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NOTE

MUNICIPALITIES ARE NOT KINGDOMS: REGULATING GUN OWNERSHIP IN CASES INVOLVING DOMESTIC VIOLENCE IN LIGHT OF THE *PAULER* DECISION

KELLIE DESROCHERS*

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INTRODUCTION¹

In the wake of mass shootings, debates in the United States surrounding gun regulation and the status of the Second Amendment as a fundamental right reach

¹ It is important to discuss at the outset of this Note the limitations that are inherent to the study of gun violence in the United States, as well as the statistics related to domestic violence. Gun violence is understudied in the United States for several reasons, the most important being the lack of federal funding and support for such research due to the Dickey Amendment. *See infra* note 213, 240. Passed in 1996, this Amendment has effectively blocked the Center for Disease Control and Prevention (CDC) from studying gun violence in a meaningful way. *See infra* 240. Due to the lack of top-down leadership and the political power of the National Rifle Association (NRA), most data collection relating to gun violence in the U.S. is fragmented across non-profit organizations, investigative journalists, and the Federal Bureau of Investigation (FBI). This fragmentation means that data collection is not uniformly done with the same methodology. For example, Everytown For Gun Safety's database is based off of the previous definition for mass shooting developed by the FBI before the passage of the Investigative Assistance for Violent Crimes Act in 2012, which lowered the threshold definition of mass shooting from four fatalities down to three. *See Ten Years of Mass Shootings in the United States: An Everytown for Gun Safety Support Fund Analysis*, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/wp-content/uploads/2019/11/Everytown-mass-shootings-report-2009-2018_Methodology.pdf. Therefore, even when comparing statistics within the FBI Uniform Crime Reporting database (which is most often used) there will be discrepancies in the raw data collected across different time periods.

There are drawbacks in each dataset. First and foremost, the FBI reporting system is entirely voluntary from individual police agencies. Not all states report their crime information to the FBI, and accurate details from which to base any categorization is dependent on what each police organization provides in their Supplementary Homicide Report, which is a subset of the reporting program. Additionally, FBI does not categorize "mass shootings" within the report itself. With Mother Jones, the dataset changed its definition when the FBI changed its definition of a mass shootings to three, bringing with it the methodological problems described above. With Everytown's dataset, it has maintained uniformity with the old definition of four or more fatalities. *See* Marisa Booty, Jayne O'Dwyer, Daniel Webster, Alex McCourt and Cassandra Crifasi, *Describing a "mass shooting": the role of databases in understanding burden*, INJURY EPIDEMIOLOGY, 6 (Dec. 3, 2019).

Moreover, there is an additional wrinkle in understanding mass shootings in the context of domestic violence. Unless the dataset explicitly includes contextual factors, it may not be possible to discern which cases have a connection domestic violence. "Connection" is a term used here purposefully, because many incidents of domestic violence go unreported, (*see Police Responded to Nearly Two-Thirds of Reported Nonfatal Domestic Violence Victimization in 10 Minutes or Less*, BUREAU OF JUSTICE STATISTICS (May 2, 2017) <https://www.bjs.gov/content/pub/press/prdv0615pr.cfm>), let alone affirmatively prosecuted and convicted. And even when there is a conviction on record, this information can be omitted in the data collection process. For example, the court marshal and dishonorable discharge of

“a fever pitch” in almost a rhythmic, seasonal cycle.² Pro-gun advocates resist further restrictions on gun ownership.³ Gun control advocates, on the other hand, usually look to regulate gun ownership in response to the latest tragedy.⁴ Though tension between these two cultural perspectives on guns has always existed, one area of compromise has historically bridged the divide – keeping

Devin Kelley was not properly reported to NCIS, which enabled him to access firearms before his deadly rampage in a Texas Church. *See infra* note 209.

This paper relies primarily on the datasets produced by the non-profit Everytown for Gun Safety and the database created by the investigative journalists at Mother Jones for two important reasons. First, both the way the datasets are created and maintained help to overcome some of the issues the FBI database has. These datasets do not rely on voluntary reporting, and the data collection process of each provide the contextual information necessary to determine if a perpetrator has a connection to domestic violence. Second, Everytown and Mother Jones’ methodologies help bridge the gap between the “new” definition of mass shootings, which Mother Jones adapted to, as well as provide a consistent view over time, as Everytown has utilized the previous standard of four fatalities. A standard definition, at minimum, is necessary for researchers, advocates, and the government to develop a uniform methodology for the study of this issue, and to develop appropriate interventions to reduce this type of violence.

For further discussion about how the role of these databases, *see* Marisa Booty, Jayne O’Dwyer, Daniel Webster, Alex McCourt and Cassandra Crifasi, *Describing a “mass shooting”: the role of databases in understanding burden*, INJURY EPIDEMIOLOGY, 6 (Dec. 3, 2019).

² *See Arizona Shooting Fuels Debate About Open-Carry Gun Law in California*, FOX NEWS (Jan. 17, 2011), <http://www.foxnews.com/politics/2011/01/17/tucson-shooting-fuels-open-carry-debate-california.html> (after the shooting of Rep. Gabriella Giffords); Susan Davis, *A Familiar, Partisan Response In Congress to Las Vegas Massacre*, NAT’L PUB. RADIO (Oct. 2, 2017, 4:05 PM) (post Las Vegas Massacre), <https://www.npr.org/2017/10/02/555099794/a-familiar-partisan-response-in-congress-to-las-vegas-massacre>; Paige Lavender, *Donald Trump Sides with Democrats Over NRA in Gun Ban Debate*, HUFFINGTON POST (June 15, 2016, 11:09 AM), https://www.huffingtonpost.com/entry/donald-trump-nra-meeting_us_576160aae4b09c926cfda93d (“anti-gun furor following the Paris terrorist attacks reached fever pitch last year” in 2015); Bill Schneider, *The Hard Push Ahead for Gun Control*, REUTERS (Dec. 18, 2012), <http://blogs.reuters.com/great-debate/2012/12/18/the-hard-push-ahead-for-gun-control/> (the “outcry for tougher gun laws is reaching a fever pitch” after Sandy Hook Elementary School massacre); Allan Smith, *‘We’re Watching it All Unfold’: We’ve Reached a Fever Pitch in the Debate Over Gun Control*, BUS. INSIDER (June 25, 2016, 6:55 PM), <http://www.businessinsider.com/gun-control-house-sit-in-collins-bill-2016-6> (post Orlando terror attack).

³ *See* Chris W. Cox, *The Great Flood of 2018*, NAT’L RIFLE ASS’N – INST. FOR LEGIS. ACTION (Dec. 29, 2017), <https://www.nraila.org/articles/20171229/the-great-flood-of-2018> (advocating against gun control and finding that gun control advocates want to “chip away at [their] firearms freedom”).

⁴ Liam Sullivan, Press Release, Brady Campaign, Brady Campaign Demands that Lawmakers Take Meaningful Action to Stop Gun Violence, BRADY CAMPAIGN (Nov. 17, 2017), <https://www.bradyunited.org/press-releases/brady-campaign-demands-that-lawmakers-take-meaningful-action-to-stop-gun-violence>.

guns out of the hands of perpetrators of domestic violence.⁵ This common ground is now threatened by the decision in *United States v. Pauler*.⁶ Pro-gun advocates⁷ see this ruling as a “huge win and the start of a bright future for those who have had their guns taken from them by local law enforcement.” This would allow for more gun owners to use *Pauler* as precedent to prevent local authorities from removing guns from domestic violence misdemeanants who happen to be charged with a municipal ordinance.⁸ In contrast, domestic violence organizations and gun control advocates see weapons in the hands of a person who has committed an act of domestic violence as a severe threat to not only their partners, but to the general population: 55% of intimate partner homicides in 2015 were committed with a gun and 54% of mass shootings between January 2009 to July 2014 involved the shooter killing an intimate partner.⁹

Before *Pauler*, there was a general consensus that guns should remain out of the hands of domestic violence offenders. Congress passed the Violence Against Women Act in 1994, which restricted gun ownership by domestic violence offenders.¹⁰ Since this law went into effect, federal and state legislatures and the courts have worked together to provide a patchwork system regulating gun

⁵ The Editorial Board, *There is Common Ground on Guns: Part 1 The Home Front*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/opinion/domestic-violence-guns.html>.

⁶ *United States v. Pauler*, 857 F.3d 1073 (10th Cir. 2017).

⁷ There is a wide spectrum of positions relating to gun ownership and gun possession in the United States, some whom support restrictions on ownership based on certain criteria, to those who believe in an unabridged, absolute right to gun access for all. The phrase “pro-gun advocates” is used in this note to delineate a particular, problematic subset of supporters of the Second Amendment right who oppose restrictions applied to domestic violence offenders.

⁸ Craig Martin, *Denver’s 10th Circuit Court Ruling Has Wide Ramifications for Gun Owners*, CONCEALED CARRY.COM (May 25, 2017, 2:29 PM), <https://colorado.concealedcarry.com/2017/05/25/denvers-10th-circuit-court-ruling-has-wide-ramifications-for-gun-owners/>.

⁹ *Domestic Violence and Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>; *Facts About Gun Violence*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/wp-content/uploads/2018/01/18.01-FACT-Stats.pdf>. It is important to note that the statistics relating to mass shootings are not uniformly defined across data sets. The study cited here follows the former FBI definition of four or more deaths (post 2012, the threshold is three or more deaths). For more information regarding methodology for this study, please see *Ten Years of Mass Shootings in the United States: An Everytown for Gun Safety Support Fund Analysis*, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/wp-content/uploads/2019/11/Everytown-mass-shootings-report-2009-2018_Methodology.pdf.

¹⁰ Winnie Stachelberg et al., *Preventing Domestic Abusers and Stalkers from Accessing Guns*, CTR. FOR AM. PROGRESS, (May 9, 2013, 2:19 PM), <https://www.americanprogress.org/issues/courts/reports/2013/05/09/60705/preventing-domestic-abusers-and-stalkers-from-accessing-guns/>.

ownership for people who are convicted of domestic violence offenses. In 1996, Congress enacted the “Lautenberg Amendment” to the Gun Control Act of 1968. This amendment prohibited gun possession for those convicted of a misdemeanor crime of domestic violence, an outstanding loophole that legislators sought to close whereby dangerous offenders would escape the penalty of surrendering their weapons by pleading to a lesser charge not covered by the specific wording of the Violence Against Women Act. Additionally, this amendment eliminated the “public interest exception” for those working in law enforcement, under which law enforcement officers convicted of a domestic violence offense were allowed to keep their firearms, in the furtherance of the public interest by way of their continued police service.¹¹ Courts have defended the constitutionality of the amendment against several constitutional challenges.¹² More recently, the Supreme Court reaffirmed the reach of the amendment in *United States v. Castleman*¹³ as well as *Voisine v. United States*.¹⁴

Yet the courts are not immune from the “culture wars”¹⁵ raging in the body politic, and it seems that the debate surrounding the Second Amendment is reaching the ears of some judges.¹⁶ For the first time in ten years, Justice Clarence Thomas spoke out in apparent frustration from the bench in *Voisine*, concerned that the Court was denigrating the Second Amendment as a “second-class right.”¹⁷ The lower courts are heeding the call to evaluate the Second Amendment with greater deference to its status as an enumerated right, and to

¹¹ T.J. HALSTEAD, CONG. RESEARCH SERV., RL31143, FIREARMS PROHIBITIONS AND DOMESTIC VIOLENCE CONVICTIONS: THE LAUTENBERG AMENDMENT, at 6 (2001).

¹² *Id.* at 5 (describing the early constitution-based challenges to the ban, focusing on the Commerce Clause, *United States v. Lopez*, Equal Protection Clause, and Ex Post Facto concerns).

¹³ *United States v. Castleman*, 572 U.S. 157, 173 (2014).

¹⁴ *Voisine v. United States*, 136 S. Ct. 2272, 2282 (2016) (applying 18 U.S.C. § 922(g)(9) to reckless assaults).

¹⁵ James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 866 (2014).

¹⁶ See *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting) (finding the Supreme Court avoids taking Second Amendment cases because it is not one of the “favored rights”); see also George Leef, *A Federal Judge Upholds Second Amendment Rights - But the Case is Heading for the Ninth Circuit*, FORBES (July 17, 2017, 6:45 AM), <https://www.forbes.com/sites/georgeleef/2017/07/07/a-federal-judge-upholds-second-amendment-rights-but-the-case-is-heading-for-the-ninth-circuit/#4a2e9cce7f50> (finding that the Ninth Circuit will hear an appeal regarding an injunction on a proposition that increases gun control).

¹⁷ See *Silvester*, 138 S. Ct. at 952; see also Dennis A. Henigan, *The “Second-Class” Second Amendment Right*, HUFFINGTON POST (June 30, 2016, 12:02 PM), https://www.huffingtonpost.com/dennis-a-henigan/the-second-class-seconda_b_10756856.html.

provide scrutiny in order to preserve individuals' access to guns.¹⁸ The most significant departure from established precedent recently took place in the Tenth Circuit in *United States v. Pauler*, where the court held that the proper statutory interpretation of 18 U.S.C. §921(a)(33) (hereinafter, the "Misdemeanant Definition Statute,")¹⁹ does not include those offenders who were convicted of a domestic violence offense under municipal ordinances.²⁰ That ruling allows dangerous, convicted domestic violence offenders to remain free to own or buy a gun.²¹

The *Pauler* decision is an aberration from the established Second Amendment gun regulation jurisprudence and should not be followed by courts deciding cases implicating the misdemeanor definition statute and/or 18 U.S.C. §922(g)(9), (hereinafter, the "DVM Gun Ban" ²²). *Pauler* undermines a legitimate state interest in protecting domestic violence victims from a significant threat to their lives,²³ and the lives of those in the domestic violence misdemeanor's community.²⁴ The Supreme Court should to adopt a universal

¹⁸ See *United States v. Pauler*, 857 F.3d 1073, 1107 (10th Cir. 2017), see also *United States v. Wagner*, No. 3:17-cr-00046-MED-WGC, 2017 WL 4467544, at *2, (D. Nev. Oct. 5, 2017). The case of *District of Columbia v. Heller* confirmed the right to bear arms as an "individual right." *District of Columbia v. Heller*, 554 U.S. 570 (2008) *passim*.

¹⁹ 18 U.S.C. § 921(a)(33) provides the explicit definition of the offense that qualifies as a misdemeanor crime of domestic violence. (2019). 18 U.S.C. § 922(g)(9) is the statute that bans domestic violence misdemeanants from owning firearms. (2019). Both passages are included when discussing the "Lautenberg Amendment" as a whole but will be referenced separately when discussing specific statutory interpretations drawn by the courts.

²⁰ *Pauler*, 857 F.3d at 1077 ("...when Congress refers only to "State" law, it does not also include the laws of a state's political subdivisions. Accordingly, because Defendant's prior violation of a Wichita municipal ordinance was not a "misdemeanor crime of domestic violence" as defined [by the Amendment] the government has not demonstrated that [the defendant] was prohibited from possessing a firearm under [the Amendment].").

²¹ *Id.* at 1073 (holding that the construction of the statute used the term "state" to only refer to a state itself, not to the state and all of its municipalities. Thus, those who have been convicted of a domestic violence municipal ordinance would not be covered under 18 U.S.C. § 921(a)(33)'s definition of misdemeanor domestic violence conviction under state law).

²² Abbreviated from Domestic Violence Misdemeanant.

²³ See *United States v. Chovan*, 735 F.3d 1127, 1127 (9th Cir. 2013) (holding that 18 U.S.C. § 922(g)(9) "did not violate the Second Amendment because its prohibition on gun possession by domestic violence misdemeanants was substantially related to the important government interest of preventing domestic gun violence"), *cert. denied*, 135 S. Ct. 187 (2014).

²⁴ See *Analysis of Recent Mass Shootings*, EVERY TOWN FOR GUN SAFETY SUPPORT FUND (July 2014), <https://everytownresearch.org/wp-content/uploads/2014/10/analysis-of-recent-mass-shootings.pdf> (reflecting a study that indicated that 57% of the mass shootings that occurred between January 2009 to July 2014 involved the killing of a family member, or a current or former intimate partner of the shooter). See also *Domestic Violence and Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>.

bright line rule for Second Amendment disenfranchisement for domestic violence offenders in order to avoid the confusion that the *Pauler* ruling has brought into the patchwork of jurisprudence regarding the gun ownership in America.²⁵

To understand how the sudden shift in statutory interpretation in *Pauler* originated, this Note will first briefly summarize the extensive legislative history of the Violence Against Women Act (“VAWA”) and the Lautenberg Amendment, which laid the foundational statutes at the core of this particular regulatory scheme. It will then analyze, within the ongoing political debates over the Second Amendment, the development of judicial precedent that broadened gun ownership restrictions to include all levels of domestic violence offenders, culminating in *United States v. Castleman* and *Voisine v. United States*. Turning to *Pauler*, this Note will then dissect the statutory interpretation provided by the Tenth Circuit.

Furthermore, this Note will argue that the *Pauler* decision is incorrect because: 1) the common statutory interpretation applied by the Supreme Court concerning gun regulation treats municipal law as “State law;” 2) the 10th Circuit in *Pauler* incorrectly interpreted Congress’ intent when it did not apply the Lautenberg Amendment in the *Pauler* case; 3) the 10th Circuit in *Pauler* impermissibly strayed from precedent by restricting its interpretation of “domestic violence” to exclude municipal violations that *Pauler* was charged under; 4) the 10th Circuit application of the Act in *Pauler* makes the law under-inclusive; and 5) the 10th Circuit decision creates an impermissible and arbitrary division in the “class” of similarly situated persons (domestic violence offenders), violating the Equal Protection Clause.

Finally, this Note will express caution about the potential judicial and legislative impact of an unchallenged *Pauler* decision, as well as the implications the case could have on the public interest.

I. BEFORE *PAULER*: GUN REGULATION FOR DOMESTIC VIOLENCE OFFENDERS

A. *Federal Gun Restrictions: Historical Development*

Gun restrictions have been part of state and local regulations for the entirety of U.S. history and have varied widely from state to state, and even from town to town.²⁶ Federal regulations, however, began in 1934 with the passage of the

²⁵ It should be noted that any gun restriction case brought before the current selection of Justices on the Supreme Court would be facing an uncertain fate. Justice Kavanaugh’s Second Amendment jurisprudence seems to reflect that of Justice Scalia, but it is important to note that even Justice Scalia did not support gun ownership for all. See German Lopez, *Brett Kavanaugh’s 2nd Amendment Views, Explained*, VOX, (Sep. 5, 2018) <https://www.vox.com/2018/9/5/17820310/brett-kavanaugh-second-amendment-guns-supreme-court>.

²⁶ “Contrary to popular perceptions, the United States has always had gun laws in place. . . There were so many state and local firearm regulations, many in direct contradiction, that successive U.S. Postmasters General complained that the post office was ‘compelled to carry

National Firearms Act.²⁷ The Act banned the sale of “gangster type” weapons, machine guns, and sawed-off shotguns.²⁸ In 1938, the second National Firearms Act was passed and focused on licensing and record-keeping practices for gun makers, with restrictions on shipping guns across state lines.²⁹ The next round of serious legislation came after public furor over the assassinations of John F. Kennedy in 1963, and Robert F. Kennedy and Martin Luther King, Jr. in 1968, with the Gun Control Act of 1968.³⁰ The Act specifically targeted and banned the sale of guns to minors, convicted felons, the mentally disabled, and those with records of substance abuse, among other provisions.³¹ The important development in regulation between 1938 and 1968 was the shift from regulating specific types of weapons and gun manufacturers to banning specific classes of persons from obtaining weapons.³² This shift provides the framework for Congress to use later in constructing gun restrictions for domestic violence offenders.

B. Domestic Violence and Gun Restriction: Legislative Intent

1. Precursor to Lautenberg: Gun Control Act Amendment

The impetus for gun regulation for domestic violence offenders began after the passage of the Violence Against Women Act of 1994 (VAWA).³³ VAWA was a turning point for domestic violence in terms of public awareness, legal reform, funding, and research.³⁴ During VAWA’s creation, as part of a consortium of laws passed in 1994 aimed at “women’s issues,” the Gun Control Act Amendment, for the first time, specifically targeted domestic violence offenders as a specific sub-group of criminals.³⁵ There were several

firearms’ in defiance of ‘local laws and regulations prohibiting the purchase and possession’ of guns,” while delivering guns ordered and shipped through the U.S. Postal Service. Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 139 & 170 (2001).

²⁷ *Id.* at 176.

²⁸ *Id.* at 175–76.

²⁹ *Id.* at 176.

³⁰ *Id.* at 179; *November 22, 1963: Death of the President*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/november-22-1963-death-of-the-president> (last visited Feb. 28, 2020).

³¹ Bellesiles, *supra* note 26, at 179.

³² See Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133 (1975), for additional in-depth analysis of the specifics of the 1934, 1938, and 1968 regulations.

³³ Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 825 (2000).

³⁴ *Id.* at 824–25.

³⁵ See Laura Lee Gildengorin, *Smoke and Mirrors: How Current Firearm Relinquishment Laws Fail to Protect Domestic Violence Victims*, 67 HASTINGS L. J. 807, 811–12 (2016), <http://www.hastingslawjournal.org/wp-content/uploads/Gildengorin-67.3.pdf> (noting that the

shortcomings to the Gun Control Act Amendment, particularly the temporary nature of protective orders on which the gun ban is predicated, as well as offenders avoiding restrictions altogether through inadequate charging by local prosecutors.³⁶ Two years later, the Lautenberg Amendment was put forward in an attempt to close these gaps in coverage.³⁷

2. Legislative Intent of the Lautenberg Amendment

The legislative intent of the Lautenberg Amendment was made abundantly clear in the multiple statements made by Senator Lautenberg and other supporters of the Amendment over the course of its development, as discussed below.

Senator Lautenberg viewed the amendment as prohibiting gun ownership by any person convicted of domestic violence “no matter how it is labeled.”³⁸ In the legislation’s development, this message was consistent: “I have introduced legislation which would prohibit any individual convicted of any crime involving an act of domestic violence from owning or possessing a gun.”³⁹ He intended the Amendment to be “a very clear rule. If you are convicted of beating your wife or your child . . . you lose your gun, no ifs, ands, or buts.”⁴⁰ Supporters in the Senate reiterated this understanding: “This amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm.”⁴¹

Senators considered the Amendment a critical piece in closing a “dangerous loophole” left by the shortcomings of the Gun Control Act Amendment.⁴² It enjoyed widespread support in the Senate: the voice vote held on the Amendment passed with not a single objection and passed 97-2 in formal roll call.⁴³

Gun Control Act extended the gun prohibition from convicted felons, drug addicts, and the mentally ill to offenders subject to a domestic violence restraining order).

³⁶ *Id.* at 812.

³⁷ Nathan, *supra* note 33, at 826.

³⁸ 104 CONG. REC. S8,832 (daily ed. July 25, 1996) (statement of Sen. Lautenberg) (referencing the connection between various domestic violence related offenses and escalating criminal behavior).

³⁹ *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1997: Hearings on H.R. 3814 Before a Subcomm. of the Comm. on Appropriations*, 104th Cong. 91 (1997) (statement of Sen. Lautenberg).

⁴⁰ 104 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

⁴¹ 104 CONG. REC. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein).

⁴² 104 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

⁴³ 104 CONG. REC. S8829,30 (daily ed. July 25, 1996) (statement of Sen. Lautenberg); 104 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

C. *Judicial Upholding, Interpretation, and Extension*

Since the passage of the VAWA and the subsequent Lautenberg Amendment, the majority of courts have gone beyond simply upholding the gun ownership restrictions.⁴⁴ Over time, the courts have expanded the coverage of these restrictions to include a substantial number of offenders: from offenders who were prosecuted under generic battery statutes (instead of only offenders charged under statutes that specifically defined domestic violence), to offenders who used the common law standard of force (instead of elevating the crime of domestic violence to only instances of where an act left physical marks on the body), to offenders who were reckless in their actions that resulted in a battery (expanding the *mens rea* beyond knowingly or intentionally harming a partner).⁴⁵

1. Upholding Constitutionality: Commerce Clause and Equal Protection (1998-2003)

After the initial passage of the Lautenberg Amendment, the DVM Gun Ban was attacked from several constitutional angles. The most important arguments focused on the Commerce Clause and Equal Protection Clause.⁴⁶ The Commerce Clause argument focused on attacking Congress's ability to regulate an item that is not embedded in the instrumentalities or channels of interstate commerce.⁴⁷ The Equal Protection Clause argument, in contrast, focused primarily on the DVM Gun Ban's target demographic rather than on the guns specifically.⁴⁸

Courts were not receptive to the Commerce Clause challenge to the Lautenberg Amendment, despite the fact that some courts believed the holding in *United States v. Lopez* could have rendered the Lautenberg Amendment unconstitutional due to the facially non-commercial nature of the statute.⁴⁹ In *Lopez*, the Supreme Court determined that Congress could not regulate the action of simply possessing a gun on school grounds because the legislation was not within Congressional authority under the Commerce Clause.⁵⁰ Possessing a gun on school property did not inherently use the channels of interstate commerce, nor did the possession of a gun on school property relate to the "instrumentalities" of interstate commerce like highways or cargo planes, nor did possession of a gun on school property have a substantial effect on interstate commerce or relate to interstate commerce.⁵¹ Yet, "every court applying [the

⁴⁴ See discussion *infra* Section C.1-4.

⁴⁵ See discussion *infra* Section C.1-4.

⁴⁶ There were also constitutional cases concerning the amendment's *ex post facto* application, which are not addressed here. See Halstead, *supra* note 11, at 9.

⁴⁷ *Id.* at 5-6.

⁴⁸ *Id.* at 6-9.

⁴⁹ *Id.* at 5-6.

⁵⁰ *United States v. Lopez*, 514 U.S. 549, 552 (1995).

⁵¹ *Id.* at 558.

substantial economic effects test]” as held in *Lopez* ruled that the gun ownership restriction under the DVM Gun Ban passed the “minimum constitutional requirements” necessary “under the Commerce Clause.”⁵² The courts justified this interpretation by resting on the jurisdictional element of the *Lopez* holding that “requires the government to establish . . . the firearm at issue was possessed in or affecting commerce, or was received after having been shipped or transported in interstate or foreign commerce.”⁵³ Effectively, the government must prove that the weapon in question travelled through the machinations of interstate commerce, and this qualification brought the DVM Gun Ban into compliance with the *Lopez* holding.⁵⁴ This nexus has been enough to protect the DVM Gun Ban from Constitutional attack through the Commerce Clause.⁵⁵

The Equal Protection Clause line of cases caused a split in the circuits concerning the Lautenberg Amendment’s application after the D.C. Circuit’s initial ruling in *Fraternal Order of Police v. United States (FOP I)*, which held that the DVM Gun Ban created an impermissible distinction between misdemeanor and felony offenders, with misdemeanants receiving potentially longer term gun restrictions than felons.⁵⁶ On rehearing, the D.C. Circuit reversed its original position in *FOP I* and held that the Lautenberg Amendment was constitutional on a different ground from the holdings of other circuits.⁵⁷ Those other circuits follow the analysis provided in *Hiley v. Barrett* by the Eleventh Circuit, which upheld the Amendment applying rational basis review because the claims did not include a “suspect class or a fundamental right.”⁵⁸ The court in *Hiley* concluded that Congress had the authority to treat domestic violence offenders differently from other groups of people, in that it was rational for Congress to restrict these offenders’ access to guns given “the likelihood that domestic violence will escalate into murder.”⁵⁹

Where the Eleventh Circuit focused on domestic violence offenders as a group, however, the D.C. Circuit focused on a perceived difference in treatment within the class of domestic violence offenders.⁶⁰ The D.C. Circuit was concerned by the appearance of different, harsher penalties produced by the application of the Lautenberg Amendment to misdemeanants versus the outcomes for felony offenders.⁶¹ This perception was due to the Lautenberg

⁵² Halstead, *supra* note 11, at 6.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 8.

⁵⁷ *Id.* at 8–9.

⁵⁸ *Id.* at 7–8.

⁵⁹ *Id.* at 7 (referencing *NAGE, Inc. v. Barrett*, 968 F. Supp. 1564, 1573 (N.D. Ga. 1997)).

⁶⁰ Halstead, *supra* note 11, at 8.

⁶¹ *Id.* (“The court maintained that the Amendment could not be permitted to enable the government to prohibit domestic violence misdemeanants from possessing firearms pursuant

Amendment's universal applicability for misdemeanor offenders in preventing them from owning guns after conviction, whereas some states allow offenders convicted of felonies to have their Second Amendment rights restored based on individual state policies.⁶² Thus, in a hypothetical state, a person convicted of a felony charge of domestic violence could eventually come to own a gun again, but misdemeanor offenders would remain restricted from gun ownership under the Lautenberg Amendment.⁶³ However, the D.C. Circuit reheard the case and recognized that Congress's focus on misdemeanants was not necessarily a harsher standard, in that there were additional pre-existing laws and non-legal restrictions that already restricted gun ownership for those convicted of a felony which did not apply to domestic violence misdemeanants.⁶⁴ The D.C. Circuit therefore decided to uphold the Lautenberg Amendment against the Equal Protection Clause challenge.⁶⁵

Though there has been potential for disagreement among the courts regarding the "proper" application of the Equal Protection Clause to the Lautenberg Amendment between the Eleventh and D.C. Circuit approaches,⁶⁶ Congress has reauthorized VAWA (the genesis legislation of the Lautenberg Amendment) several times⁶⁷ and the courts have continued to reject attacks on the Amendment's constitutionality.⁶⁸ In fact, the courts have not only upheld the constitutionality of the Amendment, but have actively expanded the scope of the Amendment over the course of the past decade.⁶⁹

to the public interest exception 'while it imposes a lesser restriction on those convicted of crimes that differ only in being more serious.'").

⁶² *Id.* at 7.

⁶³ *Id.* ("[T]he fact that while convicted felons may regain the right to possess a firearm if they receive a pardon, have their conviction expunged . . . many jurisdictions do not deprive misdemeanants of their civil rights. As such, the Amendment creates 'an anomaly whereby certain felons may be able to possess firearms, but domestic violence misdemeanants will not.'").

⁶⁴ *Id.* at 8–9.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.*

⁶⁷ For an overview of the renewal of VAWA, see OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEPT. OF JUSTICE, TWENTY YEARS OF THE VIOLENCE AGAINST WOMEN ACT: DISPATCHES FROM THE FIELD, at 1 (June 2016) <https://www.justice.gov/ovw/file/866576/download>. VAWA is currently up for reauthorization in 2018, and its reauthorization was delayed to December 7. See *The Violence Against Women Act Did Not Expire on September 30th*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE BLOG (Oct. 2, 2018), <https://ncadv.org/blog/posts/the-violence-against-women-act-did-not-expire-on-september-30th>.

⁶⁸ See discussion *supra* Section C. Judicial Upholding, Interpretation, and Extension, Part 1. Commerce Clause and Equal Protection (1998-2003).

⁶⁹ See discussion *infra* Section C. Judicial Upholding, Interpretation, and Extension, Parts 2 & 4.

2. Expansion: *Hayes* and *Chovan*

The holding in *United States v. Hayes* in 2009 marked the beginning of a distinct period of expansion in the applicability of the Lautenberg Amendment's gun ownership restriction.⁷⁰ In a 7-2 majority opinion, the Supreme Court held that the term "domestic relationship" did not have to be explicitly written in the predicate offense to fall under the statute's interpretation of "misdemeanor crime of domestic violence."⁷¹ The Court ruled that, although the generic battery statute was used to prosecute in this particular case, the fact the battery itself was *in fact* domestic violence was sufficient to trigger the domestic violence gun ownership restriction.⁷² This was an important step in protecting the wide application of the misdemeanor definition statute and the DVM Gun Ban, as many States did not necessarily have explicit domestic violence offenses at the time of the statute's passage.⁷³ Additionally, many prosecutors have discretion as to which statute to apply if both a domestic violence charge and a generic battery charge are available.⁷⁴ In order for the Lautenberg Amendment to retain effectiveness, its gun ownership restriction would need to be applicable in both charging scenarios.⁷⁵

In 2013, the DVM Gun Ban survived a more significant constitutional challenge in *United States v. Chovan*. The defendant argued that the application of the Amendment violated the Second Amendment as an "impermissible" restriction on the individual's right to bear arms, and that the Amendment no longer applied to him after his civil rights were restored now that ten years had passed from his conviction – the relevant period that California state law prohibited gun ownership for his conviction.⁷⁶ Here, the Ninth Circuit held that the gun ownership restriction was constitutional because it was substantially related to the important government interest of preventing gun violence.⁷⁷ Moreover, although the Ninth Circuit recognized that the Lautenberg Amendment "burdened" the Second Amendment right, it found that intermediate scrutiny was satisfied.⁷⁸ The court held that *District of Columbia v. Heller* found the "core" of the Second Amendment right is "the right of law-abiding, responsible citizens to use arms in defense" and the regulation of guns in the hands of criminally convicted persons therefore does not infringe on that "core."⁷⁹ Given that, the Ninth Circuit acknowledged that "it is self-evident that

⁷⁰ *United States v. Hayes*, 555 U.S. 415, 418 (2009).

⁷¹ *Id.* at 415.

⁷² *Id.* at 418–20.

⁷³ *Id.* at 417–18.

⁷⁴ See Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. OF GENDER L. & POLICY 173, 191 (2015).

⁷⁵ *Hayes*, 555 U.S. at 418.

⁷⁶ *United States v. Chovan*, 735 F.3d 1127, 1131 (9th Cir. 2013).

⁷⁷ *Id.* at 1140.

⁷⁸ *Id.* at 1139, 1140–41.

⁷⁹ *Id.* at 1138.

the government interest in preventing domestic gun violence is important,” and restricting gun ownership from domestic violence misdemeanants is substantially related to that goal.⁸⁰ The Supreme Court denied certiorari.⁸¹

3. Pinnacle Reached: *Castleman*

The Supreme Court again ruled in favor of gun restrictions for domestic violence offenders in 2014, with a 9-0 unanimous decision in *United States v. Castleman*, resolving a split among the circuit courts over the definition of “physical force” required in the scope of the Lautenberg Amendment.⁸² *Castleman* determined that the common law definition of force satisfied the statutory requirement of a “misdemeanor crime of domestic violence.”⁸³ The Court held that the common law definition of force, “satisfied by even the slightest offensive touching,” should be applied not only due to the general rule that a common-law term of art should be interpreted to reflect its established common-law meaning, but also because domestic violence is often prosecuted under general battery laws and is often perpetrated without “violent” force.⁸⁴ This interpretation of physical force enabled the Court to reaffirm the statute’s coverage of ten states.⁸⁵ As in *Hayes*, the Court sought to uphold an interpretation that would prevent the Amendment from becoming a “dead letter.”⁸⁶

4. A Crack in the Façade: *Voisine*

In 2016, additional expansion to the coverage provided by the Lautenberg Amendment came when the Supreme Court granted certiorari in *Voisine v. U.S.* The majority of the Court held that “recklessness” as a *mens rea* standard for domestic violence statutes was sufficient to trigger the gun ownership restriction of the DVM gun ban.⁸⁷ This expanded the coverage of the Lautenberg Amendment beyond knowing or intentional conduct.⁸⁸

However, Justice Thomas’ dissent explicitly gave life to the concern that the DMV Gun Ban was imposing an unconstitutional burden on the Second Amendment right to bear arms.⁸⁹ He believed that including “recklessness” would make this provision “patently” unconstitutionally overbroad in its application, as it would include “infractions or summary offenses” that normally

⁸⁰ *Id.* at 1139–140.

⁸¹ *Id.* at 1127.

⁸² *United States v. Castleman*, 572 U.S. 157, 161–62 (2014).

⁸³ *Id.* at 162–63.

⁸⁴ *Id.* at 163–64.

⁸⁵ *Id.* at 167.

⁸⁶ *Id.* at 168.

⁸⁷ *Voisine v. United States*, 136 S. Ct. 2272, 2272 (2016).

⁸⁸ *Id.*

⁸⁹ *Id.* at 2290.

would be simply adjudicated with a fine.⁹⁰ Thomas took issue with the fact that prosecutors would have the ability to effectively deny an enumerated constitutional right depending on the statue and situation chosen for a given prosecution, treating the Second Amendment “cavalierly.”⁹¹ Though his dissent still acknowledged that Congress was justifiably concerned about abusers pleading to lesser (misdemeanor) charges in order to retain their rights to gun ownership,⁹² his dissent provided intellectual, judicial legitimacy to a growing fear that the right to bear arms was, in fact, eroding.⁹³ Gun rights activists saw the ruling in *Voisine* as an “assault on all fronts” to the Second Amendment right.⁹⁴

Justice Thomas reiterated this call to action to protect the Second Amendment in his latest dissent from the denial of certiorari for *Silvester v. Becerra*.⁹⁵ The case concerns a California state law that requires a ten-day waiting period for firearm purchases.⁹⁶ He again asserted in his dissent that “[i]f a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court.”⁹⁷ Through this assertion, Justice Thomas is likely speaking to pro-gun activists, who have been able to apply incredible pressure to federal and state legislatures across the country⁹⁸ to be sure, but also to the lower courts.

⁹⁰ *Id.* at 2291.

⁹¹ *Id.*

⁹² *Id.* at 2292.

⁹³ See *Second Amendment as Second-Class Right? A Dismal Warning*, NAT’L RIFLE ASS’N – INST. FOR LEGIS. ACTION (Mar. 4, 2016), <https://www.nraia.org/articles/20160304/second-amendment-as-second-class-right-a-dismal-warning> (“The decision in the *Voisine* case is pending. So is the future of the Second Amendment.”); Nate Madden, *SCOTUS Sets Terrifying New Precedent on Gun Rights*, REPUBLIC BROAD. NETWORK (July 6, 2016), <https://republicbroadcasting.org/news/scotus-sets-terrifying-new-precedent-on-gun-rights/> (“In a 6-2 decision in the case of *Voisine v. United States*, the court ruled that crimes of recklessness. . . [will] preclude individuals convicted of such a crime from firearm ownership by federal law. The Second Amendment is under assault on all fronts.”).

⁹⁴ *Id.*

⁹⁵ See *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting).

⁹⁶ *Id.* at 945 (Thomas, J., dissenting).

⁹⁷ *Id.* (Thomas, J., dissenting).

⁹⁸ See Eric Lipton & Alexander Burns, *The True Source of the N.R.A.’s Clout: Mobilization, Not Donations*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/us/politics/nra-gun-control-florida.html>.

D. Legislative Developments Before Pauler

1. Legislative Context

The National Rifle Association (“NRA”) has increased its lobbying efforts since 2008, with a significant increase in 2017.⁹⁹ Additionally, the NRA has new competition in the lobbying space.¹⁰⁰ Following the shooting of Arizona Representative Gabrielle Giffords in 2011, the Colorado movie theater shooting in 2012, and the Sandy Hook elementary school shooting, several new gun control-focused groups emerged: Moms Demand Action, Everytown for Gun Safety, and the Giffords Center/Americans for Responsible Solutions.¹⁰¹ Beyond the legislative arena, these new groups have been active in electoral campaigns and highly visible local actions, such as involving popular restaurant and retail stores requesting gun owners to leave their firearms outside.¹⁰²

State and federal legislators made several significant legislative attempts at regulating guns since 2012, usually in the wake of a mass shooting event, which may be contributing to the fears of gun rights advocates.¹⁰³ The following are examples of noteworthy legislation involving domestic violence gun restrictions.

On the federal level, the Domestic Violence Criminal Disarmament Act was introduced in 2013.¹⁰⁴ The bill sought “to provide grant money [to] states that enacted laws and procedures to seize [and surrender guns]” from those under a gun ownership restriction.¹⁰⁵ The Senate introduced a similar bill called the Domestic Violence Gun Homicide Prevention Act in 2014.¹⁰⁶ In 2015, federal legislators introduced the Zero Tolerance for Domestic Abusers Act, which

⁹⁹ *Secrets Client Profile: Nat’l Rifle Ass’n*, THE CTR. FOR RESPONSIVE POLITICS (Oct. 21, 2017), <https://www.opensecrets.org/lobby/clientsum.php?id=d000000082> (showing a compilation of Annual Lobbying expenditures by the NRA from 1998-2017).

¹⁰⁰ See Adam Edelman, *Five Years after Sandy Hook, Gun Control Groups Still Looking for a Big Win*, NBC NEWS (Dec. 15, 2017, 3:37 PM), <https://www.nbcnews.com/news/us-news/5-years-after-newtown-gun-control-groups-still-looking-big-n829871>.

¹⁰¹ See Justine McDaniel, Allison Griner & Natalie Krebs, *Gun Wars: Decades Old Gun Control Debate Reshaped by New Advocacy Groups*, CTR. FOR PUBLIC INTEGRITY (Aug. 18, 2014), <https://www.publicintegrity.org/2014/08/18/15231/decades-old-gun-control-debate-reshaped-new-advocacy-groups>.

¹⁰² *Id.* See Sarah Childress, *The Gun-Control Movement, Two Years After Newtown*, FRONTLINE (Dec. 19, 2014), <http://www.pbs.org/wgbh/frontline/article/the-gun-control-movement-two-years-after-newtown/> (listing examples of local actions, including seven major consumer chains requesting gun owners to keep firearms out of their stores due to the lobbying efforts of then Moms Demand Action for Gun Sense in America – now part of Everytown for Gun Safety).

¹⁰³ See Richard Perez-Pena, *Gun Control Explained*, N.Y. TIMES (Oct. 7, 2015), <https://www.nytimes.com/interactive/2015/10/07/us/gun-control-explained.html>.

¹⁰⁴ See Gildengorin, *supra* note 35, at 821.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

expanded the definition of “intimate partner” to include past and present non-marital (dating) relationships and included stalking misdemeanors to the gun ownership restriction.¹⁰⁷ This modification of the definition of “intimate partner” would greatly increase the Lautenberg Amendment’s reach, especially considering the decline in marriage rates and the prevalence of dating violence.¹⁰⁸ However, all of these bills died in committee,¹⁰⁹ as the federal legislative sessions ground to a near standstill in the second half of Obama’s presidency.¹¹⁰ As of mid-year 2019, there were 110 gun-related bills that were stalled in Congress, with the majority focusing on gun control including Republican sponsored “Red Flag Laws” that aim to enable police and family members to petition the courts to have firearms removed from an individual that has become dangerous, as well as Democrat backed bills focusing on expanding the Lautenberg Amendment.¹¹¹

In contrast, legal restrictions on domestic violence offenders’ gun ownership have made progress in state legislatures since 2014, with several passing each year.¹¹² By May of 2017, twenty states had introduced bills focusing on domestic violence gun restrictions.¹¹³ By August of 2018, 50 bills had passed

¹⁰⁷ *Id.* at 818-19.

¹⁰⁸ See NAT’L COAL. AGAINST DOMESTIC VIOLENCE, FACTS ABOUT DATING ABUSE AND TEEN VIOLENCE (2015), https://assets.speakcdn.com/assets/2497/dating_abuse_and_teen_violence_ncadv.pdf.

¹⁰⁹ See Gildengorin, *supra* note 35, at 821.

¹¹⁰ See Philip Bump, *Yes, the Senate is Ignoring Hundreds of Bills Passed by the GOP House. But it’s Always That Way*, WASH. POST (Aug. 8, 2014, 9:43 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/08/08/yes-the-senate-is-ignoring-hundreds-of-bills-passed-by-the-gop-house-but-its-always-that-way/>.

¹¹¹ See *Congress has 110 gun bills on the table. Here’s where they stand*, PBS (Aug. 6, 2019, 6:37 PM), <https://www.pbs.org/newshour/politics/congress-has-110-gun-bills-on-the-table-heres-where-they-stand>.

¹¹² See GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, GUN LAW TRENDWATCH: 2017 YEAR-END REVIEW (Dec. 19, 2017), <https://lawcenter.giffords.org/wp-content/uploads/2017/12/Trendwatch-2017-Year-End-12.19.17-pages.pdf>; GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, GUN LAW TRENDWATCH: 2016 YEAR-END REVIEW (Dec. 2, 2016), https://lawcenter.giffords.org/wp-content/uploads/2016/12/Trendwatch-Year-End-2016_PAGES.pdf; GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, GUN LAW TRENDWATCH: 2015 YEAR-END REVIEW (Dec. 12, 2015), <https://lawcenter.giffords.org/wp-content/uploads/2015/12/Trendwatch-Year-End-2015-CCadjust.pdf>; see also *Tracking State Gun Laws: 2014 Developments*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (May 2, 2014), <http://lawcenter.giffords.org/tracking-state-gun-laws-2014-developments/>.

¹¹³ GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, GUN LAW TRENDWATCH, (May 26, 2017), <https://lawcenter.giffords.org/wp-content/uploads/2017/06/Law-Center-Trendwatch-05.26.17-1.pdf>.

into law relating to gun control, covering domestic violence restrictions, expanding background checks, as well as bump stock bans.¹¹⁴

2. Prelude to *Pauler*: Kansas Debates over Domestic Violence

To understand the politicization of gun rights for domestic violence offenders, it is informative to examine the issue at the state level, particularly in states that have higher rates of gun ownership. Mr. Pauler brought this exemplar case in Kansas, a state in a proverbial tug-of-war with domestic violence gun ownership restriction laws. On the one hand, Kansas has a higher percentage of gun owning individuals.¹¹⁵ On the other hand, it is far from immune from domestic violence homicides: Kansas had thirty domestic violence homicides in 2013, which was one quarter of the state's homicides.¹¹⁶ Yet, despite the tragically high domestic homicide rates, there is discord within the state as to how to deal with the problem: for example, in 2011, Topeka's City Council decriminalized domestic violence to force the Shawnee County District Attorney to try domestic violence cases because the District Attorney previously stopped prosecuting domestic violence misdemeanors due to budget cuts, and instead, transferred them to the municipal court for adjudication.¹¹⁷ As the budget crisis continued into 2012, the Wichita City Council deliberated changes to its mandatory domestic violence sentences in a bid to reduce jail fees.¹¹⁸ However, Kansas's Attorney Generals have recognized the seriousness of the domestic violence the state has been experiencing, and had active roles in reform, such as assisting the development of batterer intervention programs.¹¹⁹ The state legislature recently increased penalties for domestic assault and applied gun ownership restrictions

¹¹⁴ See Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws*, PEW (Aug. 2, 2018) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws>.

¹¹⁵ See Julia Lurie, *This Map Shows Where America's Gun Owners Are*, MOTHER JONES AND THE FOUND. FOR NAT'L PROGRESS (July 8, 2015), <http://www.motherjones.com/politics/2015/07/gun-owners-study-one-in-three/> (citing *Injury Prevention* study, showing 30-40% of people in Kansas owning a gun).

¹¹⁶ See NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE IN KANSAS (2015), assets.speakcdn.com/assets/2497/kansas_2019.pdf.

¹¹⁷ See A. G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES (Oct. 11, 2011), <http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalize-domestic-violence.html> (stating budget cuts from the State Government caused severe budget constraints in the District Attorney's Office and the city's budget would not be able to compensate for the \$1 million increase in prosecution costs for the municipal court to take the misdemeanor domestic violence cases).

¹¹⁸ See Bill Wilson, *City Delays Change to Domestic Violence Sentences*, THE WICHITA EAGLE (Apr. 3, 2012, 5:00 AM), <http://www.kansas.com/news/article1089619.html>.

¹¹⁹ Editorial, *Kansas is a Model on Domestic Violence Laws*, THE TOPEKA CAPITAL-J. (Mar. 5, 2017, 10:47 PM), <http://cjonline.com/opinion/editorials/2017-03-05/editorial-kansas-model-domestic-violence-laws>.

to persons with misdemeanor domestic violence convictions and those subject to a court order.¹²⁰

But then, pulling the other way, the Kansas legislature passed the Second Amendment Protection Act in 2014, which attempted to exempt guns that were made and remained in Kansas from all federal gun control regulations under the thoroughly discredited theory that the Tenth Amendment enables states to reject federal laws on issues not explicitly in the purview of the federal government in the Constitution.¹²¹ This Act would have enabled domestic violence offenders to circumvent the Lautenberg Amendment,¹²² had the federal district court not stepped in and struck down the Act on January 31, 2017, as the state legislature could not prevent Congress from regulating firearms under the National Firearm Act.¹²³ As the Act's fate played out in the courts, the Kansas Bureau of Investigation released data demonstrating an increase in domestic violence "for the first time in years."¹²⁴ Finally, the Kansas state legislature passed a law that effectuated the Lautenberg Amendment on May 3, 2018.¹²⁵

This is the federal and state legislative context in which the Tenth Circuit found itself in May 2017 when making its decision in *Pauler*.

II. THE PAULER DECISION

A year after Justice Thomas's dissenting statements from the bench in *Voisine*, decrying the Second being relegated to the Amendment's status as a "second-class right,"¹²⁶ the Tenth Circuit received Alexander J. Pauler's appeal

¹²⁰ See Press Release, Kansas Attorney General, AG Derek Schmidt: New Laws Protect Victims of Domestic Violence, Sexual Assault (May 15, 2017), <https://ag.ks.gov/media-center/news-releases/2017/05/15/ag-derek-schmidt-new-laws-protect-victims-of-domestic-violence-sexual-assault>; H.R. 2145, 2017 Gen. Assemb., Reg. Sess. § 1 (17), (18), (Kan. 2017) (as passed by House, Apr. 20, 2018).

¹²¹ See Editorial, *Kansas Goes a Little Gun Crazy with its Second Amendment Protection Act*, L.A. TIMES (July 10, 2014, 5:01 PM), <http://www.latimes.com/opinion/editorials/la-ed-kansas-gun-law-brady-center-20140711-story.html>.

¹²² See *id.*

¹²³ See *United States v. Cox*, 235 F. Supp. 3d 1221, 1124 (D. Kan. 2017); Bob Adelman, *Kansas District Court Judge Throws Out State's Second Amendment Protection Act*, THE NEW AMERICAN (Feb. 3, 2017), <https://www.thenewamerican.com/usnews/constitution/item/25293-kansas-district-court-judge-throws-out-state-s-second-amendment-protection-act> (stating that Second Amendment advocates remain hopeful that the decision will be appealed and seen by the Supreme Court to challenge the National Firearms Act of 1934).

¹²⁴ Jacob Albracht, *KBI: Kansas Sees Increase in Domestic Violence Cases*, KWCH (Oct. 25, 2017, 10:33 PM), <http://www.kwch.com/content/news/KBI-Kan-sees-increase-in-domestic-violence-cases-453213633.html>.

¹²⁵ See H.R. 2145, 2017 Gen. Assemb., Reg. Sess. § 1 (17), (18), (Kan. 2017) (as passed by House, Apr. 20, 2018); for additional discussion see Editorial, *More Women Die When Domestic Abusers Own Guns. Do Kansas and Missouri Lawmakers Care?* THE KAN. CITY STAR (Feb. 19, 2018), <http://www.kansascity.com/opinion/editorials/article200998154.html>.

¹²⁶ *Voisine v. United States*, 136 U.S. 2272, 2292 (2016) (Thomas, J., dissenting).

from the United States District Court of Kansas.¹²⁷ Pauler was convicted under the Lautenberg Amendment when he was caught with a firearm in his possession. He was previously convicted under a municipal ordinance for domestic battery for punching his girlfriend in the face several times.¹²⁸ Pauler argued that he was exempt from the Lautenberg Amendment's gun restriction because his conviction under the municipal ordinance was not a predicate offense.¹²⁹ The District Court held that, despite the Amendment's ambiguity, "it would be unreasonable to read [the Amendment] to exclude local misdemeanor crimes of domestic violence and include an analogous State offense because the behavior, not the source of law, is the pertinent aspect of the statute."¹³⁰ The court correctly recognized that Lautenberg Amendment should apply to Pauler because the restriction is intended to be applied to the behavior of domestic violence in all instances of that violence, no matter the prosecution's choice of how to classify Pauler's punches. A punch that violates a municipal ordinance leaves the same bruise as the punch that violates a State law.

On appeal, despite the Supreme Court precedent of expanding the Lautenberg Amendment's applicability, the Tenth Circuit reversed the District Court's decision.¹³¹ Using various tenets of statutory interpretation, the Tenth Circuit opinion compared the DMV Gun Ban subsection to the Gun Control Act as a whole. The Tenth Circuit focused specifically on the phrase in the DVM Gun Ban, "misdemeanor crime of domestic violence," and how it referred only to misdemeanors under "Federal, State, or Tribal law"¹³² - it did not specifically mention municipalities or local law. The Tenth Circuit then looked to the entirety of the "Gun Control Act," which did specifically mention local law.¹³³ The court argued that when interpreting the specific subsection of the DVM Gun Ban it would violate two customary rules of statutory interpretation for the court to consider the term "State" as referring to both State and municipalities within the DMV Gun Ban subsection.¹³⁴ First, if the term State was to refer to both State law and municipal law, then the other parts of the Act would be "superfluous" and would therefore violate the rule that a statute should be construed so that every word has "some operative effect."¹³⁵ Second, if the term "State" was to refer to both State law and municipal law in the DVM Gun Ban, it would render the word to mean something different within the specific subpart

¹²⁷ *United States v. Pauler*, 857 F.3d 1073, 1074 (10th Cir. 2017).

¹²⁸ *United States v. Pauler*, No. 14-10118, 2015 WL 5093274, at *1-2 (D. Kan. Aug. 28, 2015).

¹²⁹ *Id.* at *1.

¹³⁰ *Id.* at *4.

¹³¹ *United States v. Pauler*, 857 F.3d at 1074-75.

¹³² *Id.* at 1075.

¹³³ The Gun Control Act differentiated between State and local laws by referring to "State and local" and "State or local." *Id.*

¹³⁴ *Id.* at 1075-76.

¹³⁵ *Id.* at 1076 (internal quotations omitted) (citations omitted).

of the Act, which would violate the interpretive rule that “identical words used in different parts of the same act are intended to have the same meaning.”¹³⁶ The Tenth Circuit also noted that another principle of statutory interpretation advises that Congress acts intentionally and purposely when including or excluding certain terms or language in one part of an act to another.¹³⁷ The Tenth Circuit declined to delve into Congressional intent, stating that it was not the province of the court to “construe [the statute] atexually” where Congress has already spoken in “express terms.” Meaning that the court could not interpret the DMV Gun Ban to include local law, as the phrase “local” or “municipal” was not written explicitly in the text as it was in the rest of the Gun Control Act.¹³⁸

As a result, the Tenth Circuit reversed the District Court and allowed Appellant to keep his weapons, holding that municipal ordinances were not covered by the Lautenberg Amendment’s gun restriction mandate.¹³⁹

III. THE FLAWS OF THE *PAULER* DECISION

Pauler puts forth the assertion that if Congress intended to include municipal violations that are *in fact* domestic violence under the umbrella of the VAWA regulatory scheme, it would have done so explicitly.¹⁴⁰ This analysis of the statute fails to take into account five issues: 1) common statutory interpretation adopted by the Supreme Court concerning gun regulation treats municipal law as State law, 2) the legislative history of the VAWA/Lautenberg Amendment supports the interpretation that Congress intended to include all domestic violence offenders, 3) Supreme Court precedent through *Voisine* has consistently supported the broadest interpretation of “misdemeanor crime of domestic violence” to regulate gun ownership among domestic violence offenders, 4) *Pauler* is under-inclusive as applied, and; 5) *Pauler* creates an impermissible and arbitrary division in the “class” of similarly situated persons (domestic violence offenders) that violates the Equal Protection Clause, especially given the context of municipal law in the various jurisdictions in the United States.

This Note will address each of these five issues, beginning with the problematic promotion of municipal law as separate and apart from State law.

A. *Municipalities, States in Second Amendment Jurisprudence: McDonald*

The importance of *McDonald v. City of Chicago* rests in the fact that the municipalities directly asserted their status as “separate” from the State laws of

¹³⁶ *Id.*

¹³⁷ *United States v. Pauler*, 857 F.3d 1073, 1076 (10th Cir. 2017).

¹³⁸ *Id.* at 1077 (internal quotations omitted) (citations omitted).

¹³⁹ *Id.* at 1078.

¹⁴⁰ *Id.* at 1076.

Illinois, thus enabling them to ban firearms in their jurisdictions.¹⁴¹ The city argued that binding the Second Amendment to the States *and their subdivisions* was “inconsistent with the principles of federalism,” and given that citizens have different beliefs regarding gun control, the locality should be allowed to express these beliefs provided that the law enacted is reasonable.¹⁴² The Court, however, rejected this interpretation of incorporation, explaining that the Second Amendment right is fully binding on the States and limits the ability for locals to create their own solutions to social problems according to their values and needs.¹⁴³

McDonald addressed a municipal ordinance in Chicago and the surrounding suburbs.¹⁴⁴ The municipality of Oak Park and the city of Chicago argued that their gun bans were constitutional because the Second Amendment did not apply to the States.¹⁴⁵ The Supreme Court rejected this argument.¹⁴⁶ The case focused on a city municipal ordinance that prohibited gun ownership without valid registration; the city code subsequently prohibited the registration of most handguns, which effectively banned gun ownership by almost all citizens of the city.¹⁴⁷ The Court described in detail the incorporation theories of the Fourteenth Amendment that makes the Second Amendment applicable to the States.¹⁴⁸ Specifically, the Court “reject[ed] . . . [a] depart[ure] from our established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions is inconsistent with the principles of federalism. . . .”¹⁴⁹ Throughout the majority opinion, State and municipalities are considered as one entity, subject to the rights and limitations imposed upon it by the Constitution.¹⁵⁰ The majority treats the State and municipalities as one entity throughout its outline of the substantive history of Congressional intent, including behind the Second Amendment, the Fourteenth Amendment, the Freedman’s Bureau Act of 1866, and the Committee on Reconstruction.¹⁵¹

Based on the interpretation in *McDonald*, the Court asserts that municipalities do not have an inherent right to be their own legal fiefdom.¹⁵² *McDonald* focuses on the constitutional right of the Second Amendment overcoming local legal variations in order to prevent infringement on the right, in line with

¹⁴¹ *McDonald v. City of Chicago*, 561 U.S. 742, 783–84 (2010).

¹⁴² *Id.* at 783–84.

¹⁴³ *Id.* at 784–85.

¹⁴⁴ *Id.* at 750.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *McDonald v. City of Chicago*, 561 U.S. at 750 (2010).

¹⁴⁸ *Id.* at 744.

¹⁴⁹ *Id.* at 782–85.

¹⁵⁰ *Id. passim.*

¹⁵¹ *Id.* at 768–780.

¹⁵² *Id.* at 782–85.

supremacy doctrine.¹⁵³ Taking this holding to its logical conclusion: if the Constitution subsumes municipalities within the State for purposes of modifying Second Amendment regulation (in the case of *McDonald*, reducing regulation), and that comprehensive national systems of regulation is privileged, from even marginal interference from local diversity of laws, it would follow that the federal legislature's laws relating to gun regulation would be binding upon the municipalities throughout the State. It is widely understood that municipal codes must be in conformity with State law and public policy, and even where the State and municipality have concurrent jurisdiction, the municipal ordinance cannot prohibit what the State law permits, or permit what the State law prohibits.¹⁵⁴ Thus, if the Lautenberg Amendment applies as federal law to the States, and binds the States, so too does it bind the municipalities, who are bound to the State, according to traditional statutory interpretation.¹⁵⁵ However, in practice some States have permitted municipalities to provide differing sanctions for the same offenses as covered under state law.¹⁵⁶ This practical variation could trigger Equal Protection issues, as discussed below.

Additionally, *McDonald* fits into Supreme Court precedent that privileges national policy over federalist arguments for "experimentation" among and within the various states. This is especially applicable where variation would threaten to undermine that national policy. The majority opinion in *McDonald* insists that incorporation always restricts experimentation and local variations, and that such limitations on State power regarding the Second Amendment is not unlike the other limitations the Constitution enforces.¹⁵⁷ This interpretation is also supported by the holding in *Gonzales v. Raich*.¹⁵⁸ Here, the Supreme Court held that Congress could regulate an intrastate activity, if failure to regulate would undercut the interstate regulation of that activity.¹⁵⁹ Moreover, in a concurring opinion, Justice Scalia opined that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation. . . ."¹⁶⁰ When analyzing gun restriction and regulation, the Supreme Court has consistently upheld that the Lautenberg Amendment passes the "substantial effects" test for Commerce Clause regulation.¹⁶¹

¹⁵³ *McDonald v. City of Chicago*, 561 U.S. at 783-85 (2010).

¹⁵⁴ MCQUILLIN MUN. CORP. § 23:7 (3d ed.) (Jul. 2017 Update), [https://1.next.westlaw.com/Document/I4c82718b71c711dca47eb4ff0872f9f9/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)&firstPage=true](https://1.next.westlaw.com/Document/I4c82718b71c711dca47eb4ff0872f9f9/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at n.29.

¹⁵⁷ *McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010).

¹⁵⁸ *Gonzales v. Raich*, 545 U.S. 1, 18 (2005).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 32.

¹⁶¹ T.J. HALSTEAD, CONG. RESEARCH SERV., RL31143, FIREARMS PROHIBITIONS AND DOMESTIC VIOLENCE CONVICTIONS: THE LAUTENBERG AMENDMENT at 6 (2001).

The regulation of guns under the Lautenberg Amendment is part of a greater scheme of gun regulation, that is promoted by the national government via federal law.¹⁶² The Lautenberg Amendment operates in tandem with other federal gun restrictions for violent felons, as well as with state regulations that together produce a comprehensive regulatory scheme.¹⁶³ In contrast, the *Pauler* decision undermines national policy on gun restrictions by eliminating municipal violations from the Lautenberg Amendment's purview.¹⁶⁴ Through the *Pauler* decision, the Tenth Circuit has effectively eliminated gun restrictions for misdemeanants in areas where municipal violations are utilized to the exclusion of State law.¹⁶⁵

B. Legislative Intent: VAWA and Lautenberg

The second flaw of the Tenth Circuit's decision in *Pauler* relates to its insistence on using statutory interpretation to hypothesize what the legislators meant by not including the word "municipal," when legislative intent is readily available.¹⁶⁶ The legislative history of the VAWA and Lautenberg Amendment clearly support the interpretation that Congress intended to include municipal offenders.¹⁶⁷ The VAWA Gun Restriction Amendment in 1994 specifically targeted offenders while in the restraining order process, which is prior to any conviction.¹⁶⁸ Congress put primacy on the actual dangerousness of restraining order proceedings¹⁶⁹ and found that the governmental interest was greater than the right of a dangerous offender to have access to guns.¹⁷⁰ Two years later, the Lautenberg Amendment then expanded the gun restrictions beyond felons and those with an active restraining order, to include misdemeanants precisely because many would-be felons were able to plead to lower charges and therefore avoid the federal gun restrictions.¹⁷¹

¹⁶² *Id.* at 8–9.

¹⁶³ Gildengorin, *supra* note 35, at 835–38, 843–45.

¹⁶⁴ *United States v. Pauler*, 857 F.3d 1073, 1078 (10th Cir. 2017).

¹⁶⁵ For further analysis on this point, *See infra* Section E.

¹⁶⁶ *See* discussion *supra* Section B.

¹⁶⁷ *Id.*

¹⁶⁸ *See* Gildengorin, *supra* note 35, at 811–12 (noting that the Gun Control Act extended the gun prohibition from convicted felons, drug addicts, and the mentally ill to offenders subject to a domestic violence restraining order).

¹⁶⁹ For example, the second question on the "Danger Assessment" tool first developed asks the victim if the abuser owns a gun; since then more risk assessments have been developed and are used by police and other actors in the criminal justice system. *See Risk Assessment, BATTERED WOMEN'S JUSTICE PROJECT*, <http://www.bwjp.org/our-work/topics/risk-assessment.html> (last visited Feb. 26, 2020).

¹⁷⁰ 104 CONG. REC. S10,379 (daily ed. Sept. 12, 1996) (statement of Sen. Murray).

¹⁷¹ *Id.* (statement of Sen. Wellstone).

C. Precedent: Comprehensive and Direct

The third flaw of the *Pauler* decision stems from its deviation from precedent. Supreme Court precedent from *Hayes* through *Voisine* has consistently supported the broadest interpretation of “domestic violence” to regulate gun ownership among domestic violence offenders.¹⁷² Throughout this line of precedent, the Court has focused on two main issues: first, that the Lautenberg Amendment is applied to cases in a pragmatic way, with an understanding of its application in domestic violence prosecutions, and second, that the application of the law would encompass the entirety of the intended “class” of offenders, as outlined below.

In *Hayes*, the Court ruled that the words “domestic relationship” did not have to be explicitly written into state statutes used to prosecute a domestic violence offender in order for the case to be covered by the Lautenberg Amendment.¹⁷³ The Court acknowledged the fact that many states did not have specific domestic violence statutes to prosecute offenders, and in states that had specific statutes, prosecutors often have significant discretion in charging an individual with a domestic violence-specific statute or a general assault and battery statute.¹⁷⁴ By affirming the Lautenberg Amendment’s application in cases where offenders are charged with a nonspecific statute, the Court interpreted the Lautenberg Amendment to reflect the realities of prosecuting domestic violence cases, assuring that those who were *in fact* committing acts of domestic violence would be covered by the Lautenberg Amendment.¹⁷⁵ The Court did not want to create an overly narrow statutory interpretation that would leave out large swaths of the population who committed domestic violence, which would result denying potentially millions of victims the protection provided by the Lautenberg Amendment.¹⁷⁶

The Court’s next interpretive decision came in *United States v. Castleman*, which determined the requisite amount of “force” necessary for a situation to fall under the label domestic “violence.”¹⁷⁷ Once more, the Court approached the question pragmatically, and interpreted “domestic violence” to include the common law definition of physical force: “offensive touching.”¹⁷⁸ The Court rejected the narrower interpretation of violence to ensure that the full “class” of domestic violence offenders would remain in reach of the Lautenberg Amendment.¹⁷⁹ Additionally, the Court noted that most domestic violence

¹⁷² See *supra*, discussion at Section C. Judicial Upholding, Interpretation, and Extension, Parts 2 & 4.

¹⁷³ *United States v. Hayes*, 555 U.S. 415, 418 (2009).

¹⁷⁴ *Id.* at 427.

¹⁷⁵ *Id.* at 426–27.

¹⁷⁶ *Id.*

¹⁷⁷ *United States v. Castleman*, 572 U.S. 157, 160–63 (2014).

¹⁷⁸ *Id.* at 162–63.

¹⁷⁹ *Id.* at 167 (stating “[a]n additional reason to read the statute as we do is that a contrary reading would have rendered [the Amendment] inoperative in many States at the time of its

incidents are not perpetrated with what popular parlance considers to be “violent” force, assuring that the application of the law reflected the way that domestic violence is actually committed.¹⁸⁰

Finally, in *Voisine*, the Court addressed another interpretive challenge on the applicable *mens rea* for domestic violence.¹⁸¹ Many state statutes provide a range of possible mental states when considering a charge for domestic violence, including intentional, knowing, or reckless.¹⁸² The petitioner in *Voisine* argued that statutes that included “recklessness” as a possible *mens rea* should be exempt from the Lautenberg Amendment’s reach.¹⁸³ The petitioner argued that “use” of force, as written in the Amendment, required a level of intent that recklessness does not possess.¹⁸⁴ However, the majority opinion chose to incorporate recklessness, looking again to the realities of domestic violence and with the purpose of keeping the class of domestic violence offenders intact.¹⁸⁵ First, the majority rejected the idea that “use” of force was a “dividing line between reckless and knowing conduct,” and illustrated the point with examples of domestic abuse.¹⁸⁶ By using the common understanding of the words in the statute and locating their meaning in actual lived experience, the majority grounded their analysis in how domestic violence is perpetrated.¹⁸⁷ Second, the majority made it clear that it was imperative that the law capture all domestic violence offenders.¹⁸⁸ In fact, the Court recognized that if the petitioners’ interpretation were accepted, the result would have been that *any and all* convictions under the applicable misdemeanor statutes in the thirty-five jurisdictions that include recklessness would not have been covered by the Lautenberg Amendment.¹⁸⁹ Therefore, the majority preserved the application of the Lautenberg Amendment to the full class of domestic violence offenders,

enactment . . . in at least 10 states—home to nearly thirty percent of the Nation’s population . . .”).

¹⁸⁰ *Id.* at 164–65 (noting that the common understanding of the word “violence” represents significant force; domestic violence is understood as a “term of art” that incorporates acts that may not be considered “violent” in other contexts, such as grabbing, shoving, and slapping).

¹⁸¹ *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016).

¹⁸² *Id.* at 2280.

¹⁸³ *Id.* at 2277.

¹⁸⁴ *Id.* at 2288.

¹⁸⁵ *Id.* at 2278–89.

¹⁸⁶ *Id.* at 2279 (noting that an abuser may not intend to harm his wife when he throws the plate against the wall, but nonetheless the reckless behavior is undertaken knowing there is substantial risk in the resulting shards hitting his wife).

¹⁸⁷ *Voisine v. United States*, 136 S. Ct. 2272, 2278–79 (2016).

¹⁸⁸ *Id.* at 2280–89.

¹⁸⁹ *Id.* at 2280–81 (“In *Castleman*, we declined to construe [the Amendment] so as to render [it] ineffective in 10 States. All the more so here, where the petitioners’ view would jeopardize [the Amendment’s] force in several times that many.”).

rather than eliminate scores of offenders from its restriction due to the inclusion of recklessness in some state statutes.¹⁹⁰

The precedent is clear: over all of these cases, the Court interpreted the Lautenberg Amendment to maintain its application to all misdemeanor domestic violence offenders, regardless of state variations in statutes. The Court is mindful of the ways domestic violence is actually perpetrated and prosecuted when interpreting and applying the Lautenberg Amendment. Both considerations are imperative to the Lautenberg Amendment's effectiveness in providing protection to both the victims of domestic violence and to society at large.

In contrast, *Pauler's* interpretation significantly undermines the legislative purpose of the Lautenberg Amendment because preventing the Amendment's application to municipal violations would leave out substantial numbers of the "class" of domestic violence offenders that Congress intended to be covered: as applied, dangerous offenders are able to keep their weapons after committing acts of domestic violence.¹⁹¹ Moreover, *Pauler's* interpretation ignores the substantial variance in prosecutorial options for domestic violence and how the differences between municipalities, towns, and villages constrain prosecutorial discretion in ways that would create detrimental results for victims and society.¹⁹²

¹⁹⁰ *Id.* at 2280.

¹⁹¹ The following sources show how charging domestic violence as a municipal violations look in practice, as a demonstrative. See CANTON MUNICIPAL COURT: CRIMINAL DIVISION (2013), <http://www.cantoncourt.org/Forms/CrimDiv> (reporting that some of the most common cases filed in Canton Municipal Court are domestic violence cases, around 1,200 per year); see also Taylor Dungjen, *Domestic Violence Offenders Rarely Convicted, Report Says*, THE BLADE (Jun. 21, 2011), <http://www.toledoblade.com/Police-Fire/2011/06/21/Advocates-say-only-13-percent-domestic-violence-cases-net-convictions-in-Toledo.html> (citing the 2010 Domestic Violence Court Watch Report which found that of the 1,916 misdemeanor domestic violence cases in municipal court, 82% were dismissed or reduced to lesser charges); Claire Lowe, *Why 80 percent of New Jersey's domestic violence cases are dismissed*, THE PRESS OF ATLANTIC CITY (Apr. 11, 2017), http://www.pressofatlanticcity.com/breaking-the-cycle/why-percent-of-new-jersey-s-domestic-violence-cases-are/article_d9878dce-e162-5f98-8d6a-95eee8cb8884.html; Doug Pardue et al., *Till Death Do Us Part: Part Five—Cases Fall Apart, Abusers Go Free*, THE POST & COURIER (2014), <http://www.postandcourier.com/app/till-death/partfive.html> (finding municipal courts handle the "lion's share" of domestic violence cases in South Carolina, seeing 5,329 domestic violence cases in a year's sample from 2012–2013).

¹⁹² See sources cited *supra* note 191. See also Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (Jul. 2003) ("...gun availability still had substantial independent effects" that increased domestic violence homicide risk); April M. Zeoli, Rebecca Malinski, & Brandon Turchan, *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 EPIDEMIOLOGIC REV. 125 (Jan. 2016) (reporting that an evaluation of studies on firearm restriction statutes show that gun ownership restriction statutes are associated with a significant decrease in domestic violence homicide rates). However, it is important to note

D. “Shrinking the Class”: Pauler’s Interpretation is Under-Inclusive as Applied

The fourth issue with the *Pauler* decision is its potential effect of “shrinking the class” of offenders to whom the Lautenberg Amendment applies. The precedent reviewed above shows that in Second Amendment restriction cases, the Court is concerned about undermining the legislative purpose: in effect, the concern is that an interpretation that is under-inclusive would circumscribe the “class” of domestic violence offenders resulting in dangerous offenders having access to firearms. In *Hayes*, the majority noted that, if the Lautenberg Amendment were interpreted only to apply to cases that explicitly mentions the words “domestic violence,” it would render the Amendment inapplicable to several states that did not have specific domestic violence provisions under which to prosecute domestic violence offenders.¹⁹³ A similar interpretive issue was at stake in *Castleman* and *Voisine*.¹⁹⁴ The Court time and again recognized that there is a significant gap between law and reality when prosecuting domestic violence cases,¹⁹⁵ and similar realities are at play with *Pauler’s* decision. By eliminating the municipal violations from the Lautenberg Amendment’s purview, thousands of offenders would be able to retain their guns.¹⁹⁶ The reason that the Lautenberg Amendment specifically addressed misdemeanor offenders was to capture those offenders who would plead to a lower charge, a natural consequence of a plea-bargaining process that encourages settlement before a criminal trial, offenders that Congress wanted to keep away from guns.¹⁹⁷ By eliminating the municipal violations, the consequence would be similar to eliminating the Amendment altogether in places where misdemeanor charges are codified as municipal ordinances.¹⁹⁸

that the effect of misdemeanor gun ownership restrictions is widely variant depending on the implementation of the law at various courts. See Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN’S HEALTH 93 (2010) (showing only 26% of judges used their authority to require abusers to surrender their guns); see also Laura Lee Gildengorin, *Smoke and Mirrors*, 67 HASTINGS L. J. 807 (2016).

¹⁹³ United States v. Hayes, 555 U.S. 415, 418 (2009).

¹⁹⁴ See *supra* discussion at Section C. Judicial Upholding, Interpretation, and Extension, Parts 3 & 4.

¹⁹⁵ See *supra* discussion at Section C. Judicial Upholding, Interpretation, and Extension, Parts 2 & 3.

¹⁹⁶ See sources cited *supra* note 192.

¹⁹⁷ 104 CONG. REC. S10, 379 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

¹⁹⁸ Dean Weingarten, *10th Circuit: Municipal Domestic Violence Conviction’s Don’t Remove 2nd Amendment Rights*, THE TRUTH ABOUT GUNS, (May 27, 2017) <http://www.thetruthaboutguns.com/2017/05/dean-weingarten/10th-circuit-domestic-violence-convictions-municipal-ordinances-not-remove-2nd-amendment-rights/>.

E. Too Much Variance: Equal Protection Concern

Moreover, the distinction *Pauler* discerns between state and municipal domestic violence misdemeanants may create an Equal Protection issue.¹⁹⁹ In the *Fraternal Order of Police v. United States*, (“*F.O.P.*”), the D.C. Circuit was concerned about a potential arbitrary distinction between misdemeanor and felony domestic violence offenders, but was ultimately placated by the fact that Congress was attempting to address the gap in “existing laws and practices that adequately deal with the issuance of official firearms to felons but not to domestic violence misdemeanants.”²⁰⁰ In relation to the *Pauler* decision, the division between domestic violence misdemeanants and those who are convicted of domestic violence through a violation of a municipal ordinance would be the embodiment of the “arbitrary division” within the class of domestic violence offenders that concerned the Equal Protection Clause according to the D.C. Circuit in *F.O.P.*²⁰¹

Municipal ordinances vary greatly from state to state, and at times, even within the state.²⁰² Some states allow for ordinances to effectively duplicate state misdemeanor laws.²⁰³ This is usually for the benefit of obtaining greater control over prosecutions in the municipality, with an eye to obtaining the fines - the usual penalty involved with municipal infractions. Municipal ordinance violations could result in jail time as well, so long as the penalties imposed are within the misdemeanor range.²⁰⁴ Thus, there is a significant financial incentive for municipalities to create laws that overlap with state misdemeanor offense and for local prosecutors to use their discretion to utilize municipal codes over state law.²⁰⁵ States, counties, and municipalities may change where and how overlapping crimes are adjudicated to address budgetary constraints or to manage the efficiency of court operations. For example, misdemeanor domestic violence crimes have been placed in different dockets, from municipal to county

¹⁹⁹ T.J. HALSTEAD, CONG. RESEARCH SERV., RL31143, FIREARMS PROHIBITIONS AND DOMESTIC VIOLENCE CONVICTIONS: THE LAUTENBERG AMENDMENT, 6-9 (2001).

²⁰⁰ *Id.* at 8-9.

²⁰¹ *Id.* at 8.

²⁰² Trevor Langan, *City Authority Varies Widely from State to State*, NAT’L LEAGUE OF CITIES (Feb. 22, 2017), <https://citiesspeak.org/2017/02/22/city-authority-varies-widely-from-state-to-state/> (demonstrating the variation between state regulation of municipal authority). See also NLC-SML Preemption Report, 2017, <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>.

²⁰³ WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 1.8(d) (4th ed. 2015) <https://1.next.westlaw.com/Document/1985e11c49cf311dc8c42a169332e61f0/View/FullText.html>.

²⁰⁴ *Id.*

²⁰⁵ *Id.* But see *Seattle v. Hogan*, 766 P.2d 1134, 1137 (1989) (holding that the prosecutor’s discretion to charge under a more lenient state law versus a more severe municipal ordinance violated the defendant’s right to equal protection), demonstrating that some states regulate prosecutorial authority when deciding on charges between state law and municipal violations.

(State) courts, and vice versa, in both Kansas and Louisiana to address budgetary and efficiency issues.²⁰⁶ Therefore, in certain states, it is possible that some domestic violence misdemeanants may be relieved of their gun rights in one county, but not the other, depending upon the prosecutor and the administrative flows of the courts at the time. The ultimate consequence of the *Pauler* decision: the class of misdemeanor domestic violence offenders is impermissibly bifurcated. Depending on where the offender is charged, some offenders would lose their gun rights when charged in areas that prosecute via state law, and some offenders would be able to retain their gun rights when charged in an area that prioritized prosecuting municipal violations, all potentially occurring within the same state.

IV. SOCIAL IMPACT OF *PAULER*

The *Pauler* decision could have a significant impact on the courts and the public at large if it remains good law. In some jurisdictions, a significant number of domestic violence cases are charged as municipal violations.²⁰⁷ Both legal representation and gun interest websites now offer advice to challenge the Lautenberg Amendment's application using *Pauler*,²⁰⁸ signaling that the courts will face an increase of these cases in their dockets. Given the number of people

²⁰⁶ New Orleans moved misdemeanor domestic violence cases out of their criminal district court into their municipal court to address the backlog of cases in 2010. See Alex Woodward, *Domestic Violence: the DA's Side*, GAMBIT (Dec. 9, 2013), <https://www.bestofneworleans.com/gambit/domestic-violence-the-dasside/Content?oid=2285348> [<https://perma.cc/4DQA-WUZZ>]. In Louisiana, the domestic violence cases were decriminalized to ease budgetary constraints. See A. G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES (Oct. 11, 2011), <http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalize-domestic-violence.html>.

²⁰⁷ See Lowe, *supra* note 191; Dungjen, *supra* note 191; Pardue, Smith, Hawes & Hauff, *supra* note 191; CANTON MUNICIPAL COURT, *supra* note 191. It is important to note that most databases do not specify the domestic violence offense by municipal or state in terms of the charges. The distinction between ordinance violations and "state law" prosecutions are not typically recorded, and rather the data is aggregated at the court level. Thus, using municipal court records of domestic violence offenses is the best data that is currently available.

²⁰⁸ See Craig Martin, *Denver's 10th Circuit Court Ruling Has Wide Ramifications for Gun Owners*, CONCEALED CARRY.COM (May 25, 2017), <https://colorado.concealedcarry.com/2017/05/25/denvers-10th-circuit-court-ruling-has-wide-ramifications-for-gun-owners>; see also Joshua Prince, *A Very Interesting Decision on City Domestic Violence Convictions Not Triggering A Federal Prohibition*, PRINCE LAW OFFICES, P.C. BLOG (May 26, 2017), <https://blog.princelaw.com/2017/05/26/a-very-interesting-decision-on-city-domestic-violence-convictions-not-triggering-a-deferal-prohibition/>; Dean Weingarten, *10th Circuit: Municipal Domestic Violence Convictions Don't Remove 2nd Amendment Rights*, THE TRUTH ABOUT GUNS.COM (May 27, 2017), <http://www.thetruthaboutguns.com/2017/05/dean-weingarten/10th-circuit-domestic-violence-convictions-municipal-ordinances-not-remove-2nd-amendment-rights>.

who were denied weapons due to the Lautenberg Amendment,²⁰⁹ it is likely that many facing a municipal violation for a domestic violence offense will ask the courts to protect their gun ownership, directly undermining the legislative intent of the Lautenberg Amendment.

The impact of the *Pauler* decision will likely generate additional discord and confusion because gun violence is a notoriously difficult subject to study due to the Congressional restriction on the Center for Disease Control and Prevention from “promoting or advocating” for gun control as a health concern.²¹⁰ In 1996, the NRA successfully lobbied Congress to add this restriction to its appropriations to the Center for Disease Control and Prevention (CDC), and since then, the CDC has refrained from studying gun violence.²¹¹ In 2015, Democrats in Congress unsuccessfully attempted to remove the rider.²¹² Finally, in 2018, Congress was able to insert a single sentence stating that the CDC has the “authority” to conduct research on the “causes” of gun violence.²¹³ However because the Dickey Amendment remains good law and the language inserted into the spending bill still prohibits the CDC from “advocat[ing] or promot[ing] gun control,” and does not provide funding, experts believe this language will not bring about the research necessary to make an impact.²¹⁴ Though governmental bodies are prevented from studying gun violence directly,

²⁰⁹ *Federal Denials for Firearm Permits from the NICS Section: Nov. 30, 1998-Dec. 31, 2019*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/file-repository/federal_denials.pdf/view (last visited Jan. 29, 2020) (638 people were denied due to misdemeanor convictions for domestic violence). It should be noted that domestic violence offenders could also be hidden within the figures of other forms of denial. For example, if Devin P. Kelley’s domestic violence case was properly reported to NCIC, it could have been filed under the “dishonorable discharge” category, depending on the information given to NCIC by the Air Force. See generally David Montgomery, Richard A. Oppel & Jose A. Del Real, *Air Force Error Allowed Texas Gunman to Buy Weapons*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/texas-shooting-church.html>.

²¹⁰ Commonly known as the Dicky Amendment, this rider prohibited the Center for Disease Control and Prevention from using earmarked funds from advocating or promoting gun control. Omnibus Appropriations Bill, Pub. L. No. 104-208, tit. II, 110 Stat. 3009 (1996).

²¹¹ Todd C. Frankel, *110 Members of Congress Plead for Ending Ban on CDC Gun Research*, WASH. POST (Oct. 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/28/110-members-of-congress-plead-for-ending-ban-on-cdc-gunresearch/?utm_term=.8d8965c44932.

²¹² *Id.* See also Sarah Ferris, *House Dems Lose Fight to Nix Gun Research Ban in Budget*, THE HILL (Dec. 16, 2015), <http://thehill.com/policy/healthcare/263404-house-dems-lose-fight-to-nix-gun-research-ban-in-budget>.

²¹³ Nell Greenfieldboyce, *Spending Bill Lets CDC Study Gun Violence; But Researchers Are Skeptical It Will Help*, NPR (Mar. 23, 2018), <https://www.npr.org/sections/health-shots/2018/03/23/596413510/proposed-budget-allows-cdc-to-study-gun-violence-researchers-skeptical>.

²¹⁴ *Id.*

members of the media have launched their own investigations into gun violence, collecting and presenting substantial data.²¹⁵

The data as it stands currently suggests that the gun homicide rates have held steady after a decline in the 1990s, though there has been an increase in the suicide rates using a gun.²¹⁶ Mass shootings have increased, particularly since 2012, across several accumulated data sets.²¹⁷ These events have dominated the national news cycle, and recent mass shootings have shed a spotlight on the connection between domestic violence and mass homicide. For example, news outlets reported on the Orlando Night Club shooter's violence against his wife, and news coverage of the Texas Church Massacre exposed that the shooter had targeted the church his ex-wife's family attended.²¹⁸ The Parkland School shooter's history of abusing his former girlfriend, attacking her new boyfriend, and stalking another female student made headlines,²¹⁹ indicating that he is yet

²¹⁵ See, e.g., Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982-2019: Data From Mother Jones' Investigation*, MOTHER JONES (last updated Dec. 11, 2019), <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>; Bonnie Berkowitz, Lazaro Gamio, Denise Lu, Kevin Uhrmacher & Todd Lindeman, *The Math of Mass Shootings*, WASH. POST (last updated Dec. 10, 2019), <https://www.washingtonpost.com/graphics/national/mass-shootings-in-america/>. See also, *supra* note 1. But see Robert Verbruggen, *NYT Shows How Not to Analyze Mass-Shooting Data*, NAT'L REV. (Nov. 7, 2017), <http://www.nationalreview.com/corner/453485/nyt-shows-how-not-analyze-mass-shooting-data> (critiquing the New York Times article's use of statistics and the murkiness of the underlying data when comparing international mass shootings with U.S. rates).

²¹⁶ Jens Manuel Krogstad, *Gun Homicides Steady After Decline in '90s; Suicide Rate Edges Up*, PEW RESEARCH CTR. (Oct. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/10/21/gun-homicides-steady-after-decline-in-90s-suicide-rate-edges-up/>.

²¹⁷ See, e.g., Matt Rocheleau, *These 11 Graphics Show Problem of Gun Violence in America*, THE BOSTON GLOBE figs.1-3, (Dec. 3, 2015), <https://www.bostonglobe.com/metro/2015/12/03/key-charts-mass-shootings-gun-violence-unitedstates/xLlu1HFK5y5newTtQcCkzl/story.html>; The Data Team, *In Graphics: America's Guns: To Keep and Bear Arms*, THE ECONOMIST fig.5 (Aug. 10, 2015), <https://www.economist.com/blogs/graphicdetail/2015/08/graphics-americas-guns> (citing the Stanford Geospatial Centre).

²¹⁸ See Hilary Brueck, *The Men Behind the US's Deadliest Mass Shootings Have Something In Common – And It's Not Mental Illness*, BUS. INSIDER (Nov. 7, 2017), <http://www.businessinsider.com/deadliest-mass-shootings-almost-all-have-domestic-violence-connection-2017-11> (showing nine out of the top ten deadliest shootings had documented instances of violence, threatened violence, or disparagement against women); Corky Siemaszko & Alex Johnson, *Texas Church Shooter Had 'a Purpose and a Mission' in Family Feud, Investigator Says*, NBC NEWS (Nov. 7, 2017), <https://www.nbcnews.com/storyline/texas-church-shooting/texas-church-shooter-may-have-been-targeting-his-mother-law-n817961>.

²¹⁹ Max de Haldevang, *Florida Shooter Nikolas Cruz Shared a Trait with Other Mass Killers: He Abused Women*, QUARTZ (Feb. 15, 2018), <https://qz.com/1208345/parkland-florida-attack-school-shooter-nikolas-cruz-abused-women-like-most-mass-killers/>.

another domestic abuser turned mass shooter among a long list of others in recent U.S. history.²²⁰

Despite the perceived increase in gun violence, public views about guns show a general increase since 1995 in the desire to protect gun rights versus controlling gun ownership.²²¹ The past election cycles of President Barak Obama²²² and the 2016 election saw increases in gun sales.²²³ These increases have been attributed to fears of gun control measures being adopted by Democratic Presidents, fears of mass shootings and “general societal upheaval.”²²⁴ Thus, despite the noise of the debate, on the whole there have been surges in gun purchases in recent election years as well as an increase in pro-gun legal sentiment among the general population.²²⁵

At least, this pro-gun sentiment predominated until the Parkland School shooting on February 14, 2018, which created the #NeverAgain movement and mobilized teens across the country at a rate that was unprecedented in the wake of a mass killing.²²⁶ What may come of this movement is yet to be known. The *Pauler* decision will likely contribute to the continued debate, especially in light of the increasingly publicized connection between domestic violence and mass shootings.²²⁷

²²⁰ Melissa Jeltssen & Sarah Ruiz-Grossman, *America's Mass Shooting Problem is a Domestic Violence Problem*, HUFFINGTON POST (Nov. 12, 2017, 5:32 PM), https://www.huffingtonpost.com/entry/mass-shooters-domestic-violence_us_5a0376e7e4b0937b510f5fdd; Michael Martin, *All Things Considered: The Relationship Between Domestic Violence and Mass Shootings*, (Nat'l Pub. Radio broadcast Oct. 7, 2017), <https://www.npr.org/2017/10/07/556405489/the-relationship-between-domestic-violence-and-mass-shootings>.

²²¹ *A public opinion trend that matters: Priorities for gun policy*, PEW RESEARCH CTR.: U.S. POLITICS & POLICY, PUB. VIEWS ABOUT GUNS (Jan. 9, 2015) fig. 1, <https://www.pewresearch.org/fact-tank/2015/01/09/a-public-opinion-trend-that-matters-priorities-for-gun-policy/>.

²²² The Data Team, *supra* note 209, 217, at fig.3.

²²³ Brad Tuttle, *You Can Tell It's an Election Year Because Gun Sales Are Hitting Record Highs*, MONEY.COM (Nov. 8, 2016), <https://money.com/election-2016-gun-sales-hillary-clinton-donald-trump-obama/>.

²²⁴ *Id.*

²²⁵ *Id.* See also PEW RESEARCH CTR. *supra* note 212; The Data Team, *supra* note 217, at fig.3.

²²⁶ See Brian Mann, *Students Who Lived Through Florida Shooting Turn Rage into Activism*, NAT'L PUB. RADIO (Feb. 18, 2018), <https://www.npr.org/2018/02/18/586958556/student-activists-who-lived-through-florida-shooting-plan-Mar.-on-washington>.

²²⁷ Everytown's original research concludes that mass shootings are often intermingled with acts of domestic violence as one of four common traits of mass shootings in the past 10 years. *Ten Years of Mass Shootings in the United States: An Everytown for Gun Safety Support Fund Analysis*, EVERYTOWN FOR GUN SAFETY (Nov. 21, 2019), <https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/>. See also Julie Bosman, Kate Taylor, and Tim Arango, *A Common Trait Among Mass Killers: Hatred Toward Women*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10>

The most pressing concern post-*Pauler* would be the increase in domestic violence misdemeanants retaining guns because there is a strong likelihood that there will be a similar rise in domestic violence homicides²²⁸ and other ancillary violence. For example, domestic dispute calls are some of the deadliest for responding police officers.²²⁹ In addition to the potential increase in family annihilation, the public is becoming more aware of the connection between

/us/mass-shootings-misogyny-dayton.html; Meghan Keneally, *Domestic violence plays a role in many mass shootings, but receives less attention: Experts*, ABC NEWS (Jan. 7 2019), <https://abcnews.go.com/US/domestic-violence-plays-role-mass-shootings-receives-attention/story?id=59418186>; Hilary Brueck and Shana Lebowitz, *supra* note 213; Mark Follman, *Armed and Misogynist: How Toxic Masculinity Fuels Mass Shootings*, MOTHER JONES, (May/June 2019), <https://www.motherjones.com/crime-justice/2019/06/domestic-violence-misogyny-incels-mass-shootings/> (finding that in the 22 mass shooters analyzed, 86% had a history of domestic abuse); Alison Kodjak, *In Texas and Beyond, Mass Shootings Have Roots in Domestic Violence*, NPR (Nov. 7, 2017), <https://www.npr.org/sections/health-shots/2017/11/07/562387350/in-texas-and-beyond-mass-shootings-have-roots-in-domestic-violence> (citing the dataset of the Congressional Research Service released in 2015, which found that a “domestic dispute of some sort was allegedly a contributing factor in about a fifth of mass public shootings” and “arguably nearly all of the familicide mass shootings,” despite some offenders having restraining orders and domestic violence convictions on their records, “both prohibiting factors under federal law”).

²²⁸ See April M. Zeoli, Rebecca Malinski, & Brandon Turchan, *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 EPIDEMIOLOGIC REV., 38 125 (2016) (evaluating studies on firearm restriction statutes shows that gun ownership restriction statutes are associated with a significant decrease in domestic violence homicide rates); Jacquelyn C. Campbell et al, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93(7) AM. J. PUBLIC HEALTH 1089 (2003) (“...gun availability still had substantial independent effects” that increased domestic violence homicide risk). However, it is important to note that the effect of misdemeanor gun ownership restrictions is widely variant depending on the implementation of the law at various courts. See Daniel W. Webster, Shannon Frattaroli, Jon S. Vernick, Chris O’Sullivan, Janice Roehl, & Jacquelyn Campbell, *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners: Results from an Exploratory Study*, 19-1 J. WOMEN’S HEALTH, 93 (2010) (results showing only 26% of judges used their authority to require abusers to surrender their guns, analyzing hearings for protective orders; see also Laura Lee Gildengorin, *Smoke and Mirrors*, 67 HASTINGS L. J. 807 (2016).

²²⁹ NICK BREUL & MIKE KEITH, NAT’L L. ENF’T OFFICERS MEM’L FUND, DEADLY CALLS AND FATAL ENCOUNTERS: ANALYSIS OF U.S. LAW ENFORCEMENT LINE OF DUTY DEATHS WHEN OFFICERS RESPONDED TO DISPATCHED CALLS FOR SERVICE AND CONDUCTED ENFORCEMENT (2010–2014), (2015) at 14 (showing that domestic offenses were the most dangerous type of call for responding officers: 22% of officer fatalities in the calls for service studied were from domestic disputes); see also I. Bennett Capers, *Reading Michigan v. Bryant*, “Reading” Justice Sotomayor, THE YALE L. J. FORUM (Mar. 24, 2014), n.60 at 438 (citing Shannon Meyer, *When Officers: Die: Understanding Deadly Domestic Violence Calls for Service*, POLICE CHIEF MAG., May 2011, where between 1996 and 2009, 14% of law enforcement officers killed in the line of duty were responding to a domestic violence call for service).

domestic violence perpetrators and mass violence,²³⁰ another area where the *Pauler* decision is likely to have an impact.

Given the serious threat that armed domestic violence offenders pose to their victims, families, and communities, it is important to shield the issue of gun ownership restrictions for domestic violence offenders from partisan conflict in the realm of the courts. For many years, both Republicans and Democrats have supported restrictions on gun ownership for domestic violence offenders,²³¹ with even the NRA supporting such restrictions.²³² Moreover, the judiciary needs to stay the course with precedent, not only to prevent political pandering by undermining a cornerstone of domestic violence protections, but to also protect their own legitimacy and integrity of the judicial process. The Court must take a stand and reiterate that domestic violence is a serious threat to the life and health of the community.

Though *Pauler* stands today, the Supreme Court should address the case to reassert that the *Castleman* and *Voisine* jurisprudence should control going forward. *Pauler* relies on a seemingly benign statutory reinterpretation, but in reality this reinterpretation is a disingenuous effort to allow politics into judicial decision-making. *Pauler*'s intent is to undermine the regulation of gun ownership. Judicially, *Pauler* presents a conflict of law because the interpretation and application of the Lautenberg Amendment now differs between the Tenth Circuit and the rest of the federal courts.²³³ The *Pauler* decision potentially renders the Lautenberg Amendment a dead letter for

²³⁰ See *Analysis from Recent Mass Shootings*, MAYORS AGAINST ILLEGAL GUNS (2013), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=263487> (focusing on mass shootings between 2009-2013, surveys found that domestic violence was a factor closely connected to 57% of cases); see also WILLIAM J. KROUSE & DANIEL J. RICHARDSON, CONG. RESEARCH SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS & VICTIMS, 1999–2013 29–30 (2015) (reporting that “. . . a domestic dispute of some sort was allegedly a contributing factor in about a fifth of mass public shootings and arguably nearly all of the familicide mass shootings.”).

²³¹ See James M. Peters, *Federal Domestic Violence Laws – 2001*, 44 ADVOCATE 15 (2001) (providing an overview of the federal domestic violence and gun laws from 1994-2000); Sierra Smucker, *Ammunition for Change: The Surprising Social Movement behind Bipartisan Gun Control in the United States*, EUROPEAN CONF. ON POLITICS & GENDER (Jun. 2017), <https://ecpr.eu/Events/PaperDetails.aspx?PaperID=33040&EventID=114> (showing that between 2008 and 2015, 35 states passed legislation tackling domestic violence and guns due to domestic violence prevention advocates successfully creating bipartisan legislation).

²³² On the state level, the NRA has consulted with legislators on several bills, giving “tacit approval” to bills banning gun possession for those convicted of misdemeanor domestic violence, served with restraining orders, and those who are “deemed by the court to pose a physical threat to their families.” See Laura Bassett & Christina Wilkie, *The NRA Quietly Backs Down on Domestic Violence*, HUFFINGTON POST (Apr. 22, 2014), https://www.huffingtonpost.com/2014/04/22/nra-domestic-violence_n_5191555.html.

²³³ See *supra* Section C. Judicial Upholding, Interpretation, and Extension, Parts 2 & 4. Cf. II. The *Pauler* Decision.

domestic violence misdemeanors in six states.²³⁴ Additionally, *Pauler* ignores the precedent of past Supreme Court decisions, and thus demands correction.²³⁵ Moreover, *Pauler* ignores the longstanding public interest in reducing domestic violence related homicide,²³⁶ which occurs at significant rates when the abuser has access to a gun.²³⁷ Despite the regulatory scheme for domestic violence offenders already failing to provide perfect protection, the *Pauler* decision creates an even more perilous situation: in some areas, a significant number of domestic violence cases are charged as municipal violations, meaning a significant number of dangerous persons continue to have access to deadly weapons.²³⁸ Thus, it is imperative for the Supreme Court to take a clear and definitive stand against *Pauler*'s interpretation.²³⁹

CONCLUSION

The Lautenberg Amendment is an essential component within the web of laws that both the federal and state governments have implemented over the past twenty years to combat domestic violence. The *Pauler* decision, by excising municipal violations from the Lautenberg Amendment's reach, threatens to undermine the entire structure of this system. However, the Lautenberg

²³⁴ See *General Information*, 10TH CIRCUIT COURT OF APPEALS, <https://www.ca10.uscourts.gov/clerk>.

²³⁵ See *supra* Section IV.

²³⁶ See *supra* Section I. Before *Pauler*: Gun Regulation for Domestic Violence Offenders, Parts A & B.

²³⁷ See *When Men Murder Women: An Analysis of 2015 Homicide Data*, VIOLENCE POLICY CTR., (2017) <http://www.vpc.org/studies/wmmw2017.pdf>; see also Alli Maloney, *The "boyfriend loophole" in U.S. gun laws is costing women's lives*, WOMEN IN THE WORLD LLC in partnership with N.Y. TIMES (Sept. 18, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/09/18/the-boyfriend-loophole-in-u-s-gun-laws-is-costing-womens-lives/>.

²³⁸ See *supra* note 191. One of the major issues surrounding domestic violence is that there are no centralized databases or surveys focusing on court intake and outcomes for specifically domestic violence cases. Many statistics are provided only on a court-by-court basis, and usually are collected for special reports, as cited above. Another issue is that these cases can be moved to different dockets: for example, New Orleans moved misdemeanor domestic violence cases out of their criminal district court into their municipal court to address the backlog of cases in 2010. See Alex Woodward, *Domestic Violence: the DA's Side*, GAMBIT (Dec. 9, 2013), https://www.nola.com/gambit/news/article_a32455de-fb8f-51d6-bbd2-4a13c7fcf405.html.

²³⁹ Given the alignment of the Executive Branch with the Republican party, it is unlikely that the Government will move to appeal and apply for certiorari in the Tenth Circuit itself. An alternative way to bring the case up to the Supreme Court would be via an appeal in the other circuits that currently uphold the traditional interpretation of the Lautenberg Amendment.

Amendment, as it stands, is not a panacea to cure this deeply rooted social problem.²⁴⁰

Most importantly, the Lautenberg Amendment needs to be more uniformly enforced. Even in the most effective jurisdictions, where police, district attorneys, and the courts coordinate to properly convict domestic violence offenders, there is still the “relinquishment gap” that hampers these guns from being removed from offender’s homes, even where stronger state laws against domestic violence offender gun possession exist.²⁴¹ In some of the laxest jurisdictions, judges do not even inform defendants that they are required by law to relinquish their guns, or use their judicial discretion to avoid statutory compliance.²⁴²

²⁴⁰ There is active debate as to how effective the law is in reducing domestic violence and improving outcomes for victims attempting to escape dangerous relationships. Some research indicates that in areas where the Lautenberg Amendment gun restrictions are actively enforced, there is a reduction in gun murders of female intimate partners. See Philip J. Cook & John J. Donohue, *Saving Lives by Regulating Guns: Evidence for Policy*, 385 (6368) SCI. 1259, 1261 (Dec. 2017). The focus on later studies reduce the “staggering effect” brought on by litigation of the Lautenberg Amendment, during which some states did not implement the law to the fullest extent until post litigation. *Id.* Other studies are ambivalent in terms of showing a reduction in violence after the Lautenberg Amendment, but these studies occurred over the “staggered” timeframe where implementation was not consistent, and are impacted as well by the state-by-state differentiation in implementation. See Ruth E. Fleury-Steiner, Susan L. Miller, & Ava Carcirieri, *Calling the Shots: How Family Courts Address the Firearms Ban in Protection Orders*, 23(9) VIOLENCE AGAINST WOMEN 1140, 1141-42 (2017), <http://www.preventdvgunviolence.org/assets/fleury-steiner-miller-carcirieri-vaw-2017.pdf> (focusing on research from 2006-2010).

One of the major reasons at the heart of this issue is the underreporting in domestic violence, as well as a lack of centralized, thorough attention from researchers. This is beginning to be addressed, however, it will likely be a persistent shortcoming into the near future, especially for tracking the cases that involve gun related threats, injury, or homicide given the continued restrictions placed on the Center for Disease Control by the Dickey Amendment, which has significantly hampered research into gun violence for over two decades. See Laura Wexler, *Gun Shy*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Fall 2017), <https://magazine.jhsph.edu/2017/fall/features/cassandra-crifasi-hopkins-moderate-gun-owner-gun-policy-researcher/how-the-dickey-amendment-affects-gun-violence-research.html>.

²⁴¹ The “relinquishment gap” is the lack of protocols and enforcement of firearm relinquishment laws at both the federal and state levels. See Díez, et al, *State Intimate Partner Violence – Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991-2015*, 167(8) ANNALS OF INTERNAL MED. (Sept. 19, 2017), <http://annals.org/aim/fullarticle/2654047/state-intimate-partner-violence-related-firearm-laws-intimate-partner-homicide> (citing Law Center to Prevent Gun violence, n.14).

²⁴² See Laura Lee Gildengorin, *Smoke and Mirrors*, 67 HASTINGS L. J., 807, 828–30; see also Ruth E. Fleury-Steiner, Susan L. Miller, & Ava Carcirieri, *Calling the Shots: How Family Courts Address the Firearms Ban in Protection Orders*, 23(9) VIOLENCE AGAINST WOMEN 1140, 1141–42 (2017), <http://www.preventdvgunviolence.org/assets/fleury-steiner-miller-carcirieri-vaw-2017.pdf> (focusing on research from 2006-2010). Though the study focuses

Additionally, there have been attempts from both sides of the political aisle to update the Lautenberg Amendment to close “the boyfriend loophole.”²⁴³ The original text of the Amendment does not conceptualize modern relationships that now predominate and exist outside of the traditional domestic living situation, such as “boyfriends,” and other forms of casual dating relationships.²⁴⁴ This would be an important extension to the Lautenberg Amendment, as boyfriends are nearly as likely as husbands to murder their intimate partners.²⁴⁵ Attempts in Congress to address this specific shortcoming has not been successful.²⁴⁶

Finally, as the connection between domestic violence and mass shootings demonstrates,²⁴⁷ the Lautenberg Amendment’s coverage and protection needs to be increased, not truncated.²⁴⁸ It is imperative for the Lautenberg Amendment to provide the full coverage of protection, as Congress intended, in order to make further reforms effective. The Supreme Court must take action and disavow the *Pauler* decision.

on communication in protection order hearings, the study’s rigor and conclusions bear critical insights that translate to those cases where the Lautenberg Amendment apply (e.g. cases that result in a misdemeanor conviction).

²⁴³ The Editorial Board, *There is Common Ground on Guns: Part 2 Boyfriends Can Kill, Too*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/opinion/domestic-violence-guns.html>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See *Analysis from Recent Mass Shootings*, MAYORS AGAINST ILLEGAL GUNS (2013); WILLIAM J. KROUSE & DANIEL J. RICHARDSON, CONG. RESEARCH SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS & VICTIMS 1999-2013 29-30 (2015).

²⁴⁸ Additional measures can be taken to make gun relinquishment laws more effective but are beyond the scope of this Note. For additional insights, see Ruth E. Fleury-Steiner, Susan L. Miller, & Ava Carcieri, *Calling the Shots: How Family Courts Address the Firearms Ban in Protection Orders*, 23(9) VIOLENCE AGAINST WOMEN 1140 (2017), <http://www.preventdvgunviolence.org/assets/fleury-steiner-miller-carcieri-vaw-2017.pdf>; see also Laura Lee Gildengorin, *Smoke and Mirrors*, 67 HASTINGS L. J. 807 (2016); Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. OF GENDER L. & POLICY 173 (2015) (advocating for the creation of an ethical rule to be followed by prosecutors, requiring prosecutors to charge domestic violence offenses appropriately to bring to bear the full consequences of gun restrictions on these kinds of cases).