

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, Hon. Barbara B. Crabb**

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**BRIEF FOR AMICI CURIAE BRADY CENTER TO PREVENT GUN  
VIOLENCE, NATIONAL BLACK POLICE ASSOCIATION, HISPANIC  
AMERICAN POLICE COMMAND OFFICERS ASSOCIATION,  
NATIONAL LATINO PEACE OFFICERS ASSOCIATION, AND  
NATIONAL NETWORK TO END DOMESTIC VIOLENCE  
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

*United States v. Skoien*, No. 08-3770

Pursuant to Fed. R. App. P. 26.1 and 7th Cir. R. 26.1, the following is a list of additional interested parties not contained in briefs previously filed:

The Brady Center To Prevent Gun Violence is a § 501(c)(3) non-profit corporation, has no parent corporation, and no publicly held corporation holds ten percent or more of its stock.

The National Black Police Association is a § 501(c)(3) non-profit corporation, has no parent corporation, and no publicly held corporation holds ten percent or more of its stock.

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The National Latino Peace Officers Association is a § 501(c)(3) non-profit corporation, has no parent corporation, and no publicly held corporation holds ten percent or more of its stock.

The National Network to End Domestic Violence is a § 501(c)(3) non-profit corporation, has no parent corporation, and no publicly held corporation holds ten percent or more of its stock.

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## INTEREST OF AMICI CURIAE

The Brady Center To Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving the constitutionality of gun laws, including in *McDonald v. City of Chicago*, No. 08-1521 (U.S.) (argued Mar. 2, 2010), *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), and in this Court in *City of Chicago v. United States Department of Justice*, 423 F.3d 777 (7th Cir. 2004).

The National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

The Hispanic American Police Command Officers Association is the oldest and largest association in the United States of Hispanic-American command officers from law-enforcement and criminal-justice agencies.

The National Latino Peace Officers Association is one of the largest Latino law-enforcement organizations in the United States, with a membership including chiefs of police, sheriffs, police officers, parole agents, and federal officers.

The National Network to End Domestic Violence is a non-profit membership organization devoted to remedying domestic violence; its members provide shelter, advocacy, and other services to survivors of domestic violence.

All *amici* have a compelling interest in ensuring that the Second Amendment does not stand as an obstacle to strong governmental action to prevent gun violence. *Amici* focus on the problem of gun violence and its impact on domestic-violence victims and law-enforcement personnel. *Amici* respectfully suggest that they likely bring a broader and deeper perspective to these concerns, at which the legislation being challenged aims, than do the parties.

All parties have consented in writing to the filing of this brief.

## SUMMARY OF ARGUMENT

This Court should reject Skoien’s attempt to expand the scope of the Second Amendment right and disable Congress from enacting reasonable public-safety measures such as 18 U.S.C. § 922(g)(9), which take firearms away from convicted perpetrators of domestic-violence abuse. Both the history of the right and the Supreme Court’s recent decision in *District of Columbia v. Heller* make clear that the Second Amendment is limited to law-abiding citizens; it does not reach dangerous domestic abusers such as Skoien. If, however, this Court concludes that § 922(g)(9) does implicate the Second Amendment, it should review § 922(g)(9)—and any other Second Amendment challenge—under a deferential level of scrutiny that upholds reasonable gun regulations aimed at preserving public safety. This “reasonable regulation” standard appropriately accounts for the unique dangers inherent in gun ownership and possession—dangers that have no counterpart in the exercise of any other constitutional right.

Such a standard would provide legislatures with the necessary flexibility to address the serious (and often lethal) problem of gun violence. Decades of experience at the state level further shows that a “reasonable regulation” standard, uniformly applied by state courts evaluating firearms regulations under state constitutional analogues to the Second Amendment, strikes the appropriate balance between the public’s interest in safety and the right to gun ownership.

In any event, § 922(g)(9) is constitutional under any standard of review. Section 922(g)(9) narrowly applies only to those who have been convicted of inflicting violence on their intimates. Although no particular expertise is required to recognize that “[f]irearms and domestic strife are a potentially deadly combination nationwide,” *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009), a wealth of social-science studies confirms this common-sense realization.

## **ARGUMENT**

### **I. THE SECOND AMENDMENT DOES NOT PROTECT THE RIGHT OF VIOLENT CRIMINALS TO POSSESS FIREARMS**

The Second Amendment right recognized by the Supreme Court in *District of Columbia v. Heller* protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” 128 S. Ct. 2783, 2821 (2008). It does not entitle domestic-violence abusers like Skoien to keep and bear arms for *any* purpose—arms that domestic abusers could, and often do, use to threaten, coerce, or injure their families. The history of the Second Amendment also refutes the expansive interpretation of the right advanced by Skoien.

#### **A. The Second Amendment, As Interpreted In *Heller*, Does Not Protect The Possession Of Firearms By Violent Criminals**

In *Heller*, the Supreme Court held that the District of Columbia’s broad ban on firearms in the home deprived the petitioner, “a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center,” of his



Second Amendment right. 128 S. Ct. at 2788. The Court struck down D.C.'s ban as an outlier among our Nation's gun laws, noting that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 2818.

In reaching this decision, the *Heller* Court held that the Second Amendment protects "the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home." 128 S. Ct. at 2821 (emphasis added). Two fundamental and interrelated qualifications therefore define the contours of the right to keep and bear arms: First, the holder of the right must be "law-abiding" and "responsible." *Id.* Second, the Second Amendment protects the right of individuals to own firearms "for the core lawful purpose of self-defense." *Id.* at 2818; *see also id.* at 2801 (self-defense is "the *central component* of the right itself"). Nowhere did the Court state or imply that the Second Amendment right was any broader.

On the contrary, *Heller* made clear that "the right protected by the Second Amendment is not unlimited," and that numerous "longstanding prohibitions on the possession of firearms," including bans on possession by felons and the mentally ill, are unaffected by the right to bear arms (and noted that the list of "presumptively lawful" gun laws was "not exhaustive"). 128 S. Ct. at 2816-2818 & n.26. Although the Court did not elaborate on the "historical justifications" for the limited scope of the Second Amendment right, or the non-exhaustive list,

nothing in *Heller* suggests that the Amendment would guarantee to Skoien a continued right to possess weapons. *Id.* at 2821.

Five months after the *Heller* ruling, the Supreme Court considered a challenge to the scope of the federal ban on domestic-abuser gun possession, 18 U.S.C. § 922(g)(9), in *United States v. Hayes*, 129 S. Ct. 1079, 1080 (2009). The Court upheld a broad reading of § 922(g)(9) to serve “Congress’ manifest purpose” of “keeping firearms out of the hands of domestic abusers.” *Id.* at 1087. Although *amici* urged the Court to protect “Mr. Hayes’s fundamental Second Amendment rights” as a convicted misdemeanant to possess firearms, Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund at 13, *United States v. Hayes*, 129 S. Ct. 1079 (2009), none of the Justices identified any potential Second Amendment concerns. Rather, given Congress’s recognition that “many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies,” 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg), the Court held that § 922(g)(9) was enacted to “close this dangerous loophole” and was simply an “exten[sion of] the prohibition” in the Gun Control Act banning felon gun possession. *Hayes*, 129 S. Ct. at 1082.

Despite the Supreme Court’s holding that the Second Amendment protects the right of *responsible, law-abiding* citizens to possess guns for self-defense in their home, Skoien asks this Court to rule that the Second Amendment protects the

right of violent criminals such as himself to own weapons that they claim are “for deer hunting.” (Br. 4.) Nothing in *Heller* supports his claim that violent criminals have a constitutional right to be armed.

**B. The History Of The Right To Bear Arms Shows That The Second Amendment Does Not Protect The Right Of Dangerous Individuals To Possess Firearms**

That the Second Amendment was not intended to protect violent criminals’ access to firearms is supported by the history of the right to bear arms, as recounted in *Heller*. “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 128 S. Ct. at 2816. Then, as now, public safety often necessitated disarming criminals or other dangerous persons. The state’s authority to disarm such individuals was never seen as incompatible with the Second Amendment.

*Heller* identified the 1689 English Declaration of Right, later codified as the English Bill of Rights, as “the predecessor to our Second Amendment.” 128 S. Ct. at 2798. English restrictions on firearm possession in the seventeenth and eighteenth centuries demonstrate that the English right to arms existed side-by-side with the state’s power to disarm those perceived to pose a threat of violence. The Declaration of Right permitted Parliament to restrict arms ownership according to religion and social status, based on the threat that these groups were believed to

pose. *See, e.g.*, 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689) (“Protestants may have arms for their defense suitable to their conditions and as allowed by law.”).<sup>1</sup> Modern values, of course, reject the social stereotypes reflected in these provisions, but these laws nevertheless demonstrate that the English right did not restrict the state’s power to disarm in the interest of public safety.

The American colonies likewise exercised the power to disarm dangerous persons. While “persons of good quality” were permitted to wear “common weapons” where “it [was] common fashion to make use of them, without causing the least suspicion,” it was a crime “for a man to arm himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people,” even “when there is no actual violence.”<sup>2</sup> In addition, at the time of the Revolution, the Continental Congress urged the states to disarm those loyal to the Crown. *See* Act of Mar. 14, 1776, in 4 *Journals of the Continental Congress 1774-1789*, at 205 (1906). Pennsylvania followed the suggestion and denied a right to arms to those who refused to swear loyalty to the state, proclaiming that it would be “very improper and dangerous that persons disaffected to the liberty and

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<sup>1</sup> *See generally* Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 46 (2000).

<sup>2</sup> *Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-men, and Overseers of the Poor* 26-27 (Philadelphia, Matthew Carey 1801); *see also* Cornell & DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 501 (2004).

independence of this state should possess or have in their own keeping or elsewhere any fire arms.”<sup>3</sup> Pennsylvania enacted these restrictions despite having recently incorporated a right to bear arms into its constitution. *See* Pa. Decl. of Rights, cl. 13 (1776).<sup>4</sup>

The debates preceding the adoption of the Second Amendment confirm that by the time of the founding, it was well understood that dangerous individuals could be stripped of their right to bear arms. Proposed constitutional amendments protecting a right to arms that were offered by Anti-Federalists in three states, which the *Heller* Court saw as “plainly refer[ing] to an individual right” to possess firearms, 128 S. Ct. at 2804, expressly permitted the state to deny a right to arms to dangerous individuals or criminals. *See 2 Documentary History of the Ratification of the Constitution* 597-598 (Jensen ed., 1976); *4 Documentary History of the Ratification of the Constitution* 1452, 1453 (Kaminski & Saladino eds., 2000) (discussing amendments proposed by the Pennsylvania and Massachusetts Anti-Federalist minorities that excluded criminals and dangerous citizens from the right); *The Complete Bill of Rights* 181 (Neil H. Cogan ed. 1997) (discussing similar proposal by the New Hampshire Anti-Federalist delegation). The Anti-

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<sup>3</sup> *See* Act of Mar. 31, 1779, ch. 836, § 4, *reprinted in* 9 Stat. at Large of Pa. 346-348 (Wm. Stanley Ray, ed., 1903); *see also* Act of June 13, 1777, ch. 756, § 4, 9 Pa. Stat. Ann. 110.

<sup>4</sup> *See generally* Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 228 (1999).

Federalists did not in the end succeed in incorporating these provisions into the Constitution at the time of its drafting. But the *Heller* Court, unlike *amicus curiae* National Rifle Association (NRA Br. 15-16), nonetheless concluded that these attempts were “highly influential” on the Second Amendment as it was ultimately adopted in 1791.

**II. IF THE SECOND AMENDMENT APPLIES TO SKOEN, THIS COURT SHOULD ADOPT THE REASONABLE-REGULATION TEST TO REJECT HIS SECOND AMENDMENT CHALLENGE**

If the Court nonetheless concludes that § 922(g)(9) does implicate the Second Amendment, it should uphold the law under a test that properly defers to reasonable efforts by democratically elected legislatures to protect families and communities from gun violence. A deferential test is appropriate given the unique risks of lethal harm that the exercise of the Second Amendment right poses to gun owners, their families, and the public at large—a risk that has no comparable counterpart when any other right protected under the Constitution is exercised.

In finding a host of gun regulations “presumptively lawful,” the *Heller* Court implicitly rejected a strict-scrutiny standard. 128 S. Ct. at 2799, 2816-2817 & n.26, 2822. In devising the framework for reviewing Second Amendment challenges, this Court should consider the unique dangers inherent in the unregulated possession of firearms, as well as the longstanding, broad police-power authority of governmental bodies to protect public safety. And it should

take account of Congress’s superior institutional ability to discern and address the most effective measures to prevent gun violence. Virtually every state court to have addressed the question has adopted a “reasonable regulation” test to assess Second Amendment challenges. Under this test, the government may not prohibit all firearm ownership, but “may regulate the exercise of [the] right [to bear arms] . . . so long as the exercise of that power is reasonable.” *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994).

**A. Deferential Review Is Appropriate In Light Of The Unique Public-Safety Concerns Implicated By The Right To Possess Firearms**

The right to keep and bear arms recognized in *Heller* is unique among rights safeguarded in the Constitution. While the exercise of the right to free speech, worship, or vote does not generally create an increased risk of physical harm or death, gun possession poses grave risks to the gun’s possessor, his or her family, and the public.

Empirical research links firearms to immense societal costs, both in terms of loss of life and economic costs. Each year, approximately 30,000 Americans are killed by gunfire, and an additional 60,000 to 70,000 are wounded.<sup>5</sup> In 2007 alone,

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<sup>5</sup> See Centers for Disease Control and Prevention, WISQARS Nonfatal Injury Reports, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (“CDC Nonfatal”) (query: “All Intents”; “Firearm”; “2006”); *id.*, WISQARS Injury Mortality Reports, 1999-2006, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (“CDC Fatal”) (query: “All Intents”; “Firearm”; “2006”).

firearms were used in more than 385,000 serious crimes, including an estimated 12,000 murders, 191,000 robberies, and 181,000 aggravated assaults.<sup>6</sup> Social scientists have estimated that the lifetime medical costs in one year alone for all U.S. gunshot injuries was \$2.3 billion, of which \$1.1 billion was paid by U.S. taxpayers.<sup>7</sup> When lost earnings, pain, disability, and the costs of lost life are included, the aggregate economic cost of gun violence to American society approaches \$100 billion annually.<sup>8</sup>

While firearms inflict heavy costs on all sectors of society—including more than 16,000 suicides<sup>9</sup> and 15,000 unintentional deaths and injuries per year<sup>10</sup>—these costs are not spread evenly. As one pair of researchers explains, “an increase in gun prevalence causes an *intensification* of criminal violence—a shift toward greater lethality, and hence greater harm to the community.”<sup>11</sup> As a result of this “lethality effect,” the sectors of society that are already most exposed to criminal activity—whether because of socio-economic conditions or professional risks as in the case of law enforcement officers—are disproportionately more likely to fall

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<sup>6</sup> Bureau of Justice Statistics, *Crimes committed with firearms, 1973-2007*, available at <http://bjs.ojp.usdoj.gov/content/glance/tables/guncrimetab.cfm>.

<sup>7</sup> Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 J. Am. Med. Ass’n 447, 447 (1999) (costs for injuries in 1994).

<sup>8</sup> See Cook & Ludwig, *Gun Violence: The Real Costs* 117 (2000).

<sup>9</sup> See CDC Fatal (query: “Suicide”; “Firearm”; and “2006”).

<sup>10</sup> See CDC Fatal (query: “Unintentional”; “Firearm”; and “2006”); CDC Fatal (query: “Unintentional”; “Self-harm”; and “2006”).

<sup>11</sup> Cook & Ludwig, *The Social Costs of Gun Ownership*, 90 J. Pub. Econ. 379, 387 (2006).



victim to gunfire. As explained in Part III.B *infra*, this “intensification” is particularly acute (and lethal) in the context of criminal activity involving domestic violence—the very concern addressed by the law challenged by Skoien. If the prospect that speech could “incit[e] or produc[e] imminent lawless action” is sufficient to place that speech outside the scope of the First Amendment, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), then the immense loss of life resulting from gun ownership and use surely warrants, at a minimum, deferential judicial review.

**B. Deferential Review Is Appropriate And In Accord With Precedent Providing Legislatures With Discretion To Develop Effective Public-Safety Laws**

The Supreme Court has repeatedly stressed that legislatures “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976); *see also Ewing v. California*, 538 U.S. 11, 28 (2003) (upholding sentencing law: “We do not sit as a ‘superlegislature’ to second-guess these policy choices.”); *Kelo v. City of New London*, 545 U.S. 469, 488-489 (2005) (declining “to second-guess the City’s considered judgments” in takings case). This is particularly true where, as in the case of firearms regulations, the regulated activities directly affect public safety, for the “promotion of safety of persons and property is unquestionably at the core of the State’s police powers.” *Kelley v. Johnson*, 425

U.S. 238, 247 (1976); *see also Gonzales v. Oregon*, 546 U.S. 243, 271 (2006)

(“Even though regulation of health and safety is primarily, and historically, a matter of local concern, there is no question that the Federal Government can set uniform national standards in these areas.” (internal quotation marks and citations omitted)).

Firearms regulation lies at the core of the government’s responsibility for public safety. Indeed, as significant as the societal costs of gun violence are today, they would be much higher if not for reasonable State and federal firearms regulations. Reasonable regulations—including restrictions on domestic abusers’ access to guns—are associated with reduced risk of gun deaths and criminal access to guns.<sup>12</sup> For instance, after the Brady Act mandated background checks on handgun purchasers in 1994, the number of violent crimes committed with firearms, which had risen in nine of the ten preceding years, decreased

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<sup>12</sup> *See, e.g., Webster et al., Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 *Injury Prevention* 184, 184 (2001); Hepburn et al., *The Effect of Child Access Prevention Laws on Unintentional Child Firearm Fatalities, 1979-2000*, 61 *J. Trauma, Injury, Infection & Critical Care* 423, 423 (2006); Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 *J. Urban Health: Bulletin N.Y. Acad. Med.* 525, 525 (2009); Weil & Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 *J. Am. Med. Ass’n* 1759, 1759 (1996); Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 *Am. J. Pub. Health* 1089, 1094 (2003).

substantially, from more than one million gun crimes in 1993 to about 313,000 in 2008, a decline of more than seventy percent.<sup>13</sup>

This steady improvement has required and will continue to require complex empirical judgments. The standard of review utilized for Second Amendment challenges should reflect the distinctly empirical and prophylactic nature of gun regulation. As the Supreme Court has held, legislatures, and not the courts, have the greater institutional competence to make such predictive empirical judgments, even when regulation affects constitutional rights. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000). Accordingly, courts should not review challenges predicated on the right recognized in *Heller* under unduly exacting judicial scrutiny, which would prevent legislatures from devising practical solutions to the very practical (and serious) problem of gun violence. Justice Jackson's admonition resonates forcefully in this context: "There is danger that, if ... doctrinaire logic [is not tempered] with a little practical wisdom, [it] will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

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<sup>13</sup> *See* Bureau of Justice Statistics, *Nonfatal Firearm-Related Violent Crimes, 1993-2008*, available at <http://www.ojp.usdoj.gov/bjs/glance/tables/firearmnonfataltab.htm> (data on nonfatal gun crimes); Bureau of Justice Statistics, *Homicide Trends in the U.S., Weapons Used*, available at <http://www.ojp.usdoj.gov/bjs/homicide/tables/weaponstab.htm> (homicide data for 1976-2005); DOJ, *Murder Victims by Weapon, 2004-2008*, available at [http://www.fbi.gov/ucr/cius2008/offenses/expanded\\_information/data/shrtable\\_08.html](http://www.fbi.gov/ucr/cius2008/offenses/expanded_information/data/shrtable_08.html) (homicide data for 2004-2008).

### C. *Heller* Forecloses Strict Or Other Heightened Scrutiny

The *Heller* Court did not articulate a standard of review for Second Amendment challenges. 128 S. Ct. at 2817-2818, 2821. The Court’s reasoning, however, forecloses any form of heightened scrutiny that would require the government to proffer particularized evidence of a tight “fit” between the means and ends of gun legislation. *Heller* explicitly recognized that the Constitution leaves legislatures “a variety of tools for combating” the “problem of handgun violence.” *Id.* at 2822. And the Court identified as “presumptively lawful” a host of firearms regulations, including regulations that preclude violent criminals from possessing firearms. *Id.* at 2816-2817 & n.26.

As noted in Part I, this presumption strongly suggests that restrictions on gun possession by criminals are outside the scope of the Second Amendment protection. At a minimum, the *Heller* presumption forecloses any suggestion that laws affecting Second Amendment rights might be subject to strict scrutiny or any other form of heightened scrutiny that places on the government the burden to come forward with empirical evidence of an adequate “fit.” *See id.* at 2851 (Breyer, J., dissenting); *Heller v. District of Columbia*, No. 08-1289, 2010 WL 1140875, at \*7 (D.D.C. Mar. 26, 2010) (“[A] strict scrutiny standard of review would not square with the [*Heller*] majority’s references to ‘presumptively lawful regulatory measures’”).

Strict scrutiny would be antithetical to a presumption of validity. Indeed, strict scrutiny means virtually the opposite—that a law “is not entitled to the usual presumption of validity.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). The *Heller* presumption also rules out any form of intermediate scrutiny that would reverse the presumption of constitutionality of Congress’s enactments, forcing the government to establish “the public benefits of the restrictions ... by evidence.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009). If certain gun regulations are “presumptively lawful,” the government is not required to come forward with evidence to justify them.

Moreover, in many cases where the harms from the exercise of a constitutional right are self-evident, the Supreme Court does not require the government to assume an evidentiary burden to justify restricting the right. The Supreme Court has recognized the common-sense principle that the required “quantum of empirical evidence ... will vary up or down with the novelty and plausibility of the justification raised” by the government. *Shrink*, 528 U.S. at 391.<sup>14</sup> Accordingly, the Court has often declined to require a detailed legislative or litigation record, even in the First Amendment context. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (regulations burdening commercial

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<sup>14</sup> Although the Supreme Court formally articulated this principle in the intermediate-scrutiny context of limitations on political contributions, *Shrink*, 528 U.S. at 391, its logic would apply under a “reasonable regulation” test as well.

speech may be “based solely on history, consensus, and ‘simple common sense’”). Where expressive activities are regulated to prevent their secondary effects that threaten public safety, such regulations require “very little evidence” to uphold them. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring). And that evidence need only be “reasonably believed to be relevant to the problem that the city addresses.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *see also Alameda Books*, 535 U.S. at 451-452 (Kennedy, J., concurring) (“As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners” and regulations on adult bookstores may rest, in part, on “common experience” and inference). If protected speech may be restricted on the basis of “common experience” generally linking adult establishments to crime, *see id.*, then Second Amendment rights may certainly be subjected to regulations supported by history, common sense, and empirical data linking guns to approximately 30,000 deaths every year. *See supra* Part II.A.

**D. State Second Amendment Analogues Have Uniformly Been Enforced Through A “Reasonable Regulation” Test Or Similarly Deferential Review**

If “[t]he life of the law has ... been experience,”<sup>15</sup> then the uniform experience of over forty States whose constitutions include right-to-bear-arms

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<sup>15</sup> Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

provisions tells a compelling story:<sup>16</sup> Not a single state reviews firearms restrictions under heightened scrutiny. *See* Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-687 (2007). While recognition of an individual right to keep and bear arms under the Second Amendment is new, many states have long interpreted their state constitutions to contain such a right, yet “[e]ven in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test.” *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004). Courts “have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens.” *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989). Such uniformity is particularly probative where, as in the right-to-bear-arms context, judicial decisions have coalesced around a single mode of analysis despite significant differences in the political backdrop, timing of the challenge,<sup>17</sup> and constitutional text. *See, e.g.,*

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<sup>16</sup> *See* Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 193-207 & tbl 1 (2006) (listing state constitutional provisions).

<sup>17</sup> *State v. Reid*, 1 Ala. 612, 616-617 (1840) (“Legislature [has] the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals,” so long as state statutes do not “amount[] to a destruction of the right.”); *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (state prohibition on possession of firearms by intoxicated individuals is “but a reasonable regulation of the use of such arms, and to which the citizen must yield, and a valid exercise of the legislative power.”); *English v. State*, 35 Tex. 473, 478 (1871) (upholding a ban on certain types of weapons); *State v. Wilburn*, 66 Tenn. 57 (1872) (prohibiting

*Benjamin v. Bailey*, 662 A.2d 1226, 1233 (Conn. 1995) (“While we are not bound by the interpretations given by our sister state courts to their own constitutional documents, the uniformity in the analysis they have used to address the question before us lends particular authority to their decisions.”); *Winkler*, 105 Mich. L. Rev. at 686-687 & n.12 (collecting cases).

The reasonable-regulation test is deferential, but not toothless. Under this test, laws that “eviscerate,” *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003), render “nugatory,” *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002), or result in the effective “destruction” of the right, e.g., *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968), are struck down. See, e.g., *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972) (invalidating sweeping city ordinance banning all firearm possession outside very limited circumstances); *City of Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979) (same). Laws that are reasonably designed to further public safety, by contrast, are upheld. See e.g., *Robertson v. City & County of Denver*, 874 P.2d 325, 328, 330 n.10 (Colo. 1994) (“The state may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable.”); *Jackson v. State*, 68 So. 2d 850, 852 (Ala. Ct. App. 1953) (same); *Bleiler v. Chief, Dover Police Dep’t*, 927 A.2d 1216, 1223 (N.H. 2007) (same). This test reflects the

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the wearing or carrying of guns is constitutional); *State v. Buzzard*, 4 Ark. 18 (1842). But see, e.g., *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (invalidating concealed weapons ban).



considered balance that dozens of state courts have uniformly struck between the government's interest in safeguarding public safety and individuals' rights to bear arms. This Court should adopt the reasonable-regulation test if it chooses to subject Skoien's challenges to analysis under the Second Amendment.

### **III. UNDER ANY STANDARD OF REVIEW, SECTION 922(g)(9) IS CONSTITUTIONAL, AND SKOIEEN'S CHALLENGE FAILS**

To fall within the scope of § 922(g)(9), the offender must have committed a crime that involved “the use or attempted use of physical force, or the threatened use of a deadly weapon” against an intimate or family member. *See* 18 U.S.C. § 921(a)(33)(A)(ii). Section 922(g)(9) thus applies only to those who have both been convicted of a serious violation of the law in the past *and* have demonstrated a capacity to inflict violent harms on others. No particular expertise is required to recognize that, as the Supreme Court recently noted, “[f]irearms and domestic strife are a potentially deadly combination nationwide.” *Hayes*, 129 S. Ct. at 1079.

Nonetheless, if any greater showing were needed, § 922(g)(9) was motivated by, and it continues to be supported by, decades of social science research showing that domestic abusers are a danger to their families when armed. Section 922(g)(9) therefore advances Congress's plainly legitimate and compelling goal of protecting

the public from the increased harms that result when abusers have access to guns, and it does not infringe the Second Amendment under any standard of review.<sup>18</sup>

**A. Congress Properly Recognized That Domestic-Violence Offenders Pose Unique Dangers When Armed With Guns**

By precluding convicted violent abusers from gaining access to firearms, Congress acted to address the serious public-safety problem of domestic violence. Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner, such as a current or former spouse, cohabiting partner, or boyfriend or girlfriend each year.<sup>19</sup> More than one in five women and nearly one in 14 men are victimized by their intimate partners in their lifetimes.<sup>20</sup> On average, 3.5 people are killed by intimate partners *every day* in the United States.<sup>21</sup> In 2002, about 22 percent of all murder victims were killed by family members, while

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<sup>18</sup> In the wake of *Heller*, courts have overwhelmingly agreed that § 922(g)(9) does not violate the Second Amendment. *See, e.g., United States v. White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010); *United States v. Pettengill*, No. CR-09-138, 2010 WL 374437, at \*5-6 (D. Me. Feb. 1, 2010); *United States v. Booker*, 570 F. Supp. 2d 161, 164 (D. Me. 2008); *United States v. Li*, No. 08-CR-212, 2008 WL 4610318, at \*4 (E.D. Wis. Oct. 15, 2008). *Skoien* cites (Br. 34) a district court decision that, despite finding § 922(g)(9) “presumptively lawful,” applied strict scrutiny and left open the possibility of as-applied challenges to the constitutionality of § 922(g)(9). *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1230-1235 (D. Utah 2009). That decision has since been effectively reversed by the Tenth Circuit, which—on a government petition for writ of mandamus in later proceedings in *Engstrum*—upheld § 922(g)(9) in all its applications in an unpublished order. *In re United States*, 578 F.3d 1195, 1199 (10th Cir. 2009).

<sup>19</sup> Tjaden & Thoennes, Nat’l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence & Consequences of Violence Against Women, Findings From the National Violence Against Women Survey* 26 (Nov. 2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> Vigdor & Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide*, 30 Evaluation Rev. 313, 313 (2006).

another 7 percent were killed by boyfriends or girlfriends.<sup>22</sup> These acts of domestic violence inflict significant costs not only on the direct victims, but also on their families, their children, the police officers who are called to intervene, and the social workers who provide post-incident counseling. Society at large also bears the economic costs of domestic violence,<sup>23</sup> as well as harm to children and others who witness domestic violence.<sup>24</sup> Through § 922(g)(9), Congress addressed this significant national problem by limiting abusers' ability to threaten, coerce, injure—and, in the worst cases, kill—their victims with firearms.

At the time of § 922(g)(9)'s enactment, the bill's sponsor, Senator Lautenberg, explained that the bill was intended to disarm those that have “proven themselves to be violent,” and that “in households with a history of battering, a gun in the home increases the likelihood that a woman will be murdered fivefold.” *See* 142 Cong. Rec. 5840, 5840 (1996). Congress enacted § 922(g)(9) in part out of

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<sup>22</sup> Bureau of Justice Statistics, *Family Violence Statistics* 17 (June 2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf>.

<sup>23</sup> Many victims of domestic violence end up in hospitals or emergency rooms, resulting in costs estimated to exceed \$5.8 billion each year, \$4.1 billion of which is for direct medical and mental health care services. *See* Nat'l Ctr. for Injury Prevention & Control, *Costs of Intimate Partner Violence Against Women in the United States 2* (2003), available at [http://www.cdc.gov/ncipc/pub-res/ipv\\_cost/IPVBook-Final-Feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf).

<sup>24</sup> Children personally witness violence in 22% of domestic-violence cases. *See* Smith & Farole, Bureau of Justice Statistics, *Profile of Intimate Partner Violence in Large Urban Counties 4* (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pipvcluc.pdf>. These children are more likely to exhibit behavioral and physical health problems, including violence toward peers, anxiety, and learning difficulties. Bancroft & Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 38-39 (2002).

concern that many states treat family violence less seriously than other forms of violence, such that “one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.” *See* 142 Cong. Rec. 22,956, 22,985 (1996) (statement of Sen. Lautenberg). As Senator Lautenberg noted, § 922(g)(9) was specifically intended to “close this loophole” and ensure that “people who engage in serious spousal or child abuse [but] ultimately are not charged with or convicted of felonies” lose their right to own a firearm. 142 Cong. Rec. at 5840; *see also Hayes*, 129 S. Ct. at 1087 (acknowledging that Congress enacted § 922(g)(9) because “[e]xisting felon-in-possession laws . . . were not keeping firearms out of the hands of domestic abusers”). Congress thus recognized that the public-safety rationale for disarming domestic-violence abusers is at least as compelling as that for disarming felons.

**B. Restricting Firearm Possession By Domestic Violence Offenders Limits Their Ability To Inflict Greater Harms With Firearms**

Because domestic violence is often a part of a pattern of crime and not a one-time event, Congress recognized that it is important to remove guns from the hands of known abusers *before* the violence escalates. Batterers typically exhibit a “pattern of coercive control in a partner relationship, punctuated by one or more acts of intimidating physical violence, sexual assault, or credible threat of physical

violence.’<sup>25</sup> Studies confirm that in many cases, an abuser increases the frequency and severity of assaults over time.<sup>26</sup> Accordingly, a previous act of domestic violence is an unusually strong indicator that an individual will commit domestic violence again—and women bear the brunt of this abuse.<sup>27</sup> Approximately half of women raped by an intimate, and more than two-thirds of women physically assaulted by an intimate, have been victimized multiple times by the same person.<sup>28</sup> Indeed, the more recently a woman has been a victim of domestic violence, the more likely it is that she will be killed by her partner.<sup>29</sup> By removing guns from abusers before they commit a felony assault, Congress reasonably sought to increase the likelihood that such predictable assaults would be less deadly.

The consequences of not preventing batterers from obtaining deadly weapons are chilling. In recent years, nearly one-third of all women murdered in

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<sup>25</sup> Bancroft & Silverman, *supra* note 24, at 3.

<sup>26</sup> Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence From the Spouse Assault Replication Program* 11 (Dec. 2005), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/212298.pdf>.

<sup>27</sup> Dutton et al., *Ecological Model of Battered Women’s Experience Over Time* 9-10 (Apr. 2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213713.pdf>.

<sup>28</sup> Tjaden & Thoennes, Nat’l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Extent, Nature, & Consequences of Intimate Partner Violence* 39 (July 2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

<sup>29</sup> Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, Nat’l Inst. of Justice J. 5 (Nov. 2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250c.pdf>.

the United States were killed by a current or former intimate partner.<sup>30</sup> This tragic outcome is far more likely when the abuser keeps a gun in the home. A majority of those killed by their partners were killed with a firearm.<sup>31</sup> In fact, three times as many women were murdered by guns wielded by their husbands or intimate partners than were killed by strangers' guns, knives, or other weapons *combined*.<sup>32</sup> Furthermore, an abused woman is six times more likely than other abused women to be killed when her abuser owns a gun.<sup>33</sup> A family or intimate assault is 12 times more likely to result in a fatality when the assault involves a firearm than when it involves bodily assaults or other weapons.<sup>34</sup> This is unsurprising, given the increased lethality of firearms.

While murder and grievous injuries are the most tragic result of allowing abusers to keep firearms, they are by no means the only consequence. A gun also increases the abuser's ability to control (and thus continue to abuse) the victim through the implied threat of violence. Abusers who sense that they are losing

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<sup>30</sup> Rennison & Welchans, Bureau of Justice Statistics, *Intimate Partner Violence 1993-2001* (Feb. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>.

<sup>31</sup> *Family Violence Statistics*, *supra* note 22, at 21.

<sup>32</sup> National Coalition Against Domestic Violence, *Homicide and Domestic Violence Facts: When Men Murder Women*, available at [http://www.ncadv.org/files/WhenMenMurderWomen2004\\_.pdf](http://www.ncadv.org/files/WhenMenMurderWomen2004_.pdf).

<sup>33</sup> Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, Nat'l Institute of J. 16 (Nov. 2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250e.pdf>.

<sup>34</sup> Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Med. Ass'n 3043, 3043 (1992).

control over the victim often resort to escalating threats of violence, against themselves, the victim, or the victim's family members.<sup>35</sup> When the abuser has ready access to a firearm, the victim knows that these threats can be more easily carried out, making it more difficult for victims to separate from their abusers. Firearms can also be used to coerce sex or simply to inflict terror on the victims.<sup>36</sup> In one state-wide study, two-thirds of battered women who lived in households with a gun reported that it had been used against them, most frequently in the form of threats to shoot or kill them.<sup>37</sup> Thus, a firearm can become a tool of violence in the hands of an abuser even when it is never fired.

Allowing convicted domestic violence abusers to arm themselves also places law-enforcement officers at a heightened risk of death or injury. Responding to domestic violence calls is a significant part of an officer's workload: 15 to 40 percent of all calls for police assistance are family disturbances.<sup>38</sup> A substantial number of police officer deaths result when officers respond to these domestic-violence incidents.<sup>39</sup> Eighty-one law enforcement officers were killed when

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<sup>35</sup> See Bancroft, *Why Does He Do That? Inside the Minds of Angry and Controlling Men* 219-220 (2002).

<sup>36</sup> Sorenson, *Firearm Use in Intimate Partner Violence*, 30 *Evaluation Rev.* 229, 235 (2006).

<sup>37</sup> *Id.*

<sup>38</sup> Breci, *Police Response to Domestic Violence*, in 4 *Crisis Intervention in Criminal Justice/Social Service* 102 (Hendricks & Byers, eds., 2006).

<sup>39</sup> National Law Enforcement Officers Memorial Fund, *Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community*, available at <http://nleomf2.nleomf.org/media/press/domesticviolence07.htm>.

responding to domestic disturbance calls from 1996 to 2005, or 14 percent of law enforcement deaths during that period.<sup>40</sup> Domestic disturbances are also responsible for a disproportionate number of assaults on and injuries to police officers.<sup>41</sup> The specter of danger associated with domestic-violence investigation is a major source of stress for police officers and their families.<sup>42</sup>

The International Association of Chiefs of Police has recently recommended that, to keep police officers safe, federal and state governments should “reduc[e] the firepower available to criminals” and “[r]equir[e] judges and law enforcement to remove guns from situations of domestic violence . . . .”<sup>43</sup> In light of the danger posed by armed abusers, the report also recommended that legislatures authorize law-enforcement officers to remove all guns and ammunition from the scene of a domestic-violence incident and that judges be required to order the removal of guns and ammunition from domestic-violence misdemeanants.<sup>44</sup>

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<sup>40</sup> *Id.* The FBI reports that between 1996 and 2005, 59 law-enforcement officers were feloniously killed where the circumstance at the scene of the incident was a “family quarrel.” U.S. Dep’t of Justice Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2005*, tbl. 20 (Oct. 2006), available at <http://www.fbi.gov/ucr/killed/2005/feloniouslykilled.htm>.

<sup>41</sup> Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers*, 11 Justice Q. 99, 107 (1994).

<sup>42</sup> *Id.*

<sup>43</sup> Int’l Ass’n of Chiefs of Police, *Taking a Stand: Reducing Gun Violence In Our Communities* 6 (2007), available at <http://www.theiacp.org/Portals/0/pdfs/publications/ACF1875.pdf>.

<sup>44</sup> *Id.* at 17.



Congress thus acted reasonably and with ample justification to try to minimize such outcomes. If the Second Amendment were interpreted to prohibit the government from barring firearms possession by convicted domestic-violence abusers, they will be permitted to re-arm and thus pose a great risk to the public and law-enforcement officers.

### CONCLUSION

The Court should uphold 18 U.S.C. § 922(g)(9) as constitutional and affirm the judgment of conviction.

Dated: April 30, 2010

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## **CIRCUIT RULE 31(e) CERTIFICATION**

Pursuant to Circuit Rule 31(e), I hereby certify that I have filed electronically versions of the foregoing brief in non-scanned PDF format.

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## RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) because it contains 6,987 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the Microsoft Word 2003, version 11.8227.822 SP3, proportionally spaced typeface of Times New Roman with 14-point font in the text and 12-point font in the footnotes.

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 30<sup>th</sup> day of April 2010, I caused two copies and a digital version of the foregoing Brief *Amici Curiae* Brady Center Against Gun Violence, National Black Police Association, Hispanic American Police Command Officers Association, National Latino Peace Officers Associations, and National Network to End Domestic Violence in Support of Appellee and Affirmance to be served upon the following counsel by e-mail and Federal Express:

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