestic violence* as a lesser offense." *Id.* (emphasis added). Such statements suggest that the drafters intended to impose a prohibition on gun ownership only on those who committed the specific crime of "domestic violence"—i.e., a crime for which a domestic relationship was a necessary element.

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[3] The lack of any meaningful legislative history is a result of the unusual way in which § 922(g)(9) was enacted. Eric Andrew Pullen, comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment*, 39 S. TEX. L. REV. 1029, 1037-38 (1998) (noting "undetectable fashion" in which "this controversial legislation became law"). As the government acknowledges, § 922(g)(9) was initially an amendment to an anti-stalking bill. However, Senator Lautenberg subsequently offered the bill as an amendment to a Treasury and Postal Service appropriations bill, which was subsequently subsumed within the Omnibus Consolidated Appropriations Act. Pet. Br. at 28. Thus, the amendment was slipped into an appropriations bill at the eleventh hour after being amended "shortly beforehand." *Id.* at 29. Moreover, "[m]any in Congress were unaware the Lautenberg Amendment was present when they voted on the bill because Senator Lautenberg requested the Presiding Officer to dispense with the reading of his amendment." Pullen, *supra*, at 1037-38.

In the face of this history, the government and amici rely upon a lone statement by Senator Lautenberg, who noted that "convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence." 142 Cong. Rec. 26,675 (1996). That statement is notable for its uniqueness in the debates and the fact that it was made at the eleventh hour. Taken as a whole, the sparse legislative history indicates that Congress contemplated that the predicate offense in Section 922(g)(9) was one that specifically criminalized "domestic violence". In any event, this Court has underscored that such statements by "a single legislator who sponsors a bill" are "not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). *Accord Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."). This principle applies with even greater force where, as here, it appears that the relevant language was inserted at the request of *opponents* of the original legislation. *See* Resp. Br. at 30; Lautenberg Br. at 17-18. Accordingly, to the extent the legislative history is helpful at all, it further supports the court of appeals' interpretation.

II. The Well-Settled Principle Of Constitutional Avoidance Warrants Affirmance.

Were there any ambiguity in the statute, however, it would be resolved by settled principles of statutory construction.[4] While the court of appeals correctly held that

[4] Several of the courts holding that a domestic relationship is not a required element of the predicate offense under § 922(g)(9) have nonetheless conceded that the contrary reading "has some force," *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003), and that the statute is "not a model of clarity or preciseness," *United States v. Heckenliable*, 446 F.3d 1048, 1050 (10th Cir. 2006).

the rule of lenity would require reversal of Mr. Hayes' conviction were there any ambiguity in the statutory text, another principle of statutory construction is equally applicable. This Court has made clear that statutes should be construed to avoid constitutional questions where possible. Here, the government's interpretation raises several constitutional concerns. Most immediately, there is a significant issue regarding the constitutionality of Section 922(g)(9) in the wake of this Court's decision in *Heller*. While the Court in *Heller* suggested that, consistent with our nation's tradition and history, restrictions on gun ownership by convicted felons may be constitutional, prohibitions on gun ownership for *misdemeanors* have no such historical pedigree. Likewise, there are significant questions regarding congressional authority to enact such legislation under the Commerce Clause. As this Court made clear in *United States v. Morrison*, 529 U.S. 598 (2000), such non-economic, criminal legislation is constitutionally questionable. Finally, the government's interpretation has the potential to render the statute unconstitutionally vague: if misdemeanor crimes other than those specifically targeting domestic violence are brought within the statute's scope, many misdemeanants will lack sufficient notice that they are subject to the statute's restriction on gun ownership. This constitutional concern is compounded by the fact that Section 922(g)(9) applies retroactively to those such as Mr. Hayes who committed misdemeanors before the statute's enactment in 1996. Thus, adopting the government's proposed interpretation would raise significant constitutional questions.

A. Statutes Should Be Interpreted, Where Possible, To Avoid Serious Constitutional Doubts.

"'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526

U.S. 227, 239 (1999). In order to apply the doctrine of constitutional avoidance, it is not necessary for the Court to determine whether an asserted constitutional question has merit, as the avoidance canon is intended to "allow[] courts to *avoid* the decision of constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Instead, the doctrine applies where one interpretation of a statute "engenders constitutional issues" while "a reasonable alternative interpretation" avoids those constitutional questions. *Gomez v. United States*, 490 U.S. 858, 864 (1989). Indeed, this Court has often applied the avoidance canon in situations where it later *rejected* the alleged constitutional deficiency. *See* Adrian Vermuele, *Saving Constructions*, 15 GEO. L.J. 1945, 1960-61 (1997).

B. The Fundamental Second Amendment Right At Stake Warrants A Narrow Reading of Section 922(g)(9).

"[T]he Second Amendment confer[s] an individual right to keep and bear arms" comparable to the First Amendment right of free speech. *Heller*, 128 S. Ct. at 2799.[5] "[C]entral to the Second Amendment right" is "the inherent right of

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[5] For example, John Locke maintained that the right to armed self-defense was "so necessary to, and closely tied with, a man's preservation, that he cannot part with it but by what he forfeits his preservation and life together." JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 23 (1690) (reprinted Hackett ed. 1980). William Blackstone recognized that the right to bear arms in the English Bill of Rights acknowledged "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 WILLIAM BLACKSTONE, COMMENTARIES *143-44. And St. George Tucker described the Second Amendment as equivalent to Blackstone's "right of self-defence [which] is the first law of nature." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 143, 300 (1803). Consistent with this view, *Federalist No. 28* recognizes an "original right of self-defense which is paramount to all positive forms of government." THE FEDERALIST NO. 28, at 178.

self-defense," especially in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 2817.[6]

The indictment under appeal strikes directly at Mr. Hayes's fundamental Second Amendment rights, as it seeks to criminalize his possession of firearms in his home. Pet. Br. at 4. While the Second Amendment right to bear arms is "not unlimited, just as the First Amendment's right of free speech [is] not," nonetheless regulation of that right must not exceed the bounds set by the Constitution. *Id.* at 2799. Thus, for example, in *Heller* while the Court indicated that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" may be constitutionally permissible, the Court cited no such historical pedigree for the prohibition on firearms ownership by *misdemeanants*. *Id.* at 2816-17; *see also United States v. Booker*, -- F. Supp. 2d --, 2008 WL 3411793, at *1 (D. Me. Aug. 11, 2008) (*Heller* left open the "significant question" of whether 18 U.S.C. § 922(g)(9) is constitutional). To the contrary, "[u]nlike felons, there is no tradition in United States or English law of depriving misdemeanants of civil rights or barring misdemeanants from gun possession." Congressional Research Service, Gun Ban for Persons Convicted of Misdemeanor Crime of Domestic Violence: Ex Post Facto Clause and Other Constitutional Issues 5 (Dec. 30, 1996) (reviewing constitutional questions raised by 922(g)(9)).

This distinction between felonies and misdemeanors is fundamental to the criminal law. It has deep roots in our nation's history and traditions, with significant implications

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[6] Given the "fundamental" nature of the right, which is "'deeply rooted in this Nation's history and tradition,'" strict scrutiny is warranted. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (first amendment interests subject to strict scrutiny).

for the types of process that are afforded defendants, and the types of punishments that may be fairly imposed. *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 812 (1993). No one would suggest, for example, that individuals could be constitutionally subject to permanent deprivation of the right to own firearms (or for that matter, any other fundamental right, such as the right to exercise free speech) simply because they have been convicted for the misdemeanor crime of littering or jaywalking.

These concerns are amplified by the government's expansive interpretation of Section 922(g)(9). As a threshold matter, the government has interpreted Section 922(g)(9) to apply *retroactively*, such that individuals who may have chosen not to contest misdemeanor charges and did not realize at the time that they may be forfeiting their Second Amendment rights may find themselves deprived of a fundamental constitutional right. 63 Fed. Reg. 35,521 (June 30, 1998). In addition, the government has interpreted the statute to apply to individuals whose misdemeanor offenses were not punishable by imprisonment, but rather only a fine, as well as to individuals who have been previously convicted in states that do not "characterize offenses as misdemeanors." *Id.* at 35,520-21. Finally, according to the government, the statute may be applied to individuals convicted of a wide range of offenses ranging from "generic assault" to "disorderly conduct." Information Needed to Keep Guns Out of the Hands Of Persons Convicted of an MCDV, *available at* *http://www.fbi.gov/hq/cjisd/nics/mcdvbrochure.pdf*. Indeed, in the present suit, the government has construed the statute to apply where the predicate offense may reach not only those who cause another "physical harm", but any individual

who "unlawfully and intentionally makes physical contact of an insulting or provoking nature." W.Va. Code § 61-2-9(c).

Given the serious constitutional issues raised by the prosecution of Mr. Hayes, and the ability to avoid those issues by adopting the court of appeals' reasonable construction of Section 921(a)(33)(A), the canon of constitutional avoidance further supports affirmance. *See, e.g., United States v. Kitsch*, 2008 WL 2971548, at *7 (E.D. Pa. Aug. 1, 2008) (applying canon of constitutional avoidance in interpreting 922(g)(1) to "avoid[] potential doubts post-*Heller* about the statute's constitutionality").

C. The Constitutional Limits On Congressional Authority Under The Commerce Clause Warrant A Narrow Reading Of Section 922(g)(9).

A further substantial constitutional issue is raised by the application of Section 922(g)(9) to Mr. Hayes's intra-state possession of a firearm—namely, whether Section 922(g)(9) exceeds the scope of congressional authority under the Commerce Clause. The factors this Court articulated in *Morrison* and *Lopez* demonstrate that there is a significant question regarding congressional authority to enact Section 922(g)(9), which may be avoided by adopting the court of appeals' construction of the statute.

First, Section 922(g)(9) is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Neither gun possession nor gender-motivated acts of violence qualify as economic activity. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561. Accordingly, Section 922(g)(9) raises significant constitutional concerns. As this Court observed in *Morrison*, "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to [the Court's] decision in that case." 529 U.S. at 610.

Second, although Section 922(g)(9) does have a jurisdictional element that may "lend support" to the constitutionality of the statute, *id.* at 612-13, this factor cannot save a statute that, like Section 922(g)(9), reaches far into "areas of traditional state regulation" such as criminal and family law. *See id.* at 615-16; *Lopez*, 514 U.S. at 561 n.3. "Under our written Constitution, ... the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616.[7] Moreover, that same jurisdictional element counsels in favor of a narrow construction of Section 922(g)(9) to reach only that "discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Here, it is difficult to see how such a "case-by-case inquiry" would demonstrate any effect on interstate commerce. *See Lopez*, 514 U.S. at 561-62.

Third, the sparse legislative history of Section 922(g)(9) is devoid of congressional findings demonstrating any effects on interstate commerce of gun possession by individuals previously convicted of a crime of domestic violence. *See Morrison*, 529 U.S. at 612. "While 'Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,' ... the existence of such findings may 'enable [the Court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Id.* (quoting *Lopez*, 514 U.S. at 563). There are no such findings here because, like the possession of guns in a school zone at

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[7] Thus, in *Morrison*, the Court held that the fact that Congress expressly prohibited 42 U.S.C. § 13981 "from being used in the family law context" could not save the statute. 529 U.S. at 616. Moreover, here, the legislation specifically *targets* conduct occurring within a domestic relationship and thus the constitutional concerns are even greater.

issue in *Lopez* and the gender-motivated crime at issue in *Morrison*, there is simply no effect on interstate commerce.

Finally, as the Court observed in *Morrison*, "the link between gun possession and a substantial effect on interstate commerce [is] attenuated." 529 U.S. at 612. While the government argued in *Lopez* that violent crime imposed costs on society that are substantial and reduced the willingness of individuals to travel to areas within the country that are perceived to be unsafe, the Court "rejected these 'costs of crime' and 'national productivity' arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'" *Id.* at 612-13 (quoting *Lopez*, at 514 U.S. at 564). As the Court explained, such arguments would effectively eviscerate the traditional regulatory authority of the states in areas such as family law and criminal law enforcement:

> "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."

Id. at 613 (quoting *Lopez*, 514 U.S. at 564). That is exactly the effect of Section 922(g)(9) here, where the government seeks to impose additional penalties on conduct that by definition involves criminal activity within the context of a domestic relationship—an area this Court has repeatedly affirmed lays within the traditional scope of state regulation.

In sum, the Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" on the ground that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. Indeed, the Court has found "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618.[8]

D. The Government's Construction Would Render Section 922(g)(9) Unconstitutionally Vague And Violate The Fifth Amendment Right To Due Process.

Finally, the government's construction of the statute would render it unconstitutionally vague and violate Mr. Hayes's right to due process. *See United States v. Harriss*, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."); *Lambert v. California*, 355 U.S. 225 (1957). Under the government's proposed construction, Section 922(g)(9) may be applicable to individuals whose predicate offense does not mention domestic violence at all, much less require the government to demonstrate a domestic relationship as an element. Indeed,

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[8] While lower courts have rejected Commerce Clause challenges, they have relied heavily on the presence of a jurisdictional element in § 922(g)(9), which this Court made clear in *Morrison* is not dispositive of the Commerce Clause analysis. *See, e.g., Gillespie v. City of Indianapolis*, 185 F.3d 693, 704 (7th Cir. 1999) ("inclusion of that jurisdictional element" is "sufficient to overcome Commerce Clause challenges"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 907 (D.C. Cir. 1999); *United States v. Daugherty*, 264 F.3d 513 (5th Cir. 2001).

the government contemplates that there will be judicial proceedings perhaps years after the fact involving "the presentation and weighing of proof, and a finding of guilt beyond a reasonable doubt" by a jury to adjudicate whether the predicate offense constitutes a "crime of domestic violence." Pet. Br. at 10-11. Under such circumstances, many criminal defendants such as Mr. Hayes who were not convicted under statutes that specifically mentioned domestic violence may not be placed on notice that they are subject to the restrictions of 922(g)(9). Not only is such a construction of the statute at odds with common sense, but it also raises serious constitutional concerns. *See Belless*, 338 F.3d at 1067 (Congress "may have intended to limit predicate offenses to those with a domestic element ... to avoid questions years later about what the relationship might have been between the perpetrator and the victim").

The potential due process implications are compounded by the fact that the government has construed Section 922(g)(9) as having retroactive effect. While several lower courts have held that Section 922(g) does not violate the Ex Post Facto clause,[9] a critical rationale underlying these decisions is that the defendants had *notice* that their possession of a firearm could result in additional criminal sanctions. Thus, for example, several courts have relied on the Second Circuit's decision in *United States v. Brady*, 26 F.3d 282 (2d Cir. 1994), upholding the felon-in-possession statute in the face of a similar challenge on the ground that the defendant "had more than adequate notice that it was illegal for him to possess a firearm because of his status as a convicted felon" and thus "could have conformed his conduct to the requirements of the law." *Id.* at 291. In affirming the constitutionality of the statute, the court observed that "[o]ne of the principal aims of the Ex Post

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[9] *See, e.g., United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000).

Facto clause is to ensure that individuals have fair notice of what conduct is criminally prescribed." *Id.*

Here, however, the government's interpretation would severely undermine this rationale. Unlike the defendant in *Brady* who was put on notice of the predicate offense because it was expressly classified as a "felony", individuals such as Mr. Hayes would be subject to prosecution under Section 922(g)(9) even though a domestic relationship was not an element of the predicate offense and, indeed, may not have been relevant at all in the proceedings that resulted in the prior conviction. Such a result would significantly undermine the constitutionality of the statute.[10]

Indeed, the Congressional Research Service has concluded more broadly that "[t]he law may be vulnerable to an *ex post facto* challenge if," as here, "prosecution is attempted against a person in lawful possession of a firearm before the effective date who merely continues possession of the same firearm after the effective date without any notice of the change in the law." CRS, *supra*, at 1. "Although knowledge of the law is not ordinarily a defense to criminal behavior, when the law departs from the traditional distinction between misdemeanors and felons, the fair notice principle underlying the *ex post facto* clause may apply." *Id.* at 6. Given that "there is no tradition in United States or English law of depriving misdemeanants of civil rights or

[10] While the lower courts have relied heavily on the notice element, it is unclear that such "notice" can cure the constitutional defect under this Court's precedents. The Court has held that the Ex Post Facto clause is violated where "the law changes the legal consequences of acts completed before its effective date" by, for example, retroactively increasing the punishment for a criminal act. *Weaver v. Graham*, 450 U.S. 24, 31 (1981). That is the case under § 922(g)(9), which imposes new criminal sanctions—i.e., deprivation of the fundamental right to bear arms—retroactively to individuals who may have been convicted of misdemeanors decades before enactment of the statute.

barring misdemeanants from gun possession," such individuals would not have "fair warning" that their misdemeanor convictions might deprive them of the right to bear arms. *Id.*

The problems inherent in the government's interpretation are illustrated by *White v. Department of Justice*, 328 F.3d 1361 (Fed. Cir. 2003), where the court rejected a vagueness challenge even though the petitioner had been *acquitted* under the Virginia misdemeanor crime of domestic violence statute but convicted of simple assault. Given that he had been *acquitted* under the statute specifically containing the domestic relationship element, was informed by the Virginia State Police that he could carry a weapon, and successfully purchased one, the defendant reasonably believed that he was not subject to Section 922(g)(9). Nonetheless, the court held that he was indeed subject to the statute, which the court found was not unconstitutionally vague, simply asserting "we see no … problem with this statute." *Id.* at 1368 & n.3.[11]

The court's decision in *White* also illustrates another potential constitutional problem with the government's interpretation. The Fifth Amendment right to due process and Sixth Amendment right to trial by an impartial jury "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77. In Mr. White's case, however, he was deprived of his position as a correctional officer even though no jury ever made a finding establishing the domestic relationship element, and indeed the count

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[11] Some lower courts have rejected similar challenges, although often with little or no analysis. *See, e.g.*, *United States v. Kavoukian*, 315 F.3d 139, 145 (2d Cir. 2002); *United States v. Pfeifer*, 371 F.3d 430 (8th Cir. 2004); *Barnes*, 295 F.3d at 1363; *Meade*, 175 F.3d at 222.

against him containing that element was dismissed. Thousands of individuals are in the same position given that Section 922(g)(9) dispenses with the public interest exception for members of the military and law enforcement that is applicable to other gun control provisions (such as those applicable to felons in possession of a firearm). 18 U.S.C. § 925(a)(1). Because such individuals must carry a weapon as a condition of their employment, they may be summarily dismissed if they are deemed subject to the restrictions in Section 922(g)(9).[12] In addition, many more individuals will be prohibited from purchasing a firearm under the Brady Act even though, under the government's interpretation, no jury need ever have found that the domestic relationship element was satisfied. Brady Center Br. at 35.

III. The Recitation Of Policy Concerns Amici Raise Is Incomplete And Irrelevant.

Finally, the policy arguments amici raise in defense of the government's interpretation are both incomplete and irrelevant. *See* Brady Center Br. at 8-35. This Court has made clear that its role "is not to make policy, but to interpret a statute." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("'[O]ur role is too interpret the intent of Congress ..., not to make a freewheeling policy choice.'"). Indeed, the Court recently rejected similar policy-based arguments in

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[12] This aspect of the law can lead to absurd and inequitable results by, for example, depriving a "soldier who slaps her husband, who is convicted for simple battery in state court" of the right to carry Army-issued firearms, while a "soldier who severely beats his wife, who is convicted of a felony ... would still be able to carry a weapon legally in the Army under the umbrella of the Government Exception." E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, ARMY LAWYER 1 (Oct. 2000), *available at* http://findarticles.com/p/articles/mi_m6052/is_2000_Oct/ai_71829233.

Heller, observing that they had been taken "off the table" by the "enshrinement" of the individual right to keep and bear arms in the Second Amendment. *Heller*, 128 S. Ct. at 2822. "The very enumeration of the right takes out of the hands' of the government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 2821 (emphasis in original).

Even if such concerns were a proper subject for this Court's consideration, however, the list of policy concerns articulated by amici presents an incomplete picture. Amici completely ignore the significant policy considerations embodied in the Second Amendment—the belief among the Framers that the right to bear arms was fundamental and provided an important bulwark against government overreaching. Nor do they address the important federalism concerns that are raised by the court of appeals' decision. As this Court has recognized, criminal and family law are areas that historically have been regulated by the states. *See Lopez*, 514 U.S. at 561 n.3. Accordingly, far from being problematic (Pet. Br. at 22-27), allowing states to retain control over the appropriate remedies for crimes of domestic violence may have significant positive benefits, allowing states to develop alternative approaches to address a critical problem.[13]

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[13] Nor would the court of appeals' interpretation "fundamentally undermine[] the consistent application of federal law." Pet. Br. at 27. Under the court of appeals' interpretation, there is in fact a consistent federal rule, which says that if a state chooses to enact a statute criminalizing domestic violence, federal law will prohibit individuals convicted under such statutes from possessing firearms. That rule can be applied consistently and equally to all the states. *Cf. United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (refusing to impose uniform federal rule for priority of liens, holding that under federal law, state-law rules regarding priority of liens govern); *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (discussing various federal criminal statutes that define federal offenses based on state law). Moreover, the government's assertion that Congress was even attempting to create such uniformity is

The court of appeals' interpretation of the statute gives due consideration to these concerns by leaving with the states the power to define whether additional penalties should be placed on domestic abusers by defining specific crimes targeting domestic abuse. Those states that wish to take advantage of Section 922(g)(9) and impose additional punishment may specifically criminalize crimes of domestic violence. Those states that do not wish to impose such punishment may refrain from enacting such specific laws (which has been the choice of approximately half the states to date, Brady Center Br. at 7; Pet. Br. at 9). The court of appeals' decision therefore has the benefit of protecting the traditional role of the states in defining the scope of criminal liability for individuals within their jurisdictions. *See Belless*, 338 F.3d at 1067 (Congress "may have intended to limit predicate offenses to those with a domestic element ... to spur states to pass statutes that expressly focus on domestic violence.").

The government's interpretation, in contrast, would remove the policy determination from the hands of the states. States that have chosen not to specifically criminalize domestic violence may believe that special legislation is not needed in order to address the relevant policy concerns, that it is ineffective, or that such legislation would trigger restrictions on gun ownership that are constitutionally

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belied by the record. Under the statute, for example, "[w]hether a person has been 'convicted' of a misdemeanor crime of domestic violence is determined by the law of the jurisdiction where the proceedings were held." 63 Fed. Reg. 35,521 (June 30, 1998). Accordingly, Congress sought to preserve the traditional role of the states in defining the parameters of criminal liability, rather than imposing a uniform rule in all the states. Adam W. Kersey, *Misdemeanants, Firearms, and Discretion: The Practical Impact of the Debate Over "Physical Force" and 18 U.S.C. § 922(g)(9)*, 49 WM. & MARY L. REV. 1901, 1931 (2008) ("Section 922(g)(9) is a product of the infusion of state substantive law into the federal criminal process.").

questionable. Amici's preferred policy determination should not be forced on such states.

Even if the only policy considerations at issue were those amici raise, however, the evidence they have submitted is of dubious relevance. None of the evidence amici cite actually shows that their interpretation would lead to any significant increase in the efficacy of Section 922(g)(9) compared to the court of appeals' interpretation. Amici do not cite a single study that specifically examines the efficacy of Section 922(g)(9), much less one that compares the effects of the court of appeals' interpretation of the MCDV definition to the government's proposed definition.

In fact, the court of appeals' interpretation is likely to have little practical effect. The court of appeals' decision does not render inapplicable Section 922(g)(9)'s prohibition on gun ownership in all circumstances. It only does so where state legislatures choose not to enact specific statutes criminalizing crimes of domestic violence (and only as to individuals who did not commit a specific domestic violence crime or are not already prohibited from owning firearms because they, for example, have committed felonies). Individuals who committed misdemeanor crimes of domestic violence or who committed a felony offense *will* be prohibited from owning firearms. Brady Center Br. at 7; Pet. Br. at 9.

Moreover, the court of appeals' interpretation would only impact the minority of domestic abusers who have actually been convicted of a predicate offense. Even the proponents of Section 922(g)(9) recognized that the statute—no matter how it is interpreted—would not have a significant effect on the underlying problem due to the limited prosecution of domestic violence. Thus, for example, Senator Murray, one of the co-sponsors of the original bill stated: "Unfortunately, this amendment will not make life better for many women who are abused, even when guns are present in the home.

We know that most domestic violence is not even reported, and of the cases that are reported, many do not lead to a conviction. This is a problem associated with the horrible effects of victimization, and has a different set of solutions." 142 Cong. Rec. 22,987 (1996). As Senator Murray observed, the vast majority of domestic violence incidents are never reported. Of those that are reported, the vast majority do not lead to conviction. Accordingly, the threshold requirements for Section 922(g)(9) are seldom satisfied.

In addition, the materials amici cite indicate that there are significant questions regarding the enforcement, and enforceability, of Section 922(g)(9). Commentators universally note that there have been very few prosecutions under the statute. *See, e.g.*, Emily F. Rothman, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62, 67 (2005) ("as of 2001, only 566 batterers in the United States had been prosecuted for violating the statutes"); Tom Lininger, *A Better Way To Disarm Batterers*, 54 HASTINGS L.J. 525, 530-32 (2003) (observing that "enforcement problems persist under section 922(g)(9)" and that there is a "low rate of prosecution").

Moreover, while amici suggest that "[t]he Lautenberg Amendment prevented thousands of domestic violence abusers from obtaining firearms nationwide due to the Amendment's successful interaction with the Brady Handgun Prevention Act" and its criminal background check system (Brady Center Br. at 32-33), the materials they cite conclude that "[t]he background check system itself is currently subject to deficiencies that can work to criminals' advantage." Rothman, *supra*, at 67. As a threshold matter, domestic abusers or others subject to the Brady law may simply obtain weapons from private owners, or illegally, which is apparently a common means of circumventing the

Act.[14] As the materials amici cite acknowledge, the seminal study on the Brady Act, published in the *Journal of the American Medical Association*, found that the law has had no detectable impact on homicide rates.[15] Thus, while amici note that thousands of individuals have been denied hand guns by *federally licensed dealers* under the Brady law, they cannot claim that this has had any effect on gun acquisition in the secondary market or actual crime rates.

The problems with respect to domestic abusers are even more acute. As the studies amici cite acknowledge, even where a background check applies, it may not prevent such individuals from obtaining a handgun for a variety of reasons, including the difficulty of identifying crimes of "domestic violence" from misdemeanor records, incomplete and unclear state recordkeeping, misclassification of cases of

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[14] Garen Wintemute et al., Violent Prevention Research Program, *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants*, at 42 (May 29, 2002), available at http://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf ("perhaps 40% of all firearm transfers" are by private vendors not subject to Brady law).

[15] *See* Wintemute, *supra*, at 46 ("a recent evaluation of the impact of the Brady Handgun Violence Prevention Act … did not detect an effect on criminal violence," citing J.A. Ludwig & P.J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 JAMA 585 (2000)). As Professor Bogus, a member of the governing board of the Brady Campaign or its legal action arm from 1987 to 1993, has observed, while "[t]he Brady Campaign has since touted the purported effectiveness of the legislation," the 2000 *JAMA* study found "'no detectable difference in homicide trends between the 'Brady' (treatment) and 'non-Brady' (control) states.'" Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 459-60 (2008). Indeed, "[e]ven before it was enacted, few people expected [the Brady law to] have a significant impact on homicide rates." *Id.* at 468 & n.127. The National Academy of Sciences has likewise concluded that "the Brady act had no direct effect on homicide rates." NRC, Firearms and Violence: A Critical Review 94 (2005).

domestic violence, the limited time available to perform the background check, and "problems with the federal definition of domestic violence conviction":

> As of 2003, gun retailers in 31 states lacked the ability to distinguish batterers from others because they could not identify misdemeanor convictions for partner violence consistently through background checks. Reasons for this include incomplete or unclear state record keeping, lack of automated systems, insufficient resources, and problems with the federal definition of domestic violence conviction. Another reason for the failure of the background check system may be that domestic violence cases are misclassified. A recent study of domestic violence arrests made in Arizona from 2000 to 2002 found that 54% were misclassified, allowing some offenders to retain their firearms after arrest.

Rothman, *supra*, at 67. Thus, the General Accounting Office found that thousands of domestic abusers were able to obtain firearms from *federally-licensed dealers*, despite the background check system.[16] In addition, the Brady law does nothing to prevent domestic abusers from retaining weapons they already possessed. *Id.*

Thus, even under amici's suggested interpretation, the statute would have little positive effect. Indeed, by its own admission, the government is often unable to ascertain who is subject to Section 922(g)(9) given its vague approach to the domestic relationship requirement, which does not limit

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[16] The GAO report documented many of the same problems contributing to the "difficulty in preventing domestic violence offenders from purchasing firearms." GAO, Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System 3-4 (2002).

predicate offenses to actual crimes of domestic violence, but expands it to misdemeanors lacking a domestic relationship element. *See* GAO Report, *supra*, at 27 ("domestic violence offenses may not always be clearly labeled as domestic violence, and the complex federal definition of domestic violence misdemeanor requires obtaining information that may not be immediately available in the state criminal history record"). Moreover, the haphazard way in which the statute is enforced raises significant concerns regarding fairness and equality in the deprivation of a constitutional right that this Court has recently confirmed to be fundamental.

Lacking evidence of any significant benefit resulting from the government's interpretation of the statute, amici instead argue generally in favor of removing guns from as many people as possible, or as many misdemeanants as possible, or as many potentially abusive people as possible, asserting that "prohibiting violent misdemeanants from possessing firearms is associated with a specific decrease in the risk of arrest for new firearm crimes and violent crimes." Brady Center Br. at 10 (citing Wintemute, *supra*, at 2).[17]

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[17] Thus, for example, the primary study upon which amici rely, Wintemute et al., did not examine § 922(g)(9), or even a similar state statute, but rather violent misdemeanants generally. Wintemute, *supra*, at 1, 4. Moreover, while amici suggest the study definitively shows that preventing violent misdemeanants from obtaining guns reduces crime, the study only found a very minor effect under certain specific conditions (blocking gun sales to violent misdemeanants reduced new gun and/or violent crime by only 3.8%, *id.* at 37). Accordingly, the National Academy of Sciences recently concluded after reviewing the study and other evidence that, while implementing screening procedures for violent misdemeanants may "prevent prohibited persons from making gun purchases in the primary market, the question remains what, if any effect, it has on purchases in the secondary market, on gun crimes, and on suicide." NRC, *supra*, at 94.

Not only are such assertions highly questionable for the reasons stated above, but they also prove too much. This Court has already rejected the argument that constitutional guarantees embodied in the Second Amendment can be overridden by the fear that individuals may abuse their constitutional rights. *Heller*, 128 S. Ct. at 2821-22. Indeed, the same arguments might be proffered in support of depriving all male citizens of the right to bear arms given that males commit the vast majority of violent crime in the United States (including domestic violence and gun crimes). *See* Brady Center Br. at 5. An across-the-board ban of private firearm possession would theoretically be even more effective (although the experience in the District of Columbia and other jurisdictions certainly proves that, as a practical matter, such bans are ineffective).

At bottom, amici's argument boils down to an assertion that we cannot be trusted to responsibly exercise our constitutional liberties. However, the remedy for such dangers is not to prospectively deprive us of our constitutional freedoms, but rather to impose reasonable criminal or civil sanctions on individuals who are charged with, and convicted of, crimes.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be affirmed.

DOUGLAS G. SMITH
Counsel of Record
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

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