No. 13-7120

IN THE
# Supreme Court of the United States

SAMUEL JAMES JOHNSON, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari to the
U.S. Court of Appeals for the Eight Circuit

## Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc., and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

These *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal and state courts.

## SUMMARY OF ARGUMENT

After accepting Petitioner Samuel Johnson's guilty plea to the federal charge of possession of a firearm by a convicted felon, the U.S. District Court sentenced

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Johnson to a mandatory minimum sentence of 180 months (15 years) under the Armed Career Criminal Act ("ACCA"). But for Eighth Circuit precedent that Johnson's constructive possession of a short-barreled shotgun qualified as a conviction of a "violent felony" under the ACCA, the trial judge would have imposed a sentence only half, or at most two thirds, of the mandated minimum.

The threshold issue presented on this appeal is one of statutory construction of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), which defines a violent felony to be "burglary, arson, extortion, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another." Applying the basic rule of construction that the words of a statute are to be given their ordinary meaning, "conduct" does not comprehend mere or constructive possession. Applying further the whole text canon of construction, "burglary, arson, extortion and use of explosives" are all conduct-based, requiring proof not only of conduct, but of violent and aggressive actions, which are a far cry from passive possession. Finally, applying the interpretive principle of *expressio unis est exclusio alterius,* the statutory specification of the "use of explosives," the closest analog of the four enumerated offenses to Johnson's crime of conviction, absolutely precludes a crime that requires only proof of mere or constructive possession of any firearm, including a short-barreled shotgun.

With regard to the secondary issue — whether Johnson's violation of the crime of possession of a short-barreled shotgun "presents a serious potential

risk of physical injury to another" — the Eighth Circuit ruling that it does is based upon a demonstrably false premise that short-barreled shotguns are inherently dangerous, having the singular purpose of violent criminal activity. However, Congress has provided that a person may lawfully possess a short-barreled shotgun if properly registered under the National Firearms Act ("NFA"). Also, shotguns generally, and short-barreled ones as well, have a variety of lawful purposes, including self defense in the home. Short-barreled shotguns certainly do not pose an inherent risk of serious physical injury to another.

## STATEMENT

This case presents yet another issue of statutory construction of the mandatory minimum sentence prescribed under the 1984 Armed Career Criminal Act, and it comes to this Court at a time of wide-spread public debate over the consequences that such sentencing policy and practices have had for the administration of criminal justice. There is increasing dissatisfaction with the practice of mandatory minimum sentences being voiced by and before all three branches of the federal government.[2] Chief among the reasons given for eliminating mandatory minimums altogether is the contention that they have

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[2] *See, e.g.,* E. Luna, "Mandatory Minimum Sentencing Provisions Under Federal Law," Testimony before the United States Sentencing Commission (May 27, 2010) http://www.cato.org/publications/congressional-testimony/mandatory-minimum-sentencing-provisions-under-federal-law.

vested enormous discretionary power in federal prosecutors and, at the same time, withdrawn from trial judges any sentencing discretion whatsoever — all without reducing disparities among sentences or accomplishing anything more than to contribute to the overcrowding of federal prisons.[3] This appeal appears to present just such a case.

Induced by a several-count indictment, Johnson entered into a plea bargain, hoping to persuade the trial court that the mandatory minimum sentence provision in the ACCA did not apply because the third predicate crime of which he had been convicted was not a "violent felony" under the ACCA. At sentencing the government prevailed, as the district court sentenced "Mr. Johnson to 180 months in prison, the statutory mandatory minimum." Brief for the Petitioner ("Pet. Br.") at 5. Before imposing the sentence, however, the court stated:

> I think 180 months is too heavy of a sentence in this case. But I take an oath to follow the law as I see it and I've made my decision in that regard. But as I say, I impose the sentence reluctantly because I think a sentence of half that or two-thirds of that would be more than sufficient to qualify. But as I say, I do not have

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[3] *See, e.g.,* E. Bernick & P. Larkin, "Reconsidering Mandatory Minimum Sentences: The Arguments For and Against Potential Reforms," The Heritage Foundation Legal Memorandum #114 (Feb. 10, 2014) http://www.heritage.org/research/reports/2014/02/reconsidering- mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms.

> any choice in the matter, at least as I view it. [*Id.*]

The trial court believed itself bound by Eighth Circuit precedent that the Minnesota statute criminalizing possession of a short-barreled shotgun was a "violent felony" and, thus, Johnson was required to receive the prescribed mandatory minimum. But as *amici* argue in Part I, the Eighth Circuit ruling precedents are inconsistent with a careful reading of the statutory prerequisite that to be counted as a violent felony the predicate crime must involve active and aggressive "conduct," such as actual employment, not mere possession, of the forbidden firearm. Further, as we argue in Part II, the Eighth Circuit rule that possession of a short-barreled shotgun is premised upon an erroneous assumption that such shotguns have no lawful purpose when, in fact, Congress has sanctioned ownership of such firearms under the National Firearms Act. Additionally, such shotguns have a variety of lawful purposes, including self-defense in the home. Finally, although not developed herein, these *amici* would urge this Court to apply the rule of lenity, as argued by Petitioner's opening brief. Pet. Br. at 47-50.

## ARGUMENT

This case concerns whether the crime of possession of a short-barreled shotgun is a "violent felony" for purposes of sentence enhancement under 18 U.S.C. § 924(e)(1). The question raised in this case concerns the meaning of "violent felony," as that term appears in § 924(e)(2)(B)(ii), which states that a "violent felony"

is "burglary, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another**." (Emphasis added.) Because the crime of possession of a short-barreled shotgun is not among the four named offenses, the specific question in this case is whether the crime is nevertheless a violent felony because it constitutes a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Four times previously, this Court addressed whether the statute in question was triggered by conduct that "**presents a serious potential risk of physical injury to another**." *See* James v. United States, 550 U.S. 192 (2007); Begay v. United States, 553 U.S. 137 (2008); Chambers v. United States, 555 U.S. 122 (2009); and Sykes v. United States, 131 S.Ct. 2267 (2011). Importantly, in each of these cases there was no question but that the crimes of conviction involved "conduct." *See* James at 196 (attempted burglary); Begay at 140 (DUI); Chambers at 126 (escape); and Sykes at 2273 (vehicle flight). The only question addressed in each case was whether the "conduct" specified in the predicate statute "present[ed] a serious potential risk of physical injury to another."

Unlike previous cases, this case raises the threshold question whether the crime of conviction involves "conduct" as that term appears in § 924(e)(2)(B)(ii). If the crime does not involve conduct, then it cannot be a "violent felony" regardless of whether the government can establish that the

crime presents a serious risk of physical injury to another.

The government would have this Court adopt the view that a statute, which expressly provides that "use," rather than mere possession, of explosives to constitute a violent felony, should be applied to extend to constructive possession of a certain type of firearm. This Court instead should adopt the view of the Sixth and Eleventh Circuits rejecting the illogic of that argument.

## I. "CONDUCT" AS THAT TERM APPEARS IN 18 U.S.C. § 924(e)(2)(B)(ii) DOES NOT COMPREHEND THE CRIME OF POSSESSION OF A SHORT-BARRELED SHOTGUN.

### A. Johnson's Conviction Was Based upon Mere Possession.

The Minnesota statute at issue here defines the crime of conviction to be "whoever owns, possesses, or operates a ... short-barreled shotgun." Minnesota Statute § 609.67, sub. 2. According to the record, Johnson's conviction under this statute was secured by evidence of the discovery of a "sawed-off shotgun" in a bag in the backseat of a car in which Johnson was a front seat passenger. *See* Petition for Writ of Certiorari ("Pet. Cert.") at 13. Thus, facts underlying Johnson's conviction appear similar to the evidence of "passive possession" as in other cases prosecuted under the Minnesota and similar statutes. *See* Pet. Br. at 21 and n.5. The initial question, then, is

whether a passive possession of a short-barreled is "conduct" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii). If such passive possession is not "conduct," then this Court need not reach the question whether the crime of possession of a short-barreled shotgun under the Minnesota statute is a crime "that presents a serious potential risk of physical injury to another."

### B. The Ordinary Meaning of Conduct Does Not Comprehend Mere Possession.

In petitioner's opening brief, Johnson contends that "conduct," as it appears in § 924(e)(2)(B)(ii), does not comprehend "a crime of mere possession and nothing more, which distinguishes it entirely from the enumerated offenses and from inclusion as a violent felony." Pet. Br. at 15. *See also id.* at 18-19, 22.

There is no more basic rule of statutory construction than "[w]ords are to be understood in their ordinary, everyday meanings." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, p. 69 (West: 2012). According to its ordinary meaning, "conduct" is "the act, manner, or process of carrying out (as a task) or carrying forward (as a business)." Webster's 1962 International Dictionary at 473. Possession, "both in common speech and in legal terminology [is] ambiguous[,] interchangeably used to describe [i] actual possession and [ii] constructive possession." National Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914). Although the actual exercise of possession, such as holding a firearm, may constitute conduct, the Minnesota statute prohibiting possession

of a short-barreled shotgun does not — as was true in this case — require proof of actual physical custody, *i.e.*, "possession in fact."[4] Rather, as the court of appeals ruled below, "Johnson's offense is not meaningfully distinguishable from the one in *Lillard*,"[5] in which, under a comparable Nebraska statute, Lillard was convicted for having "constructively possessed a short shotgun." *See* United States v. Lillard, 685 F.3d 773, 776, n.3 (8th Cir. 2012).

Historically, constructive possession does not require proof of any conduct whatsoever. *See, e.g.,* W. Clark, Handbook on Criminal Law, § 95, pp. 323-24 (West: 1915). Rather it is a legal construct that extends possession to situations where a person has no hands-on custody, but has knowledge plus the ability to control an object even though not in physical contact with it. *See, e.g.,* United States v. DeRose, 74 F.3d 1177 (11th Cir. 1996). Thus, according to the ordinary meaning of the term "conduct," Johnson's conviction for constructive possession of a short-barreled shotgun was not based upon any act, manner, or process of carrying out any task or carrying forward any activity, *i.e.*, any "conduct."

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[4] Stead, 232 U.S. at 68.

[5] United States v. Johnson, 526 Fed. Appx. 708, 711 (8th Cir. 2013).

### C. Contextually, Conduct Does Not Comprehend Mere Possession.

A requirement of actual possession, not present here, is reinforced by statutory context.[6] 18 U.S.C. § 924(e)(2)(B)(ii) reads in pertinent part: "the term 'violent felony' means any crime ... if committed by an adult, that — is [i] burglary, [ii] arson, or [iii] extortion, [iv] involves use of explosives, or [v] otherwise involves conduct that presents a serious potential risk of physical injury to another." As **one** court of appeals has observed, "[e]ach of these [four] crimes involves affirmative and active conduct." United States v. Flores, 477 F.3d 431, 436 (6th Cir. 1994).

"More tellingly," this same court noted that the "statute provides that the *use* — rather than the possession — of explosives is conduct that rises to the level of a violent felony." *Id.* If the statute is clear that mere possession of explosives such as a box of dynamite[7] cannot justify a sentencing enhancement, it would be illogical to conclude mere constructive possession of a single short-barreled shotgun was

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[6] The "whole-text canon .... calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Reading Law at 167.

[7] The saying is overused — but nonetheless true — that "guns don't kill people, people kill people." It is inconceivable that, if mere possession of a box of dynamite (potentially unstable and which literally could detonate on its own) does not qualify as a violent felony, that mere possession of a short-barreled shotgun (which by itself is a danger to no one) could qualify.

intended to trigger the 15-year mandatory minimum sentence.

Additionally, another court of appeals has recognized that "settled principles of statutory construction require us to interpret the provision in § 924(e)(2)(B)(ii) regarding conduct presenting a 'serious potential risk of physical injury' in light of the language that precedes it":

> [The four] specifically enumerat[ed] offenses each manifest affirmative, overt and active conduct in which the danger posed to others extends beyond the mere possession of a weapon .... Most significantly, the statute requires that the *use* — rather than possession — of explosives gives rise to a potential violent felony. It is unlikely that in enacting § 924(e), Congress intended that the possession of a firearm be deemed a violent felony, while the possession of explosives would not be so categorized. [United States v. Oliver, 20 F.3d 415, 418 (11th Cir. 1994).]

Similarly, in Begay v. United States, 553 U.S. 137 (2008), this Court ruled that a conviction for driving under the influence of alcohol was not a violent felony because:

> DUI differs from the example crimes — burglary, arson, extortion, and crimes involving the use of explosives — in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, "violent," and

> "aggressive" **conduct.** [*Id.* at 144-45 (emphasis added).]

On this basis, this Court ruled that a crime that "amounts to a form of inaction [is] a far cry from the 'purposeful, "violent," and "aggressive" conduct' potentially at issue when an offender **uses** explosives against property...." Chambers v. United States, 555 U.S. 122, 128 (2009) (emphasis added). The same logic governs here.

### D. Measured by Its Closest Analog, "Use" of Explosives, Conduct Does Not Comprehend Possession.

In James v. United States, this Court concluded that "[t]he specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct 'otherwise ... presents a serious potential risk of physical injury.'" *Id.* 550 U.S. at 203. Thus, the Court decided that it "can ask whether the risk posed by [the predicate crime] is comparable to that posed by its closest analog." *Id.* *See also* Sykes at 2273.

In this case, the closest analog to the predicate crime of possession of a short-barreled shotgun is the phrase "use of explosives." Employing that analog, it is clear that **possession** of any type of firearm would not be covered, it being a far cry from "**use**" of explosives.

Indeed, interpreting 18 U.S.C. § 924(c)(1)(A) — a mandatory minimum sentencing statute companion to

18 U.S.C § 924(e) — this Court construed "use" of a firearm to "require[] evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey v. United States, 516 U.S. 137, 143 (1995). It was not enough, the Bailey Court ruled, for the government to have proved that the firearm was "accessible and proximate" to the defendant. *See id.* at 138-39. Instead, the Court reasoned that "use" required proof of "active employment," **not** "mere possession." *Id.* at 143-44.

Likewise, since the government would be required to prove more than mere possession of explosives with accessibility and proximity in order to establish "use of explosives" to be a violent felony, *a fortiori* mere possession of a short-barreled shotgun, even if accessible and proximate, would not constitute a violent felony. In neither case would such a crime require proof of "conduct" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii).

Had Congress intended that mere possession of explosives be classified as a violent felony, it would have omitted "conduct" entirely from § 924(e)(2)(B)(ii) — so that it would have read "or otherwise presents a serious potential risk of physical injury to another." Such a reading would violate the surplusage canon that requires, if possible, every word or provision is to be given effect. *See* Reading Law at 174. Moreover, by the phrase, "involves conduct that," Congress intended to trigger the negative implication that only those crimes that are conduct-based are eligible to be

classified as a violent felony — *expressio unius est exclusio alterius*. *See* Reading Law at 107, *et seq*.

Because the crime of mere possession of a short-barreled shotgun does not require any proof of actual conduct, the crime does not meet the threshold requirement of conduct. Therefore, the crime is not even eligible to be classified as a violent felony. Thus, this Court cannot find such possession to trigger the statute even if it adopts the government's speculation as to whether a short-barreled shotgun necessarily presents a serious potential risk of physical injury to another.

## II. A SHORT-BARRELED SHOTGUN IS DESIGNED AND REGULARLY USED FOR A VARIETY OF LAWFUL PURPOSES.

Relying on United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012), the court of appeals below found that possession of a short-barreled shotgun "as a **categorical** matter ... presents a serious potential risk of physical injury to another" and, thus, that it qualifies as a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). Johnson at 711. Lillard, in turn, was based on the assumption that short-barreled shotguns are "inherently dangerous because they are not useful '**except for violent and criminal purposes**.'" *Id.* at 776 (emphasis added). This assumption is demonstrably untrue.

Thousands of Americans legally own short-barreled shotguns which are registered with the U.S. Department of the Treasury pursuant to the National

Firearms Act. *See* Pet. Br. at 25-29. The government's untenable position is that Congress simultaneously sanctions the ownership and possession of a category of weapons that it has determined are intended **only** for "violent and criminal purposes."[8]

Certainly, there was no basis for the Eighth Circuit to assert without qualification whatsoever that "[p]ossession of a short shotgun creates an extreme 'likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" Lillard at 777. Does this statement apply to those who **lawfully** own short-barreled shotguns under the NFA? Does it apply to American citizens who illegally possess a short-barreled shotgun — but have never committed any other crime? Does the statement apply to police officers and military personnel who use short-barreled shotguns in the course of their employment? Does the simple possession of a short-barreled shotgun somehow transform a person into one who is extremely likely to become violent? The Eighth Circuit simply failed to consider the consequence of its view that anyone in mere possession of a short-barreled shotgun is a potential cold-blooded killer.

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[8] Having federal paperwork to accompany a short-barreled shotgun, in and of itself, does not decrease or eliminate the risk of violence associated with the short-barreled shotgun, since it is only a person, not the short-barreled shotgun, that has the capacity to be violent. A short-barreled shotgun sitting in the corner is not inherently more dangerous than a short-barreled shotgun sitting in the corner with an ATF tax stamp lying next to it.

To the contrary, short-barreled shotguns have many legitimate, lawful uses.

### A. The Shotgun Is the Self-Defense Weapon of Choice for Millions of Americans.

Second only to the handgun,[9] the shotgun is no doubt the most popular weapon chosen by Americans for self-defense in the home. The reasons for this are myriad, ranging from the power, to the versatility of ammunition, to the simplicity of this type of firearm.[10]

The shotgun is undoubtedly a powerful weapon. Federal law generally prohibits the possession of firearms with barrels that are more than 0.50 inches wide. *See* 18 U.S.C. § 921(a)(4)(B). However, shotguns are expressly exempted from this prohibition, even though the diameter of, for example, the most commonly owned size of shotgun, 12 gauge, is 0.73 inches.

The power of the commonly owned shotgun is illustrated by comparison to other common calibers of firearms, such as the .45 ACP (the largest handgun calibers typically used for self defense) and the .308

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[9] *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008) ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

[10] *See* Firearms Tactical Institute, Tactical Briefs #10, Oct. 1998, http://www.firearmstactical.com/briefs10.htm.

Winchester (one of the largest rifle calibers typically used for self defense).

First, a 12 gauge slug can weigh as much as 1 3/8 ounce.[11] By comparison, the projectile in the .45 ACP is around 230 grains (0.53 oz) and the .308 is around 150 grains (0.34 oz).

Second, the muzzle energy generated by a 12 gauge shotgun slug can be as much as 4700 foot pounds, compared to 400-500 foot pounds from the .45 ACP and about 2600 foot pounds from the .308.

Not only are shotguns powerful weapons, the most popular models are pump action, making it very simple to operate the action, even in the highly stressful circumstances when the need for self-defense arises. The simplicity of the action also contributes to making shotguns immensely reliable. Indeed, it is well known that some criminal encounters often are deterred by the terrifying and unmistakable sound of the simple racking of the slide of a pump action shotgun — with or without the ability to see the weapon. Such deterrent effect cannot be quantified, but should not be underestimated.

Many shotgun models have a simple bead sight, which is highly durable and more than sufficient in the close quarters and short ranges that it would be used in home defense situations.

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[11] There is a plethora of different types of lawful projectiles that can be fired from a shotgun, *e.g.*, buckshot, birdshot.

There is a consensus among many that the shotgun should be considered the weapon of choice for self-defense and home protection. Indeed, even zealous gun-control advocate Vice President Joe Biden lobbying for bans on so-called "assault weapons"[12] like AR-15 and AK-47 semi-automatic rifles, has counseled his fellow citizens, "If you want to protect yourself ... buy a shotgun. Buy a shotgun."[13]

### B. Short-Barreled Shotguns Are Particularly Useful for Self-Defense within the Home.

A short-barreled shotgun is defined under federal law as one with a barrel length under 18 inches. Thus, by definition, short-barreled shotguns are identical to legal shotguns, only with shorter barrels than on other shotguns. Shorter barrel length translates into less mass, and thus into less weight. In the most popular of shotguns with tubular magazines that reside below the barrel, a shorter barrel also means reduced capacity of the magazine, which also translates into less weight. A fully loaded short-barreled shotgun could weigh a pound less than a fully loaded shotgun with a longer barrel and longer magazine containing more rounds.

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[12] The term "assault weapons" is a politically charged misnomer.

[13] *See* "Open for Questions: Vice President Biden on Reducing Gun Violence," Feb. 13, 2013, https://www.youtube.com/watch?v=Eeh3Krw8FGU, excerpted at https://www.youtube.com/watch?v=HHZ7zXLvOkY.

Shotguns are relatively heavy weapons, especially when fully loaded, and are often much heavier than rifles such as the AR-15, especially when fully loaded in tubular magazines that rest forward near the front of the shotgun, making its center of balance further forward than, say, an AR-15. Basic physics says that the further away from the fulcrum (the hands that hold it) that weight gets, the more of a load or strain it places on the fulcrum (the shooter's arms). Therefore, the longer and heavier the shotgun, the more it can pose logistical problems for persons of small stature, lesser strength, or physical disability. By employing a short-barreled shotgun — weighing significantly less and carrying far less mass forward for the user — it is far easier for many people to effectively wield a short-barreled shotgun. This attribute is critically important in self-defense situations, when the ability to effectively manipulate a weapon is essential.

Moreover, when used for self-defense in the home, a shorter barrel on a shotgun increases the mobility of the user. Almost universally, when evaluating a firearm for use in the home, a shorter barrel is preferred over a longer one. It is self-evident that while attempting to maneuver through one's home without bumping into walls and doors, a shorter barrel is superior than a longer one. Additionally, the shorter barrel decreases the chances that the firearm may be grabbed by an assailant and its muzzle reoriented, rendering it ineffective. A short-barreled shotgun is thus more easily employed for self defense not only in the home, but also in one's place of business or in one's vehicle, or elsewhere.

In short, there are a variety of perfectly understandable and legitimate reasons that a person would prefer a short-barreled shotgun for use as a self-defense weapon in the home.

### C. The Arbitrary Distinction of a Short-Barreled Shotgun Defies Determinations of Dangerousness.

It is illogical to believe a shotgun with a 17.9 inch barrel has only criminal application while, at the same time, federal law recognizes a shotgun with a barrel of 18.1 inches to be fully lawful. Although the arbitrarily chosen length of 18 inches defines what is permitted and what is not, it makes no sense to argue — as the Eighth Circuit has — that the uses for shorter barreled shotguns are "categorically" and inherently dangerous and illegal simply based on barrel length.

Lastly, pistols chambered in a shotgun caliber[14] are widely used by Americans for lawful purposes. The fact that their ownership is lawful exposes the illogic of the Eighth Circuit's assertion that (i) short-barreled shotguns have no lawful purposes, but (ii) handguns chambered for shotgun shells which are shorter, and standard shotguns which are longer, both have lawful uses, neither carrying any presumption of a tendency to violence.

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[14] *See, e.g.*, Taurus' "Judge" and Smith & Wesson's "The Governor" revolvers chambered for .410 shotshells.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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