

No. 08-3770

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**In the  
United States Court of Appeals  
for the Seventh Circuit**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

STEVEN M. SKOIEN,  
*Defendant-Appellant.*

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**On Appeal from the United States District Court  
for the Western District of Wisconsin**

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**Brief *Amicus Curiae* of  
Gun Owners Foundation and  
Gun Owners of America, Inc.  
In Support of Appellant and Reversal**

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## DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners Foundation and Gun Owners of America, Inc., through their undersigned counsel, submit this Disclosure Statement pursuant to Rule 26.1(b), Federal Rules of Appellate Procedure (“Fed. R. App. P.”), Rule 26.1(c), Rules of the United States Court of Appeals for the Seventh Circuit (“Seventh Circuit Local Rules”), and Fed. R. App. P. 29(c).

The *amici curiae*, Gun Owners Foundation and Gun Owners of America, Inc., are non-stock, nonprofit corporations, neither of which has any parent company, and no person or entity owns them or any part of them. *Amici Curiae* are represented herein by Herbert W. Titus, Esquire, who is counsel of record, William J. Olson, Esquire, John S. Miles, Esquire, and Jeremiah L. Morgan, Esquire, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, VA 22180-5615.

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## INTEREST OF AMICI CURIAE

Gun Owners Foundation (“GOF”) and Gun Owners of America, Inc. (“GOA”) are nonprofit educational organizations, exempt from federal taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, respectively, and each is dedicated, *inter alia*, to the correct construction, interpretation and application of the law, with particular emphasis on federal firearms statutes and constitutional guarantees related to firearm ownership and use.

GOF is a public charity which primarily engages in nonpartisan research and public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. GOA is a social welfare organization which also engages in nonpartisan research and education, as well as assistance, regarding victims’ rights and certain public policy issues and public interest litigation, particularly that related to the correct construction of the Constitution and federal and state statutes. In the past, each of the *amici* has conducted research on other issues involving the interpretation of federal law and has filed *amicus curiae* briefs in other federal litigation involving such issues.<sup>1</sup>

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<sup>1</sup> *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

## ARGUMENT

### I. The Government's Arguments Rest upon Faulty Premises.

#### A. The Heller Dictum of “Presumptively Lawful” is a “Slender Reed.”<sup>2</sup>

In its Petition of the United States for Rehearing *en banc* (“Pet. Rehear.”), at page 2, the government argues that the panel’s opinion violates the Supreme Court’s *dictum* in Heller that “longstanding prohibitions on the possession of firearms by felons”<sup>3</sup> are “presumptively lawful.”<sup>4</sup> Of course, the instant case involves the application of the Second Amendment to 18 U.S.C. section 922(g)(9) — a statute not regulating the possession of firearms by a felon, but by misdemeanants whose offense involved force or threats of force in a domestic context.<sup>5</sup> Citing the Heller footnote explaining the felony presumption to be just one “example” of “presumptively lawful regulatory measures,”<sup>6</sup> the government seeks to summarily extend the presumption to include section 922(g)(9)’s misdemeanor disqualification.

The government overplays its hand, treating the words “presumptively lawful” as the functional equivalent, for an appellate court, of “conclusively lawful,” asking

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<sup>2</sup> Cf. Anderson v. Celebrezze, 460 U.S. 780, 784 n.5 (1983).

<sup>3</sup> See District of Columbia v. Heller, 554 U.S. \_\_\_, 128 S. Ct. 2783, 2816-17 (2008).

<sup>4</sup> *Id.*, 128 S. Ct. 2817 n.26.

<sup>5</sup> This provision is usually, but inaccurately, termed a Misdemeanor Crime of Domestic Violence, hereinafter cited as “MCDV”.

<sup>6</sup> *Id.*, 128 S. Ct. 2817 n.26.

this Court to adhere to a Supreme Court *dictum* as though it were a holding reached after careful briefing, argument, and consideration. In latching onto the “presumptively lawful” language, the government disregards the fact that the Heller Court knew that it was not settling all issues and anticipated future Second Amendment challenges to firearms laws. Indeed, the Court expressed a willingness to consider all challenges — even challenges to what its opinion expressly identified as exceptions to the Second Amendment, such as the felony prohibition rule.

[T]here will be time enough to expound upon the historical **justifications for the exceptions we have mentioned** if and when those exceptions come before us. [128 S. Ct. 2822 (emphasis added).]

The Court no doubt anticipated that, when such issues would arise, they would be faithfully analyzed by lower courts — not given short shrift as the government urges.

The government also tries to manufacture a pedigree for the MCDV provision to make it appear “longstanding” — at least by some measure, and alleging that its legislative purpose came from the **Gun Control Act of 1968** (“GCA”) — the purpose of which was “to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of ... criminal background.” *See* Pet. Rehear., pp. 2-3. But the ban on firearms possession visited on persons convicted of a misdemeanor crime of domestic violence was not enacted 42 years ago; rather, it **became law only in 1996** — as an unrelated amendment (the “**Lautenberg Amendment**”) to an Omnibus Emergency Appropriations Bill, offered on the floor of the Senate without any benefit of regular order — no committee hearings, no

Committee deliberation, no Committee report, no Congressional Findings, no debate. *See* 142 Cong. Rec. S11872\*-S11877\* (1996). *See also* A. Nathan, “Domestic Violence and Guns,” 85 Cornell L. Rev. 822, 826-27 (2000).

Not only did the GCA referenced by the government contain no ban on any misdemeanor firearms possession, the GCA’s across-the-board ban on felony possession was subsequently curtailed by enactment of the **Firearms Owners’ Protection Act of 1986** (“FOPA”), which was designed, in part, “to correct existing firearms statutes and enforcement policies,” in part, to better preserve “the rights of citizens ... to keep and bear arms under the second amendment to the United States Constitution.” 100 Stat. 449, Pub. L. 99-308, Sec. 1(b)(1)(A) (1986).

Prior to FOPA, the “felony” disqualification in 18 U.S.C. section 922(g)(1) prohibited firearms to “any person ... who is under indictment for, or who has been convicted ... of a crime punishable by imprisonment for a term exceeding one year.” By enacting FOPA, Congress not only removed the felony indictment disqualification, but also exempted persons who had been convicted of certain “business” felonies and certain state-defined “misdemeanor[s] punishable by a term of imprisonment of two years or more.” *See* 100 Stat. 449-50, Pub. L. 99-308, Sec. 101(5).

These statutory changes cast doubt not only on the government’s attempt to parlay the Supreme Court’s *dictum* of the “presumptive lawfulness” of felony firearms disqualification into support for the MCDV disqualification, but on the *dictum*, itself, undermining the Heller Court’s twin assumptions that “prohibitions

on the possession of firearms by felons” are “longstanding” and indiscriminate, applying to all felonies.<sup>7</sup> See Heller, 128 S. Ct. 2816-17. Indeed, the Heller dictum, like all *dicta*, suffers from the absence of vigorous advocacy in a case or controversy fully contested and briefed both as to law and fact.

**B. The Government’s Description of the MCDV Ban Is Faulty.**

The government’s effort to extend the Supreme Court’s “presumptively lawful” *dictum* concerning felon firearms possession to the section 922(g)(9) MCDV disqualification relies on a series of false and misleading arguments about the MCDV rule.

First, the government falsely claims that section 922(g)(9) requires a previous conviction for “violent assault,” or of having otherwise “acted violently toward a family member or domestic partner.” Pet. Rehear., pp. 7-8. The statute is not so limited, but rather extends to any use or attempted use of “physical force” against another in such a relationship. See 18 U.S.C. § 921(a)(33)(ii).

Second, the government erroneously implies that a person may not be disqualified from possessing a firearm unless it has been proven that he and the victim were in one of the domestic relationships prescribed by section 921(a)(33)(ii).

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<sup>7</sup> Prior to 1961, there was a federal ban on felony possession, but it was “limited to those convicted of a ‘crime of violence.’” Efforts to ban felony possession of firearms did not meet with much success until the 1930’s, and efforts before that time were confined primarily to the states, not the federal government. Even then, since the “early 1800’s, [s]tates avoided the more extreme approach of banning *possession*.” See K. Marshall, “Why Can’t Martha Stewart Have a Gun?,” 32 *Harv. J. of Law & Pub. Pol.* 695, 699, 707 (2009) (italics original).

*See* Pet. Rehear., p. 8. Because the nature of the relationship is not an element of the offense, it need not be proved in a court beyond a reasonable doubt. *See* United States v. Hayes, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1079 (2009). Thus, a person convicted of a MCDV could be disqualified not by a jury verdict or judicial decision, but by unverified information in a police report, or uncontested information about a domestic relationship ministerially placed in a court not of record. *Id.*, 129 S. Ct. at 1092 (Roberts, C.J., dissenting).<sup>8</sup>

Third, the government cultivates the erroneous impression that the MCDV disqualification was added to the statute after careful consideration of empirical studies addressed to the problem of “gun-related domestic violence.” *See* Pet. Rehear., pp. 12-14. Instead, the provision made its way into the statute books as a back-room amendment to an omnibus emergency appropriations bill, and the statements, quoted by the government as if they constituted meaningful legislative history, were only personal statements of a New Jersey Senator who is notoriously anti-gun, who had ample reason to exaggerate the foundation for, and purpose of, the amendment.<sup>9</sup> *See* 142 Cong. Rec. S11872\*-S11877\* (1996).

Finally, the government errs in representing to this Court that a MCDV offender may seek to have his civil rights — and hence, his firearm rights — restored, as

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<sup>8</sup> *See also* Brief *Amicus Curiae* of Gun Owners Foundation in Support of Respondent, pp. 19-22 (United States v. Hayes, U.S. Supreme Court Docket No. 07-608) (<http://www.wjopc.com/site/constitutional/hayes.pdf>).

<sup>9</sup> *See* Brief *Amicus Curiae* of Gun Owners Foundation in Support of Respondent, pp. 25-30 (United States v. Hayes, U.S. Supreme Court, No. 07-608).

prescribed by 18 U.S.C. section 921(a)(33)(B)(ii), just as a convicted felon may under 18 U.S.C. section 921(a)(20). *See* Pet. Rehear., p. 7. That would be possible only if, under state law, a person convicted of a such a misdemeanor would lose his civil rights upon such conviction. In Wisconsin, Skoien would have no right under section 921(a)(33)(B)(ii) to obtain restoration of those rights, because his civil rights would not have been taken away. *See Logan v. United States*, 552 U.S. 23, 32 (2007). Thus, a felon would have more opportunities to get his firearms rights restored than would one convicted of a MCDV.

## **II. The Right to Keep and Bear a Hunting Rifle Is Fully Secured by the Second Amendment.**

In his statement of the facts, Appellant Skoien admits that he was in temporary possession of his father's Winchester shotgun "solely for deer hunting." Defendant-Appellant's Brief on Rehearing, p. 4 (Mar. 25, 2010). In his earlier brief, when this case was before a three-judge panel, Skoien made the same statement, that "[t]he Winchester shotgun belonged to [his] father, but had been loaned to Skoien for hunting." Defendant-Appellant's Brief, p. 5 (Jan. 8, 2009).

Pouncing on this statement in the earlier brief, the three-judge panel decided that the right being asserted by Skoien was a right "to bear arms for hunting," not a "right to possess the gun for self-defense," and therefore, that Skoien's possession of the shotgun was somehow deserving of less protection, being outside "the core right of self-defense." *See United States v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009)

(vacated). In so ruling, the panel misconstrued the constitutional text, misunderstood history, and defied common sense.

The Heller Court explained that the Second Amendment's overarching purpose is expressed in the prefatory clause: "to secur[e] a free state" *Id.*, 128 S. Ct. at 2797-2802. However, as the Court recognized, the operative clause — "the right of the people to keep and bear arms" — could not be limited to "carrying arms in a militia," those words expressing nothing more than "the purpose for which the right was codified...." *Id.*, 128 S. Ct. at 2794. Rather, the words "bear arms" embrace the possession of any "bearable firearm" for "confrontation," either "offensive or defensive."

The Second Amendment was designed to ensure a citizen's militia independent of control of the United States Government by preventing the government from disarming the people, whether those arms were used for self-defense or for hunting. *See generally* K. Marshall, 32 *Harv. J. of Law and Pub. Pol.* at 719-21. Indeed, as Heller noted, two early constitutional authorities, St. George Tucker and William Rawle, regarded the English game laws — prohibiting "keeping a gun or other engine of destruction of game" — to be violative of the "right codified in the Second Amendment." *Id.*, 128 S. Ct. at 2805. Even when the right is linked to "self-preservation," it does not mean that the firearm kept for hunting is somehow inferior to the firearm used for self-defense, as understood in historical context by the remarks of Senator Charles Sumner: "The rifle has ever been the companion of

pioneer and, under God, his tutelary protector against the red man and the beast of the forest.” Heller, 128 S. Ct. at 2807.

The panel should have understood that it is not the **use** of the weapon that signals whether it is protected by the Second Amendment, but rather whether the firearm is the **kind** of weapon “which might be necessary to oppose an oppressive military force if the constitutional order broke down.” *Id.*, 128 S. Ct. at 2801. Thus, in 1868, J. Pomeroy in his Introduction to the Constitutional Law of the United States observed: “[A] militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons.” Heller, 128 S. Ct. at 2812. A little over a decade later, B. Abbott wrote: “Some general knowledge of firearms is important to the public welfare, because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people have some familiarity with weapons of war.” Heller, 128 S. Ct. at 2812.

The Heller Court ruled “that the Second Amendment right ... extends ... to certain types of weapons,” namely those “useful in warfare ... of the kind in common use at the time ... for lawful purposes **like** self-defense.” *Id.*, 128 S. Ct. at 2815 (emphasis added). Thus, whether Skoien’s shotgun was actually used, or possessed, for self-defense or whether it was being used, as it actually was, for hunting, makes no constitutional difference. Skoien’s right to possess a shotgun is fully protected by the Second Amendment.

### III. **Skoien Has Not Forfeited His Second Amendment Right by Having Been Convicted of a MCDV.**

#### A. **The Second Amendment Right Belongs to Skoien as a Citizen.**

Heller put to an end the contention that the Second Amendment secures only a “collective,” not an individual right. Indeed, even the dissenting justices agreed that the amendment protects the individual right “to use weapons for certain military purposes.” Heller, 128 S. Ct. at 2783. Heller also made clear that the Second Amendment individual right inures to those persons who are part of the national political community — American citizens — not to any person who may happen to be on American soil, such as those on a tourist or student visa. As the Heller majority put it, the Second Amendment secures the right of the **people** to keep and bear arms. *Id.*, 128 S. Ct. at 2790-91. Thus, the right “is [to be] exercised individually and belongs to **all Americans.**” *Id.*, 128 S. Ct. at 2791 (emphasis added).

Any other reading as to whose rights were protected would have brought the operative clause into conflict with the Second Amendment’s prefatory clause. As Heller confirmed, the prefatory clause — “A well-regulated Militia, being necessary to the security of a free state” — “announces [the] purpose” of the second, or operative, clause: “the right of the people to keep and bear arms, shall not be infringed.” *Id.*, 128 S. Ct. at 2788-89. As a statement of purpose, the prefatory clause is there to “clarify” — “to resolve an ambiguity in the operative clause”:

“Logic demands that there be a link between the stated purpose and the command.”  
*Id.*, 128 S. Ct. at 2789.

According to Heller, the purpose stated in the prefatory clause is “to secure the ideal of a **citizen** militia.” *Id.*, 128 S. Ct. at 2801 (emphasis added). The operative clause was settled on as the best way to accomplish this purpose because “history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia, but simply by taking away the **people’s** arms, enabling a select militia or standing army to suppress **political opponents.**” *Id.*, 128 S. Ct. at 2801 (emphasis added).

Logic demands, then, that the Second Amendment be understood as securing the individual right of **citizens** — “the people composing [the American] nation or community” — to keep and bear arms, **not** the common law right of self-defense that inures to **any person** from any nation or community if that person is on American soil. *See id.*, 128 S. Ct. at 2800.<sup>10</sup> An alien is not comprehended by the nation’s charter as part of the “the people” entitled to “dissolve the political bands which have connected them with another,” or “to alter, or to abolish [the current form of Government] and to institute a new Government.” Declaration of Independence. And no such person is comprehended by “We, the People” of the

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<sup>10</sup> Although an alien traveling as a tourist, studying at an American university, or possessing a temporary work visa, or even an illegal alien, may exercise the same common law or statutory right of self-defense or firearms ownership as any American, no such alien could possibly claim protection of the Second Amendment.

Constitution's Preamble, nor endowed with "the powers [of] the people" secured by the Tenth Amendment of that document.

**B. A Right of Citizenship Cannot Be Involuntarily Divested.**

As an American citizen, Skoien is part of the national polity. Unless the government can affirmatively demonstrate that, because of his misdemeanor conviction, Skoien may be deprived of a right that would otherwise belong to him as a citizen of this country, Skoien is among the "people" protected by the Second Amendment. In its rehearing petition, the government appears to deny Skoien that privilege and immunity of United States citizenship on the ground that — based on "common knowledge, shared experience, and reasonable intuition" — persons convicted of MCDV's "pose an unreasonably high risk of injury or death to others." Pet. Rehear., p. 14. Such reasoning is reminiscent of the reasoning that animated the English Bill of Rights of 1689, which limited the right to keep and bear arms to Protestants, and thus, permitted the "disarm[ing of] Roman Catholics — 'for the better securing their Majestyes Persons and Government.'" See K. Marshall, 32 *Harv. J. of L. & Pub. Pol.* at 721-22. Indeed, the government's purported concern for community safety is comparable to that underpinning the Black Codes which deprived United States freedmen of their right to keep and bear arms. See R. Cottrol and R. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," 80 *Geo. L. J.* 309, 344-46 (Dec. 1991).<sup>11</sup>

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<sup>11</sup> Some observers have even claimed that modern gun control was motivated in part by fear of black radicals and urban violence. See R. Sherill, The

The privileges and immunities of United States citizenship, however, are not subject to involuntary divestiture by the United States Government. In Afroyim v. Rusk, 387 U.S. 253, 257 (1967), the Supreme Court ruled that United States citizenship, once vested, may not be “take[n] away ... without [the citizen’s] assent”:

[W]e reject the idea ... that ... Congress has any general power ... to take away an American’s citizenship.... This power cannot ... be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country **the people are sovereign and Government cannot sever its relationship to the people by taking away their citizenship.** [*Id.* (emphasis added).]

If Congress has no power to strip away **all** of the privileges of a citizen, then, quoting Chief Justice Marshall in Osborn v. Bank of the United States,<sup>12</sup> “[t]he constitution does not authorize Congress to ... **abridge** those rights.” Afroyim, 387 U.S. at 261 (emphasis added). Furthermore, the Afroyim Court wrote:

[W]hether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship.... There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. **Once acquired, this Fourteenth Amendment citizenship** was **not** to be shifted, canceled or **diluted** at the will of the Federal Government, the States,

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Saturday Night Special 280 (Penguin Books: 1973) (“The Gun Control Act of 1968 was passed not to control guns but to control blacks....”)

<sup>12</sup> 22 U.S. (9 Wheat.) 738, 927 n.22 (1824).

or any other governmental unit. [Afroyim, 387 U.S. at 262 (emphasis added).]

Thus, the Court concluded that Congress had adopted the citizenship clause in the Fourteenth Amendment “to put this question of citizenship and **the rights of citizens ... beyond the legislative power.**” *Id.*, 387 U.S. at 262-63 (emphasis added).

The government would have this Court disregard these principles by its effort to justify the congressionally-enacted MCDV disqualification as necessary “to prevent firearms from falling into dangerous hands” on the ground that Congress has been making such “predictive judgments ... for at least 70 years.” *See* Pet. Rehear., p. 13. If a citizen may be deprived of his Second Amendment right as a consequence of having committed a MCDV, what principle would prevent the government from similarly abridging First Amendment rights as well? Could the government, for example, deprive a citizen of his freedom to engage in a peaceable assembly on the ground that he had been previously convicted of disorderly conduct in relation to a public protest against an abortion clinic which, in Congress’s predictive judgment, created serious dangers to the public peace and a woman’s right to choose? While the right of the people to assemble or to exercise any other First Amendment right may be limited, as the Heller Court stated,<sup>13</sup> such limitations are based upon factors<sup>14</sup> other than a citizen’s **status**, unlike the MCDV disqualification here.

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<sup>13</sup> 128 S. Ct. at 2799.

<sup>14</sup> *See id.* at 2799 and 2821.

According to the principles enunciated in Afroyim, the privileges and immunities of United States citizenship can only be lost by a voluntary renunciation of citizenship, not by the commission of any act that Congress might consider sufficient to justify the deprivation of such privileges and immunities.

### **C. Skoien Has Not Forfeited His Second Amendment Rights.**

Even the Afroyim dissenters did not concede that Congress had plenary power to strip a citizen of his citizenship privileges. Rather, they concluded that Congress could take away a person's citizenship if that person engaged in an act that "indicate[d] a dilution of his allegiance to this country." *See Afroyim*, 387 U.S. at 268-69. According to the dissenting justices, such an act could be the basis upon which Congress could conclude that the person had "forfeited" his citizenship rights, and act accordingly. *See id.*, 387 U.S. at 286.

While such views might be found to justify the deprivation of a citizen's right to vote based upon a conviction of certain felonies, as the Supreme Court ruled in Richardson v. Ramirez, 418 U.S. 551 (1974),<sup>15</sup> such historical deprivations have been based upon criminal acts far removed from Skoien's having been convicted of a

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<sup>15</sup> In contrast to the right to keep and bear arms, the right of a citizen to vote is not, per se, constitutionally secured. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). Rather, it is secured only against certain discriminatory criteria, such as race, sex, payment of a poll tax, and the age of eighteen. *See* Amendments 15, 19, 24, and 26, U.S. Constitution. Thus, Section 2 of the Fourteenth Amendment allows for the excepting of persons denied the elective franchise on account of "**rebellion or other crime**, and various Acts readmitting the states of the confederacy allowed for disenfranchising persons for "**rebellion or for felony at common law.**" *Id.*, 418 U.S. at 41-55 (emphasis added).

MCDV. A MCDV conviction does not implicate Skoien's patriotic allegiance, as was an act of rebellion or commission of a similar crime, such as was the case in Ramirez. Nor is a misdemeanor conviction historically linked, as might have been the case respecting the commission of a felony at common law, to the forfeiture of one's standing as a citizen.

According to Blackstone's Commentaries, a conviction of a common law felony "occasion[ed] a total forfeiture of either lands, or goods, or both." IV W. Blackstone, Commentaries on the Laws of England, 93 (U. Of Chi. Facsimile ed., 1769). Under the feudal system such a total forfeiture severed not only the felon from his land, but also the felon's connection to his Lord, and thus expatriation. *Id.* at 95-97. By contrast, a misdemeanor conviction did not produce any such "civil death." *See* K. Marshall, 32 *Harv. J. of L. & Pub. Pol.* at 714-15. Rather, a misdemeanor, in contrast to a crime, was concerned with only "smaller faults, and omissions of less consequence." *Id.* at 5. Those distinctions among felonies, crimes, and misdemeanors pointed out by Blackstone prevailed in early America. Indeed, Noah Webster's 1828 Dictionary definition of "felony" — as "any crime which incurs the forfeiture of lands or goods" — is a verbatim quote from Blackstone. So is Webster's 1828 Dictionary definition of "misdemeanor." Thus, there is no historical justification for treating MCDV and felony convictions as functional equivalents with respect to the forfeiture of the right of a citizen to keep and bear arms.

Indeed, there appears to be a serious question whether the commission of a felony — except treason and like offenses — could trigger forfeiture of any

constitutionally-secured citizenship right in the United States, in which the feudal system never gained a foothold, but where sovereignty has always resided in an educated and God-fearing people. *See* K. Marshall, 32 *Harv. J. of Law & Pub. Pol.* at 715-16. *See also* J. Adams, “A Dissertation on Canon and Feudal Law,” reprinted in The Revolutionary Writings of John Adams, pp. 21-35 (Liberty Fund, Indianapolis: 2000) (“Rulers are no more than attorneys, agents, and trustees, for the people, and if the cause, the interest and trust, is insidiously betrayed, or wantonly trifled away, the people have a right to revoke the authority that they themselves have deputed and to consider abler and better agents, attorneys, and trustees.” (p. 28)).

Even assuming that Skoien could forfeit his right as an American citizen to keep and bear arms on some grounds other than voluntary renunciation, there is no constitutionally-legitimate ground upon which to deprive Skoien of his right to keep and bear arms because of his MCDV conviction.

#### **IV. Skoien’s Right to Keep and Bear Arms Cannot Be Balanced Away by Non-Textual Standards of Review**

With respect to the standard of review to be employed, this case has been decided by the panel and briefed by all parties as if Heller had never been decided. This Court should not make the same mistake. The Second Amendment states that, without exception — compelling, reasonable or otherwise — the right protected “shall not be infringed.”

The panel’s opinion identified a “self-defense” purpose as being the “core” of the Second Amendment protected by Heller which requires such strict scrutiny-type review, allowing for an exception for a “compelling reason.” However, since Skoien’s use of the shotgun in question at the time of his arrest was for “hunting,” Skoien’s right was said to have fallen outside the core of the Amendment, triggering only “intermediate scrutiny” which would allow an exception for good reason. U.S. v. Skoien, 587 F.3d 803, 812 (Nov. 18, 2009). The government’s Petition for Rehearing *en banc* embraced the panel’s intermediate scrutiny, but argued that under that standard “empirical proof” would not be required to support the reasonableness of the regulation. Appellant Skoien urges the highest level of scrutiny, arguing that “without applying strict scrutiny” the court “would eviscerate the individual right to bear arms, stripping *Heller* of its clear import.”<sup>16</sup> Thus, the panel, the government, and Appellant all view the “standard of review” selected as critically important, while differing as to the burden to be imposed on the government.

In Heller, both Petitioners and Respondents urged the Court to apply a balancing test; they only differed as to the standard of review — strict scrutiny and intermediate scrutiny, respectively. *Compare D.C. v. Heller*, Brief for Petitioners, pp. 40-58, *with* Brief for Respondents, pp. 54-62. However, there were *amici curiae*

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<sup>16</sup> The Appellant embraces the so-called First Amendment standard of review analysis when he says, “The government is required to present a compelling interest to justify infringing a fundamental right,” apparently not recognizing that the Heller Court rejected this approach. *See* Defendant-Appellant’s Brief on Rehearing, p. 37.

in Heller which asserted that both parties had it wrong, urging upon the Court the view that the Second Amendment carried its own standard of review:

Petitioners' standard ignores the text which states — without exception reasonable or otherwise — that the specific right **shall not be “infringed.”** According to its ordinary meaning, “infringe” means to break, as contracts” .... [citing N. Webster, American Dictionary of the English Language (1828).] In short, the **argument that “the right of the people” is subject to reasonable regulation** and restriction **tramples on the very words of the Second Amendment**, reading the phrase — “**shall not be infringed**” — as if it read “shall be subject only to reasonable regulation to achieve public safety. [*Amicus Curiae* Brief of Gun Owners of America, Inc., *et al.* (Feb. 11, 2008), p. 35 (emphasis added).]

When Heller was argued to the Supreme Court, the Solicitor General — contending for the United States as *amicus curiae* — urged the Court to employ “intermediate scrutiny” in reviewing the D.C. ban on handguns, believing that if that standard were employed, the statute would be upheld. *See Heller*, S. Ct. Docket No. 07-290, Oral Argument Transcript, pp. 44-45. Justice Roberts rejected this attempt:

[T]he various phrases under the **different standards** that are proposed, “compelling interest,” significant interest,” “narrowly tailored,” **none of them appear in the Constitution**; and I wonder why in this case we have to articulate an all-encompassing standard. **Isn't it enough to determine the scope of the existing right** that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how ... this restriction and the scope of this right looks in relation to those?

I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as **sort of baggage that the First Amendment** picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case? [Oral Argument Transcript, p. 44.]

Indeed, when Heller was decided, the approach telegraphed by Justice Roberts during oral argument was exactly the approach taken by the majority.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. **The very enumeration of the right takes out of the hands of government** — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.... The Second Amendment ... is the very *product* of an interest-balancing by the people.... [128 S. Ct. at 2821 (italics original) (emphasis added).]

This rehearing *en banc* provides the Court with the opportunity to follow Heller, not just in its enshrinement of the Second Amendment as an individual right, but also in its use of the Amendment’s text as the singular guide governing Second Amendment challenges to other legislation. In Heller, the Court determined that First Amendment nontextual standards of review would not be carried over into the Court’s new Second Amendment jurisprudence. Rather, once a Second Amendment right is found, the Court’s responsibility is not to balance it, weigh it, or decide if it likes it, but rather to protect it, by ensuring that it is not “infringed” by the legislature. It matters not a whit what the members of this Court personally think about the merits of the Second Amendment balanced against the commission of a MCDV, for, as Justice Scalia explained in unmistakable terms, “[t]he very enumeration of the right [in the Second Amendment] takes out of the hands of government — even the Third Branch of Government — the power to

decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.*, 128 S. Ct. at 2821 (emphasis added).

**CONCLUSION**

For the reasons set out above, Appellant Skoien’s conviction should be vacated, and his indictment dismissed, for the reason that 18 U.S.C. section 922(g)(9) imposes an impermissible infringement of his rights, and the rights of others, under the Second Amendment to the United States Constitution.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of Appellant complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,562 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as the requirements of Seventh Circuit Rule 32(b), because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 12-point Century Schoolbook.

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Dated: April 2, 2010

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America, Inc., in Support of Appellant and Reversal, was made, this 2<sup>nd</sup> day of April 2010, by submitting sufficient hard copies thereof by First-Class Mail, addressed to counsel for the parties as follows:

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