No. 08-16010-DD

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

LUDIVIC WHITE, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of Alabama, Case No. 07-00361 CV-WS

BRIEF FOR THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, AND LEGAL COMMUNITY AGAINST VIOLENCE AS AMICI CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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April 1, 2009

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

United States v. White, No. 08-16010-DD

Pursuant to 11th Cir. R. 26.1-1, the following is a list of additional interested parties not contained in briefs previously filed:

1) Brady Center To Prevent Gun Violence

2) Hussain, Laura Moranchek, Esq.

3) Hut, A. Stephen, Jr., Esq.

4) Legal Community Against Violence

5) Lowy, Jonathan, Esq.

6) National Network To End Domestic Violence

7) Wilmer Cutler Pickering Hale and Dorr LLP

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

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

Legal Community Against Violence is a § 501(c)(3) non-profit corporation, and no publicly held corporation holds ten percent of its stock.

/s/ Laura Moranchek Hussain
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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. The Brady Center has a substantial interest in ensuring that the Second Amendment is not misinterpreted as a barrier to strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs amicus curiae in cases involving the constitutionality of gun laws.

The **National Network To End Domestic Violence** is a non-profit organization dedicated to creating a social, political, and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women, their children, and those who provide direct services to them. NNEDV has a long history of working at the local, state, and national levels to promote a strong criminal justice response to domestic violence, including reducing homicides by removing firearms from convicted batterers.

Legal Community Against Violence is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms

legislation, as well as legal challenges to firearms laws. As an amicus, LCAV has provided informed analysis of the legal bases for a variety of laws to reduce gun violence before the Supreme Court and state courts.

All parties have consented to the filing of this brief.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Does the Second Amendment prohibit Congress from criminalizing the possession of firearms by convicted domestic violence offenders?[1]

[1] *Amici* do not express any view on the other issues presented in this appeal.

SUMMARY OF ARGUMENT

Since 1996, Congress has prohibited firearms possession by those who have proved themselves to be a danger to others by committing a misdemeanor crime of domestic violence. *See* 18 U.S.C. § 922(g)(9).[2] Under this law, domestic violence offenders like appellant Ludivic White, Jr., forfeit their right to own a firearm when they show not only that they are capable of inflicting harm through violence, but that they will direct that violence against those who are closest to them. By stripping violent domestic abusers of any right to firearms, Congress sought to prevent the even greater harms that can occur when an abuser has access to the deadliest weapons. This law therefore serves the same purpose as the federal prohibitions on firearms possession by felons or the mentally unstable, which is to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *See Scarborough v. United States*, 431 U.S. 563, 572 (1977) (internal quotation marks omitted). As noted by the bill's principal sponsor, Senator Frank Lautenberg, "[a]

[2] The statute defines a "misdemeanor crime of domestic violence" as a federal or state misdemeanor that "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." 18 U.S.C. § 921(a)(33)(A)(ii).

firearm in the hands of an abuser all too often means death." 142 Cong. Rec. 22,956, 22,986 (1996).

In *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008), the Supreme Court held that the Second Amendment protects the right of law-abiding, responsible citizens to keep a firearm in the home for lawful self-defense. The Court made clear, however, that the Second Amendment right is limited and does not entitle convicted criminals to possess guns. Section 922(g)(9), like the legislation deemed "presumptively lawful" by the Court, *Heller*, 128 S. Ct. at 2817 n.26, does not affect the right of law-abiding citizens to defend themselves in the home, and so does not infringe the Second Amendment. Indeed, dangerous individuals and criminals have been precluded from owning firearms since the earliest days of the Republic. Domestic violence offenders like White are simply not among the limited class of law-abiding citizens that the Supreme Court brought within the protection of the Second Amendment in *Heller*.

Even assuming the Second Amendment applies to convicted abusers such as White, however, § 922(g)(9) is a constitutional exercise of Congress's authority to regulate firearm possession by dangerous individuals. Abundant evidence supports Congress's conclusion that convicted domestic violence abusers are threats to their families and intimate partners when armed. As the Supreme Court recently recognized, "[f]irearms and domestic strife are a potentially deadly combination

nationwide." *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). Section 922(g)(9) advances Congress's plainly legitimate and compelling goal of protecting the public from the increased harms that may result when abusers have ready access to guns, and does not infringe the Second Amendment under any standard of review.

ARGUMENT

I. THE SECOND AMENDMENT DOES NOT PROHIBIT CONGRESS FROM PROTECTING PUBLIC SAFETY BY BARRING DOMESTIC VIOLENCE OFFENDERS FROM POSSESSING FIREARMS

The Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), was narrow. The Court held that the District of Columbia's broad ban on firearms in the home deprived petitioner, "a D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center," *id*. at 2788, of his Second Amendment right. 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. While White seeks to extend the Court's ruling to enshrine a broad constitutional right for anyone—even violent criminals—to possess guns, the *Heller* Court pointedly rejected that proposition. Section 922(g)(9), a public safety law that prevents convicted domestic violence offenders from possessing guns that they might use against their partners, is therefore a lawful regulation of firearms.

The *Heller* Court could not have been more plain 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); *see also id*. at 2818 (Second Amendment protects the right of individuals to own firearms "for the core lawful purpose of self defense"); *id. at* 2801 (the right to self defense is "the *central component* of the right itself"). Nowhere did the Court state that the Second Amendment right was any broader. Abundant research shows that individuals who have committed domestic violence in the past pose a grave risk of engaging in increasingly serious attacks against their families and intimates. *See infra* at Part IV. Placing a firearm in the hands of convicted domestic abusers, in other words, does not protect hearth and home, but threatens the safety of others in their hearth and home. To arm domestic violence offenders is therefore the antithesis of self-defense, and represents the very opposite of the interests protected by the Second Amendment right described in *Heller*. The Second Amendment does not provide criminals such as White with a right to arms, and it certainly does not prevent Congress from protecting public safety by keeping firearms out of the hands of those who put their closest intimates at risk.

Far from providing the broad right to arms that White advances here, the *Heller* Court made clear that "the right secured by the Second Amendment is not unlimited," 128 S. Ct. at 2816, and that many restrictions on the possession, use, or

sale of firearms are valid under the Second Amendment. The Court specifically identified numerous "longstanding prohibitions on the possession of firearms" that are presumptively lawful, including the bans on possession by felons and the mentally ill. *Id*. at 2817-2818. The Court went further still to make clear the narrowness of its holding, explicitly noting that these are only "examples" of lawful prohibitions that did not purport to be "exhaustive." *Id*. at 2817 n.26. The Court recognized that the Second Amendment leaves government "a variety of tools for combating [the] problem" of gun violence in this country. *Id*. at 2822. One of those lawful tools is a federal ban on the possession of firearms by convicted criminals with a track record of violence.

The ban on possession by domestic violence offenders is in some respects narrower than the ban on felons in possession, a "presumptively lawful" regulation, *Heller*, 128 S. Ct. at 2817 n.26, and Congress's interest in enacting the ban is no less compelling. The federal ban on the possession of firearms by felons applies to non-violent and violent felons alike, sweeping in the tax evader and the counterfeiter as well as the armed robber. To fall within the scope of § 922(g)(9), however, 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." *See* 18 U.S.C. § 921(a)(33)(A)(ii). Thus § 922(g)(9) applies only to those who have both

been convicted of a serious violation of the law in the past *and* that have demonstrated a capacity to inflict violent harms on others.

In the wake of *Heller*, accordingly, courts have unanimously agreed that § 922(g)(9) does not violate the Second Amendment. *See, e.g.*, *United States v. Booker*, 570 F. Supp. 2d 161, 164 (D. Me. 2008) (noting "absence of a meaningful distinction between felons and persons convicted of crimes of domestic violence as predictors of firearm violence"); *United States v. Li*, No. 08-CR-212, 2008 WL 4610318, at *4 (E.D. Wis. Oct. 15, 2008) ("[S]imply stated, one who has been convicted of a crime of domestic violence, regardless of whether such conviction was for a misdemeanor or felony, has shown himself or herself to be a danger to others."); *United States v. Chester*, No. 2:08-00105, 2008 U.S. Dist. LEXIS 80138, at *5 (S.D.W. Va. Oct. 7, 2008) ("[T]he need to bar possession of firearms by domestic violence misdemeanants in order to protect family members and society in general from potential violent acts of such individuals is quite often far greater than that of the similar prohibition . . . on those who commit nonviolent felonies."); *United States v. Skoien*, No. 08-CR-12, 2008 U.S. Dist. LEXIS 66105 (W.D. Wis. Aug. 27, 2008).

Moreover, in enacting § 922(g)(9), Congress recognized that the difference between a domestic violence misdemeanor and a felony is often insubstantial, arbitrary, or both. Congress enacted § 922(g)(9) in part out of concern that many

states treat family violence less seriously than other forms of violence, such that crimes that would be felonies if committed against a stranger are misdemeanors when committed against a family member. *See* 142 Cong. Rec. 22,956, 22,985 (1996) (statement of Sen. Lautenberg) ("One third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors"). Further, many perpetrators are able to plead down to a misdemeanor charge despite committing serious and brutal family assaults. As sponsor 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" nonetheless lose their right to own a firearm. 142 Cong. Rec. 5840, 5840 (1996); *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 was thus on solid ground in concluding that similar treatment is warranted between those who commit felonies and violent domestic violence offenses. This conclusion is also entirely consistent with the Second Amendment. "Constitutionally speaking, there is nothing remarkable about the extension of federal firearms disabilities to persons convicted of misdemeanors, as opposed to felonies." *Gillespie v. City of Indianapolis*, 185 F.3d 693, 706 (7th Cir. 1999).

While no court of appeals has considered a Second Amendment challenge to § 922(g)(9) after *Heller*, the Supreme Court recently construed the meaning of the law in *United States v. Hayes*, 129 S. Ct. 1079 (2009), its first post-*Heller* case involving a firearm law, and no Justice even suggested that it raised a Second Amendment issue, much less that it might be unconstitutional.[3] Further, two courts of appeals that upheld federal restrictions on firearm possession by batterers prior to *Heller* specifically indicated that the same result would obtain under a non-militia-based analysis of the Second Amendment. *See United States v. Lippman*, 369 F.3d 1039 (8th Cir. 2004) (§ 922(g)(8), which prohibits firearms possession by individuals under domestic violence restraining orders, does not violate Second Amendment, even assuming a non-militia-based right to bear arms); *United States v. Emerson*, 270 F.3d 203, 263-264 (5th Cir. 2001) (§ 922(g)(8) does not violate Second Amendment, which confers non-militia-based right to arms). While other courts of appeals that upheld § 922(g)(9) against Second Amendment challenges prior to *Heller* relied on a militia-based interpretation of the Second Amendment,

[3] Hayes, a domestic violence offender, raised a statutory construction defense to his unlawful possession charge under § 922(g)(9) before the *Heller* decision, yet even after *Heller* was announced, the Court did not ask for briefing on the Second Amendment, and no Justice raised a constitutional issue during the argument or in any opinion. Justice Scalia, the author of the Court's opinion in *Heller*, joined a dissent that argued that Hayes's firearm possession was lawful because § 922(g)(9) did not apply to him, without suggesting that his firearms possession was constitutionally protected. *See Hayes*, 129 S. Ct. at 1092 (Roberts, C.J., dissenting).

none indicated that the outcome would be any different under a non-militia-based analysis. *See, e.g.*, *United States v. Pfeifer*, 371 F.3d 430, 438 (8th Cir. 2004) (§ 922(g)(9) does not violate the Second Amendment); *United States v. Chavez*, 204 F.3d 1305, 1313 n.5 (11th Cir. 2000) (suggesting same); *Gillespie*, 185 F.3d at 711 (same). As the Supreme Court itself observed, the mere fact that these courts applied the kind of militia-based framework rejected in *Heller* does not mean that "the[se] cases . . . would necessarily have come out differently under a proper interpretation of the right." *Heller*, 128 S. Ct. at 2815 n.24.

II. RESTRICTIONS ON FIREARM POSSESSION BY DANGEROUS INDIVIDUALS WERE COMMON AT THE TIME OF THE RATIFICATION OF THE SECOND AMENDMENT

The *Heller* Court recognized that, "[f]rom 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. Unsurprisingly, laws specifically prohibiting firearm possession by those convicted of crimes of domestic violence did not exist in the colonial and Early Republic period, because the crime of domestic violence itself did not exist. Nonetheless, then, as now, public safety often necessitated disarming criminals or other dangerous persons, and the state's authority to disarm these individuals was never seen as incompatible with the Second Amendment.

A. The English Right To Arms Was Limited By The State's Interest In Disarming Dangerous Individuals

Although historians continue to disagree about the original meaning of the Second Amendment's right to keep and bear arms, the Supreme Court concluded that the 1689 English Declaration of Right, later codified as the English Bill of Rights, represents "the predecessor to our Second Amendment." *Heller*, 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. For example, the English 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 to the populace. *See* 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689) ("[T]he subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.").[4] While these limitations on the English right to arms "reflected hierarchical social values and fear of arming the lower classes"[5] that are offensive to modern values, they indicate that the English right did not restrict the state's police power to disarm individuals in the interest of public safety.

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[4] *See generally* Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 46 (2000).

[5] *Id.*

Such limitations on firearm ownership were by no means confined to the English side of the Atlantic. Under common law applied in the American colonies, justices of the peace, sheriffs, and constables had authority to disarm those who "carry weapons in the highway" in armed terror of the peace, even if the perpetrator did not "break the peace in [the officer's] presence." *The 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* 377 (New York, Hugh Gaine 1788).[6] In addition, at the time of the Revolution, the Continental Congress urged the states to disarm citizens who were disaffected from the fledgling republic. *See* Act of Mar. 14, 1776, *in* 4 *Journals of the Continental Congress 1774-1789*, at 205 (1906).[7] Pennsylvania followed the suggestion and disarmed 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 independence of this state should possess or have in their own keeping or elsewhere any fire arms." *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, *reprinted in id*. at 110-114. Pennsylvania

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[6] *See also* Cornell & DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 501 (2004)

[7] *Available at* http://lcweb2.loc.gov/learn/features/timeline/amrev/homefrnt/loyalist.html.

enacted these restrictions despite having just recently incorporated a right to bear arms into its new constitution. *See* Pa. Declaration of Rights, cl. 13 (1776).[8]

These restrictions on firearm possession in the founding period show that it was widely understood that those thought to endanger others or the general peace were not entitled to possess arms. Regardless of whether the Fourteenth and First Amendments would place these restrictions in jeopardy today, these founding-era laws evidence that restrictions on arms possession were common. Then, as now, the state retained the power to disarm those thought dangerous, the better to protect people from violence.

B. Anti-Federalist Proposals For A Private Right To Arms Expressly Permitted The Disarmament Of Dangerous Individuals

The debates preceding the adoption of the Second Amendment confirm that by the time of the founding, it was well understood that the state possessed the authority to disarm dangerous individuals. Proposed constitutional amendments protecting a right to arms that were offered by Anti-Federalists in three states, which the *Heller* Court saw as "plainly referr[ing] to an individual right" to possess firearms, 128 S. Ct. at 2804, also expressly permitted the state to disarm dangerous individuals or criminals. Although the Anti-Federalists did not succeed in incorporating these provisions into the Constitution at the time of its drafting, the

[8] *See generally* Cornell, *Commonplace or Anachronism*, 16 Const. Comment 221, 228 (1999).

Heller Court concluded that they were "highly influential" on the Second Amendment as it was ultimately adopted in 1791. *See Heller*, 128 S. Ct. at 2804.[9]

In December 1787, the Pennsylvania Anti-Federalist minority proposed to add a right to bear arms to the Constitution that contained a clear exception for those who commit crimes or pose a danger to society. The proposed amendment stated:

> That the people have a right to bear arms for the defense of themselves and their own state . . . or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, *unless for crimes committed, or real danger of public injury from individuals*[.]

2 *Documentary History of the Ratification of the Constitution* 597-598 (Kaminski & Saladino, eds., 2000) (emphasis added) (hereinafter, "DHRC"). Proposals by the New Hampshire and Massachusetts Anti-Federalist delegations similarly recognized society's need to protect itself from crime and rebellion. Samuel Adams' proposed amendment at the Massachusetts convention provided "that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms[.]" 6 *DHRC* at 1452, 1453 (emphasis added). The New Hampshire Anti-Federalist proposal stated that "Congress shall never disarm any Citizen unless

[9] The *Heller* Court stated that even though these proposals were not adopted, they shed light on the original meaning of the right to arms because it was one of the "widely understood liberties" whose meaning was not significantly disputed in the founding period. *See* 128 S. Ct. at 2804.

such as are or have been in *Actual Rebellion*." Cogan, *Complete Bill of Rights* 181 (1997) (emphasis added). Thus all three of these proposed constitutional amendments—the same three that the Supreme Court interpreted as "unequivocally referr[ing] to individual rights" to keep and bear arms, *Heller*, 128 S. Ct. at 2804—expressly permitted the disarmament of dangerous individuals or criminals.

III. THIS COURT NEED NOT SPECIFY THE LEVEL OF REVIEW, BUT STRICT SCRUTINY IS CLEARLY INAPPLICABLE

This Court need not decide what level of scrutiny to apply to federal restrictions on firearms, because § 922(g)(9) is constitutional under any test. First, the Supreme Court held that the Second Amendment right extends only to "law-abiding, responsible citizens," *Heller*, 128 S. Ct. at 2821, and so convicted domestic violence offenders do not fall within the scope of the right to arms. Even assuming that § 922(g)(9) restricts any rights cognizable under the Second Amendment, however, it is clear that this law would be constitutional under any standard of judicial review.[10]

There is overwhelming evidence that a domestic violence conviction is a strong predictor of a future capacity for violence. *See infra* Part IV. There is therefore no question that § 922(g)(9) serves the compelling governmental interest

[10] This Court has not yet determined what governmental interests are sufficient to justify a restriction on Second Amendment rights. *See United States v. Wright*, 117 F.3d 1265, 1274 n.18 (11th Cir. 1997), *vacated in part on other grounds by* 133 F.3d 1412 (11th Cir. 1998). The Supreme Court has similarly declined to specify a standard of review. *See* 128 S. Ct. at 2817-2818 & n.27.

of "protecting the public (and in particular the potential victims of domestic violence) from the grievous harm that firearms can inflict when placed in the wrong hands." *United States v. Lewitzke*, 176 F.3d 1022, 1026 (7th Cir. 1999). As the Seventh Circuit observed:

> Persons convicted of such offenses have, by definition, already employed violence against their domestic partners on one or more occasions. Congress could reasonably believe that such individuals may resort to violence again, and that in the event they do, access to a firearm would increase the risk that they might do grave harm, particularly to the members of their household who have fallen victim to their violent acts before.

Id.; *see also National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1573 (N.D. Ga. 1977) ("The court does not doubt that limiting the ability of a domestic violence misdemeanant to possess a firearm is reasonably related to Congress' purpose of protecting public safety by keeping firearms out of the hands of potentially dangerous or irresponsible persons."), *aff'd and adopted by Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998). Further, the statute is narrowly tailored because it focuses on a small class of dangerous persons with a proven propensity for violence. *See Lippman*, 369 F.3d at 1044 (assuming that the Second Amendment protects a private right to bear arms and upholding § 922(g)(8) because it was "narrowly tailored and . . . Congress had a compelling interest in . . . decreas[ing] domestic violence"); *United States v. Knight*, 574 F. Supp. 2d 224, 226 (D. Me. 2008) (laws removing guns from the hands of known abusers are

narrowly tailored and "[r]educing domestic violence is a compelling government interest").

Should this Court choose to specify the level of review, however, it is clear that the Court should eschew strict scrutiny and apply a reasonableness test. In *Heller*, the Court pointedly declined to adopt the argument that strict scrutiny should apply in Second Amendment cases. As Justice Breyer noted in his dissent:

> Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear.
>
> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible.

Heller, 128 S. Ct. at 2851 (Breyer, J., dissenting) (internal citations omitted).

Strict scrutiny would be inconsistent with *Heller*'s analysis. As Justice Breyer noted, while the *Heller* majority did not state what standard of review should be applied when the Second Amendment is implicated, the Court implicitly rejected any standard that would jeopardize the firearms restrictions that the Supreme Court thought "presumptively lawful." *See* 128 S. Ct. at 2817-2818. To deem "presumptively lawful" the ban on felons in possession, including non-violent felons such as embezzlers or counterfeiters, or conditions on the

commercial sale of arms, all without any showing to the Court that those laws are narrowly tailored to further a compelling governmental interest, strongly suggests that the Court favored a standard akin to a reasonableness test.

Moreover, rights secured by numerous provisions in the Bill of Rights are subject to review by standards more lenient than strict scrutiny, including the Fourth Amendment, Sixth, and Eighth Amendments. Even assuming *arguendo* the right to bear arms were "fundamental"—and the Supreme Court has said it is not, *see Lewis v. United States*, 445 U.S. 55, 66 (1980)—the Court frequently applies more relaxed standards of review to infringements of even fundamental rights. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876 (1992) (joint opinion) (applying "undue burden" test to restrictions on fundamental right to abortion under the Fourteenth Amendment); *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) (strict scrutiny should not be used to evaluate generally applicable burdens to religious free exercise under First Amendment).

Finally, it is noteworthy that the courts in nearly every state, including Florida, Alabama, and Georgia, apply a reasonableness standard when reviewing statutes under state Second Amendment analogues that recognize a private right to arms. *See, e.g.*, *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972) (right to arms not "absolute" and subject to "valid police regulations"); *Jackson v. State*, 68 So. 2d 850, 852 (Ala. Ct. App. 1953) (right to arms "is subject to reasonable regulation by

the State under its police power"); *Strickland v. State*, 72 S.E.2d 260, 263 (Ga. 1911) (right to arms subject to regulation "legitimate and reasonably within the police power").[11] Federal courts may particularly benefit from the wisdom and experience of state courts in interpreting these state Second Amendment analogues. *See Bartkus v. Illinois*, 359 U.S. 121, 134 (1959) (looking to the "experience of state courts" for guidance on federal constitutional law). Of the 17 states nationwide that restrict the possession or purchase of firearms or handguns by domestic violence misdemeanants under state statutes, 12 have state constitutional provisions that protect the right to keep and bear arms.[12] Yet not a single court has invalidated such a statute on the ground that it violates an individual right to arms, as White contends here.

IV. RESTRICTING FIREARM POSSESSION BY DOMESTIC VIOLENCE OFFENDERS LIMITS ABUSERS' ABILITY TO INFLICT GREATER HARM WITH FIREARMS

Abundant evidence supports Congress's conclusion that keeping firearms from domestic violence offenders is a reasonable and justified public-safety measure of the sort countenanced as lawful in *Heller*. By stripping firearms from

[11] *See also* Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 687, 716-718 (2007) (describing hundreds of gun law decisions issued by state supreme courts that with "surprisingly little variation" have adopted a standard of review more deferential than strict scrutiny).

[12] See Appendix I for the list of states and the relevant statutes and constitutional provisions.

convicted abusers, Congress sought to address the epidemic of domestic violence, a serious public health and safety concern by any measure. 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.[13] More than one in four women and nearly one in twelve men are victimized by their intimate partners in their lifetime.[14] 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 frequently called to intervene, and the social workers who provide direct services. Society at large also bears costs of domestic violence in the form of health care expenses,[15] lost work days and productivity for victims, and increased mental and physical health problems

[13] 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* iv (Nov. 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

[14] *Id*. at 26.

[15] 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.

among those who witness domestic violence, especially minor children.[16] By enacting § 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.

A. Congress Properly Recognized That Because Domestic Violence Offenders Often Commit Subsequent, Escalating Acts of Violence, They Should Not Have Access to Firearms

Rarely is a fatal or life-threatening incident the first physical violence that a woman experiences from her partner. 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."[17] 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.[18] Approximately half of women raped by an intimate, and more than two-thirds of women physically assaulted by an intimate,

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[16] Children under the age of 12 are present in more than a third of the households that experience nonfatal domestic violence. Catalano, Bureau of Justice Statistics, *Intimate Partner Violence in the United States* (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipvus.pdf. These children are more likely than children not raised in abusive households to exhibit behavioral and physical health problems such as 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).

[17] Bancroft & Silverman, *supra* note 16, at 3.

[18] 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.

have been victimized multiple times by the same person.[19] As only about three to six percent of self-reported assaults, rapes, and cases of stalking between intimate partners ultimately result in an arrest and conviction,[20] an individual who has actually been convicted of domestic violence not only has very likely abused a family member before, but is also highly likely to do it again.

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. Studies also confirm that in many cases, an abuser increases the frequency and severity of assaults over time.[21] Of those charged with serious, felony assault crimes against their families in state courts, for example, some 73 percent had previously been convicted of some type of felony or misdemeanor crime, and 45 percent had been subject to a restraining order at some point in their lives.[22] By removing guns from abusers before they

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[19] 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.

[20] Vigdor & Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Evaluation Rev. 313, 322 (2006).

[21] 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.

[22] Bureau of Justice Statistics, *Family Violence Statistics* 2-3 (June 2005), *available at* http://www.ojp.usdoj.gov/bjs/abstract/fvs.htm.

commit a felony assault, Congress sought to ensure that such assaults are less likely to be deadly.

The consequences of not preventing batterers from obtaining the means to kill are chilling. On average, 3.5 people are killed by intimate partners *every day* in the United States.[23] In 2002, about 22 percent of all murder victims were killed by family members, while another 7 percent were killed by boyfriends or girlfriends.[24] Women are disproportionately victimized; in recent years, nearly one-third of all women murdered in the United States were killed by a current or former intimate partner.[25] 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.[26]

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.[27] 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

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[23] Vigdor & Mercy, *supra* note 20, at 313.

[24] *Family Violence Statistics*, *supra* note 22, at 18.

[25] Rennison & Welchans, Bureau of Justice Statistics, *Intimate Partner Violence 1993-2001* (Feb. 2003), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ipv01.htm.

[26] Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, Nat'l Inst. of Justice J. 6 (Nov. 2003), *available at* http://www.ncjrs.gov/pdffiles1/jr000250c.pdf.

[27] *Family Violence Statistics*, *supra* note 22, at 21.

weapons *combined*.[28] Furthermore, an abused woman is six times more likely than other abused women to be killed when her abuser owns a gun.[29] This is unsurprising, given the increased lethality of firearms. 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.[30]

While murder is obviously the most tragic result of allowing abusers to keep firearms, it is by no means the only consequence. Many domestic violence victims who are not killed are seriously wounded. 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 control over the victim often resort to escalating threats of violence, either against themselves, the victim, or the victim's family members.[31] 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 and costly for victims to separate from their abusers. Firearms can also be

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[28] National Coalition Against Domestic Violence, *Homicide and Domestic Violence Facts: When Men Murder Women, available at* http://www.ncadv.org/files/WhenMenMurderWomen2004_.pdf (last visited Apr. 1, 2009).

[29] 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.

[30] Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Med. Ass'n 3043, 3043 (1992).

[31] *See* Bancroft, *Why Does He Do That? Inside the Minds of Angry and Controlling Men* 219-220 (2002).

used to coerce sex or simply to inflict terror on the victims.[32] In one state-wide study, two-thirds of battered women who had a gun in their household reported that it had been used against them, most frequently in the form of threats to shoot or kill them.[33] Thus, a firearm can become a tool of violence in the hands of an abuser even when it is never fired.

B. Allowing Convicted Domestic Violence Offenders To Arm Themselves Endangers Law Enforcement Officers

Allowing convicted domestic violence abusers to arm themselves with firearms not only jeopardizes abusers' family members, it 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; nationwide, 15 to 40 percent of all calls for police assistance are family disturbances.[34] A substantial number of police officer deaths result when officers respond to these domestic violence incidents.[35] Eighty-one law enforcement officers were killed when responding to domestic disturbance calls from 1996 to 2005, or 14 percent of

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[32] Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 235 (2006).

[33] *Id*.

[34] Breci, *Police Response to Domestic Violence, in* 4 Crisis Intervention in Criminal Justice/Social Service 102 (Hendricks & Byers, eds., 2006).

[35] National Law Enforcement Officers Memorial Fund, *Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community*, *available at* http://www.nleomf.com/media/press/domesticviolence07.htm (last visited Apr. 1, 2009).

law enforcement deaths during that period.[36] According to the Officer Down Memorial Page website, 65 officers were killed by gunfire in 2007, and 11 of those, or 17 percent, were killed while responding to a domestic-dispute call.[37] In 2008, 36 officers were killed by gunfire, and seven, or 19 percent, were killed while responding to such a call.[38]

Domestic disturbances are also responsible for a disproportionate number of assaults on and injuries to police officers.[39] According to the FBI, of officers assaulted or injured when responding to a call for police assistance, 30 percent occurred during domestic violence calls.[40] This was the category with the highest percentage of police officer assaults, with the next highest category, "attempting other arrests," totaling only 16 percent of officer assaults. The danger of assault or death involved in police work has additional costs for police departments and for police officers: "it results in hazardous duty pay, early retirement programs, use of

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[36] *Id.* The FBI reported that from 1996-2005, 59 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* (tbls. 1, 20), *available at* http://www.fbi.gov/ucr/killed/2005/feloniouslykilled.htm.

[37] 2007 Total Line of Duty Deaths by Gunfire, The Officer Down Memorial Page, Inc., *available at* http://www.odmp.org/year.php?year=2007 (last visited Apr. 1, 2009).

[38] 2008 Total Line of Duty Deaths by Gunfire, *available at id*.

[39] Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers*, 11 Justice Q. 99, 107 (1994).

[40] Nat'l Law Enforcement Officers Mem'l Fund, *supra* note 35.

bulletproof vests, and specialized training in backup assistance and weapon retention."[41] The specter of danger associated with domestic violence investigation is a major source of stress for police officers and their families.[42]

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 . . . ."[43] In light of the danger posed by armed abusers, the report also recommended that federal, state, and local laws 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.[44] If the Second Amendment is 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.

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[41] Hirschel, *supra* note 39, at 115.

[42] *Id.*

[43] 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.

[44] *Id.* at 17.

CONCLUSION

For the reasons set forth above and in the Brief for Appellees, this Court should hold that 18 U.S.C. § 922(g)(9) does not infringe appellant White's rights under the Second Amendment.

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The undersigned hereby certifies that the attached brief complies with the type-volume limitation established by Federal Rule of Appellate Procedure 32(a)(7)(B), 32(a)(5), and 29(d). This brief contains 6,819 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, version 11.8227.822 SP3, in 14-point proportional type Times New Roman.

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Appendix I: State Laws Restricting Handgun Possession or Purchase by Domestic Violence Misdemeanants

State	**Firearm Restriction on Domestic Violence Misdemeanants**	**Second Amendment Analogue**
California	Prohibits anyone convicted of a violent misdemeanor, regardless of the relationship between victim and offender, from owning, purchasing, receiving or possessing any firearm within 10 years of conviction. Cal. Penal Code § 12021(c)(1).	None.
Delaware	Prohibits anyone convicted of a "any misdemeanor crime of domestic violence" from purchasing, owning, possessing or controlling a deadly weapon or ammunition. Del. Code Ann. tit. 11, § 1448(a)(7).	"A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use." Del. Const. art. I, § 20.
Florida	Prohibits the purchase of firearms by anyone "convicted of a misdemeanor crime of domestic violence." Fla. Stat. Ann. § 790.065(2)(a).	"The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Fla. Const. art. I, § 8(a).
Hawaii	Prohibits the ownership, possession, or control of any firearm or ammunition by "a person prohibited from possessing firearms or ammunition under federal law." Haw. Rev. Stat. § 134-7(a).	"A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Haw. Const. art. I, § 17.

Illinois	Prohibits possession of a firearm without a valid state license, which will not be issued to anyone prohibited from acquiring or possessing firearms under federal law, as well as anyone convicted of "domestic battery or a substantially similar offense" in another jurisdiction. 430 Ill. Comp. Stat. § 65/4(a)(2)(8).	"Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. art. I, § 22.
Indiana	Prohibits possession of a firearm by anyone convicted of a misdemeanor act of domestic battery. Ind. Code § 35-47-4-6.	"The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. art. 1, § 32.
Iowa	Prohibits possession of a firearm by anyone previously convicted of a crime, including a crime of domestic assault. Iowa Code § 724.15(1)(e).	None.
Louisiana	Persons convicted of domestic abuse battery cannot receive a suspended sentence unless they refrain from owning or possessing a firearm for the entire length of the original sentence. La. Rev. Stat. Ann. § 14:35.3(C), (D).	"The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." La. Const. art. 1, § 11.
Minnesota	Prohibits handgun possession by anyone convicted of misdemeanor assault against a family or household member within the previous three years, regardless of whether a firearm was used. Minn. Stat. § 609.2242, subd. 3(d), (e).	None.

New Jersey	Prohibits the purchase or possession of firearms by persons convicted of "a crime involving domestic violence." N.J. Stat. Ann. § 2C:39-7(b)(1).	None.
New York	Prohibits firearm possession by those not of good moral character or who have previously been convicted of a felony or "serious offense." N.Y. § 400.00(1)(c).	None.
Oregon	Prohibits the sale of firearms to anyone convicted of any misdemeanor crime involving violence within the last four years. Or. Rev. Stat. § 166.470(1)(g).	"The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]" Or. Const. art. I, § 27.
Pennsylvania	Prohibits the possession of firearms by anyone who is prohibited from possessing a firearm under 18 U.S.C. § 922(g)(9). 18 Pa. Cons. Stat. Ann. § 6105(c)(9).	"The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." Pa. Const. art. I, § 21.
South Dakota	Prohibits the possession or control of a firearm by anyone convicted of a misdemeanor crime of domestic violence for a period of one year following conviction. S.D. Codified Laws § 22-14-15.2.	"The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. Const. art. VI, § 24.
Texas	Prohibits the possession of a firearm by domestic violence misdemeanants for a period of five years following release from confinement or community supervision. Tex. Penal Code Ann. § 46.04(b).	"Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to

		regulate the wearing of arms, with a view to prevent crime." Tex. Const. art. I, § 23.
Washington	Prohibits possession of a firearm by anyone who has been convicted of a number of crimes when committed by one family or household member against another, including misdemeanor assault. Wash. Rev. Code § 9.41.040(2)(i).	"The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this Section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." Wash. Const. art. I, § 24.
West Virginia	Prohibits possession of anyone convicted of misdemeanor domestic assault or battery or misdemeanor assault when the victim is a family member or intimate partner. W. Va. Code § 61-7-7(a)(8).	"A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. Va. Const. art. III, § 22.