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Brief of the Domestic Violence Legal Empowerment and Appeals Project, Aequitas: The Prosecutors' Resource on Violence Against Women, & Futures Without Violence as Amici Curiae in Support of Respondent, Voisine v. United States, No. 14-10154 (U.S. Jan. 26, 2016).

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No. 14-10154

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, AND FUTURES WITHOUT VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project ("DV LEAP") is committed to combatting domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence, pursuing civil and criminal legal and policy reform efforts on their behalf, and filing *amicus curiae* and party briefs in appellate courts and in this Court.

AEquitas: The Prosecutors' Resource on Violence Against Women ("AEquitas") provides training, research assistance, and resources to improve the investigation and prosecution of crimes of violence against women.

Futures Without Violence ("FUTURES") provides groundbreaking programs, policies, and campaigns to empower individuals and organizations working to end violence against women and children around the world. FUTURES was a driving force behind the passage of the Violence Against Women Act of 1994.

SUMMARY OF ARGUMENT

Amici, three nationally recognized organizations providing advocacy and training, and promoting reform of the criminal and civil law pertaining to domestic violence,

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

are gravely concerned about the devastating impact Petitioners' position would have on the safety of victims of domestic abuse. Petitioners' proposed result would deeply erode the protections of the 1996 amendments to the federal Gun Control Act (the "Lautenberg Amendment"), by allowing many convicted batterers to possess firearms. *Amici* seek to make clear that (1) Petitioners' arguments as to the meaning of the Lautenberg Amendment are incorrect; (2) Petitioners' position would devastate state and federal efforts to keep guns out of the hands of batterers due to the practical realities of state prosecutions; and (3) Petitioners' argument that this Court should narrow the scope of the firearms prohibition because too many minor domestic abuse cases are prosecuted now, completely misstates reality.

First, Petitioners' depiction of how battery[2] has been prosecuted over time is distorted. The common law treatment of battery varied across states and unquestionably includes support for a recklessness *mens rea*. Moreover, both the unsettled nature of the common law's treatment of the *mens rea* for battery, and this Court's decisions in *Taylor v. United States*, 495 U.S. 575 (1990), and *Castleman v. United States*, 134 S. Ct. 1405 (2014), make clear that the common law, while an important starting place, cannot be an outer limit on the meaning of the statute's definition of a "misdemeanor crime of domestic violence" ("MCDV") in 18 U.S.C. § 922(g)(9). Rather, the legislative history indicates that MCDVs were intended to include convictions under contemporary

2. As noted by the Government, "assault" and "battery" are often "used interchangeably" in criminal law. Brief for the United States ("Gov. Br.") at 14 n. 2. *Amici* will do the same.

statutes and that reckless crimes were very much on the sponsors' minds.

Second, the practicalities of state misdemeanor prosecutions mean that the result Petitioners seek would render the Lautenberg Amendment protections largely meaningless in the numerous jurisdictions with "divisible" statutes, which permit conviction under more than one *mens rea* level, because such adjudications rarely produce documentation of the specific *mens rea* for the conviction. As a result, excluding recklessness from the MCDV definition would mean that convicted domestic violence misdemeanants in a substantial number of states would still have access to firearms, despite the Lautenberg Amendment.

Third, contrary to Petitioners' contention, reckless domestic batteries are neither "minor" nor "accidental," and removal of firearms from such perpetrators is not "unjust," but a matter of common sense. Reckless battery involves "conscious disregard" of the risk of harm, and in the domestic violence context, is only a small piece of a larger pattern of highly intentional coercive control. Moreover, many incidents that may appear "minor" in a vacuum are often immediately followed by homicide. Guns provide abusers with an effective tool for terrorizing victims and significantly increase the likelihood of fatal violence.

Finally, there is no factual basis to support Petitioners' claim that too many misdemeanor offenses are "swept" into a criminal justice system that has eliminated discretion in arrests and prosecution. Even today, only a tiny percentage of all domestic violence crimes that occur

result in conviction. Accordingly, this Court should reject Petitioners' efforts to keep guns in the hands of convicted domestic abusers and should hold that the Lautenberg Amendment's definition of an MCDV includes convictions for reckless domestic battery.

ARGUMENT

I. WHILE THE COMMON LAW IS NOT CONTROLLING, IT ALSO SUPPORTS INTERPRETING THE WORD "USE" IN THE PHRASE "USE OF PHYSICAL FORCE" TO INCLUDE A RECKLESSNESS *MENS REA*.

Relying on *Castleman,* Petitioners argue that Congress intended to incorporate "the common-law definition of battery" when adopting the phrase "use of physical force" in the definition of an MCDV and that the common law precluded battery based on recklessness as a *mens rea*. Brief for Petitioners ("Pet. Br.") at 13-17. However, Petitioners overstate the role of the common law in construing Section 922(g)(9), and they misstate the common law view of the *mens rea* for battery.

A. The Common Law Provides a Floor, but not a Ceiling in Defining a Misdemeanor Crime of Domestic Violence.

The Lautenberg Amendment bars individuals convicted of an MCDV from possessing firearms. An MCDV is defined, in pertinent part, as a "misdemeanor under Federal, State, or Tribal law" that "has, as an element, the use or attempted use of physical force…" 18 U.S.C. § 921(33)(A)(i-ii). In *Castleman,* this Court

consulted the common law to answer the question of whether an "offensive touching" battery could be classified as a "use of physical force," despite the fact that relatively little "force" was required for the crime. *Castleman,* 134 S. Ct. at 1410. Concluding that, as a historical matter, the common law's "misdemeanor-specific meaning of 'force'" for the *actus reus* of battery is "satisfied by even the slightest offensive touching," the Court held that an MCDV does indeed include an offensive touching battery. *Id*. at 1410, 1413.

In *Castleman,* the common law was used to *support* an application of the Lautenberg Amendment to a purportedly minor battery of offensive touching, not to limit its application. The Court stated that Congress "incorporated" the common law — a non-exclusive term suggesting the common law was "included" in the definition, but not implying - and certainly not holding - that if the common law fails to answer the question, or if modern state statutes and case law differ from earlier common law, contemporary usages of "misdemeanor" or "use of physical force" would necessarily be excluded from the definition of MCDVs. *See id.* at 1410.

Indeed, this Court has "declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's purpose." *Taylor*, 495 U.S. at 594-95. Here, limiting the statute as Petitioners propose would fly in the face of Congressional intent and the plain language of the statute, which expresses, without doubt, Congressional intent to treat misdemeanor convictions under state, Tribal, or federal law as the predicate offenses for the federal firearm prohibition.

In fact, the remarks of sponsors and other senators when the Lautenberg Amendment was enacted signaled concern about reckless abusive behavior that could cause death or grievous injury when guns are available. *See*, *e.g.*, 142 CONG. REC. S11872-01 (Sept. 30, 1996) (statement of Sen. Lautenberg) (describing the law's application to scenarios in which domestic arguments "get out of control," "the anger will get physical" and one partner will commit assault "almost without knowing what he is doing"); 142 CONG. REC. S10379 (Sept. 12, 1996) (statement of Sen. Feinstein) (describing concern that guns "might do . . . harm" when domestic "violence get[s] out of hand," "result[ing] in tragedy"). As these remarks illustrate, Congress was concerned not only with intentional injuries, but also with volatile situations that could spiral out of control. *See also United States v. Hayes*, 555 U.S. 415, 426-27 (2009) (the "manifest purpose" of § 922(g)(9) was to remedy the "potentially deadly combination" of "[f]irearms and domestic strife").

Congressional intent with regard to the term "use of physical force" is also clear: As Senator Lautenberg explained, that phrase was inserted in order to ensure that purely property-related crimes, such as "cutting up a credit card with a pair of scissors," would be excluded from the definition of MCDV. 142 CONG. REC. S11872-01. No reference was made to the common law meaning of the phrase "use of physical force." *Id.*

Indeed, Senator Lautenberg spoke at length about the importance of identifying predicate offenses that fit the MCDV definition, without once mentioning *mens rea*:

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, *it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law . . . I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun.* After all, for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death.

142 CONG. REC. S11872-01, (Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added). Despite this in-depth focus on how conviction records would need to be explained to identify MCDVs, neither Senator Lautenberg, nor anyone else offering remarks about the amendment, expressed any concern about identifying the *mens rea* of a predicate offense; it is therefore apparent that excluding state convictions for reckless acts was neither considered nor intended.

Thus, the most one can say about the role of the common law in interpreting the definition of an MCDV and the term "use of physical force," is that the common law provides a floor, but not a ceiling or limit on the crimes included as predicate offenses. Neither *Castleman,* the language of the statute, nor anything in the legislative

history suggests that Congress sought to *limit* the scope of application of the Lautenberg Amendment to only those crimes that were recognized at common law.

B. The Common Law is Diverse, but Supports a *Mens Rea* of Recklessness for Battery.

To whatever extent the common law informs the interpretation of "use of physical force," it provides support for including reckless crimes, although it is far from uniform.

Petitioners assert that there is a well-settled common-law definition of battery that "makes clear that the crime could be committed only with the mental state of intentional or knowing conduct." Pet. Br. at 15. However, Petitioners acknowledge that "Blackstone described battery as '[t]he least touching of another's person willfully, or in anger.'" Pet. Br. at 15-16 (quoting 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 120 (1768)). Blackstone's distinction between "willfulness" and "anger" could not be a clearer indication that something less than purpose or knowledge was contemplated. Indeed, the reference to "anger" captures the classic reckless crime, in which the perpetrator is enraged, and behaves recklessly in a manner which is dangerous, but not with a specific intent to harm. *See, e.g.,* statements of Sens. Lautenberg and Feinstein, *supra* at 7. *See also* Gov. Br. at 16-22 (citing multiple early sources).

Moreover, here is what members of Congress would have found if they had looked to neighboring states to investigate whether there was a "common law definition of battery" (Pet. Br. at 13) before enacting § 922(g)(9):

If Congress had looked nearby to Maryland, the common law of Maryland defines battery to include offensive physical contact that is the result of a reckless act. *See Nicolas v. State*, 44 A.3d 396, 406-07 (Md. 2012) (noting that statute codified the common law meaning, which included offensive physical contact that was the result of an intentional or reckless act of the defendant).

If Congress looked across the Potomac to Virginia, the common law of Virginia defines battery to include conduct "which showed a reckless and wanton disregard for human life and safety." *See Davis v. Commonwealth*, 143 S.E. 641, 643 (Va. 1928). Virginia courts also capture the Blackstone formulation, holding that a battery includes any touching "in rudeness or in anger" or "willfully or in anger." *See Lynch v. Commonwealth*, 109 S.E. 427, 428 (Va. 1921).[3]

Petitioners, in identifying some examples in which common-law battery required more than recklessness, have at most shown that the common law is varied. Pet. Br. at 15-16. But Congress could not have intended to incorporate "the well-settled" or "widely accepted" common-law definition of battery, if there is not one well-settled or widely accepted common-law definition. *See Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) ("Congress intends to incorporate the *well-settled meaning* of the common-law terms it uses") (emphasis added) (citation omitted); *Morissette v. United States*, 342 U.S.

3. See also *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. Ct. App. 2013)(allowing "a finder of fact to infer the general intent to commit a crime from reckless conduct" and applying that to statutory "simple assault").

246, 263 (1952) (allowing courts to presume that Congress knows of and adopts "widely accepted definitions" of terms of art that it uses, absent contrary direction). In the absence of a uniform common law definition, therefore, the plain meaning statutory interpretation of the Lautenberg Amendment would include any MCDV under which a defendant was convicted, with whatever *mens rea* the applicable federal, state, or Tribal statute required.

II. EXCLUDING RECKLESSNESS FROM THE DEFINITION OF AN MCDV WOULD RENDER THE LAUTENBERG AMENDMENT LARGELY INEFFECTUAL IN MANY STATES DUE TO THE PRACTICALITIES OF MISDEMEANOR ADJUDICATIONS.

Amici agree with the Government's assertion that, if reckless crimes are excluded from the definition of an MCDV, the Lautenberg Amendment would become a "dead letter" in a majority of states under an elements-based "categorical approach" to determining whether a predicate offense qualifies as an MCDV. *Hayes*, 555 U.S. at 427 (rejecting an interpretation under which § 922(g)(9) would have been a "dead letter"); Gov. Br. at 38-40. *Amici* explain herein that, due to the realities of misdemeanor prosecution, even if this Court's *modified* categorical approach is applied to states with "divisible" statutes[4] that theoretically permit courts to identify the *mens rea* under which a defendant was convicted, the result will be no different.

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4. *Amici* join the United States in recognizing that the definition of a "divisible" statute is currently in contention. Gov. Br. at 44.

A. The Application of the Modified Categorical Approach to State Assault and Battery Convictions

This Court has required a purely elements-based approach to determining whether a state conviction constitutes a predicate offense for a federal statutory crime. *Descamps v. United States*, 133 S. Ct. 2276, 2281-82 (2013). Where, however, statutes contain alternative elements by which an offense can be proven, some combinations of which will qualify as a predicate offense and others that will not (*i.e.*, "divisible" statutes), courts are permitted to look to the record to determine which elements formed the basis for conviction in a given case. *See Taylor*, 495 U.S. at 602; *Shepard v. United States*, 544 U.S. 13, 19-21 (2005); *Descamps*, 133 S. Ct. at 2281-82 (2013) (recognizing the "modified categorical approach"). Under this "modified categorical approach," it is permissible to examine certain reliable "approved documents," such as the charging instrument, plea agreement forms, the plea colloquy, jury instructions, or judgment of conviction to determine exactly which elements formed the basis for the defendant's conviction. *Shepard*, 544 U.S. at 25-26; *Descamps*, 133 S. Ct. at 2283-85.

As this Court has repeatedly observed, "perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws.'" *Castleman*, 134 S.Ct. at 1411 (quoting *Hayes*, 555 U.S. at 427). As shown in Appendices B and C of the Government's Brief, at least 16 states have assault or battery statutes that list (in the same subsection) more than one *mens rea* level including recklessness, any of which will suffice for

conviction if bodily injury results.[5] These statutes are, in principle, "divisible" under the *Descamps* framework, and theoretically permit a review of reliable "approved documents." *Shepard,* 544 U.S. at 20-21. Nevertheless, the manner in which such crimes are adjudicated—whether by guilty plea or by trial—only rarely generates documentation sufficient to identify the basis for the conviction. Where the *mens rea* cannot be determined, the conviction must be presumed to have been based on the lowest level of culpability (*i.e.*, recklessness). *See Johnson v. United States*, 559 U.S. 133, 137 (2010). Thus, however purposeful/intentional or knowing the offender's conduct may *actually* have been, the absence of a reliable means to ascertain the basis for a domestic violence conviction means the convicted offender will not be prohibited from obtaining a firearm, if convictions based on recklessness do not qualify as MCDVs. Several factors in the adjudication process contribute to this result.[6]

1. Charging

If a misdemeanor crime is the only offense charged, the charging document is likely to simply track the language of the statute. A charge for simple assault is likely to allege

5. These jurisdictions include Arizona; Colorado; Delaware; Hawaii; Kansas; Kentucky; Maine; Mississippi; Nebraska; New Jersey; Oregon; Pennsylvania; Tennessee; Texas; Vermont; Wyoming. *See* Gov. Br. at App. B and C.

6. Much of the information incorporated in Section II of this brief is based on the experience and insights of Attorney Advisor Teresa Garvey of *amicus* AEquitas, who prosecuted thousands of domestic violence crimes, the vast majority of which involved assaults, over a 22-year career as an Assistant Prosecutor in Camden County, New Jersey.

that on a particular date and time, in a specific place, the defendant "purposely, knowingly, or recklessly" inflicted bodily injury on the victim. By charging all of the possible alternatives, the prosecutor increases the likelihood that at least the minimum requisite culpability can be proven. The prosecutor has nothing to gain by charging that a defendant acted purposely if reckless conduct will suffice for a conviction. Thus, the charging document itself is unlikely, in most cases, to shed any light on the culpability element for which the defendant was convicted.

2. Guilty pleas

Tens of thousands of crimes of domestic violence—both felonies and misdemeanors—are prosecuted in the United States every year.[7] The vast majority of domestic violence crimes, like other crimes, are disposed of without trial—most often by plea agreement.[8]

A vast range of options is available to prosecutors and defense attorneys in the plea bargaining context

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7. While exact statistics for domestic violence prosecution are not available, a 2000 study of arrests in 18 states and the District of Columbia indicates there were in that year 82,056 arrests for crimes of violence, including aggravated and simple assault, in which the offender/victim relationship was spouse, parent, or son/daughter. Matthew R. Durose, *et al.*, *Family Violence Statistics*, U.S. DOJ, Bureau of Just. Stat. 1, 41 (2005), http://www.bjs.gov/content/pub/pdf/fvs.pdf.

8. *See Missouri v. Frye,* 132 S.Ct. 1399 (2012) (noting that 94% of state convictions are the result of guilty pleas). Other possible dispositions include dismissal of charges for unprovable cases or, in some instances, a deferred disposition or referral to a diversionary program.

for assaultive crimes. In addition to negotiating a recommended sentence or other disposition within the available statutory range, typically a number of different criminal charges could potentially apply to a given set of facts, each with its own range of potential sentences.[9]

When a plea offer for a felony or misdemeanor offense is extended, the prosecutor in a jurisdiction with multiple culpability elements generally has no reason to be concerned with the defendant's state of mind at the time of the offense, so long as the minimum culpability is admitted. The recommended sentence within the statutory range has probably already been agreed upon; moreover, even in the case of an "open" plea with no specific sentencing recommendation, the prosecutor is unlikely to insist upon a plea to a crime committed with a specific state of mind. There is usually no real or perceived benefit in doing so. The sentencing range is the same; the defendant's future criminal record will reflect a conviction for the same offense regardless of the defendant's state of mind. Thus, any plea agreement documents are unlikely to specify a particular culpability level.

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9. Under the Model Penal Code ("MPC"), for example, depending upon the quantum of bodily injury risked or inflicted, the defendant's state of mind, and whether or not a deadly weapon was used, assault can range from a petty misdemeanor (MPC § 250.4(4), harassment by offensive touching), to a misdemeanor (MPC § 211.1(1), simple assault), to a third-degree felony (MPC § 211.1(2)(b), aggravated assault with a deadly weapon), to a second-degree felony (MPC § 211.1(2)(a), aggravated assault by attempting to cause or causing serious bodily injury) – with associated sentences ranging from a handful of days to up to ten years. MPC §§ 6.08, 6.06(3), 6.06(2).

The plea colloquy is unlikely to be of any assistance, either, in determining what crime a defendant has admitted in his guilty plea, assuming that a transcript of the colloquy exists. Defendants are, understandably, likely to minimize their actions as the product of reckless behavior rather than admitting purposeful or knowing infliction of injury—provided the statute allows it. By permitting the defendant to "save face" in this manner, the prosecutor may be more likely to secure a satisfactory guilty plea to the misdemeanor offense, and many defendants will take advantage of the opportunity to minimize their conduct to the extent possible, consistent with their plea agreement.

The trial judge accepting a guilty plea typically has no reason to be concerned about whether a defendant admits purposely, knowingly, or recklessly inflicting injury, especially in the context of a simple assault or battery, where the range of punishment is usually limited. So long as the defendant admits guilt of the offense and at least the minimum required culpability, the judge is likely to accept the guilty plea, and the judgment of conviction will simply indicate the crime of conviction without specifying a particular level of culpability.

Whatever the evidence *might* have shown in terms of the defendant's intent to commit the crime, when a defendant pleads guilty to a simple assault or battery in any of the states with alternative levels of culpability, neither the charging document, nor the plea agreement documents, nor the plea colloquy, nor the judgment of conviction is likely to reflect anything more than recklessness.

3. Conviction after trial

Even in the trial context, regardless of whether the defendant is tried only for the misdemeanor offense or tried for a more serious felony but convicted of a misdemeanor as a lesser-included offense,[10] the same kinds of considerations will impact the availability of documents sufficient to determine the judge's or jury's findings with regard to the defendant's state of mind. There is seldom any reason for prosecutors, judges, defendants, or defense attorneys to be concerned about the nice distinctions between various levels of culpability that result in conviction for the same offense with the same range of available sentences; that lack of concern will be reflected in documents devoid of any indication of the culpability for the crime of which the defendant was convicted.

First, jury instructions for a simple assault or battery crime with alternative culpability elements will usually encompass all of the possible alternatives and are therefore unlikely to reveal whether reckless conduct, or something more, was the basis for the jury's verdict.

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10. Even when cases are prosecuted as felonies and taken to trial, misdemeanor offenses are often lesser-included crimes that the fact-finder must consider if the defendant is found not guilty of the charged greater offense. If, for example, there is reasonable doubt as to whether a victim's injury qualifies as "serious bodily injury," the fact-finder may be called upon to consider whether the defendant purposely, knowingly, or recklessly caused a lesser degree of bodily injury and should, therefore, be found guilty of simple assault rather than aggravated assault.

Second, proof problems that are common in domestic violence cases increase the likelihood of the jury returning a verdict of guilt on a lesser-included misdemeanor offense even where the defendant is being tried for a felony assault. Often the only eyewitness to a domestic violence assault is the victim, who may be reluctant to participate, fail to appear in response to subpoena, recant a prior statement, minimize the defendant's conduct, or even testify on behalf of the defendant. [11] In such cases, there is an increased likelihood that a guilty verdict (if one is returned) will be to a lesser-included offense, such as a simple assault.

Third, in bench trials, a judge rendering a verdict may issue findings of fact as part of that verdict, and those findings *might* reveal the judge's findings as to the defendant's culpability. However, it is likely that such findings will extend only to the minimum culpability necessary to support a finding of guilt, since that is the only finding the judge would be required to make for purposes of rendering the verdict.

Even under the modified categorical approach, therefore, the record is highly unlikely to disclose a basis for conviction greater than recklessness. If recklessness is excluded from the MCDV definition, the vast majority of convicted defendants in these jurisdictions would still be free to possess a firearm. This result would eviscerate the

11. Victims of domestic violence are far more likely to avoid participating in criminal trials or to recant their accusations than any other crime victims. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 768 (2005). It is estimated that victims of domestic battery recant or refuse to participate in the prosecution approximately 80-90% of the time. *Id.*

protection Congress intended to afford victims of domestic violence when it enacted the Lautenberg Amendment.

III. RECKLESSNESS IS BOTH SERIOUS AND DANGEROUS, PARTICULARLY WHEN GUNS AND/OR DOMESTIC VIOLENCE ARE INVOLVED.

A substantial portion of Petitioners' brief is devoted to suggesting that misdemeanor convictions for reckless conduct, particularly in the domestic violence context, penalize conduct that is only "accidental," "minor," and that often involves "minor harms or no harm at all." Pet. Br. at 21, 25, 32. Petitioners therefore argue that "a lifetime ban on firearm possession based on reckless conduct presents an insufficient connection between the target concern, protecting victims of domestic violence, and the remedy, disarming perpetrators of domestic violence.'" *Id.* at 34. To the contrary, copious evidence supports Congress's judgment that those who act with conscious disregard of the risk of injury to their domestic partners should not possess guns.

A. Recklessness is Widely and Authoritatively Recognized as Criminally Blameworthy and Dangerous Conduct.

Petitioners mischaracterize recklessness as "accidental" conduct, and suggest that, particularly when linked to offensive touching, such non-intentional offenses do not warrant removing a perpetrator's firearms. *Id.* at 21, 34. Their characterization of both recklessness and reckless offensive contact, however, ignores the well-settled acceptance of recklessness as a culpability standard, and erroneously suggests a legally relevant

difference between reckless battery convictions arising from offensive contact or causing injury.

Reckless conduct is far more than an accident, and in some settings – such as those involving firearms – is extremely dangerous. Both Maine's criminal statute and the Model Penal Code define recklessness as requiring that a person "consciously disregards" a risk that person's conduct will cause an unjustified result. ME. REV. STAT. 17-A § 35(3)(A) and (C).[12] *See* MPC § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk . . ."). Reckless battery, therefore, necessarily entails much more than carelessness or "accident": the perpetrator knows that his conduct imposes a substantial risk of unacceptable harm to the victim, yet consciously chooses to disregard that risk and intentionally engages in that conduct anyway.

That recklessness is a serious and credible basis for criminal culpability is underlined by the fact that the Model Penal Code, produced by the leading criminal law experts in the country after extensive deliberations,[13] specifically assigns recklessness as the minimum default

12. "A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result . . . the disregard of the risk . . . must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." ME. REV. STAT. 17-A § 35(3)(A) and (C).

13. *See* Project Life Cycle, https://www.ali.org/projects/project-life-cycle (last visited Jan. 21) (describing the "diverse group of practitioners, judges, and scholars" who are "selected for their particular knowledge and experience of the subject" who develop the American Law Institute's projects, including the Model Penal Code).

mens rea for offenses with no specified intent requirement. MPC § 2.02(3).[14] The MPC is considered a highly influential articulation of standards of criminal culpability.[15] Given the purpose of the Lautenberg Amendment – to keep guns out of the hands of domestic abusers – it is unlikely that Congress would have sought to be more restrictive than the MPC. *See* Remarks of Sens. Feinstein and Lautenberg, *supra* at 7.

Moreover, there can be no doubt that reckless conduct, particularly with guns, is extremely dangerous. For example, one caller to the National Domestic Violence Hotline reported "My abuser has played Russian Roulette with me before and has pulled the trigger." Other callers have reported that their abusers have fired a gun in the

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14. While this Court in *Elonis v. United States*, 135 S. Ct. 2001 (2015), declined to reach the question of whether the Court should likewise read recklessness into a federal threat statute, Justice Alito's concurrence made a strong case for it: "[W]hen Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed . . . There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct." *Elonis*, 135 S. Ct. at 2015 (Alito, J).

15. Richard G. Singer, *Foreward,* 19 Rutgers L. J. 519-20 (1988) ("celebrat[ing] and reflect[ing] upon one of the most historic documents in the history of the criminal law . . . the crowning achievement of the Code [is that] it has brought unity and cogency to the chaos of the common law and its development in this country."); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code,* 19 Rutgers L. Rev. 671 (1988) (echoing Herbert Packer's "accolades for the Code" because it "'restored intellectual respectability to the substantive criminal law . . .'").

house, held it up to them while arguing, and worse.[16] *See Castleman*, 134 S. Ct. at 1408-09 (noting that the presence of a gun in a home significantly increases the probability of death in incidents of domestic violence), citing Jacquelyn C. Campbell, *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT. INST OF JUST. J. 16 (2003) ("When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed").[17]

In addition, Petitioners misleadingly suggest that offensive contact, when committed recklessly, is somehow more minor or less a concern with regard to gun possession than reckless battery that causes injury.[18]

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16. "The children's father has held up the gun to my head in front of my two girl [sic] and unlocked the safety . . . When I tried to break up with him he turned the gun away from me and shot it. And the craziest thing is he was a convicted felon in [Text Removed] and they handed him his gun license right back." These examples come from survey data and call summaries compiled by the National Domestic Violence Hotline and provided by electronic mail to *amicus* DV LEAP on 1/20/2016.

17. According to the Centers for Disease Control, more female intimate partners are killed by firearms than by all other means combined. Andrew R. Klein, *Practical Implications of Current Domestic Violence Research, Part II: Prosecution*, U.S. DOJ REPORT 36 (2008), citing Leonard J. Paulkossi, *Surveillance for Homicide among Intimate Partners-United States, 1991-1998,* MORBIDITY AND MORTALITY WEEKLY SURVEILLANCE SUMMARIES 5, 1-16 (2001).

18. The question on which this Court granted *certiorari* was stated in the Petition for *Certiorari* as "Does a misdemeanor crime with the *mens rea* of recklessness qualify as a 'misdemeanor crime of domestic violence' as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?" Pet. Br. at (i). Petitioners' merits brief appears to narrow that question. Pet. Br. at 1-2 ("[t]his case presents a narrow

The distinction has no salience, however, in this context. The very nature of reckless battery entails *conscious disregard* by the perpetrator of the risk to the victim. Reckless batteries resulting in serious injury are often distinguished from reckless offensive touching solely by happenstance – nothing else. To build on the First Circuit's example, recklessly throwing a knife towards a battered spouse could result in a deep gash or could just graze the victim without causing injury. *United States v. Voisine,* 778 F.3d 176, 185 (1st Cir. 2015). Whether the conduct injures or offends, and the severity of any injury, are purely a matter of chance, beyond the abuser's control. In these circumstances, as a legal matter, the abuser's conduct and culpability for consciously placing the victim at risk of harm is identical regardless of the ultimate degree of harm. As this Court held in *Castleman*, the Lautenberg Amendment's definition of misdemeanor crimes of domestic violence encompasses both violent "severe domestic abuse" and domestic battery that involves offensive contact. 134 S. Ct. at 1413, 1415. There is neither a legal nor public policy basis to distinguish between the two for purposes of the *mens rea* question before the Court.

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question of statutory interpretation: Whether the 'use or attempted use of physical force' under 18 U.S.C. § 921(a)(33)(A) extends to merely reckless (as opposed to intentional) *offensive physical contact*") (emphasis added). As described in this Section, however, the distinction Petitioners attempt to draw is legally irrelevant and misleading.

B. Even Reckless and Seemingly Minor Domestic Violence Crimes are Often Linked to an Abuser's Intentional Coercive Control Over the Victim and to Serious Risk of Lethal Harm.

1. Reckless batteries are part of an intentional course of conduct.

Petitioners minimize reckless domestic violence crimes as "accidental," "minor" or "less serious," Pet. Br. at 24-25, 28, 32, and miss the essential defining characteristic of abusers' violence against their partners: an intentional pattern of coercive control that constantly exposes victims to danger. As this Court has recognized, domestic violence is rarely a single incident, but is typified by an ongoing pattern of abuse and a dynamic of power and control.[19] Leading researchers describe domestic battering as "a course of calculated, malevolent conduct, deployed almost exclusively by men to dominate individual women, by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation and

19. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 889-93 (1992) ("Wife-battering or abuse can take on many physical and psychological forms . . . it is common for the battering husband to also abuse the children in an attempt to coerce the wife.... Many [women] may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends"). *See also Castleman,* 134 S. Ct. at 1411 ("'Domestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context. *See* Brief for National Network to End Domestic Violence, *et al.* as *Amici Curiae* 4–9.").

control."[20] In most domestic violence, the "batterer's quest for control of the woman [lies] at the heart of the battering process."[21] Guns are frequently used in furtherance of this process. In a survey of 417 women in 67 battered women's shelters in California, for example, 65% of women who lived in homes with guns before seeking shelter reported that their abuser had used a gun to scare, threaten or harm them.[22] *See generally*, Brief of Domestic Violence Hotline, *et al.*

Thus, even when a particular charged crime involves a *mens rea* of recklessness and an *actus reus* of offensive contact, the individual crime charged is typically only one part of a larger pattern of intentional, malevolent, and purposeful conduct. *Castleman*, 134 S. Ct. at 1412 ("the accumulation of such [minor] acts over time can subject one intimate partner to the other's control"). It is therefore not at all out of proportion for Congress to remove guns from those convicted of misdemeanor crimes of domestic violence with a recklessness *mens rea*.

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20. Evan Stark, Coercive Control: How Men Entrap Women in Personal Life 5 (2007). *See also* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 Northwestern J. of Crim. Law & Criminology 959, 962-963 (2003-2004) ("Outside the criminal law context, domestic violence is widely understood as an ongoing pattern of behavior defined by both physical and non-physical manifestations of power. This is a remarkably uncontroversial proposition. For women whose lives it describes, the oft-described 'power and control' dynamic is ubiquitous. . . .").

21. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 5 (1991).

22. Susan B. Sorenson & Douglass J. Wiebe, *Weapons in the Lives of Battered Women*. 94 Am. J. of Pub. Health 1412-17 (2004).

2. Seemingly minor acts can be injurious, terrifying, and harbingers of homicide.

Moreover, even individual reckless acts that may appear "minor" often entail risk of serious harm or compound victims' terror. For instance, *Amici* have handled cases in which (i) an abuser recklessly hurled a jar in the direction of his partner, missing her but almost hitting her baby; (ii) the abuser angrily slammed the door on his partner who was trying to leave, crushing her fingers; and (iii) an abuser threw a plate of hot food at his partner, leaving her uninjured but with food dripping from her face and hair. Regardless of whether severe, minor, or no injury results, such conduct displays a volatility that terrorizes and controls the victim. This is so regardless of whether the act itself was intended to injure the victim or just to express the perpetrator's rage – and regardless of whether injury or only "offensive touching" results. In short, criminalizing possession of firearms based on "minor acts" such as this is not excessive in relation to either the risks posed by the conduct or its over-arching intent, regardless of whether the particular act was intentionally or recklessly committed and of the severity of the resulting contact.

Indeed, seemingly "minor" acts of domestic violence are sometimes only minutes away from homicide. For example, in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), the police ignored a mother's repeated pleas to arrest her estranged husband for violating her protection order when he took the children without permission; the father then murdered the children. *Id.* at 751-754. *See also Campbell v. Campbell,* 682 A.2d 272, 273 (N.J. Sup. Ct. 1996) (after police failed to arrest

respondent who violated stay-away provision and merely escorted him from the premises, he returned and shot the victim); *Mastroianni v. County of Suffolk,* 91 N.Y.2d 198, 201-02 (N.Y. 1997) (victim stabbed to death after police failed to arrest husband—despite knowing he was visiting neighbors next door—after he violated order by entering her home and removing her furniture). This Court has recognized that even a minor domestic violence misdemeanor conviction can be a red flag for potentially lethal violence. *Castleman,* 134 S. Ct. at 1408-09. *See also* Jacquelyn C. Campbell, *Danger Assessment*, https://www.dangerassessment.org/DA.aspx (empirically supported instrument includes slapping, hitting, and minimally violent behaviors, in assessing risks of lethality).

For all these reasons, a leading expert in domestic violence and criminal justice states that "[o]ne of the most crucial steps to prevent lethal violence is to disarm abusers and keep them disarmed. . . [pursuant to] 18 U.S.C. Sec. 922(g)(9)." Andrew R. Klein, *Practice Implications of Current Domestic Violence Research,* 37 (2008).

Petitioners' attempt to cast doubt on the fact that "[d]omestic violence often escalates in severity over time," as this Court recognized in *Castleman,* 134 S. Ct. at 1408, must fail. *See* Pet. Br. at 28 n. 10 ("the available data suggest that the notion that domestic disputes are repeated and *necessarily* evolve into ongoing violence . . . is inconclusive") (emphasis added). Petitioners' sole support for this argument is a questionable interpretation of a single study, which does not support their assertion. [23] Moreover, one need not meet Petitioners' straw man

23. Petitioners cite for this proposition, Christopher D. Maxwell, *et al.*, U.S. Dep't of Justice, *The Effects of Arrest on*

of 100% consistency to know that as a general matter, domestic violence does indeed almost always repeat, and very often escalates. *See e.g.,* Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263, 291 (1987). In fact, specialists in risk assessment agree that both a history of misdemeanor-level violence and coercive control are among the primary red flags for potential homicide. *See* Gavin de Becker, The Gift of Fear 183 (1997) (cataloging, among other indicators of domestic violence homicide risk, acts of coercive control such as resolving conflict with intimidation, bullying and violence; breaking or striking things in anger, and a history of police encounters for behavioral offenses, such as threats, stalking, assault and battery).[24]

Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program, U.S. DOJ, Nat'l Inst. of Just. 1-15 (2001). Counter to their depiction, the Maxwell study found, among other things, that "[a]rrest is associated with less repeat offending. . ." and that reports from victims showed greater recidivism than arrest rates alone. *Id.* at 2. Given the extremely short follow-up period of six months, *id.* at 3, this study's recidivism findings are of limited significance for purposes of this case. *See* text, *infra.*

24. "Women's risk of homicide (femicide) increased for women who separated from their abusers after living together, particularly when the abuser was highly controlling." Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 Fam. Ct. Rev. 556 (2010) (citing Jacquelyn C. Campbell, *et al.*, *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study,* 93 Am. J. of Public Health, 1089-1097 (2003)); Campbell, *Assessing Risk Factors*, *supra*, at 14-19.

A comprehensive overview of empirical research on domestic violence and recidivism confirms that most individuals arrested for domestic violence have criminal records (not necessarily for domestic violence crimes),[25] and that "a hard core of a third of abusers will re-abuse in the short run and more will re-abuse in the longer run."[26] Studies have found that the rate of re-abuse during follow-up periods of four months to two years ranged from 24% to 60%.[27] Moreover, "[r]e-abuse has been found to be substantially higher in longer term studies."[28] Two found abuse re-arrest or protection order violation rates of almost 60% over five and ten years.[29] Of particular importance here, among the factors predictive of repeat abuse and of lethality, a key factor is the presence of firearms in the household.[30]

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25. Rodney Kingsworth, *Intimate Partner Violence: Predictors of Recidivism in a Sample of Arrestees*, 12 VIOLENCE AGAINST WOMEN 917-935 (2006) (finding that an offender's prior arrest for any offense predicted re-arrest for intimate violence within an 18-month follow-up period).

26. Klein, *Practical Implications, supra*, at 26.

27. *Id.* at 26, n. 121.

28. *Id.* at 27.

29. *Id.* at 27 (citations omitted). Notably, the research also confirms that re-arrest is not a complete measure of recidivism, because so much ongoing abuse is either not reported or not subjected to arrest. Richard B. Felson, Jeffrey M. Ackerman, & Catherine Gallagher, *Police Intervention and the Repeat of Domestic Assault,* U.S. DOJ, NAT'L INST. OF JUST. (2005)(finding that only half of subsequent assaults were reported to police).

30. Campbell, *et al.*, *Risk Factors for Femicide*, *supra*, *at* 1089, 1097; Campbell, *Assessing Risk Factors*, *supra*, at 14-19.

In short, the evidence shows that domestic violence incidents need not involve specific intent nor constitute major violence in order to be predictive of future risk, and that guns place victims of domestic violence at significantly greater risk. Against this backdrop, the government's compelling interest in removing guns from those convicted of misdemeanor crimes of domestic violence, whether involving actual injury or offensive contact, cannot be gainsaid.

IV. MANDATORY ARREST AND NO-DROP PROSECUTION POLICIES NEITHER REMOVE DISCRETION NOR RESULT IN OVER-PROSECUTION OF DOMESTIC VIOLENCE.

Petitioners claim that, due to mandatory arrest laws and no-drop prosecution policies, many undeserving domestic violence misdemeanors are "swept" into the criminal justice system. Pet. Br. at 10, 26, 27. They assert that such policies mean that "police and prosecutors do not have the discretion to forego arrest and prosecution in cases where the conduct is minor or unclear." *Id.* at 27 (citation omitted). This is entirely incorrect.

First, the purpose of mandatory arrest laws and no-drop prosecution policies is not to treat domestic violence more seriously than other crimes; it is to correct for past practices of refusing to treat domestic violence as a crime at all.[31] Mandatory arrest laws and prosecution

31. Prior to the late 1980s, police often avoided responding to domestic violence calls and refused to make arrests. *See* Chief William L. Hart, *et al.*, *U.S. Attorney General's Task Force on Family Violence*, FINAL REPORT 16-18 (1984), http://babel.hathitrust.org/cgi/pt?id=umn.31951d00277593j;view=1up;seq=3; Joan Zorza,

no-drop policies were correctives to widespread exercises of discretion to refuse to arrest or prosecute for domestic assaults. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 46, 48 (1992) (describing police departments with a "clear non-arrest policy").

Petitioners greatly overstate the effect of these reform policies, however. Mandatory arrest laws and no-drop prosecution policies do not, and cannot, eliminate police or prosecutor discretion. Mandatory arrest means only that police may no longer refuse to arrest *when there is probable cause to believe a crime has been committed. See* Zorza, *supra*, at 63, 64. Police must still assess the facts and determine if probable cause has been met; if it has, under mandatory arrest laws they are simply required to treat domestic violence no differently than any other crime. *See Town of Castle Rock,* 545 U.S. at 760 ("We do not believe that these provisions of Colorado [mandatory arrest] law truly made enforcement of restraining orders mandatory. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes").

The Criminal Law of Misdemeanor Domestic Violence, 1970-1990, 83 J. OF CRIM. L. & CRIMINOLOGY 16-18 (1992); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996). Studies conducted in the 1980s and 1990s found that arrests occurred in only 3% to 14% of all intimate partner cases to which officers actually responded. Eve S. Buzawa & Carl G. Buzawa, *Introduction*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE (1992) at vii, xvi. Similarly, prosecutors historically resisted prosecuting abuse, downgraded severe violence to misdemeanor charges, and dropped cases when victims expressed any ambivalence. *See* Zorza, *supra;* U.S. Attorney General's Task Force Final Report (1984), *supra*.

It is thus not surprising that, at best, mandatory arrest laws have resulted in arrest rates of approximately 50%,[32] a figure that should be taken in the context of the likelihood that official rates may not account for additional cases that are screened out "based on departmental priorities [even] before they are recorded as domestic or an officer is dispatched."[33] And despite the significant and valuable changes that mandatory arrest has brought to police practice, police response to domestic violence continues, in some quarters, to be deeply inadequate. *See* Barbara Hart, *Policing Domestic Violence,* 21 Nat'l Bulletin on Domestic Violence Prevention, 1 (2015) ("Much has changed in 40 years. Much has not.") (describing two 2015 national surveys of domestic violence victims that reported widespread police hostility toward victims, refusal to believe reports of abuse, minimizing the risks, and other biases).

Similarly, no-drop policies were adopted in many prosecutors' offices, not to prioritize domestic violence prosecutions over other crimes, but rather to overcome prosecutorial ambivalence and resistance to going forward with these often difficult cases.[34] These policies are also

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32. David Hirschel, *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rate*s (2008), retrieved at https://www.ncjrs.gov/pdffiles1/nij/222679.pdf. This report analyzed data from the National Incident-Based Reporting System in multiple jurisdictions in 2000. Among other things, it found that despite mandatory arrest policies, dual arrest remains quite low (about 2%). *Id.* at § 1.

33. Stark, *supra* at 62 (describing this practice as a "problem with accurately measuring attrition" [i.e., rates of police response]).

34. As one prosecutor stated: "When I look back at how it used to be with battered women, I can see that it was a self-fulfilling

necessary in order to remove the burden on victims of "choosing" whether to go forward or not – a practice that subjects victims to perpetrators' coercion to drop or recant the charges. *See* Hanna, *supra.*

In fact, the picture today is of prosecution policies and practices that run the gamut across the country, from minimal prosecution to quite effective no-drop policies. A review of 120 studies from over 170 mostly urban jurisdictions in 44 states and the District of Columbia of intimate partner prosecutions between 1973 and 2006 found a range of prosecution rates from 4.6% of arrests in Milwaukee in 1988-89 to 94% of arrests in Cincinnati, Ohio in 1993-96. Klein, *Practical Implications, supra,* at 41.

Even at their most rigorous, no-drop policies do not and cannot prevent prosecutors from (i) choosing not to file charges in the first instance, and (ii) dismissing cases when they deem the evidence insufficient to go forward. [35]

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prophesy. We'd file if she really wanted us to, but we knew that she'd want us to drop charges later . . . we may have even told her so. Then we sent her back home, often back to her abuser, without any support or protection at all. Sure enough, she wouldn't follow through and we'd think, 'It's always the same with these cases.'" Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* Nat'l Inst. of Just. 55 (1986).

35. Barbara E. Smith, Robert Davis, Laura B. Nickles & Heather Davies, *An Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict,* Final Report vii (2001) ("no-drop is more a philosophy than a strict policy of prosecuting domestic violence cases. None of the prosecutors pursued every case they filed. Prosecutors were rational decision-makers who were most likely to proceed without the victim's cooperation if they had a strong case based on other evidence.").

Petitioners' reliance on a Bureau of Justice Statistics study to suggest domestic violence is being prosecuted even more than other crimes overstates what the study was able to examine. Pet. Br. at 27, citing Erica Smith, e*t al.*, *State Court Processing of Domestic Violence Cases,* DOJ, Bureau of Just. Stat. (2008) ("Smith"). That study actually measured only prosecutions that moved forward *after cases were filed* by prosecutors. Those cases which prosecutors screened out and declined to charge altogether "could not be included in the calculation of the prosecution rate because that information was not collected in the 15-county study." Smith, at 7. In fact, the follow up report on the same data states that 21-49% of cases were dismissed by prosecutors after initial charges were filed. Erica L. Smith & Donald J. Farole, *Profile of Intimate Partner Violence Cases in Large Urban Counties,* U.S. DOJ, Bureau of Just. Stat. (2009) (Table 17).

The bottom line continues to be that only a fraction of domestic violence incidents result in arrest, and far fewer result in prosecution, let alone conviction.[36] Petitioners' hyperbolic claims about mandatory arrest laws and no-drop prosecution policies sweeping many cases of questionable, minor or innocent conduct into the criminal justice system, let alone going to conviction, are thus demonstrably false. Therefore, Petitioners' claim that applying the Lautenberg Amendment to reckless batteries will deprive many innocent or fundamentally benign individuals of their guns is, quite simply, fiction. *See Castleman*, 134 S. Ct. at 1412 ("If a seemingly minor act like this draws the attention of authorities and leads

36. Stark, *supra* at 62-63; Smith & Farole, *supra* (percentages of filed charges that went to conviction ranged from 17% to 89% across 16 jurisdictions).

to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence'").

CONCLUSION

For all of the reasons described in this brief, *Amici* respectfully submit that this Court should affirm the decision of the First Circuit upholding Petitioners' convictions on the grounds that the Lautenberg Amendment's definition of a misdemeanor crime of domestic violence includes convictions for reckless battery.

Respectfully submitted,

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