No. 14-10154

IN THE

Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF EVERYTOWN FOR GUN SAFETY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety ("Everytown") is the nation's largest gun violence prevention organization, with more than three million supporters fighting for public safety measures that respect the Second Amendment and help save lives. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, which arose in the wake of the gun murders of twenty children and six adults at an elementary school in Newtown, Connecticut.

A critical part of Everytown's mission is advocating for comprehensive, consistent enforcement of existing laws designed to keep dangerous weapons out of the hands of convicted domestic abusers. It submits this *amicus* brief to demonstrate that keeping American communities safe for everyone—including victims of domestic violence and the law enforcement officers who are called upon to protect them—requires interpreting 18 U.S.C. § 922(g)(9) in accordance with its plain meaning and the clear intent of Congress to prohibit a person convicted of *any* "misdemeanor crime of domestic violence" from possessing a firearm. Everytown's research demonstrates the clear danger of guns in the hands of convicted domestic abusers and underscores why the Court should reject Petitioners'

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for Petitioners and Respondent have consented to this submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than *amicus* make any monetary contribution intended to fund the preparation or submission of this brief.

dangerous view of § 922(g)(9), which would eviscerate the federal prohibition on gun possession by domestic abusers convicted of misdemeanor offenses.

SUMMARY OF ARGUMENT

This case lies at the deadly intersection of two national epidemics: domestic violence and gun violence. American women are eleven times more likely to be shot to death than women in other developed countries.[2] A majority of those murders are committed by family members or intimate partners—who, on average, fatally shoot fifty-two women each month.[3] As this Court has observed, "[f]irearms and domestic strife are a potentially deadly combination nationwide." *United States v. Hayes*, 555 U.S. 415, 427 (2009).

The evidence demonstrating the disproportionate risk of guns in the hands of domestic abusers is tragically clear. A firearm in the home *quintuples* the risk that an individual with a history of domestic violence will subsequently murder an intimate partner.[4] The high rates of recidivism among domestic

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[2] Arkadi Gerney & Chelsea Parsons, Center for Am. Progress, *Women Under the Gun: How Gun Violence Affects Women and 4 Policy Solutions to Better Protect Them* (June 18, 2014), www.americanprogress.org/issues/guns-crime/report/2014/06/18/91998/women-under-the-gun.

[3] Everytown for Gun Safety, *Gun Violence by the Numbers*, www.everytownresearch.org/gun-violence-by-the-numbers/#DomesticViolence.

[4] A case-control study of 563 women in abusive relationships found that perpetrators' access to firearms increased the risk of homicide in abusive relationships fivefold, while victims' access to weapons did not serve as a protective measure. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1089–97 (July 2003).

abusers are well established. And when such recidivism occurs, the presence of a firearm dramatically increases the risk to the victim: domestic assaults with firearms are approximately *twelve times* more likely to end in the victim's death than assaults by knives or fists.[5]

That a prior domestic violence incident was charged as—or, frequently, pleaded down to—a misdemeanor offense does not eliminate these risks. Indeed, individuals convicted of multiple *misdemeanor* domestic violence offenses commit subsequent violent felonies with rates of recidivism comparable to those who have been convicted previously of multiple *felony* assaults.[6] Bipartisan recognition of the substantial and unique risk of misdemeanor domestic violence offenses caused Congress to enact § 922(g)(9) in 1996, making it a federal offense for any person convicted of a misdemeanor crime of domestic violence to possess a firearm. § 922(g)(9). That provision, commonly known as the Lautenberg Amendment, implements Congress's intent to close a "dangerous loophole." *See Hayes*, 555 U.S. at 426–27. Prior to § 922(g)(9)'s enactment, domestic violence misdemeanants could legally buy and possess firearms because even serious domestic violence offenses were commonly charged as, or pleaded down to, misdemeanors. *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014). The Lautenberg Amendment resulted from

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[5] *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (en banc).

[6] Washington State Institute for Public Policy, *Washington's Offender Accountability Act: Department of Corrections' Static Risk Instrument* (Mar. 2007), www.wsipp.wa.gov/ReportFile/977/Wsipp_Washingtons-Offender-Accountability-ActDepartment-of-Static-Risk-Instrument_Full-Report-Updated-October-2008.pdf.

Congress's further recognition that domestic violence often escalates over time, and that it is "only a matter of time before the violence gets out of hand, and the gun results in tragedy." 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein); *see also* 142 Cong. Rec. S10377 (daily ed. Sept. 12, 1996) (quoting Senator Kay Bailey Hutchinson's statement that the Lautenberg Amendment would keep handguns from individuals "who batter their wives or people with whom they live").

The congressional intent of the Lautenberg Amendment can be fulfilled only by a holding that § 922(g)(9) embraces misdemeanor domestic violence convictions based on a *mens rea* of recklessness. At the time the Lautenberg Amendment was enacted, misdemeanor crimes of domestic violence included offenses committed with a *mens rea* of recklessness under federal law and under the law of thirty-four States and the District of Columbia.[7] The mere fact that the substantial majority of misdemeanor domestic violence statutes extend to reckless conduct compels the conclusion that an intent to capture misdemeanor domestic violence within § 922(g)(9) is

[7] The number of jurisdictions permitting a conviction for misdemeanor assault with a *mens rea* of recklessness remains unchanged. *See* Resp. Br. at 38; App. B (collecting relevant statutes and judicial decisions). In addition, seventeen States have domestic violence assault provisions that proscribe reckless conduct either expressly or by incorporating the State's general assault and battery provision. *See* Resp. Br. at 39; App. C (collecting relevant statutes). Eight of those statutes existed at the time of § 922(g)(9)'s enactment, and nine such provisions have been enacted since 1996. *Id.*

tantamount to an intent to capture reckless misdemeanor domestic violence offenses. The law of simple assault and battery in those thirty-four States and the District of Columbia has not materially changed since 1996: a misdemeanor crime of domestic violence can still be committed with a *mens rea* of recklessness.[8]

To the extent the categorical approach applies in those thirty-five jurisdictions, the intent of the Lautenberg Amendment would be gutted. In those jurisdictions, in which nearly 60% of this country's population resides,[9] misdemeanor domestic violence offenders would escape the prohibition of § 922(g)(9) and would be free to possess firearms, *even where those offenders were convicted of intentional conduct*. The result of Petitioners' interpretation also would be unacceptable even if some of the misdemeanor domestic violence statutes in those States are amenable to a modified categorical approach. In that scenario, the substantial complexities of administering the modified categorical approach would hamstring courts' ability to properly punish firearm possession in violation of § 922(g)(9). Perhaps even more critically, those same administrative complexities would impose an unworkable burden on the National Instant Criminal Background Check System ("NICS"), which serves as the bulwark against such offenders possessing firearms in the first place. The ability of the already overburdened NICS to keep firearms out of the very hands where their lethality is so dramatically increased would be crippled by

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[8] *See* Resp. Br. at 38; App. B (collecting relevant statutes and judicial decisions).

[9] U.S. Census Bureau, *Population Estimates, State Totals: Vintage 2015* (Dec. 22, 2015), www.census.gov/popest/data/state/totals/2015.

Petitioners' interpretation. Under the modified categorical approach, NICS would be required to discern the *mens rea* of the particular defendant and its significance under the specific statute and, when the record does not permit such discernment, to allow a firearm sale to the misdemeanant to proceed.

The stakes of this decision will be measured in lives. Congress has clearly expressed its intent. This Court should honor that intent by affirming the decision below and holding that the definition of "misdemeanor crime of domestic violence" extends to crimes committed with a *mens rea* of recklessness.

ARGUMENT

Interpreting "misdemeanor crime of domestic violence" as used in § 922(g)(9) to embrace all misdemeanor convictions is compelled by the statutory text and is critical to implementing the federal Gun Control Act's purpose of reducing violent crime.[10] Carving out from the definition of "misdemeanor crime of domestic violence" any offense that can be committed with a *mens rea* of recklessness, as Petitioners advocate, would undermine Congress's federal remedy for a serious national problem. Indeed, the practical effect of adopting Petitioners' interpretation would be either to allow persons convicted of misdemeanor crimes of domestic violence to possess firearms in more than two-thirds of the States, or to render unworkable nationwide the procedures that prevent those persons from purchasing firearms. Either result would be tragic, as confirmed by recent studies and data showing that prohibiting the

[10] Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*

possession of guns by convicted domestic abusers is critical to preventing and reducing gun violence.

I. Armed Domestic Abusers Pose a Lethal Threat Nationwide.

This Court has rightly recognized the persistent and prevalent problem posed by domestic violence in this country. Just two terms ago, in *Castleman*, the Court acknowledged that there are "more than a million acts of domestic violence, and hundreds of deaths from domestic violence," every year. *Castleman*, 134 S. Ct. at 1408 (2014). Recent data from the Centers for Disease Control and Prevention shows that one-third of women in the United States experience physical violence by an intimate partner in their lifetime, and nearly one-quarter of women suffer "severe" physical violence by an intimate partner, including being punched or hit with a hard object, being choked or suffocated, or having guns or knives used on them.[11]

Individuals convicted of domestic violence offenses are dangerous both to their intimate partners and to society at large. Research shows that domestic abusers are prone to reoffend—they do so at rates as high as 30 to 40%—and that they often escalate the violence of encounters when they do. Edward Gondolf, *A 30-Month Follow-Up of Court-Referred Batterers in Four Cities*, 44 Int'l J. Offender Therapy and Comparative Criminology 111, 119 (2000). Domestic violence offenders have higher rates of domestic violence recidivism and higher rates of recidivism involving other violent crimes, including a general

[11] National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *Intimate Partner Violence in the United States—2010* (Feb. 2014), www.cdc.gov/violence prevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf.

pattern of escalating violence. *Castleman*, 134 S. Ct. at 1408.[12] Not unexpectedly, individuals with a history of committing domestic violence are more likely than other individuals to murder an intimate partner.[13]

Studies further confirm what common sense teaches. Access to guns increases the lethality of domestic violence incidents: "[p]eople with a history of committing domestic violence are more likely to subsequently murder an intimate partner" when a firearm is in the house.[14] Indeed, "[d]omestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." *Skoien*, 614 F.3d at 643.[15] Lethal

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[12] The Washington State Institute for Public Policy examined the cases of more than 155,000 people who committed a domestic violence offense in 2008 and studied the cases for a follow-up period of three years. During that three-year period, domestic violence offenders were convicted of a new domestic violence felony or misdemeanor at four times the rate of nondomestic violence offenders. Washington State Institute for Public Policy, *Recidivism Trends of Domestic Violence Offenders in Washington State* (Aug. 2013) www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf.

[13] Everytown for Gun Safety, *Guns and Violence Against Women*, www.everytownresearch.org/documents/2015/09/gun-laws-violence-women-infographic.pdf (citing Mayors Against Illegal Guns, *Felon Seeks Firearm* (2013), www.everytown.org/article/felon-seeks-firearm).

[14] *Id.*

[15] The impact of guns in domestic violence situations is not limited to homicides. In 2004, more than one-third of female domestic violence shelter residents in California reported having been threatened or harmed with a firearm. In homes that contained a gun, nearly two-thirds of the victims' intimate partners had used the firearm against the victim, usually

domestic violence and gun-related domestic violence are inextricably linked. "Over the past 25 years, more intimate partner homicides in the U.S. have been committed with guns than with all other weapons combined."[16] And a woman is *five times* more likely to be murdered if a gun is present in an abusive situation. *Id.* at 642. This Court has itself recognized these facts, acknowledging that "[d]omestic violence often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408. For all these reasons, a National Institute of Justice report for the Department of Justice conclusively determined that "[o]ne of the most crucial steps to prevent lethal [domestic] violence is to disarm abusers and keep them disarmed."[17]

If this were not enough, the danger posed by domestic violence offenders in possession of firearms is not limited to their spouses or intimate partners. Ample empirical evidence shows that individuals with a history of committing domestic violence offenses are also more likely to commit violent crimes generally. A 2007 analysis involving more than 300,000 convicts

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threatening to shoot or kill her. Susan B. Sorenson et al., *Weapons in the Lives of Battered Women*, 94 Am. J. Pub. Health 1412, 1413 (2004).

[16] Everytown for Gun Safety, *Guns and Violence Against Women*, www.everytownresearch.org/documents/2015/09/gun-laws-violence-women-infographic.pdf (citing Mayors Against Illegal Guns, *Felon Seeks Firearm* (2013), www.everytown .org/article/felon-seeks-firearm).

[17] Andrew R. Klein, National Institute of Justice, DOJ, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges* (June 2009), www.ncjrs.gov/pdffiles1/nij/225722.pdf.

showed that individuals who committed domestic violence assault were more likely to subsequently commit a violent felony.[18] Felony domestic violence offenders were more likely than any other group to commit a subsequent violent felony, and people convicted of multiple domestic violence *misdemeanors* were also prone to commit subsequent violent felonies—with rates comparable to criminals who have been convicted of multiple felony assaults.[19] Similarly, an Everytown for Gun Safety analysis of every mass shooting in the United States between January 2009 and July 2015 found that, in at least twenty-one of those 133 shootings (16%), the shooter had previously been charged with a crime of domestic violence.[20]

II. Petitioners' Interpretation of § 922(g)(9) Would Defeat the Purpose of the Lautenberg Amendment and Upend the State and Federal Regulatory Regime.

The federal Gun Control Act "long prohibited possession of a firearm by any person convicted of a felony." *Hayes*, 555 U.S. at 418. In 1994, Congress expanded the list of firearms disqualifications by adding a prohibition against the possession of a firearm by any person "who is subject to a court order that . . . restrains such person from harassing,

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[18] Washington State Institute for Public Policy, *Washington's Offender Accountability Act: Department of Corrections' Static Risk Instrument* (Mar. 2007), *supra* note 6.

[19] *Id.*

[20] Everytown for Gun Safety, *Analysis of Mass Shootings* (Aug. 20, 2015), www.everytownresearch.org/reports/mass-shootings-analysis.

stalking, or threatening an intimate partner . . . or child." 18 U.S.C. § 922(g)(8). Despite those provisions, the federal firearm ban did not adequately reach domestic abusers, in part because domestic violence offenses were either charged as, or pleaded down to, misdemeanors, allowing dangerous abusers to avoid the prohibition triggered by a felony conviction. *See Hayes*, 555 U.S. at 428 (citing 142 Cong. Rec. 22,985 (1996) (statements of Sen. Lautenberg)). In 1996, Congress sought to close that "dangerous loophole," *id.* (quoting 142 Cong. Rec. at 22,986), when it extended the gun possession prohibition to include persons "convicted of a misdemeanor crime of domestic violence," § 922(g)(9). As Senator Lautenberg explained on the Senate floor:

> Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, Mr. President, most of those who commit family violence are never even prosecuted. When they are, one-third of the cases that would be considered felonies, if committed by strangers are, instead, filed as misdemeanors. The fact is, that in many places today, domestic violence is not taken as seriously as other forms of criminal behavior. Often, acts of serious spouse abuse are not even considered felonies.

142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statements of Sen. Lautenberg). To ensure that both

problems were addressed, Congress enacted § 922(g)(9) as a broad, "zero tolerance," "no margin of error" prohibition on the possession of firearms by those with any conviction of a misdemeanor involving domestic abuse.[21] *Id.* at S8831-32. The purpose of the Lautenberg Amendment, therefore, was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife."[22] *Hayes*, 555 U.S. at 427.

"[A] misdemeanor crime of domestic violence" is defined as an offense that (1) "is a misdemeanor under Federal, State, or Tribal law," (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,"[23] and (3) is committed by a person whose relationship to the victim is defined by the statute. 18 U.S.C.

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[21] "This amendment, very simply, would establish a policy of zero tolerance when it comes to guns and domestic violence. The amendment would prohibit *any* person convicted of domestic violence from possessing a firearm. . . . There is no margin of error when it comes to domestic abuse and guns. A firearm in the hands of an abuser all too often means death. By their nature, acts of domestic violence are especially dangerous and require special attention." 142 Cong. Rec. S10377-78 (daily ed. Sept. 12, 1996) (statements of Sen. Lautenberg) (emphasis added).

[22] *See* 142 Cong. Rec. S10377 (daily ed. Sept. 12, 1996) (stating the purpose of the amendment was "[t]o prohibit persons convicted of a crime involving domestic violence from owning or possessing firearms").

[23] "[Section] 922(g)(9) is the product of a legislative compromise. The provision originally barred gun possession for any 'crime of domestic violence,' defined as any 'felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment.' Congress rewrote the provision to require the use of physical force in response to the concern 'that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors[.]" *Castleman*, 134 S. Ct. at 1415-16 (citations omitted).

§ 921(a)(33)(A). Of the three elements of the statutory definition, "*none* specifies a particular—or minimum—*mens rea*." *United States v. Booker*, 644 F.3d 12, 18 (1st Cir. 2011) (emphasis added). By not limiting application of the new firearm prohibition to statutes requiring any particular *mens rea*, Congress ensured that state charging practices and variations in state misdemeanor definitions did not impede its goal of disarming domestic abusers nationwide.

Had Congress intended to include a particular or minimum *mens rea*, it clearly knew how to do so, because it included such a requirement in the provision that directly preceded the Lautenberg Amendment. The text of what was ultimately enacted as § 922(g)(9) was passed as part of the Omnibus Consolidated Appropriations Act of 1997. *See United States v. Hartsock*, 347 F.3d 1, 4 (1st Cir. 2003). The provision enacting § 922(g)(9) is found at § 658 of that Act. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372. The provision that directly preceded it amended 18 U.S.C. § 922(q), which made it "unlawful for any individual *knowingly* to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." Pub. L. No. 104-208, § 657, 110 Stat. at 3009-370 (emphasis added). The juxtaposition of §§ 657 and 658, therefore, demonstrates that Congress could have specified a *mens rea* requirement for misdemeanor crimes of domestic violence had it wanted to. The fact that Congress chose not to is a clear signal of Congress's intent that § 922(g)(9) encompass all misdemeanor domestic violence crimes, whether inflicted intentionally or recklessly. *DePierre v. United States*, 131 S.Ct. 2225, 2234 (2011) (noting that, generally "when the legislature uses certain language in one part of the

statute and different language in another, the Court assumes different meanings were intended." (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004))).

It was the drafters' view that all convicted domestic abusers—including those who have committed misdemeanors—are dangerous. *See* 142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statements of Sen. Lautenberg) (explaining that the amendment, "[i]n simple words," says that "wife beaters and child abusers should not have guns"). To exclude convictions based on recklessness would create a hierarchy of domestic violence crimes, leaving a limited number of "misdemeanor crimes of domestic violence" as predicate acts for purposes of § 922(g)(9). That is precisely the scenario Congress sought to avoid by enacting the Lautenberg Amendment. In enacting § 922(g)(9) to "'close [a] dangerous loophole'" in federal gun laws, *Castleman*, 134 S. Ct. at 1409, Congress intended to keep guns out of the hands of *all* individuals who had been convicted of committing violence against intimate partners and other domestic relations, regardless of whether that violence was classified as a misdemeanor or a felony. And Congress wrote a law that does precisely that. This Court should decline Petitioners' invitation to rewrite our federal gun laws—and severely undermine public safety—by excluding "recklessness" crimes from § 922(g)(9)'s scope.

III. Petitioners' Interpretation of § 922(g)(9) Would Allow Domestic Violence Misdemeanants in at Least Thirty-Five Jurisdictions to Legally Possess Guns.

This Court should not exclude reckless misdemeanor crimes of domestic violence from the reach of § 922(g)(9) because doing so would be contrary to the purpose of the Lautenberg Amendment and would have significant negative consequences for public health and safety. Excluding from the definition of "misdemeanor crime of domestic violence" any offense with a *mens rea* that extends to recklessness would dramatically shrink the universe of crimes that count as predicate convictions for purposes of § 922(g)(9)—introducing a gaping loophole in the law in at least thirty-five jurisdictions and undermining Congress's decision to enact a federal solution to a national problem.

The prototypical predicate misdemeanor under § 922(g)(9) is a conviction for simple assault or battery. *See Castleman*, 134 S. Ct. at 1413. The Maine assault statutes under which Petitioners were convicted are substantively similar to the assault statutes in many other States, most of which have adopted an identical or nearly identical definition of "recklessness." If the Court adopts Petitioners' interpretation, far fewer convictions under these statutes would be predicate crimes for purposes of § 922(g)(9), and many more convicted domestic abusers would have legal access to firearms. This would be true regardless of whether those abusers were convicted based on intentional or reckless conduct.

Under Maine law, a person may be convicted of misdemeanor assault by "intentionally, knowingly *or recklessly*" causing "bodily injury or offensive physical

contact." Me. Rev. Stat. tit. 17-A, § 207 (emphasis added). That definition is similar to the Model Penal Code definition of simple assault. *See* Model Penal Code § 211.1(1)(a) (defining "simple assault" as *inter alia* "attempt[ing] to cause or purposely, knowingly *or recklessly* caus[ing] bodily injury to another") (emphasis added). It is also similar to both Federal law, which permits a misdemeanor assault conviction based on recklessness, *see* Resp. Br. at 19-20, 40-41, and to the law as it existed at the time the Lautenberg Amendment was enacted in an overwhelming majority of other jurisdictions—thirty-four States and the District of Columbia—which also permit a misdemeanor assault conviction with a *mens rea* of recklessness or its equivalent, *see* Resp. Br. App. B at 7a-19a (listing, by State, statutes that permit conviction for misdemeanor assault with a *mens rea* of recklessness or a lesser mental state).

Most of these States define "recklessness" in the same terms, or nearly the same terms, as Maine does. Under Maine law, recklessness includes acts that involve a "conscious[] disregard [of] a risk that the person's conduct will cause" such a result. Me. Rev. Stat. tit. 17-A § 35. The statute further requires that the disregard be a "gross deviation from the standard of conduct" followed by a reasonable person in that situation. *Id.* The Model Penal Code definition is essentially the same. Model Penal Code § 2.02(2)(c) (recklessness requires conscious disregard of risk that is a "gross deviation from the standard of conduct that a law-abiding person would observe"). The law of simple assault and battery in those jurisdictions has not materially changed since 1996, and today, those jurisdictions are home to nearly 190 million Americans. *See* U.S. Census Bureau, *Population*

Estimates, State Totals: Vintage 2015 (Dec. 22, 2015), www.census.gov/popest/data/state/totals/2015.

Thus, Congress's decision to include misdemeanor crimes of domestic violence within the scope of § 922(g)(9) implies the decision to include reckless conduct within its scope as well. It is presumed that Congress, when it enacts legislation, "is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *see also Cannon v. Univ. of Chic.*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."). It is untenable to conclude that Congress, in crafting a federal solution to a nationwide problem, would have enacted a statute that would be a "practical nullity," *Castleman*, 134 S. Ct. at 1418-19. Nothing in the text, history, or context suggests that Congress intended the Lautenberg Amendment to be so narrow.

Moreover, at the time that the Lautenberg Amendment was passed, one factor differentiating between misdemeanor and felony assault offenses in certain States was the *mens rea* requirement. For instance, in Maryland, in order to convict a person of felony assault, a prosecutor must prove intentional conduct, but the required showing for a misdemeanor conviction is only recklessness. *See* Md. Code Ann. Crim. Law §§ 3-202 (felony statute), 3-203(a) (misdemeanor statute); *Johnson v. State*, 115 A.3d 668, 673 (Md. Ct. Spec. App.) ("Assault is causing offensive physical contact to another person" that "was the result of an intentional or reckless act of the defendant and was not accidental.") (citations omitted), *cert. denied*, 122 A.3d 975 (Md. 2015) (Tbl.). The same is true of Ohio, where felony assault

required in 1996—as it does today—at least knowing conduct, but misdemeanor assault may be proved with evidence of recklessness. *See* Ohio Rev. Code Ann. §§ 2903.11 (A) (felony statute); § 2903.13 (A), (B) (misdemeanor statute). While *mens rea* is not necessarily the dividing line between felonies and misdemeanors, *see* Resp. Br. at 47, § 922(g)(9)'s effectiveness would be restricted by ignoring state-law distinctions like these.

Accepting Petitioners' invitation to exclude from the scope of § 922(g)(9) offenses that extend to reckless conduct would frustrate Congress's intent under either of the two prevailing approaches to determining whether a predicate conviction is a "misdemeanor crime of domestic violence." Under the so-called "categorical approach," a court "consider[s] the offense generically, that is to say, [it] must examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). Accordingly, a conviction is assumed to be based on the least severe conduct described by the statute. *Hoodho v. Holder*, 558 F.3d 184, 189 (2d Cir. 2009). Thus, if an individual is convicted under a domestic violence statute that criminalizes intentional, knowing, and reckless conduct, the offense would be deemed to rest on recklessness, regardless of the actual facts. Under Petitioners' interpretation, abusers convicted under statutes requiring application of the categorical approach would no longer be subject to § 922(g)(9). Such a result would gut the protections offered by those state statutes and allow many convicted domestic abusers—including those who engaged in knowing or intentional conduct, as well as those who engaged in reckless conduct—legal access to firearms.

The result is unacceptable even when a misdemeanor domestic violence statute may be analyzed under a modified categorical approach. A modified categorical approach can be applied only when (1) a defendant was convicted under a "divisible" statute and (2) certain categories of judicial records contain facts sufficient to identify the relevant conduct underlying the conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). A statute is divisible if the elements of a statute of conviction are stated in the alternative, such that the offense in fact "comprises multiple, alternative versions of the crime." *Id.* at 2284.[24] The "modified categorical" approach requires application of a "highly technical" framework to the facts of a case, *id.* at 2295 (Alito, J., dissenting), based on a limited and circumscribed set of documents. A court may consider certain facts underlying the prior conviction only for which there is "adequate judicial record evidence" (so-called "*Shepard*" documents) rather than just the legal definition of the offense. *Shepard v. United States*, 544 U.S. 13, 16 (2005). That approach is "not always easy to apply." *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009).

A conviction for intentional or knowing conduct under a divisible statute *could* be a § 922(g)(9) predicate under Petitioners' interpretation, but determining whether it was would require a "highly technical" analysis specific to each conviction. The States' different formulations of the *mens rea* element of their assault statutes (including common law formulations that do not use the word "reckless") do

[24] On January 19, 2016, the Court granted the petition for a writ of certiorari in *Mathis v. United States*, No. 15-6092, to resolve a circuit split over the conditions under which a statute is divisible.

not easily permit black-and-white determinations. Additionally, in many instances—as in Petitioners' cases—there will not be adequate *Shepard* documents. Thus, it will be impossible for a court to conclude that a particular conviction qualifies as a predicate offense under § 922(g)(9)—even when the conviction, in fact, involved knowing or intentional conduct. Inserting additional complexity into an already difficult analysis will increase the likelihood that individuals, who Congress intended to prohibit from possessing guns, will be legally permitted to do so.

The administrative complexities of a modified categorical approach would hamstring NICS, on which the federal government and the States rely to keep guns out of the wrong hands. Pursuant to 18 U.S.C. § 922(t)(1), any person convicted of a "misdemeanor crime of domestic violence" is prohibited from possessing firearms, and this prohibition is enforced through a NICS background check conducted by a licensed firearm dealer.[25] Whenever a NICS background check determines that transfer of a firearm to a would-be gun buyer would cause a violation of § 922(g), NICS instructs the dealer to deny the sale.[26] 18 U.S.C. § 922(g). Thus, it is crucial that

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[25] Section 922(g)(9) prohibits a person convicted of a predicate offense from possessing a firearm. But there is no federal law that requires disqualified persons to surrender their firearms to government authorities, and the relevant state laws vary significantly. *See* Everytown for Gun Safety, *Guns and Violence Against Women: America's Uniquely Lethal Domestic Violence Problem* (2014), www.everytownresearch.org/documents/2015/04/guns-and-violence-against-women.pdf.

[26] *See* Criminal Justice Information Services Division, FBI, *National Instant Criminal Background Check System* (May 2015), www.fbi.gov/about-us/cjis/nics/general-information/nics-overview-brochure. In 2014, NICS prevented more than 6,000

NICS function effectively, which in turn requires that all prohibiting records be properly reported in NICS, and that any such record in the system trigger a denial whenever a background check is run in association with an attempted gun purchase.[27] But NICS is already overwhelmed by a "perfect storm" of record gun sales and understaffing.[28] Adopting Petitioners' position would exacerbate the problem. It would require NICS to employ the "modified categorical" approach in many cases to discern the *mens rea* of the

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transactions that were prohibited by reason of a misdemeanor crime of domestic violence conviction. Criminal Justice Information Services Division, FBI, *National Instant Criminal Background Check System (NICS) Operations 2014*, 18 (2014), www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report. Since inception, federal use of NICS has prevented the purchase of guns by individuals previously convicted of a misdemeanor crime of domestic violence more than 110,000 times. *Id.* The number is significantly higher when state-level data is included as well. Between 1999 and 2010, state and local agencies denied approximately 144,000 purchase applications because of a conviction for a misdemeanor crime of domestic violence. *See* Bureau of Justice Statistics, DOJ, *Background Checks for Firearms Transfers*, *2010-Statistical Tables*, Table 2 (Feb. 2013) www.bjs.gov/content/pub/pdf/bcft10st.pdf. Currently, NICS includes at least 112,000 records for misdemeanor crimes of domestic violence. Criminal Justice Information Services Division, FBI, *National Instant Criminal Background Check System (NICS) Operations 2014*, supra note 26 at 25.

[27] *See* GAO, Gun Control Opportunities to Close Loopholes in the National Instant Criminal Background Check System, 19-22 (July 2002), www.gao.gov/assets/240/235091.pdf (describing challenges in determining whether convictions reported in NICS are prohibitive.

[28] *See* Kevin Johnson, *FBI Official: "Perfect Storm" Imperiling Gun Background Checks*, USA Today, Jan. 20, 2016, www.usatoday.com/story/news/nation/2016/01/19/fbi-guns-background-checks/78752774.

particular defendant and its significance under the specific statute. But missing details in the records of many domestic assault misdemeanor convictions will preclude NICS from determining whether a conviction qualifies as a prohibiting misdemeanor crime of domestic violence within the three-day window allowed under the background check law. And individuals Congress sought to prohibit from purchasing firearms will be permitted to do so.[29] Such a result would violate Congress's intent to establish a straightforward regime and eviscerate its "zero tolerance" policy.

Eviscerating § 922(g)(9) in thirty-five jurisdictions would be particularly unworkable in light of the national nature of the problem of illegal firearms. Guns are easily transported across State lines from States with weak gun laws into States with stronger laws.[30] In light of this reality, Congress determined

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[29] Allowing firearms sales to proceed when a background check cannot be completed within three days can have tragic results: it was because NICS agents could not be resolve his background check within the three-day window that Dylan Roof was permitted to purchase the .45-caliber handgun he allegedly used to kill nine people at an evening Bible study in downtown Charleston, South Carolina in June 2015. *Id.*

[30] Mayors Against Illegal Guns, *Trace the Guns, The Link Between Gun Laws and Interstate Gun Trafficking*, 4, 29 (Sept. 2010), http://tracetheguns.org/report.pdf (reporting that, in 2009, more than 40,000 guns used to commit a crime were purchased across state lines, disproportionately in states with relatively less restrictive gun laws); *see also* Brian Knight, *State Gun Policy and Cross-State Externalities: Evidence from Crime Gun Tracing*, at 25 (Nat'l Bureau of Econ. Research, Working Paper No. 17469, 2011), www.princeton.edu/rppe/speaker-series/speaker-series-2011-12/Knight.pdf (concluding that "trafficking flows respond to gun regulations, with guns imported from states with weak gun laws into states with strict gun laws").

that federal legislation was necessary to effectively implement gun safety laws. Congress designed § 922 to serve as a federal baseline for categorically prohibiting the most dangerous types of criminal offenders—including domestic abusers who act recklessly or plead down to crimes of recklessness—from possessing firearms. 18 U.S.C. § 922. Excluding reckless misdemeanors from the scope of § 922(g)(9) would allow many convicted domestic abusers to legally skirt this prohibition. It would also fly in the face of Congress's stated purpose in passing the Lautenberg Amendment.

CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

Respectfully submitted,

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