Case No. 15-4196

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TERRY LEE STIMMEL,

Plaintiff-Appellant,

v.

JEFFERSON B. SESSIONS III, U.S. Attorney General; FEDERAL BUREAU OF INVESTIGATION; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio
Eastern Division

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Attorneys for Amicus Party Law Center to Prevent Gun Violence

Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29, proposed *amicus curiae* Law Center to Prevent Gun Violence ("Law Center") respectfully moves the Court to grant leave to file the attached brief. The Law Center obtained consent from Appellee to participate as *amicus*, but Appellant declined to consent. For this reason, the Law Center seeks permission from the Court to file its brief.

The Law Center is a national, nonprofit organization dedicated to reducing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides comprehensive legal expertise in support of common sense gun laws. The Law Center tracks and analyzes federal, state, and local firearms legislation, monitors Second Amendment litigation nationwide, and provides support to jurisdictions facing legal challenges to their gun laws. The Law Center has provided informed analysis as an *amicus* in dozens of important firearm-related cases, including: *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010); *Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Castleman*, 134 S. Ct. 1405 (2014); and *Tyler v. Hillsdale Cnty. Sherriff's Office*, 837 F.3d 678 (6th Cir. 2016) (en banc).

The Law Center's participation in the case will provide information relevant to the Second Amendment claim at issue in this appeal. The Law Center has

expertise with federal restrictions on gun possession as they relate to domestic violence, as well as as-applied challenges to such restrictions, and represents the interests of citizens—particularly victims of domestic violence—who benefit from those laws. The attached brief explains why 18 U.S.C. § 922(g)(9) is lawful in all of its applications because it is consistent with longstanding restrictions on the possession of firearms by serious lawbreakers. The brief also explains why § 922(g)(9) is reasonably tailored to achieve important government objectives: safeguarding domestic violence victims from harm and reducing the gun injuries and deaths that result from domestic abuse.

For the foregoing reasons, the Law Center respectfully requests that the Court grant the Motion for Leave to File Brief of *Amicus Curiae* Law Center to Prevent Gun Violence in Support of Appellees and Affirmance.

Dated: March 31, 2017

/s/ *Julie Y. Park*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Law Center to Prevent Gun Violence (the "Law Center") is a national, nonprofit organization dedicated to reducing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides comprehensive legal expertise in support of common sense gun laws. The Law Center tracks and analyzes federal, state, and local firearms legislation, monitors Second Amendment litigation nationwide, and provides support to jurisdictions facing legal challenges to their gun laws. The Law Center has provided informed analysis as an amicus in a wide variety of important firearm-related cases nationwide, including before the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010), *United States v. Castleman*, 134 S. Ct. 1405 (2014), and *Voisine v. United States*, 136 S. Ct. 2272 (2016), as well as in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc).[1]

SUMMARY OF THE ARGUMENT

Domestic violence in America is, to a significant degree, a problem of gun violence. Over the past 25 years, more intimate-partner homicides in the United

[1] The Law Center files this brief while seeking leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2). No counsel for a party in this action authored the brief in whole or in part. No person, inclusive of any party or party's counsel, contributed money that was intended to fund the preparation or submission of this brief.

States have been committed with guns than with all other weapons combined.[2] More than three times as many women are murdered with guns used by their husbands or intimate partners than are killed by strangers' guns, knives, or other weapons combined.[3] Domestic violence incidents involving a gun are *twelve times* more likely to result in death than those involving other weapons or bodily force alone.[4] Abusers are five times more likely to murder their intimate partners if a firearm is in the home than if no firearm is present.[5] And domestic violence victims who were previously threatened with a gun by their partner are *twenty times* more likely to die in a future domestic violence incident.[6] Moreover, the dangers of gun-related domestic violence are not limited to abuse-victims themselves: Ninety-five percent of police officers fatally wounded when responding to domestic violence incidents were killed with firearms.[7] The

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[2] April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism, Policies to Limit Batterers' Access to Guns* 53 (2013), https://www.judiciary.senate.gov/imo/media/doc/013013RecordSub-Leahy.pdf.
[3] Violence Policy Center, *When Men Murder Women: An Analysis of 2002 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incident* 7 (2004), http://www.vpc.org/studies/wmmw2004.pdf.
[4] Linda E. Saltzman, et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043-3047 (1992).
[5] Jacquelyn C. Campbell, et al., *Risk Factors For Femicide Within Physically Abuse Intimate Relationships: Results From A Multi-State Case Control Study*, 93 Amer. J. of Public Health 1089-97 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/.
[6] *Id.*
[7] Nick Breul & Mike Keith, *Deadly Call and Fatal Encounters, Analysis of U.S. Law Enforcement Line of Duty Deaths When Officers Responded to Dispatched*

evidence could not be clearer: the availability of guns to domestic abusers poses a grave and deadly threat to society.

The most effective way to curb that threat is to prohibit gun access by perpetrators of domestic violence.[8] Such restrictions, like 18 U.S.C. § 922(g)(9), which makes it unlawful for any person convicted of a domestic violence misdemeanor to possess a firearm, are necessary protections that also fall outside the scope of the Second Amendment. As the Supreme Court in *Heller* held, the Second Amendment protects the right of *law-abiding*, *responsible* citizens to possess firearms in their homes for lawful self-defense. *Heller*, 554 U.S. at 626. This right is "not unlimited," *id.*, and it does not extend to individuals who threaten the maintenance of public safety such as those convicted of domestic violence crimes. On these grounds alone the district court's judgment should be affirmed.

Even if this Court were to find that § 922(g)(9) falls within the ambit of the Second Amendment, it should nevertheless affirm the district court's judgment because § 922(g)(9) easily withstands intermediate scrutiny. As the district court correctly noted, "[i]t is self-evident that the government interest in preventing domestic gun violence is important."[9] And § 922(g)(9) is proportionally tailored to

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Calls for Service and Conducted Enforcement 46, *2010-2014*, http://www.nleomf.org/assets/pdfs/officer-safety/Primary-Research-Final-8-2-16.pdf.

[8] *See* n.2, Zeoli & Frattaroli, *supra*.

[9] *Stimmel v. Lynch*, No. 5:14CV2081, 2015 U.S. Dist. LEXIS 130312 at *17 (N.D.

further this significant government interest by preventing domestic violence misdemeanants, individuals who "are likely to commit acts of domestic violence again," *United States v. Chovan*, 735 F.3d 1127, 1140 (9th Cir. 2013), from obtaining the firearms that often make the difference between visiting the hospital and visiting the morgue.

ARGUMENT

I. DOMESTIC VIOLENCE MISDEMEANANTS ARE SERIOUS LAWBREAKERS

Domestic violence is an epidemic in this country, claiming tens of millions of Americans as victims. In a nationally representative study from 2010, researchers found that "[a]bout 1 in 4 women (24.3%) and 1 in 7 men (13.8%) have experienced severe physical violence by an intimate partner (e.g., hit with a fist or something hard, beaten, slammed against something) at some point in their lifetime."[10] That's 38,142,303 women and 20,945,822 men in the United States.[11]

Even worse, and as the previously cited statistics demonstrate, the presence of guns exacerbates both the risk and severity of domestic abuse for those millions of victims. For example, a woman's risk of being a domestic homicide victim

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Ohio Sept. 28, 2015) (citing *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011)); *see also Carey v. Brown*, 447 U.S. 455, 471 (1980).

[10] National Center for Injury Prevention and Control, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 2 (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf.

[11] United States Census 2010, https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf.

increases *seven fold* if she lives in a house with at least one firearm.[12] Nearly two-thirds of all women killed with guns are killed by their intimate partners,[13] and more than two-thirds of spouse and ex-spouse homicide victims between 1980 and 2008 were killed with firearms.[14]

Not only is domestic abuse pervasive, it's also persistent. More than sixty-five percent of women who reported being physically assaulted by an intimate partner also reported that they were victimized multiple times by that partner.[15] The average number of times a woman reporting assault had been assaulted? Almost seven.[16] "Indeed, even the language used to describe the experience of domestic violence reflects its frequent and prolonged character. We say that a woman who has been assaulted by her husband is 'battered' or 'beaten,' or has

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[12] James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 Archives of Internal Medicine 777, 777-78 (1997).
[13] Violence Policy Center, *When Men Murder Women: An Analysis of 2011 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incidents* 6 (2013), http://www.vpc.org/studies/wmmw2013.pdf.
[14] Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States, 1980-2008*, 20 (Nov. 2011), http://bjs.gov/content/pub/pdf/htus8008.pdf.
[15] Nat'l Inst. Of Justice & Ctrs. For Disease Control & Prevention, U.S. Dept. of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey* 39 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.
[16] *Id.*

been subjected to 'domestic violence,' suggesting a general status or a continued phenomenon."[17]

Despite the ubiquity of abuse, domestic violence convictions are relatively rare due to narrowly drawn domestic violence laws,[18] fear of retaliation by victims of domestic abuse[19] who consistently underreport or do not cooperate with prosecutors,[20] and insufficient prosecution:

> Although the research on court responses to domestic violence is far less extensive than that evaluating police responses, the court response research suggests that, similar to the law enforcement pattern, prosecutors often fail to pursue cases against batterers, and judges rarely convict those proportionally few batterers who get to the courts. In fact, some research has reported that judges tend to 'side' with the batterers.

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[17] Alafair Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 568 (2007), http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1148&context=faculty_scholarship.

[18] *Id.* at 572 ("Meanwhile, the substantive criminal law used to prosecute batterers continues to punish only individual incidents of threatening or violent behavior. As Professor Tuerkheimer has noted, this myopic focus prevents existing law from capturing either the frequency and duration of domestic violence, or the underlying motivation to control another person.").

[19] Jill Theresa Messing, et al, *The State of Intimate Partner Violence Intervention: Progress and Continuing Challenges*, Social Work Vol. 60, No. 4 at 307 (Oct. 2015), https://www.researchgate.net/profile/Jill_Messing/publication/282302806_The_State_of_Intimate_Partner_Violence_Intervention_Progress_and_Continuing_Challenges/links/5610440908ae48337519bb2c.pdf ("If a woman supports arrest and prosecution efforts, she will likely fear retaliation from her partner, regardless of whether jail time is served.").

[20] Burke, *supra* at 575-76 ("Researchers estimate that approximately eighty percent or more of domestic violence victims decline to cooperate as complaining witnesses in the criminal prosecutions against their abusers.").

. . . .

> Rates of nonprosecution for domestic violence cases are consistently above the 60 percent mark.[21]

The fact that domestic violence goes unpunished should not undermine its "seriousness." In fact, the opposite conclusion must be drawn: in the relatively rare cases in which the accused *is* convicted of domestic violence, the likelihood is that serious, aggravating factors were present.[22]

The same factors that cause an overall lower conviction rate for domestic violence crimes also explain why domestic abuse crimes that are prosecuted are disproportionately charged as or pleaded down to misdemeanors. Indeed, it was Congress's recognition that many dangerous domestic abusers plead down to misdemeanors—and thus avoid the terms of the felon gun prohibition in 18 U.S.C. § 922(g)(1)—that led them to close that loophole in the law and enact § 922(g)(9). *See United States v, Hayes*, 555 U.S. 415, 426 (2009) (finding that Congress passed § 922(g)(9) intending to "close th[e] dangerous loophole" found in felon-in-possession laws which left firearms in the hands of domestic abusers, e.g., "people

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[21] Joanne Belknap & Dee L.R. Graham, *Factors Related to Domestic Violence Court Dispositions in a Large Urban Area: The Role of Victim/Witness Reluctance and Other Variables, Final Report* 4 (June 2000) (citations omitted), https://www.ncjrs.gov/pdffiles1/nij/grants/184232.pdf.

[22] Kimberly M. Tatum & Rebecca Pence, *Factors That Affect the Arrest Decision In Domestic Violence Cases*, Policing: An International Journal of Police Strategies & Management, Vol. 38, Issue 1, 56 (2015) ("severity of crime, presence of children, presence of an injunction, and victim injury increased the likelihood of an arrest" when police officers were called for domestic violence disturbance).

who engage in serious spousal or child abuse [but] ultimately are not charged with or convicted of felonies") (citations omitted).

As the data summarized above suggests, and as the Supreme Court has acknowledged in its decisions addressing § 922(g)(9), domestic abusers with misdemeanor convictions are serious lawbreakers. *See, e.g.*, *Castleman*, 134 S. Ct. at 1415 (noting that Congress passed § 922(g)(9) with the understanding that "even perpetrators of *severe* domestic violence are often convicted 'under generally applicable assault or battery laws.'" (quoting *Hayes*, 555 U.S. at 427) (emphasis added)); *Voisine*, 136 S. Ct. at 2280 ("Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—*just like those convicted of felonies*—from owning guns." (emphasis added)).

II. SERIOUS LAWBREAKERS MAY BE SUBJECT TO A LIFETIME BAN ON FIREARMS POSSESSION

Heller teaches that the Second Amendment right to bear arms is "not unlimited," *Heller*, 554 U.S. at 595—it "does not confer a right to possess any kind of weapon for whatever reason." *Tyler*, 837 F.3d at 685 (citing *Heller*, 554 U.S. at 595). The government may constitutionally regulate the what (unusually dangerous weapons), the where (sensitive areas), and the who (lawbreakers) of gun possession. *Id.*

Section 922(g)(9) targets the third category: lawbreakers. Specifically, it targets serious lawbreakers who use control, threats, and intimidation to perpetrate violence and even murder in familial and intimate contexts that give rise to unique vulnerability for their victims. Because § 922(g)(9) regulates only serious lawbreakers, it does not regulate any conduct that is protected by the Second Amendment, and Appellant's as-applied challenge necessarily fails. *See United States v. Greeno*, 679 F.3d 510, 518 (2012); *see also Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 349 (3d Cir. 2016) ("The view that anyone who commits a serious crime loses the right to keep and bear arms dates back to our founding era."), *cert pet. filed* (U.S. Feb. 8, 2017); *Hamilton v. Pallozzi*, 848 F.3d 614, 627-28 (4th Cir. 2017) (criminals who have committed "significant offenses reflecting disrespect for the law" "cannot state a claim for an as-applied Second Amendment" challenge based on their individual circumstances).

A. Section 922(g)(9) Does Not Burden Gun Rights As Historically Understood

The fact that Appellant was lawfully convicted of a crime of domestic violence means the district court properly dismissed his as-applied challenge to § 922(g)(9). *Accord Hamilton*, 848 F.3d at 627.[23] Nonetheless, Appellant argues

[23] In *Hamilton*, the Fourth Circuit categorically rejected an as-applied challenge to the prohibition on gun possession by convicted felons, concluding that once a person has committed a felony he or she is no longer a "law-abiding, responsible citizen," regardless of "evidence of rehabilitation, likelihood of recidivism, and

that the district court's conclusion that § 922(g)(9) is squarely within the government's longstanding authority to disarm serious lawbreakers was error because "domestic violence was not illegal at the time the Bill of Rights or Fourteenth Amendment were enacted." (Appellant's Brief at 8.)

The scope of the Second Amendment is not defined by such facile argument. Numerous courts have recognized that a provision "need not mirror limits that were on the books in 1791" to qualify as a longstanding, presumptively lawful prohibition on arms possession. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *Greeno*, 679 F.3d at 519 ("[t]he mere fact that drug laws and the § 2D1.1(b)(1) enhancement were not enacted until recently does not automatically render the possession of weapons by drug traffickers within the scope of the Second Amendment right as historically understood."); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d

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passage of time," *Hamilton*, 848 F.3d at 626, and that permitting an as-applied challenge would amount to post-hoc jury nullification, *id.* at 627. So too here: Appellant was convicted for committing domestic violence, and cannot argue that since time has passed his actions did not violate the law. The en banc decision in *Tyler*—which addressed § 922(g)(4), a prohibition on gun possession based on mental health, not criminality—does not foreclose following the *Hamilton* approach when dealing with prohibitions based on criminal convictions, like that at issue here. The central issue in *Tyler* concerned a real question as to whether the plaintiff currently suffered from mental illness and thus met the terms of the focus of § 922(g)(4)'s prohibition. Such a question is absent here, where Appellant unquestionably has been convicted of a crime of domestic violence, and there is no doubt that he is not "law-abiding."

185, 196 (5th Cir. 2012) ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding era analogue."); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir 2015) (same). Indeed, the *Heller* Court's own examples of permissible, "longstanding prohibitions" on gun possession by felons dated back only to the 1960s, not to the founding. *Heller*, 554 U.S. at 626-27.[24]

Were Appellant correct, our laws could not evolve to protect public safety by addressing conduct, like domestic abuse, which our society now properly classifies as abhorrent, dangerous, *and* criminal. His view—that only convictions of crimes existing "at the time the Bill of Rights or Fourteenth Amendment were enacted" can constitutionally bar gun ownership—is foreign to our democratic tradition. From the Colonial and Founding Eras to the present, public safety has necessitated disarming dangerous persons and lawbreakers, and the state's authority to disarm such people has never been seen as incompatible with the Second Amendment. Nor should it be seen as incompatible with the Second Amendment today when domestic violence is appropriately recognized—and punished—as a dangerous criminal act.

[24] *Heller* identified the regulations on felons and the mentally ill "only as examples" of "presumptively lawful regulations." *Heller*, 554 U.S. at 627 n.26. The list "does not purport to be exhaustive." *Id.*

B. The Right to Bear Arms Has Historically Been Understood to Exclude Serious Lawbreakers, Whom the State May Disarm

Since before the Second Amendment was adopted, there have been restrictions placed on serious lawbreakers' ability to possess guns. 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*, 554 U.S. at 593. The English right to arms existed side-by-side with the state's power to disarm those perceived to pose a threat of violence. Indeed, the English Declaration of Right permitted Parliament to restrict arms ownership based on the threats that certain 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*.") (emphasis added); *see generally* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 43 (2000). The English right did not restrict the state's police power to disarm individuals whom the state considered dangerous. *See id.*

The same historical limitations on firearm ownership extended to the American colonies, where justices of the peace, sheriffs, and constables had authority to disarm those who "carry weapons in the highway" in violation of widespread bans on carrying arms publicly, 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 (Albany, Charles R. & George Webster 1794); *See also* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 501 (2004).

Furthermore, as the Seventh Circuit has recognized, "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam) (collecting authorities). Reflecting the permissibility of disarming citizens who were unvirtuous and, therefore, dangerous, some states enacted laws during the Revolutionary War to disarm loyalists to England who had not taken oaths to support independence efforts, deeming it "very improper and dangerous" to arm "persons disaffected" to American independence.[25]

[25] 1779 Pa. Laws 193, *An Act. . . for Disarming Persons Who Shall not Have Given Attestations of Allegiance and Fidelity to this State*, §§ 4-5, https://law.duke.edu/gunlaws/1779/pennsylvania/468026/ ("And whereas it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms . . . the lieutenant or any sub lieutenant of the militia of any county or place within this state, shall be, and is hereby empowered to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state and against whom information on oath shall be given before any justice of the peace . . . ."); *see also* Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (addressing

Indeed, the debates before the Second Amendment was adopted confirm that the state has always retained the power to disarm those thought dangerous in order to protect its people from violence. 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, 554 U.S. at 604, expressly permitted the state to disarm serious lawbreakers. The *Heller* Court concluded that these proposals were "highly influential" on the Second Amendment. *Id.*

In December 1787, for example, 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:

> 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*[.][26]

Proposals by the New Hampshire and Massachusetts Anti-Federalist delegations similarly recognized society's need to protect itself from crime and rebellion. Samuel Adams's proposed amendment at the Massachusetts convention provided "that the said Constitution be never construed to authorize Congress . . . to prevent

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the disarming of persons who were "disaffected to the Cause of America") (cited in Cornell & DeDino, *supra* at 505 n.122).

[26] 2 *The Documentary History of the Ratification of the Constitution Digital Edition* 597-98 (John P. Kaminski et al. eds., 2009) (emphasis added).

the people of the United States, *who are peaceable citizens*, from keeping their own arms[.]" 6 *The Documentary History of the Ratification of the Constitution Digital Edition* 1452, 1453 (emphasis added). And last, the New Hampshire Anti-Federalist proposal stated that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *The Complete Bill of Rights* 181 (Neil H. Cogan ed., 1997). All three of these proposed constitutional amendments expressly permitted the disarmament of dangerous individuals or criminals, like those covered by § 922(g)(9).

Throughout the nineteenth century and the first decades of the twentieth, states continued exercising their authority to prohibit arming dangerous people—prohibitions that were ultimately incorporated into federal law. In 1868, Kansas enacted a law prohibiting the carry of a pistol by "any person who has ever borne arms against the government of the United States," by anyone who is intoxicated, or by anyone "not engaged in any legitimate business."[27] In 1885, Florida enacted a law disarming people convicted of illegally carrying concealed weapons. The law provided:

> It shall be the duty of the Sheriff or other officer making any arrest under this act to take possession of any arms found upon the person arrested under this act and retain the same until after the trial of such

[27] The General Statutes of the State of Kansas, Crimes and Punishments, § 282 (1868), https://law.duke.edu/gunlaws/1868/kansas/468476/.

> person, and if he be convicted, then the said arm or arms shall be forfeited . . . .[28]

And in 1927, Rhode Island prohibited anyone "who has been convicted in this state or elsewhere of a crime of violence" from purchasing or possessing firearms,[29] while California and Oregon passed similar felon disarmament laws in the early 1930s.[30]

The laws surveyed above, dating from before the Founding to the beginning of the twentieth century, demonstrate that § 922(g)(9) does not burden conduct within the scope of the Second Amendment as historically understood. Rather, § 922(g)(9) is an exercise of the government's traditional authority, dating back to colonial times, to disarm dangerous lawbreakers.

III. SECTION 922(G)(9) WITHSTANDS INTERMEDIATE SCRUTINY

Even if the Court were to find that § 922(g)(9) burdens Second Amendment rights, it should subject the law, at most, to intermediate scrutiny. And under

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[28] 1885 Fla. Laws 62, *An Act to Provide a Punishment for Carrying Concealed Weapons and for the Trial of such Offense . . .*, chap. 3620, § 3, https://law.duke.edu/gunlaws/1885/florida/467487/.

[29] 1927 R.I. Pub. Laws 256, *An Act to Regulate the Possession of Firearms*, §§1 and 3, https://law.duke.edu/gunlaws/1927/rhode-island/468057/.

[30] 1931 Cal. Stat. 2316–17, *An Act to Control and Regulate the Possession, Sale and use of Pistols, Revolvers, and other Firearms Capable of Being Concealed Upon the Person*, ch. 1098, § 1, https://law.duke.edu/gunlaws/1931/california/467394/; 1933 Or. Laws 488, *An Act to Amend Sections 72-201, 72-202, 72-207*, Oregon Code 1930, § 2, https://law.duke.edu/gunlaws/1933/oregon/468009/.

intermediate scrutiny, § 922(g)(9) passes constitutional muster, both facially and as applied to Appellant. The evidence demonstrates that armed domestic abusers pose a serious threat to public safety, and that § 922(g)(9) effectively curbs the cycle of fatal or serious domestic violence—even if the abuser's conviction was for simple assault some time ago.

A. Intermediate Scrutiny Applies

This Court has held that intermediate scrutiny is appropriate for evaluating challenges to the firearm prohibitions in § 922(g), *see Tyler*, 837 F.3d at 692 ("Intermediate scrutiny is preferable in evaluating challenges to § 922(g)(4) and similar prohibitions."), as have other circuits, *see, e.g.*, *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Chester*, 628 F.3d 673, 676-78 (4th Cir. 2010); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (requiring a "substantial relationship between the restriction and an important governmental interest"). The Court should do the same here.

B. Section 922(g)(9) Easily Withstands Intermediate Scrutiny

Under intermediate scrutiny, a law must serve a "significant, substantial, or important" government interest, and there must be a "reasonable fit between the challenged regulation and the asserted objective." *Tyler*, 837 F.3d at 693 (citation omitted). "All that is required is a fit that is not necessarily perfect, but reasonable: that represents not necessarily the single best disposition but one whose scope is in

proportion to the interest served." *Id.* (citation omitted). Preventing domestic gun violence is unquestionably an important government interest, and § 922(g)(9)'s prohibition on gun possession by domestic violence misdemeanants is a reasonably proportionate response to further this interest.

As discussed in Part I, above, people who have been convicted of crimes of domestic violence pose a heightened risk to their intimate partners and to law enforcement officers, and disarming them helps to reduce the risk that they injure—or murder—either. Because 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,"[31] a previous act of domestic violence is an unusually strong indicator that an individual will abuse again. Indeed, recidivism rates have been estimated as ranging between 40-80%.[32] Further, seventy percent of women killed by their partners had been abused by that same person in the past.[33]

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[31] Lundy Bancroft, Jay G. Silverman, Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 4 (2d ed. 2012).
[32] Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here*, 20 J. Interpersonal Violence 448, 450 (2005), http://www.pineforge.com/isw6/articles/ch2stover.pdf ("recidivism rates in domestic violence cases are high with studies estimating 40% to 80% or more of repeat violence"); *see also* Julia C. Babcock, Charles Green, & Chet Robie, *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 Clinical Psychology Rev. 1023, 1039 (2004) (estimating a 35% recidivism rate based on partners' reports), http://www.researchgate.net/publication/8915306_Does_batterers%27_treatment_

Possession of firearms by domestic abusers also endangers law enforcement officers. Responding to domestic violence calls is a significant part of police officers' workload; nationwide, 15 to 40 percent of all calls for police assistance are family disturbances.[34] Research has shown that family violence calls are "the most dangerous type of call for the responding officers."[35] In a 2016 report on officers who were killed responding to a family violence call, all but one of the officers examined was killed with a firearm.[36]

The government's significant interest in protecting the public and disarming serious lawbreakers cannot be questioned. What is also unquestionable is that the government has chosen a reasonable solution to effectuate that goal by enacting § 922(g)(9). Laws that restrict abusers' access to guns save lives: they correlate with a 19% reduction of intimate partner homicides,[37] and a decrease in the risk

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work_A_metaanalytic_review_of_domestic_violence_treatment.

[33] *See* n.6, Campbell, et al., *supra*.

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

[35] Nick Breul & Mike Keith, *Deadly Call and Fatal Encounters, Analysis Of U.S. Law Enforcement Line of Duty Deaths When Officers Responded To Dispatched Calls For Service and Conducted Enforcement, 2010-2014*, at 15, http://www.nleomf.org/assets/pdfs/officer-safety/Primary-Research-Final-8-2-16.pdf

[36] *Id.*

[37] April M. Zeoli et al., *Effects of Domestic Violence Policies, Alcohol Taxes, and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 Inj. Prev. 90 (2010).

that a convicted abuser will be arrested for new firearm crimes and violent crimes.[38]

This case is unlike *Tyler*, in which this Court found the government had not proffered sufficient evidence that a person involuntarily committed decades earlier still posed a risk to the community. Here, there is ample evidence that batterers continue to pose an increased risk of harm to partners and the public after they have been convicted, and some increased risk exists even decades after conviction. In fact, the *Tyler* Court specifically compared the evidence on continued risk between previously involuntarily committed individuals and domestic violence misdemeanants, and explained that the evidence presented for the latter was sufficient to justify a lifetime ban under intermediate scrutiny. *Tyler*, 837 F.3d at 696-97.

The data on domestic violence misdemeanants "meaningfully compare[s] [their] propensity for violence with that of the general population." *Id.* at 696; *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (data shows domestic violence misdemeanants "are as dangerous as felons"). First, there is massive underreporting of abuse and under-prosecution of domestic abusers, which means that even the estimated 40% to 80% of abusers who recidivate may not end up with

[38] *See* Garen J. Wintemute, et al., *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants* 2 (2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

another domestic violence conviction.[39] Second, when they are prosecuted, domestic abusers consistently face lesser charges than non-domestic abusers: i.e., misdemeanors rather than felonies.[40] And third, while the rate of recidivism for all types of crime has been shown to decline over time, violent criminals still have slightly higher recidivism rates than individuals without criminal records even after *twenty* years have passed.[41] Should more offenders be relieved from the federal prohibition set forth in § 922(g)(9), it is reasonable to conclude that recidivism rates would increase further above that of the population that has never been arrested.[42]

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[39] Matthew R. Durose et al., Bureau of Justice Statistics, *Family Violence Statistics* (2005) (finding that 40% of family violence victimizations went unreported between 1998 and 2002, and only 36% of those that were actually reported led to an arrest), https://www.bjs.gov/content/pub/pdf/fvs02.pdf.

[40] 142 Cong. Rec. S10377, S10378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) ("[O]ne third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors").

[41] *See* Alfred Blumstein & Kiminori Nakamura, 47 Criminology 327, 341-43, fig. 4, *Redemption in the Presence of Widespread Criminal Background Checks* (May 2009), http://www.search.org/files/pdf/Redemption_Blumstein_Nakamura_2009Criminology.pdf ("aside from random fluctuations, [the recidivism risk of subject with a criminal record] comes very close to [recidivism risk of one who has never been arrested] but remains above it, even at t >20 [years].").

[42] Michael Luo, *Felons Finding it Easy to Regain Gun Rights*, The New York Times (Nov. 13, 2011), http://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html (noting that Dr. Blumstein's research on recidivism did not look at what happens if felons are given guns); *see also* Garen J. Wintemute, et al., *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants*, *supra* at 2 (finding that prohibiting violent misdemeanants from possessing firearms is associated with a decrease in the risk of arrest for new

In light of such evidence, it was permissible for Congress to decide that people who have broken the law by committing domestic violence—who some have estimated to have an up to 80% rate of recidivism, who are historically under-prosecuted and under-punished, and who pose a heightened risk of committing future crimes even decades after conviction—should no longer have the right to possess deadly firearms that could be used to kill, injure, or threaten their intimate partners, police officers, or the public. Despite Appellant's attempts to dispute some of this evidence (Appellant's Br. at 21), he fails entirely to show that it was *unreasonable* for Congress to conclude based on the available evidence that domestic abusers are dangerous and have high recidivism rates. *Tyler*, 837 F.3d at 693 ("All that is required [for intermediate scrutiny] is a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." (citation omitted)).

Nor does § 922(g)(9) overreach when defining who is prohibited from gun possession. Appellant asserts that because many domestic violence convictions are for simple assault, some unspecified number of individuals fall within § 922(g)(9) for committing mere "offensive touching." (Appellant's Br. at 19-20.) First, Appellant's position is irrelevant to his as-applied challenge because he does not

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firearm crimes and violent crimes).

claim that his own conviction was either for simple assault or offensive touching.[43] And second, Congress passed § 922(g)(9) with the understanding that "even perpetrators of severe domestic violence are often convicted 'under generally applicable assault or battery laws.'" *United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014) (quoting *United States v. Hayes*, 555 U. S. 415, 427 (2009)). Abusers who act violently over many years may be finally caught and convicted for a simple assault—and such convictions save lives by preventing further escalation. *Id.* at 1408-09 ("Domestic violence often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide").

Lastly, Appellant's argument that reckless abusers, as opposed to intentional abusers, should not be subject to the same prohibition, misses the point and applicable precedent. *See Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016) (finding that those who commit domestic violence misdemeanors with a reckless state of mind are also prohibited from gun possession because "Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—*just like those convicted of felonies*—from

[43] Appellant also fails to offer evidence of *any* domestic violence prosecution involving harmless "touching." He cites a news article about the arrest of a woman who used a water gun against her boyfriend (Appellant's Br. at 19 n.3), but fails to note that prosecutors opted not to pursue domestic violence charges against the woman. *See Domestic Battery Rap Dropped in Water Pistol Case*, The Smoking Gun (Dec. 6, 2013) http://www.thesmokinggun.com/documents/charges-dropped-against-water-gun-attacker-598732.

owning guns." (emphasis added)). Having a reckless mental state does not diminish the abuser's dangerousness to victims. Giving a reckless abuser access to a firearm, especially when recklessness involves the influence of alcohol, poses an even *greater risk* to victims of abuse.[44]

Given the overwhelming data showing that domestic violence misdemeanants are more likely to commit crimes again, and that making guns available to abusers increases the opportunity to cause serious or fatal harm to their partners, the police, and by extension the community, § 922(g)(9) is reasonable and in proportion to those interests it serves.

[44] Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership*, in *Reducing Gun Violence In America: Informing Policy With Evidence and Analysis* 68 (Daniel W. Webster & Jon S. Vernick eds., 2013) (citing Phyllis Sharps et al., *The Role of Alcohol in Intimate Partner Femicide*, 10 Am. J. of Addictions 2 (2001)). *See also* Garen J. Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States* 16, Prev. Med. (2015), http://www.calwellness.org/assets/docs/news/wintemute_alcohol_misuse.pdf. *See also* Garen J. Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, Annu. Rev. Public Health (2015), http://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-031914-122535 (alcohol and drug abuse are important predictors of future risk for violence, including using firearms against others); Hygiea Casiano et al., *Mental Disorder and Threats Made By Noninstitutionalized People with Weapons in the National Comorbidity Survey Replication*, 196 J. Nerv. Ment. Dis. 437 (2008) (substance use disorders correlate to threatening others with a firearm).

For the aforementioned reasons, the Court should affirm the District Court's judgment.

Dated: March 31, 2017

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I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29 (a)(5), because it contains 5,994 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

Dated: March 31, 2017

/s/ Julie Y. Park
Julie Y. Park

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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