

No. 99-10331

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IN THE  
**United States Court of Appeals For  
The Fifth Circuit**

UNITED STATES OF AMERICA  
Plaintiff-Appellant,

v.

TIMOTHY JOE EMERSON,  
Defendant-Appellee.

On Appeal from the United States District Court  
for the Northern District of Texas, San Angelo Division

BRIEF AMICI CURIAE OF THE INDEPENDENT WOMEN'S  
FORUM AND DOCTORS FOR RESPONSIBLE GUN OWNERSHIP

IN SUPPORT OF DEFENDANT-APPELLEE TIMOTHY JOE  
EMERSON

FOR AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26 and 29(c) and 5th Cir. R. 26.1, 28.2.1, and 29.2, the undersigned counsel of record for amici curiae Independent Women’s Forum and Doctors for Responsible Gun Ownership, in *United States v. Emerson*, No. 99-10331, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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United States of America

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The Independent Women’s Forum (“IWF”) is a nonprofit educational organization, incorporated under Virginia’s Nonstock Corporations Act on November 12, 1992. The Internal Revenue Service recognizes IWF as a Section 501(c)(3) tax-exempt organization. IWF has no parent corporations.

Doctors for Responsible Gun Ownership (“DRGO”) is a project of The Claremont Institute launched in late 1994. Since its beginning, DRGO’s mission has been to support the lawful ownership and prudent use of firearms for any legitimate purpose. The Claremont Institute is a non-profit

corporation, based in Claremont, California, that engages Americans in an informed discussion of the principles and policies necessary to rebuild the Nation's civic institutions. The Internal Revenue Service recognizes The Claremont Institute as a Section 501(c)(3) tax-exempt organization.

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### OTHER AUTHORITIES

Randy E. Barnett and Don B. Kates, “Under Fire: The New Consensus on the Second Amendment,” 45 <i>Emory L. J.</i> 1139, 1234 (1996).....	28
1 William Blackstone, <i>Commentaries</i> , *144 .....	28
Brief for Amici Curiae, National Network to End Domestic Violence, et al. ....	30
Delbert S. Elliott, “Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention,” 69 <i>U. Colo. L. Rev.</i> 1081 (1998).....	30
R. Burri Flowers, “The Problems of Domestic Violence is Widespread” in <i>Domestic Violence</i> 10 (Karin L. Swisher ed., 1996).....	28
Dave Grossman, <i>On Killing</i> (1996) .....	28
Ted Robert Gurr, ed. 1 <i>Violence In America</i> (1989).....	30
Don B. Kates, Henry E. Schaffer, et al., “Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda”, 62 <i>Tenn. L. Rev.</i> 513 (1995).....	30
Don B. Kates, “The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime”, 18 <i>Am. J. of Crim. L.</i> 113 (1991).....	30

Arthur Kellermann, et al., “Gun Ownership as a Risk Factor for Homicide in the Home”, 329 <i>New Eng. J. Med.</i> 1084 (1993).....	29
David Kennedy & Anthony Braga, “Homicide in Minneapolis: Research for Problem Solving”, 2 <i>Homicide Stud.</i> 263 (1998) .....	30
Martin Killias, “Gun ownership and violent crime: The Swiss Experience in International Perspective.”, 1 <i>Security Journal</i> 169 (1990)` .....	29
Gary Kleck, <i>Point Blank: Guns And Violence In America</i> (1991).....	20, 30
Gary Kleck, <i>Targeting Guns: Firearms And Their Control</i> (1997).....	29, 30
Gary Kleck and Marc Gertz, “Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun”, 86 <i>J. of Crim. L. &amp; Criminol.</i> 150 (1995) .....	30
Gary Kleck, “Crime Control Through the Private Use of Armed Force”, 35 <i>Soc. Probs.</i> 1 (1988).....	30
Gary Kleck, “Policy Lessons from Recent Gun Control Research”, 49 <i>Law &amp; Contemp. Probs</i> , 35 (1986) .....	26
David B. Kopel, <i>The Samurai, the Mountie, and the Cowboy</i> (Prometheus Books 1992).....	29
John Lott and David Mustard, “Crime, Deterrence, and Right-to-Carry Concealed Handguns Laws” 26 <i>J. Of Legal Stud.</i> 1 (1997).....	31
John Lott, <i>More Guns, Less Crime</i> (Univ. of Chicago Press 1998) 12, 15, 16, 17, 27, 28 .....	13, 22, 28, 29, 31



- Thomas B. Marvell & Carlisle E. Moody, “The Impact of High Out-of-State Prison Population on State Homicide Rates,” 36 *Criminology* 513 (1998).....30
- Massachusetts Att’y Gen’l Off., “Report On Domestic Violence: A Commitment To Action”, 28 *New Eng. L. Rev.* 313, 334 (1993).....27
- William Meyerhofer, “Statutory Restrictions on Weapons Possession: Must the Right to Self-Defense Fall Victim”, 1996 *Ann. Surv. Am. L.* 219 (1996).....28
- Nancy Nordell, “When Restraining Orders Don’t Work”, *Women and Guns*, (Nov./dec. 1998)(reprinted at the Second Amendment Foundation’s website <http://www.saf.org/pub/rkba/women-guns/wg981112nn.html>). .....26
- Note, “Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not”, 67 *Indiana L.J.* 1039 (1992).....27
- Daniel D. Polsby, “Firearms Costs, Firearms Benefits and the Limits of Knowledge,” 86 *J. Crim. L. & Criminal.* 207 (1995).....30
- Michael Rand, *Criminal Victimization 1997: Changes 1996-97 With Trends 1993-97* (1998).....28
- Joseph Sheley & James D. Wright, *In The Line Of Fire: Youth, Guns And Violence In Urban America* 63 (1995).....31
- Mary Zeiss Stange, “Arms and the Woman: A Feminist Reappraisal” in *Guns - Who Should Have Them* (David Kopel ed. 1995).....29

Murray A. Straus & Richard J. Gelles, <i>Physical Violence in American Families: Risk Factors and Adaptations to Violence in American Families</i> , (Transaction Publishers 1990).....	27
Hans Toch & Alan Lizotte, “Research and Policy: The Case of Gun Control”, <i>Psychology And Social Policy</i> , 232 (Peter Sutfield and Philip Tetlock eds. 1992) .....	30
United States Bureau of Justice Statistics, <i>Sourcebook Of Criminal Justice Statistics - 1989</i> (1989).....	30
United States Department of Justice, United States Bureau of Justice Statistics, <i>Criminal Victimization in the United States – 1991</i> (1993) .....	28
United States Department of Justice, Bureau of Justice Statistics, <i>Selected Findings - Violence Between Intimates</i> (1994).....	26
United States Department of Justice, United States Bureau of Justice Statistics, <i>National Crime Victimization Survey</i> (1994).....	28
United States Department of Justice, <i>Research in Brief - Guns in America: National Survey on Private Ownership and Use of Firearms</i> (1995) .....	29
United States Federal Bureau of Investigation, United States Dep’t of Justice, <i>Uniform Crime Reports for the United States 1997</i> (1998) .....	28
United States Department of Justice, United States Bureau of Justice Statistics, <i>Violence by Intimates</i> (1998).....	12, 28, 29

United States Department of Justice, United States Bureau of Justice Statistics, <i>Sourcebook Of Criminal Justice Statistics - 1989</i> (1989).....	30
M. Wilt, et al., <i>Domestic Violence and Police: Studies in Detroit and Kansas City</i> (1977).....	26
Marvin E. Wolfgang, “A Tribute to a View I Have Opposed”, 86 <i>J. Crim. L. &amp; Criminol.</i> 188 (1995) .....	30
James D. Wright & Peter Rossi, <i>Armed And Considered Dangerous: A Survey Of Felons And Their Firearms</i> .....	31
James D. Wright, Peter Rossi, and Kathleen Daly, <i>Under the Gun: Weapons, Crime and Violence in America</i> (Aldine 1983)).....	26
Cathy Young, Hitting Below the Belt”, on the Salon website, <a href="http://www.salon.com/mwt/feature/199/10/25/restraining_orders/print.html">http://www.salon.com/mwt/feature/199/10/25/restraining_orders/print.html</a> .....	26, 27



## **STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

Pursuant to the authority of Fed. R. App. P. 29, counsel for amici submit this Brief Amici Curiae in support of the Appellee Timothy Emerson. Consistent with Fed. R.App. P. 29, all parties have given their consent to the filing of this brief.

### **Independent Women's Forum**

The purpose of the Independent Women's Forum ("IWF") is to promote the development of women and foster public education on issues and policies concerning individual responsibility, limited government and economic opportunity. IWF is national in scope and includes members and supporters in Texas and throughout the jurisdiction of the United States Court of Appeals for the Fifth Circuit.

IWF fosters public education and debate about legal, social and economic policies, particularly those affecting women and families. IWF conducts a monthly speakers series in Washington, D.C., as well as occasional debates and conferences in Washington, D.C., and elsewhere. These events frequently are broadcast on television.

IWF also publishes a magazine, *The Women's Quarterly*, and a newsletter, *Ex Femina*, which provide fora for a thoughtful writings by and about women. IWF also has published two books, the *Media Directory of Women Experts* (1995), and *Women's Figures: An Illustrated Guide to the Economic Progress of American Women* (co-published with American Enterprise Institute, 1999). IWF also provides legislative analyses to Congressional committees and offices. Further, IWF

representatives often have published articles in major newspapers and magazines on matters of concern to the organization.

Among its projects, IWF has filed briefs amicus curiae in several cases, including *United States v. Virginia* (the Virginia Military Institute case), *Cohen v. Brown* (Title IX sports funding), *C.K. v. Shalala* (New Jersey welfare family caps), *Brzonkala v. Virginia Polytechnic Institute* (constitutionality of “gender crime” provisions of Violence Against Women Act), and *Coalition for Economic Equity v. Wilson* (California Civil Rights Initiative).

In the instant case, IWF believes that 18 U.S.C. § 922(g)(8), far from protecting women, children, and men in abusive relationships from domestic violence, places them at greater risk of death or serious bodily injury. Therefore, IWF supports the findings of the District Court that Section 922(g)(8) is unconstitutional.

### **Doctors for Responsible Gun Ownership**

Doctors for Responsible Gun Ownership (“DRGO”) is a project of The Claremont Institute launched in late 1994. Since its beginning, DRGO has become a nationwide network of over 1,100 physicians and other health professionals, and includes members and supporters in Texas and throughout the jurisdiction of the United States Court of Appeals for the Fifth Circuit. DRGO’s mission is to support the lawful ownership and prudent use of firearms for any legitimate purpose.

DRGO was formed to address the advocacy against lawful firearm ownership waged by social activists in the medical and public health fields. These activists have used their authority to misrepresent firearm ownership as a disease. Their treatment for this new “disease” is to ban

firearm ownership by regular citizens; a false solution starkly opposed to the American Founders' vision of freedom and responsibility.

The interest of Doctors for Responsible Gun Ownership in this case is to affirm the now well-documented social utility of firearm ownership by citizens and to show the false promise of the public health doctrine condemning firearm ownership.

### **SUMMARY OF ARGUMENT**

18 U.S.C. §922(g)(8) deprives individual citizens who are likely to be victims of violence by intimate partners of the means for self defense. The statute infringes upon the Second Amendment right to bear arms and upon the fundamental right to self defense. The domestic and family law proceedings and orders that trigger application of 18 U.S.C. §922(g)(8) are vulnerable to fraud and sanction of innocent and vulnerable men and women.

Many tens of millions of Americans, including increasing numbers of women, rely upon firearms for self defense and for the defense of others. Self defense is a venerable, unenumerated, fundamental right, no less so than any other unenumerated, fundamental right, and is recognized by the United States Court of Appeals for the Fifth Circuit and by the state courts within the Fifth Circuit. Overwhelming criminological evidence demonstrates that a firearm is an effective means of defending oneself or others from crimes of violence, including domestic violence.

## **I. 18 U.S.C. § 922(g)(8) IS DANGEROUS TO VICTIMS OF DOMESTIC VIOLENCE AND DEPRIVES THEM OF CONSTITUTIONAL AND FUNDAMENTAL RIGHTS**

The intent of 18 U.S.C. § 922(g)(8) was to address the problem of death or serious bodily injury of battered persons, often wives, ex-wives, and girlfriends, by decreeing that their intimate partners,<sup>1</sup> when subject to a state court-issued domestic protective order, and who possess a firearm, are federal felons. The statute is fundamentally flawed for two reasons: 1) it ignores the true nature of the abuser; and 2) it deprives the battered woman of a very effective means of defending herself from death or serious bodily injury.

### **A. Characteristics of the typical domestic abuser.**

The typical domestic abuser is not a typical American. First, the typical domestic abuser is familiar with the criminal justice system. Over 70% of abusers have had a previous arrest, and approximately 50% have had a conviction.<sup>2</sup>

Second, the local police are familiar with the typical domestic abuser. For instance, a 1977 study of domestic homicides in the Kansas City, Missouri area revealed that the police had been called previously to stop the violence in 85% of the cases.<sup>3</sup> In half of the cases, the police had been called five or more times.<sup>4</sup>

There is no reason to believe that a confirmed, repeat abuser of this sort would be deterred significantly by the issuance of a restraining or protective order, or (more to the point) by the consequences of violating 18 U.S.C. § 922(g)(8). Indeed, the odds are high that the abuser is already a criminal unlikely to be deterred by a statute dependent upon state court orders that the abuser has



already ignored. If such an abuser ignores the protective order, the victim will have little recourse but to rely on self defense.<sup>5</sup>

**B. The reality of domestic violence and restraining/protective orders.**

Ideally, only a true victim of domestic violence moves for a protective order. In a perfect world, a court issues an order only upon a showing that sufficient cause exists for a restraining or protective order. In such a world, the order applies only to the true abuser, and the abuser complies with the restraining order and 18 U.S.C. § 922(g)(8), staying away from the victim and divesting him or herself, and not acquiring, any firearms. But the gulf between the ideal and real is significant.

First, it is not always the case that restraining orders are issued upon proof of actual or imminent physical harm. Either or both partners, in divorce or child custody situations, may seek to obtain protective or restraining orders as a legal tactic unrelated to abuse.<sup>6</sup> Indeed, it has been estimated that upwards of 40% to 50% of all restraining orders are obtained under false pretenses.<sup>7</sup>

Second, courts are likely to give little, if any, thought to the facts or the proper standard to apply when issuing restraining or protective orders. In part, this is because there is a lack of clarity about what constitutes “domestic” or “family abuse.”<sup>8</sup> Also, the court may fail to apply properly the standard set forth in the applicable statute,<sup>9</sup> as apparently happens frequently in Massachusetts, for example.<sup>10</sup>

Once a domestic restraining or protective order is entered, the person against whom it is entered is an instant felon under Section 922(g)(8), if he or she possesses a firearm. Further the statute does not provide any means

for a person subject to a restraining order to lawfully dispose of his or her firearm. Doubtless, the very act of disposal would be a criminal act. These realities—lack of clarity about what constitutes domestic violence, and judicial failures to apply the proper standard, and the common practice of seeking a protective order for purely “tactical” reasons—hardly are consistent with justice or equality under the law.

Third, there is a very dangerous risk that the *victim* will be subject to a restraining or protective order, in particular, under the federal government’s reading of Section 922(g)(8), in which no evidence and no findings are required. Indeed, it is not unusual that the batterer obtains a restraining order against the battered intimate partner.<sup>11</sup> Nor is it unusual for a court to order “mutual” restraining orders against both partners.<sup>12</sup> Indeed, some judges routinely issue mutual orders so as not to take sides. Moreover, under the federal government’s theory of the statute, the following order would make it a felony for the subjects of the order to possess a firearm:

This domestic relations court finds Mr. X and the former Mrs. X to be no threat to any other human. I find each of them to be someone who has never committed any violent crime against anyone. And I find it certain that neither would ever commit a violent crime against anyone. I make these findings after a hearing in which Mr. and Mrs. X. each had notice and opportunity to be heard. But, simply to satisfy my need to clear papers off my desk, and based on no evidence at all, I hereby order Mr. X and the former Mrs. X not to commit any violent crimes against each other.

Further, the most comprehensive studies show that intimate violence is not merely a matter of men beating up

women. Data from the National Family Violence Survey (1985) demonstrate that the frequency of wife-on-husband assault (124 incidents per thousand couples) is about equal to the frequency of husband-on-wife assault (116 per thousand). Wives are in fact somewhat more likely to commit acts of severe violence (at a rate of 48 incidents per thousand, versus 34 per thousand for husbands). “Severe violence” includes kicking, punching, striking with a weapon, biting, choking—as opposed to less severe acts like pushing, shoving, or slapping. Even though a great deal of domestic violence is mutual, or instigated by the woman, researchers point out that “the greater average size and strength of men and their greater aggressiveness mean that the same act (for example, a punch) is likely to be very different in the amount of pain or injury inflicted.”<sup>13</sup>

When the victim is a woman, and her male batterer decides to violate the protective order, she is at a significant disadvantage. More than likely, his physical strength will be superior to hers. Further, she will not be able to predict the time he will attempt to attack her; he will determine the time and the location of the confrontation. Often the police will arrive too late to prevent his abusive and possibly murderous assault.

If the woman does not obtain a firearm for protection, she may be assaulted or murdered. But if she does obtain a firearm, she becomes a felon under 18 U.S.C. § 922(a)(8). The batterer, who is willing to risk a lengthy prison term for assault, rape, or murder, can hardly be deterred by the lesser sentence for illegal possession of a firearm.

In sum, under federal government’s construction of Section 922(g)(8), tragic results will ensue, and these results will be exactly the opposite of what Congress intended the statute to address. If, as the federal government argues, the statute requires neither findings

nor evidence, victims will be disarmed, and abusers thus emboldened.

## **II THE FUNDAMENTAL RIGHT OF SELF DEFENSE**

The federal government's theory of the statute—with its perverse result of disarming victims—is contrary not just to congressional intent, but to fundamental rights. Even if the Second Amendment did not exist, the federal government's interpretation of the statute would be unconstitutional, because the right of self defense is a fundamental right.

It is well accepted that Articles I through VII of the Constitution grant only specific and limited powers upon the federal government. Moreover, the Bill of Rights does not merely qualify or alter these restrictions on federal power, but also formally recognize certain inherent, inalienable rights that all Americans possess. These enumerated fundamental, individual rights are not the only fundamental rights that we enjoy as Americans. U.S. Const. amend. IX.<sup>14</sup> Indeed, the fundamental rights of travel<sup>15</sup> and marital privacy,<sup>16</sup> are enumerated nowhere in the Constitution. Yet these rights are fundamental to a free society, and may pre-exist the Constitution. So it is, as well, with the well-established and ancient right of self defense.<sup>17</sup>

The states that comprise the geographic jurisdiction of the United States Court of Appeals for the Fifth Circuit all recognize the right of self defense. For example, Louisiana Revised Statute (“La. R.S.”) § 9:362 (1999), part of the Post-Separation Family Violence Relief Act, which addresses domestic violence, excludes from “Family Violence”, acts taken in self defense. As well, La. R.S. § 14:20 (1999) defines justifiable homicide as a killing in self defense.

Mississippi recognizes the right of self defense generally, see *Anderson v. State*, 571 So.2d 961 (Miss. 1990), and in the context of justifiable homicide. Miss. Code Ann. § 97-3-15(e) (1998). Further, Texas has set forth by statute what constitutes self defense and what does not. Tex. Penal Code § 9.31 (1999).<sup>18</sup>

Finally, the Fifth Circuit recognizes self defense as a fundamental right. *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982). *Panter* is particularly important to victims of domestic violence subject to mutual restraining orders.

In *Panter*, the defendant was a convicted felon who used a firearm to otherwise lawfully defend himself from death or serious bodily injury. The federal government charged him with violating the federal statute that prohibits convicted felons from possessing a firearm, 18 U.S.C. § 1202(a)(1). This Court acknowledged the fundamental right of self defense and held that even convicted felons had the right to defend themselves. *Id.*, at 272. Indeed, to do otherwise would place such persons between a “rock” (death), and a “hard place” (a federal penitentiary). *Id.*, at 271. The court also noted that, were a felon to possess a firearm when no danger existed, there would be a violation of the statute. *Id.*, at 272.

Of course, it is accepted and proper that a person should forfeit certain rights upon conviction for a felony, after a trial in which the presumption of innocence is overcome by the high burden of proof of “beyond a reasonable doubt.” It is another thing all together to deprive a person of the right of self defense, based solely upon a civil proceeding in state court, with no presumption of innocence, and *no* burden of proof (since no finding of dangerousness is required). If a convicted felon has a fundamental right to possess a firearm for self defense against an immediate threat, then surely law-

abiding citizens, especially women who are victims of domestic violence, do as well. Clearly, it was not the intent of Congress for a woman to lose her fundamental right to armed self defense solely because of a court order with no evidence, no findings, and no burden of proof.

### **III THE FIREARM IS AN EFFECTIVE MEANS OF SELF DEFENSE FOR DOMESTIC VIOLENCE VICTIMS**

Far from an effective means of combating domestic violence, 18 U.S.C. § 922(g)(8), as the federal government interprets it, is an assault on the right of self defense and firearm ownership. The statute's supporters favor ever more stringent firearm control measures, dismiss or discount the fundamental right of self defense, and believe that firearms should play no role in exercise of that right.

Indeed, at the core of the gun control movement is the deeply held belief, approaching certitude, that the mere presence of firearms in massive quantities in the United States is the basis for the explosion in violence.<sup>19</sup> Adherents of the gun control movement believe that ready availability of firearms in American homes facilitates death or serious bodily injury. They are convinced that otherwise average people, in the "heat of the moment" during disputes, are likely to shoot and often kill family members and intimate partners, and that victims who possess firearms with which to defend themselves will be disarmed and shot with their own firearms. These beliefs and convictions are wrong.

### **Crime and Violence in America**

The available criminological data indicate that over the last four decades, there has been an explosion in violent crime generally. Of more recent, but focused,

interest, is American domestic violence. Further, firearm ownership has increased dramatically during the same period of time. In order to understand fully the context of 18 U.S.C. § 922(g)(8) and the deleterious effect of the federal government's interpretation on victims of domestic violence, it is necessary to have an understanding of the facts surrounding violent crime and firearm ownership.

### **Crimes of Violence**

Unlawful violence, particularly crimes involving serious bodily injury or death, is prevalent in the United States of America. Though there have been decreases in most violent crimes over the last few years, violent crime rates are much greater than they were 25 years ago and mirror rising trends around the globe.<sup>20</sup>

The rates for aggravated assault, robbery, and rape have all increased dramatically over the last four decades.<sup>21</sup> Murder rates, which have remained somewhat constant over the last twenty years, are 60% higher than in 1965.<sup>22</sup> In 1995, for example, total violent crime was 76% higher than in 1976 and 240% higher than in 1965.<sup>23</sup>

In 1997, assaults accounted for 63% of total violent crime.<sup>24</sup> Robberies accounted for another 30%; rapes accounted for six percent; and murder accounted for one percent.<sup>25</sup> Thus, in 1997, every 31 seconds an American was assaulted, every minute an American was robbed, every five minutes an American (typically, a woman) was raped, and every 29 minutes an American was killed.<sup>26</sup>

Of course, these figures are based on crimes *reported* to police. The United States Department of Justice has stated that victims report crimes only 38% of the time, with nearly half of all rape, robbery and burglary victims reporting.<sup>27</sup>

### **Domestic Violence**

Domestic violence<sup>28</sup>—that is, violence between intimate partners—also has increased in recent years. As with other crimes, exact figures are hard to establish, given that about half of domestic violence victims often do not report crimes against their persons, for a variety of reasons, including fear of the abuser (though the Justice Department has estimated that 50% of victims do report domestic violence).<sup>29</sup>

In 1998, the Department of Justice, through the Bureau of Justice Statistics, issued a comprehensive report titled *Violence by Intimates*.<sup>30</sup> According to data from the National Crime Victimization Survey, in 1996, there were 837,899 female victims of violence and 147,896 male victims. The rate of violent victimizations by an intimate partner was 7.5 per 1,000 persons for women and 1.4 per 1,000 persons for men.<sup>31</sup> Total intimate partner homicides in 1996 were around 1,800, a decrease from over 3,000 in 1976.<sup>32</sup> Homicides are most often committed with firearms, but the number of non-firearm homicides remained fairly constant.<sup>33</sup>

The United States Bureau of Justice Statistics has estimated that male intimate partners are responsible for 29% of female murder victims from 1976 through 1996.<sup>34</sup> Female intimate partners are responsible for only 5.9% of male murder victims during that time. When looking at the numbers of intimate partner murders, the number of such murders committed by women is 40% of those committed by men.<sup>35</sup>

### **Private Firearm Ownership in America**

Firearm ownership in the United States is extremely common and has been increasing over the last few decades. Indeed, the number of privately-owned firearms



in the United States has grown significantly over the last 30 years. In 1973, Americans owned an approximate total of 122 million firearms, of which handguns totaled 36.9 million.<sup>36</sup> Twenty years later, in 1992, there were over 220 million firearms, 77.1 million of which were handguns.<sup>37</sup> Doubtless, the number of privately-owned firearms has increased in the last seven years, to perhaps as high as 250 million. Accordingly, the number of potential victims of improper Section 922(g)(8) orders is enormous.

**Private Firearm Ownership is Widespread and includes American Women in Ever Greater Numbers.**

Who then owns firearms? In *More Guns, Less Crime*<sup>38</sup>, Professor John R. Lott, Jr. cites to a 1988 CBS News General Election Exit Poll, which asked, “Are you any of the following? . . . [A] gun owner”. Slightly over 27% of voters stated they were firearm owners.<sup>39</sup> Additionally, the 1996 Voter News Service National General Election Exit Poll asked the question: “Are you a gun owner?” In response, 37% of voters stated they were firearm owners.<sup>40</sup> Lott himself estimates firearm ownership in the United States at 39% of the population.<sup>41</sup> Others have estimated that 48% of American households admitted to firearm ownership.<sup>42</sup> Without question, a significant portion of society has access to a firearm.

Breakdowns of firearm ownership on the basis of sex reveal some interesting trends. Lott indicates that in 1988, approximately 40% of men owned a firearm, while a little over 15% of women owned a firearm.<sup>43</sup> By 1996, over 50% of men owned a firearm, while almost 30% of women owned a firearm.<sup>44</sup>

Why has firearm ownership among women increased so dramatically in the recent years? Mary Zeiss Stange, writing in *Guns: Who Should Have Them?*, states:

Millions of women are purchasing and using firearms in huge numbers, for recreational shooting and hunting, as well as for self-defense. Women also comprise 'one half of purely precautionary gun owners,' i.e., those who own firearms solely for the purpose of self-protection. Of the approximately sixty-five to eighty million gun owners in America today, by conservative estimate seventeen million are female, and a far greater number than that have access to firearms owned by other members of the households. Given current trends, there is no reason (other than severely restricting women's legal access to guns) why these numbers should not continue to grow. Guns and gun control are, indeed, women's issues of ever-increasing importance.

The above facts are liable to be unsettling to the majority of feminists who have tended to adhere to the conventional wisdom that to be feminist is to be antiviolence, and to be antiviolence is ipso facto to be antigun. Their argument surely has some merit; in the best of all possible worlds, women would not feel the need for lethal force to protect themselves or their children from abusers, known or unknown. However, in our violence-ridden society, most women have a legitimate reason to fear for their safety and the well-being of their loved ones.<sup>45</sup>

Far from viewing firearms as inherently bad and something that they should eschew in favor of nonviolence, American women in ever-greater numbers are choosing to own firearms as a precautionary means of defending themselves and their families.

### **Claims of the Dangers of Firearm Ownership are False**

The bulk of research on defensive firearm use, much of it discussed below, makes clear that firearms are an effective means of deterring violent crime. The federal government's interpretation of 18 U.S.C. § 922(g)(8) operates to deprive many who are or have been involved in an abusive intimate relationship from having access to, and using, the most effective tool available to defend themselves against the violent domestic abuser: a firearm.

A core belief held by gun prohibition advocates such as amici Educational Fund to End Handgun Violence and National Network to End Domestic Violence, et al., is that domestic violence victims and other crime victims should not use firearms for protection. The support for this assertion comes from a paper by Arthur Kellermann, who states that "domestic homicides are 7.8 times more likely to occur in homes with guns than homes without."<sup>46</sup> Of course even if this statement were true, the individual crime victim would still be the best judge of various protective measures, including firearms possession, in their particular circumstances. But even as a general observation, Dr. Kellermann's statement cannot be proven.

One reason why verification is so difficult is that Kellermann refuses to provide other scholars with the data underlying any of his studies on firearms. As Professor Daniel Polsby has commented, this extraordinary refusal so departs from ordinary requirements of scholarship that it renders Kellermann's work non-credible *per se*.<sup>47</sup> Regrettably, what those who rely upon Kellermann's work in support of their anti-self defense and anti-firearm initiatives fail to acknowledge, or even recognize, is that purported "facts" as found in the Kellermann paper have been thoroughly repudiated through rigorous examination of the available data.

For example, with respect to Kellermann's findings, professors from Harvard and Columbia Medical Schools (a criminologist and a biostatistician) were unable to fully evaluate Kellermann's conclusions because he refused them his underlying data. Evaluation of the data that Kellermann chose to reveal in publishing his conclusions revealed that the data did not support any conclusions. Instead of being relied upon as "evidence", Kellermann's work "would more appropriately be cited in a statistics text as a cautionary example of multiple statistical errors."<sup>48</sup>

Kellermann's conclusions are not only statistically flawed, but are logically flawed as well. If a woman is murdered it is usually by a man she knows, generally an intimate partner. When a man kills a woman it is generally murder by a person who (as discussed above) has a life history of violence, particularly against the murdered woman, and of felony, substance abuse, and/or psychopathology. But when a woman kills a man, she is usually not a habitual criminal. She is usually acting in self defense:

Thus, the fifty percent of interspousal homicides in which husbands kill wives are real murders, but in the overwhelming majority of cases where wives kill husbands, they are defending themselves or their children. In Detroit, for instance, husbands are killed by wives more often than wives are by husbands, yet the men are convicted far more often. In fact, three-quarters of wives who killed their husbands were not even charged, prosecutors having found their acts lawful and necessary to preserve their lives or their children's.

. . . It is, of course, tragic when, for instance, an abused woman has to shoot to stop a current or

former boyfriend or husband from beating her to death. Still, it is highly misleading to count such incidents as costs of gun ownership by misclassifying them with the very thing they prevent: murder between “family and friends”... [Such deaths] are not costs. Rather they are palpable benefits of defensive gun ownership from society’s and the victims’ point of view.<sup>49</sup>

Dishonestly classifying the defense of women’s lives as a cost, rather than as a benefit, of firearm ownership is integral to the false assertion that women are more at risk of death when there is a firearm in the home.

#### **IV THE POSSESSION OF FIREARMS REDUCES CRIME**

A central tenet of opponents of the defensive use, and possession, of firearms is that more firearms equate to more unlawful killings. Put another way, they claim an increase in firearms results in an equal or similar increase in murders.<sup>50</sup> The fact is that law abiding, responsible adults—average Americans—*do not* murder their intimates and so the risk of firearm ownership does not apply to firearms in their homes.

##### **The Reality of More Firearms in America**

Homicide studies dating back to the Nineteenth Century show that murderers are extreme aberrants whose life histories are characterized by felony, irrational violence against those around them, substance abuse, and/or psychopathology. Far from resembling ordinary people, most murderers resemble other major criminals.<sup>51</sup> “The vast majority of persons involved in life-threatening violence have a long criminal record and many prior contacts with the justice system.”<sup>52</sup> These facts appear in homicide studies so numerous and consistent that their

findings “have now become criminological axioms” about the “basic characteristics of homicide...”<sup>53</sup>

Indeed, a simple analysis of the rates of firearm ownership and murder rates in the United States indicates the fallacy of the “more guns, more murders” position. In 1973, Americans owned approximately 122 million firearms, of which handguns totaled 36.9 million. That same year, the homicide rate in the United States was 9.4 per 100,000 population.<sup>54</sup> Nearly 20 years later, in 1992, there were over 220 million firearms, 77.1 million of which were handguns. During the same year, the homicide rate was 8.5 per 100,000, that is, almost ten percent *lower* than it had been in 1973. Moreover, there is no concomitant increase in the percentage of murders committed with firearms. In 1973, 68.5% of all murders were committed with firearms. In 1992, 68.2% of the homicides were committed with firearms.<sup>55</sup> Over a twenty-year period, the number of privately-owned firearms nearly doubled, yet there was a *decrease* in the rate of deaths per 100,000 population. In short, more guns do not equal more murders.

### **Research Supports the “More Guns, Less Crime” Position**

Admittedly, simple comparisons between privately-owned firearms and murders does not take into account all other factors that may have affected that rate. Socio-economic status, rates of prosecution and incarceration, and even the state of the economy might all have some effect, whether positive or negative. However, criminologists, doctors, social scientists, and academics have considered all relevant data in depth and have come to the conclusion that firearms play an important role in making the fundamental right of self defense a right that that average Americans may exercise.

For instance, Professor Hans Toch of the School of Criminology at the State University of New York (Albany), was a key consultant to the 1968 Eisenhower Commission, whose report called for, among other things, greater gun control. In 1992, Toch expressly recanted his support for the Eisenhower Commission's conclusion "that the heart of any effective national firearms policy for the United States must be to reduce [handgun] availability...." Prof. Toch explained the reasons for his reversal:

That where firearms [ownership rates] are most dense, violent crime rates are lowest, and where guns are least dense violent crime rates are highest...

[Research has also established that] *when used for protection firearms can seriously inhibit aggression* and can provide a psychological buffer against the fear of crime. Furthermore, the fact that national patterns show little violent crime where guns are most dense implies that guns do not elicit aggression in any meaningful way. Quite the contrary, these findings suggest that *high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.*<sup>56</sup>

The Eisenhower Commission's staff report coordinator was Professor Ted Robert Gurr. In 1989, he edited a massive two-volume update of research findings bearing on the Commission's recommendations. In introducing it, he wrote:

Americans looking for simple solutions to high crime rates and to political assassinations have repeatedly proposed and sometimes imposed restrictions on gun ownership. Since about two

thirds of murders and all recent assassinations have been committed with guns, the argument goes, dry up the guns and violence will decline. [Research] ... demonstrates the implausibility of the argument. In a country with an estimated stock of 60 million handguns and more than 100 million long guns, not even the most Draconian policies could remove guns from the hands of people who were determined to get and keep them. Those determined gun owners include far more citizens concerned about defending themselves and their homes than predatory criminals. The irony of most gun control proposals is that they would criminalize much of the citizenry but have only marginal effects on professional criminals. \* \* \*

Half of American households have weapons for the same reason that police have them: *guns can be an effective defense*. [UCLA historian Roger] McGrath's historical evidence [from the 19th Century] shows that widespread gun ownership deterred [burglary and robbery] while simultaneously making brawls more deadly. Contemporary studies, summarized by [Prof. Don] Kates, also show that *widespread gun ownership deters crime*. Surveys sponsored by both pro- and anti-gun groups show that roughly three-quarters of a million private gun owning citizens report using weapons in self-defense [annually], while convicted robbers and burglars report that they are deterred when they think their potential targets are armed.<sup>57</sup>

For over 15 years, Professor Gary Kleck of Florida State University has studied the defensive use of firearms. His 1991 book on firearm policy, *Point Blank: Guns and*



*Violence in America*, was awarded the Hindelang Prize by the American Society Of Criminology, as the most significant contribution to criminology in a three-year period. In his studies, Kleck has pored over crime data, and has analyzed criminological studies. He has found that victims who used firearms to defend against violent crime did not need to discharge the firearm to successfully defend themselves, avoid injury, and prevent crime.<sup>58</sup> Kleck found that there are two to three million incidents each year of citizens using firearms in self defense, a statistic that is based on 15 different surveys dating back as far as the late 1970s.<sup>59</sup>

Prof. Kleck's conclusions described above have been the subject of a vigorous debate within the academic community. Among the academic critiques of Kleck's work, most remarkable was that of the doyen of American criminologists, the University of Pennsylvania's Professor Marvin Wolfgang. Given his well-known personal opposition to firearm ownership, when a study of defensive firearm use by Professors Kleck and Gertz<sup>60</sup> appeared in the *Journal Of Criminal Law And Criminology*, the publication sought out and published Professor Wolfgang's appraisal of the Kleck-Gertz study. He stated, in pertinent part:

I am as strong a gun control advocate as can be found among the criminologists in this country. If I [had the power] ... I would eliminate all guns from the civilian population and maybe even from the police. *I hate guns*—ugly, nasty, instruments designed to kill people.

Nonetheless the methodological soundness of the current Kleck and Gertz study is clear. I cannot further debate it. \* \* \* The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine

methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.<sup>61</sup>

The most comprehensive, critiqued, and debated scholarly work to date on the subject of defensive firearm use, came out in 1998, when the University of Chicago Press published *More Guns, Less Crime*. Its author, then-University of Chicago (now Yale Law School) professor, John Lott, is an economist in the field of empirical evaluation of the effects and effectiveness of laws. *More Guns, Less Crime*'s subject is the laws enacted in over half of the states since 1976 giving law-abiding, responsible, trained adults a right to a license to carry concealed a handgun on application.<sup>62</sup>

*More Guns, Less Crime* was an expansion of an earlier work of Lott's<sup>63</sup>, in which Lott and Professor David Mustard correlated the year-by-year enactment of these laws with violence data for the years 1977-94 from all 3,054 American counties. Lott concluded that the issuance of millions of handgun carry licenses under these laws has caused a *reduction* in violent crime.<sup>64</sup> This reduction has two components: halting crime in progress and deterring crime from happening. Lott demonstrated both.

Prof. Lott's finding that criminals are deterred by the potential that victims may have firearms is supported by two wholly independent studies conducted under the auspices of the U.S. Department of Justice, National Institute of Justice. In a survey among 2,000 felons incarcerated in several state prisons across the United States: 34% of the felons responded that they personally had been "scared off, shot at, wounded or captured by an armed victim"; 69% knew at least one other felon who had also; 34% said that when thinking about doing a crime

they either “often” or “regularly” worried that they “might get shot at by the victim”; 74% agreed that one reason “burglars avoid houses when people are home is that they fear being shot”; and 57% agreed that “most criminals are more worried about meeting an armed victim than they are about running into the police.”<sup>65</sup>

A second National Institute of Justice study surveyed juveniles in correctional facilities in California, Illinois, Louisiana and New Jersey:

36% of the respondents in our study reported having decided at least “a few times” not to commit a crime because they believed the potential victim was armed. Seventy percent of the respondents reported having been “scared off, shot at, wounded, or captured by an armed crime victim.”<sup>66</sup>

What the research shows, and what incarcerated criminals know, is that the firearm is an effective means of self defense.

In sum, scholars who have looked in greater depth at data pertinent to the effect on crime of the alleged proliferation of firearms have established that the availability of firearms reduces crime. Professor Toch’s research led him to conclude “that where firearms [ownership rates] are most dense, violent crime rates are lowest, and where guns are least dense violent crime rates are highest.”<sup>67</sup> As Prof. Toch points out, this implies that guns do not elicit aggression in any meaningful way.<sup>68</sup> Quite the contrary, these findings suggest that widespread firearm ownership and use inhibits illegal aggression.<sup>69</sup> There is, therefore, reason to believe that defensive firearm use by victims of domestic violence would lead to fewer incidents of domestic violence. Moreover, laws—

such as the statute that government is attempting to enforce in the case at bar—endanger public safety

**CONCLUSION**

When enacting 18 U.S.C. § 922(g)(8), Congress did not intend to disarm domestic violence victims, to violate the Constitution by infringing upon the fundamental right to self defense, or to endanger public safety. For the foregoing reasons, the federal government’s interpretation of the statute to require no evidence, no factual findings, and no burden of proof should be rejected. Should appellant’s interpretation be accepted, the statute should be declared unconstitutional as a violation of the right to self defense, as well as for the reasons detailed by the District Court. The opinion of the District Court should be **AFFIRMED**.

Respectfully submitted this 20th day of December, 1999.

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that true and correct copies of the foregoing Brief Amici Curiae in Support of Appellee were filed pursuant to Fed. R. App. P. 25(a)(2)(B) and 31, and 5th Cir. R. 31.2, by delivery to Federal Express for overnight delivery on this 20th day of December, 1999, and served in both paper and electronic form on a three inch disk via overnight delivery on this 20th day of December, 1999, on the following counsel of record:

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**CERTIFICATE OF COMPLIANCE**

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. Exclusive of the exemption provisions in 5th Cir. R. 32.2, the brief contains 6479 words.
2. The brief has been prepared in proportionally spaced typeface using Word 97 in Times New Roman, size 14 point, with footnotes in Times New Roman, size 12.5 point.

The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the court's striking the brief and imposing sanctions against the person signing the brief.

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Hugo Teufel III

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- <sup>1</sup> For the purposes of this brief alone, amici define "intimate partner" as a husband or wife, ex-husband or ex-wife, or boyfriend or girlfriend. Amici note that the plain meaning of the phrase, "intimate partner," is a person who cohabitates with another.
- <sup>2</sup> Gary Kleck, "Policy Lessons from Recent Gun Control Research", 49 *Law & Contemp. Probs*, 35, 40-41 (1986). *See also* United States Department of Justice, Bureau of Justice Statistics, *Selected Findings - Violence Between Intimates* 8 (1994) (stating 34% of state prisoners had previous conviction for violent offense; 36% had previous conviction for nonviolent offense).
- <sup>3</sup> M. Wilt, et al., *Domestic Violence and Police: Studies in Detroit and Kansas City* (1977) (cited in James D. Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 193, n. 3 (Aldine 1983)).
- <sup>4</sup> *Id.*
- <sup>5</sup> Nancy Nordell, "When Restraining Orders Don't Work", *Women and Guns*, (Nov./Dec. 1998)(reprinted at the Second Amendment Foundation's website, <http://www.saf.org/pub/rkba/women-guns/wg981112nn.html>).
- <sup>6</sup> Cathy Young, "Hitting Below the Belt", on the Salon website, [http://www.salon.com/mwt/feature/1999/10/25/restraining\\_orders/print.html](http://www.salon.com/mwt/feature/1999/10/25/restraining_orders/print.html). Young is co-founder and Vice-President of the Women's Freedom Network.
- <sup>7</sup> *Id.*
- <sup>8</sup> *See infra*, n. 28 (discussing broad definition of what constitutes "domestic violence"). Not all states' definitions are overly broad. *See* Miss. Code Ann. § 93-21-3 (1998), defining domestic abuse as attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon; or placing, by physical menace or threat, another in fear of imminent serious bodily injury; Texas Code Ann. § 71.004 defines

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“family violence” as an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault. *But see* La. R.S. § 9:362 (1999) (defining family violence “*includes but is not limited to* physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injuring and defamation, committed by one parent against the other parent or against any of the children”)(emphasis added).

- <sup>9</sup> For temporary orders in the states within the Fifth Circuit, *see* La. Code Civ. Proc. Ann. art. 3603.1 (requiring court to find that “the petitioner has *good and reasonable grounds* to fear for his or her safety or that of the children, or the complainant has in the past been the victim of domestic abuse by the other spouse”); Miss. Code Ann. § 93-21-11 (1998) (requiring finding of *immediate and present danger* of abuse for temporary orders); Texas Code Ann. § 83.001 (requiring court to find “*clear and present danger* of family violence”)(emphasis added).
- <sup>10</sup> Young states that a 1995 Massachusetts courts study found that fewer than half of all restraining orders involved allegations physical abuse, and that courts in that state routinely ignore the “reasonable” fear of “imminent serious physical harm”. “Hitting Below the Belt”, *supra*.
- <sup>11</sup> Note, “Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not”, 67 *Indiana L.J.* 1039, 154-56 (1992). At least one state’s attorney general has recognized the problem with mutual restraining orders. Massachusetts Att’y Gen’l Off., “Report On Domestic Violence: A Commitment To Action”, 28 *New Eng. L. Rev.* 313, 334 (1993).
- <sup>12</sup> 67 *Indiana L.J.*, at 155-56
- <sup>13</sup> Murray A. Straus & Richard J. Gelles, *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 American Families*, pp. 97-98 (Transaction Publishers 1990). The disparity of size and strength between women and men probably also accounts the far lower incidence of injuries reported by men to police and hospitals. See notes 29-30 *infra*.
- <sup>14</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
- <sup>15</sup> *Cf. Aptheker v. Secretary of State*, 378 U.S. 500 (1964).
- <sup>16</sup> *Poe v. Ullman*, 367 U.S. 497 (1961).

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- <sup>17</sup> 1 William Blackstone, *Commentaries*, \*144; *see also* William Meyerhofer, “Statutory Restrictions on Weapons Possession: Must the Right to Self-Defense Fall Victim?” 1996 *Ann. Surv. Am. L.* 219, 226 (1996) (stating that right of self defense has been recognized since at least the 16th Century).
- <sup>18</sup> That the three states have codified this unenumerated right does not in any way abrogate or limit the right.
- <sup>19</sup> Randy E. Barnett and Don B. Kates, “Under Fire: The New Consensus on the Second Amendment,” 45 *Emory L. J.* 1139, 1234 (1996).
- <sup>20</sup> The problem of violent crimes is not limited to the United States. It is epidemic throughout the western, developed world. *See*, Dave Grossman, *On Killing* xvi-xviii (1996).
- <sup>21</sup> John Lott, *More Guns, Less Crime* 40, 43-45, 47 (Univ. Chicago Press 1998) (citing to the Federal Bureau of Investigation’s Uniform Crime Reports).
- <sup>22</sup> *Id.*, at 40. Indeed, from 1973 to 1997 there was a 27.7% decrease in the murder rate (from 9.4 to 6.8 per 100,000 population). Michael Rand, *Criminal Victimization 1997: Changes 1996-97 With Trends 1993-97* (1998).
- <sup>23</sup> *More Guns, Less Crime*, at 43.
- <sup>24</sup> United States Federal Bureau of Investigation, United States Dep’t of Justice, *Uniform Crime Reports for the United States 1997* 12 (1998).
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.*, at 6.
- <sup>27</sup> United States Department of Justice, United States Bureau of Justice Statistics, *Criminal Victimization in the United States - 1991* 102 (1993).
- <sup>28</sup> Defining “domestic violence”, the subject of Section 922(g)(8), is a problem under the statute. Some advocates view “domestic violence” as not just physical abuse, but verbal abuse as well, including arguing, raising one’s voice, or not speaking to an intimate partner. R. Burri Flowers, “The Problems of Domestic Violence is Widespread” in *Domestic Violence* 10, 15 (Karin L. Swisher ed., 1996) (describing psychological abuse as form of battering).
- <sup>29</sup> United States Department of Justice, United States Bureau of Justice Statistics, *National Crime Victimization Survey* (1994). *See also* United States Department of Justice, United States Bureau of Justice Statistics, *Violence by Intimates* 19, 45 (1998) (stating that



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percentage of female victims reporting domestic violence increased from 48% to 56% from 1993 to 1996).

<sup>30</sup> United States Department of Justice, United States Bureau of Justice Statistics, *Violence by Intimates* (1998).

<sup>31</sup> *Id.*, at 3.

<sup>32</sup> *Id.*, at 5, 39.

<sup>33</sup> *Id.*, at 10, 42.

<sup>34</sup> *Id.*, at 6 (stating that in 20 year period 20,311 men were killed, 31,260 women were killed). 5 (1998).

<sup>35</sup> In other words, men are far more likely than women to be murdered (by a ration of 3:1), and further to be murdered by someone other than an intimate partner. *Id.*

<sup>36</sup> Gary Kleck, *Targeting Guns: Firearms And Their Control* table 3.1, pp. 96-97(1997).

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

<sup>38</sup> John Lott, *More Guns, Less Crime* (Univ. of Chicago Press 1998).

<sup>39</sup> *Id.*, at p. 36.

<sup>40</sup> *Id.*, at p. 37.

<sup>41</sup> *Id.*, at p. 36, fn. 2.

<sup>42</sup> David B. Kopel, *The Samurai, the Mountie, and the Cowboy* 109, n.15 (Prometheus Books 1992) (citing to Martin Killias, “Gun Ownership and Violent Crime: The Swiss Experience in International Perspective,” 1 *Security Journal* 169, 171, table 1 (1990), and stating “Killias’s results are consistent with surveys by Gallup, Harris, and others”).

<sup>43</sup> Lott, *More Guns, supra*, at 37, fig. 3.1.

<sup>44</sup> *Id.* But see, United States Department of Justice, *Research in Brief - Guns in America: National Survey on Private Ownership and Use of Firearms*, 2-3 (1995) (stating that only 9% of women and 42% of men own firearms). The difference between the Justice Department survey and other studies may be partly the result of the reluctance of some survey respondents to tell the federal government about their possession of firearms. Differences in definition of “ownership” will also affect survey rates; one survey may record that a husband and wife both “own” the same gun; another survey may record only the husband as the owner, since he was the purchaser of record.

<sup>45</sup> Mary Zeiss Stange, “Arms and the Woman: A Feminist Reappraisal” in *Guns - Who Should Have Them* 16 (David Kopel ed. 1995).

<sup>46</sup> Arthur Kellermann, et al., “Gun Ownership as a Risk Factor for Homicide in the Home”, 329 *New Eng. J. Med.* 1084, 1087 (1993).

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- <sup>47</sup> Daniel D. Polsby, "Firearms Costs, Firearms Benefits and the Limits of Knowledge," 86 *J. Crim. L. & Criminol.* 207, 210-211 (1995) (referring to the Kellermann study).
- <sup>48</sup> Don B. Kates, Henry E. Schaffer, et al., "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda", 62 *Tenn. L. Rev.* 513, 584-595 (1995) (quoting from p. 585).
- <sup>49</sup> Don B. Kates, "The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime", 18 *Am. J. of Crim. L.* 113, 128-29 (1991).
- <sup>50</sup> See, for example, Brief for Amici Curiae, National Network to End Domestic Violence, et al., at 8.
- <sup>51</sup> Thomas B. Marvell & Carlisle E. Moody, "The Impact of High Out-of-State Prison Population on State Homicide Rates," 36 *Criminology* 513, 517 (1998).
- <sup>52</sup> Delbert S. Elliott, "Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention," 69 *U. Colo. L. Rev.* 1081, 1093 (1998); see also *id.* at 1097 (stating "For the vast majority of persons who become involved in life-threatening violence, this behavior is embedded in a pattern of criminal behavior, most frequently beginning in early childhood or adolescence").
- <sup>53</sup> David Kennedy & Anthony Braga, "Homicide in Minneapolis: Research for Problem Solving", 2 *Homicide Stud.* 263, 267 (1998).
- <sup>54</sup> United States Department of Justice, United States Bureau of Justice Statistics, *Sourcebook Of Criminal Justice Statistics – 1989* 365, Table 3.11 (1989).
- <sup>55</sup> Barnett and Kates, *Supra*, at 1249.
- <sup>56</sup> Hans Toch & Alan Lizotte, "Research and Policy: The Case of Gun Control", *Psychology And Social Policy*, 232, 234 (Peter Sutfield and Philip Tetlock eds. 1992) (emphasis added).
- <sup>57</sup> Ted Robert Gurr, ed. 1 *Violence In America* 17-18 (1989) (emphasis added).
- <sup>58</sup> Gary Kleck, "Crime Control Through the Private Use of Armed Force", 35 *Soc. Probs.* 1 (1988).
- <sup>59</sup> Gary Kleck, *Point Blank: Guns And Violence In America*, ch. 4 (1991); *Targeting Guns: Firearms And Their Control* ch. 5 (1997).
- <sup>60</sup> Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun", 86 *J. of Crim. L. & Criminol.* 150 (1995).
- <sup>61</sup> Marvin E. Wolfgang, "A Tribute to a View I Have Opposed", 86 *J. Crim. L. & Criminol.* 188, 188-192 (1995) (emphasis added).

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- <sup>62</sup> Because amici support giving such adults a right to a concealed carry license, it does not mean that amici in any way concede the unenumerated right of self defense.
- <sup>63</sup> John Lott and David Mustard, "Crime, Deterrence, and Right-to-Carry Concealed Handguns Laws" 26 *J. Of Legal Stud.* 1 (1997).
- <sup>64</sup> Lott, *More Guns, Less Crime*, at 114-15.
- <sup>65</sup> James D. Wright & Peter Rossi, *Armed And Considered Dangerous: A Survey Of Felons And Their Firearms* 145, 150, 154 and table 7.1 (1986).
- <sup>66</sup> Joseph Sheley & James D. Wright, *In The Line Of Fire: Youth, Guns And Violence In Urban America* 63 (1995).
- <sup>67</sup> Toch, *supra*, at 232.
- <sup>68</sup> *Id.*, at 234
- <sup>69</sup> *Id.*, at 234, n. 10.