No. 17-9560

IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with over five million supporters across all fifty states. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combatting illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after twenty children and six adults were murdered in an elementary school in Newtown, Connecticut. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown works to promote and support public safety measures that can save lives, including laws that keep guns out of the hands of people with dangerous histories, such as felons, domestic abusers and those with dangerous mental illnesses.

Everytown has drawn on its expertise to file amicus briefs in numerous cases implicating gun safety issues, including in briefs to this Court about the proper interpretation of federal firearms law, offering historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*, *Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Castleman*, 572 U.S. 157 (2014); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *Peruta v. Cty. of San*

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[1] The parties have consented to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amicus curiae and their counsel, no person contributed money intended to fund the brief's preparation and submission.

Diego, 824 F.3d 919 (9th Cir. 2016) (en banc). It seeks to do the same here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The brief of the United States persuasively explains why the text, circuit court case law, and legislative history strongly support the conclusion that prosecutions under 18 U.S.C. § 922(g) and 18 U.S.C. § 924(a)(2) do not require the government to prove that a defendant had knowledge of his prohibited status. This brief is intended to provide the Court with an additional body of law reinforcing this consensus view: state court decisions interpreting and applying the state law counterparts to § 922(g).

These state laws, on the books in nearly every jurisdiction in the country, arose out of the same legislative efforts in the 1920s and 1930s that led to the current federal prohibited possessor statute, and they continue to be interpreted in parallel to federal law today. Like the virtually unanimous federal courts of appeals, state courts too have consistently held that the government is *not* required to prove a criminal defendant's knowledge of his prohibited status (*i.e.*, that he is a felon or a convicted domestic abuser or within one of the other prohibited categories set forth in the statute). Indeed, as the Oregon Supreme Court observed in 2011, "[e]very court—state and federal—that has considered the question has held that no such proof is required." *State v. Rainoldi*, 268 P.3d 568, 577 n.1 (Or. 2011).

Petitioner asks this Court to redefine this well-established standard in a way that will impact not only his prosecution, but the prosecutions of all those who violate the federal prohibition on certain categories of people possessing firearms. That is a dangerous course.

Section 922(g) and its state counterparts are among the most important tools law enforcement has for preventing gun violence. In 2017 alone, there were over six-thousand convictions for violating 18 U.S.C. § 922(g), about nine percent of all federal convictions. United States Sentencing Commission. *Quick Facts: Felon in Possession of a Firearm* (2018), https://bit.ly/2Ce9Isn. And, as this Court has made clear, "Congress sought to rule broadly" in enacting the federal prohibition, so as "to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (quoting 114 Cong. Rec. 14773). States have pursued the same core goal through their own parallel laws. *See, e.g.*, *People v. DeWitt*, 275 P.3d 728, 736 (Colo. App. 2011) (state prohibited possessor law intended to prevent "all convicted felons from possessing a firearm to avoid 'substantial risk of harm to the public'").

Prohibited possessor laws at both the federal and state levels thus punish the possession of firearms by "presumptively risky people," *Dickerson v. New Banner Inst.*, 460 U.S. 103,112 n.6 (1983), who are most likely to commit future acts of violence. The data back this up. For example, according to a Department of Justice analysis, more than thirty-nine percent of felons (or, more specifically, state prisoners

sentenced to a year or more in prison)—who are prohibited from firearm possession by § 922(g)(1)—were arrested for a violent crime within nine years of being released from prison.[2] Similarly, one study found that more than fifty percent of those convicted of a domestic violence offense—who are prohibited from firearm possession by§ 922(g)(1) or § 922(g)(9)—are rearrested for another domestic violence crime within ten years, and even more are rearrested for nondomestic violence crimes.[3] And, significantly, the presence of a firearm in a domestic violence situation makes it five times more likely that a woman will be killed.[4]

Like § 922(g)(1), state prohibited possessor statutes are also an essential tool for local police and prosecutors to prevent gun violence in their communities. Every state has laws prohibiting firearm possession by at least some of the categories of people listed in § 922(g). And each of these laws, like § 922(g)(1), prohibits firearm possession by at least some felons.[5]

To be sure, these state laws are written differently from the federal statute. None adopts a mens rea

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[2] Mariel Alpher et al., U.S. Dep't of Justice, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)* 11 tbl.7, 15 (2018), https://bit.ly/2IBxgrR.

[3] Tara N. Richards et al., *A 10-year Analysis of Rearrests Among a Cohort of Domestic Violence Offenders*, 29 Violence & Victims 887, 897 (2014).

[4] Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Public Health 1089, 1092 (2003).

[5] An appendix listing citations for current state prohibited possessor statutes is attached to this brief. Some of these statutes may have been revised since the date of the decisions cited in this brief.

through a specifically applicable separate statutory provision like §§ 922(g) and 924(a)(2). They also vary from jurisdiction to jurisdiction in several respects, including who is prohibited and for how long, whether an intent standard is explicitly set forth in the statute, and the level of that intent. For example, the prohibited possessor laws in more than thirty states and the District of Columbia lack any mens rea requirement in the statutory text.[6] In contrast, prohibited possessor laws of a smaller number of other states include statutory mens rea provisions that are unambiguously applicable only to possession.[7]

Notwithstanding these and other textual differences, and just like the federal courts when it comes to § 922(g), state courts applying and interpreting their prohibited possessor statutes are in agreement on one thing: a defendant's knowledge of his prohibited status is not an element required to be proved for

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[6] *See* the list of state prohibited possessor statutes set forth in the appendix for Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington West Virginia, and Wisconsin.

[7] *See, e.g.* Wyo. Stat. Ann. § 6-8-102 ("Any person who has previously pleaded guilty to or been convicted of committing or attempting to commit a violent felony . . . who uses or knowingly possesses any firearm" is guilty of a felony.); Iowa Code § 724.26 (prohibited possessor statute providing that "[a] person who is convicted of a felony . . . who knowingly has under the person's dominion and control or possession . . . a firearm or offensive weapon is guilty of a class 'D' felony").

conviction. This consistent state-level judicial and legislative understanding provides an additional body of authority supporting and reinforcing the broad national consensus that violating prohibited possessor statutes simply means knowingly possessing a firearm subsequent to becoming a member of the prohibited class. The shared federal-state history and judicial approach also raises the concern that the Court's decision in this case as to the proper interpretation of the federal prohibitor statute could have wider and unintended ramifications for the interrelated state prohibitor regimes as well.

ARGUMENT

I. Section 922(g) and Its State Law Counterparts Share a Common History and Development and Have Been Interpreted by Courts in Parallel.

A. The History and Development of Modern Prohibited Possessor Laws.

18 U.S.C. § 922(g) and analogous state prohibited possessor laws share a common history, which began at the state level. Starting in the 1920s, in response to rising violent crime, states began to prohibit the possession of firearms by certain categories of persons who "pose a risk to the public." *Rainoldi*, 268 P.3d at 575-77 (summarizing development of state prohibited possessor laws).[8] This effort was initially led by

[8] While the current state and federal prohibited possessor laws stem directly from legislation first passed in the 1920s and

the United States Revolver Association (USRA), a marksmanship group, which drafted model legislation to regulate firearms. *Id.* The USRA Model Act prohibited the possession of firearms by anyone "convicted of a felony against the person or property of another or against the Government of the United States or any State," among other classes of persons. *A Bill to Provide for the Uniform Regulation of Revolver Sales* (1922), reprinted in *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fourth Annual Meeting* 728-29 (1924). Several states quickly enacted the USRA Model Act in an effort to reduce violent crime, beginning with Connecticut and California. *See, e.g.*, 1923 Cal. Stat. 695, ch. 339; 1923 Conn. Pub. Acts 3707, ch. 252.

The USRA Model Act's success led to its adaptation by the National Conference of Commissioners on Uniform State Laws, which modified the Model Act's prohibitions to restrict anyone "convicted . . . of a crime of violence" from possessing firearms and adopted it as the Uniform Firearms Act (UFA). *See Report of Committee on An Act to Regulate the Sale and Possession of Firearms*, published in *Fortieth Conference Handbook of the National Conference of the Uniform State Laws and Proceedings of the Annual Meetings* 530, 537 (1930). Several states used the UFA as a model, as did Congress when it passed gun

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'30s, prohibitions on the possession of firearms by so-called "unvirtuous citizens," including even nonviolent felons and other criminals, date back to the founding. *See Medina v. Whitaker*, 913 F.3d 152, 158-60 (D.C. Cir. 2019) (quoting *United States v. Yancy*, 621 F.3d 681, 684-85 (7th Cir. 2010)) (summarizing founding-era history).

regulations for the District of Columbia in 1932. Act of July 8, 1932, Pub. L. No. 72-275, ch. 465, § 4, 47 Stat. 650; *see, e.g.,* 1931 Pa. Laws 497; 1935 S.D. Sess. Laws 355.

In 1938, Congress adopted the language of the UFA in passing the first national prohibition on the possession of firearms by anyone "who is under indictment or has been convicted of a crime of violence or who is a fugitive from justice." *An Act to Regulate Commerce in Arms*, Pub. L. No. 75-785, ch. 850, § 2, 52 Stat. 1250 (June 30, 1938). States continued to pass their own prohibited possessor laws in the years that followed. *See, e.g.*, 1955 Nev. Stat. 185, ch. 132 ("no person who has been convicted of a felony . . . shall own or have in his possession . . . any pistol, revolver or other firearm capable of being concealed"). In 1968, again facing rising crime as well as a string of assassinations, Congress passed the Gun Control Act, which expanded the federal prohibited possessor categories to most of those now found in the current law, including anyone convicted of a felony. Pub. L. No. 90-618, 82 Stat. 1213-36 (Oct. 22, 1968). And, finally, in 1986, the Firearms Owners Protection Act (FOPA) added an express "knowingly" requirement in § 924(a)(2) (*see* Pub. L. No. 99-308, 100 Stat. 449)—which, as the United States has explained, had already long been applied to § 922(g) prosecutions by the federal courts. U.S. Br. 29.[9]

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[9] In passing FOPA, Congress distinguished between violations of the dealer licensing provisions in 18 U.S.C. § 921, which had to be violated "willfully," and the criminal provisions in § 922, which preserved the court-acknowledged "knowingly" standard. *Compare* 18 U.S.C. § 924(a)(1)(D) (2012), *with id.* § 924(a)(2); *see also* David T. Hardy, *The Firearms Owners Protection Act: A*

Since passage of the Gun Control Act and FOPA, the close relationship and interaction between federal and state prohibited possessor laws has continued. Many states have amended their laws to be more consistent with the language and interpretation of the federal statute. *See, e.g.*, 2014 La. Acts 1573, Act. No. 195 (codified at La. R.S. § 14:95.10) (prohibiting those convicted of domestic violence from possessing firearms, consistent with the federal prohibitor at § 922(g)(8)); 2010 Iowa Acts 358, ch. 1083 (codified at Iowa Code § 724.26(3) (prohibiting those under final domestic violence restraining orders from possessing firearms, consistent with the federal prohibitor at § 922(g)(9)). States have also continued to influence the development of the federal prohibited possessor law. Most notably, in 1996, Congress followed the lead of six states and the District of Columbia by prohibiting the possession of firearms by those convicted of domestic violence offenses. Pub. L. 104–208, 110 Stat. 3009-371 (codified at 18 U.S.C. § 922(g)(9)); *see, e.g.*, 1994 Wash Sess. Laws 2196, 2217 ch. 6, § 402 (codified at Wash. Rev. Code Ann. § 9.41.040).

Historical and Legal Perspective, 17 Cumb. L. Rev. 585, 653 (1986) ("Certain offenses, distinguished by their more serious natures, are singled out for a requirement only that accused violators know of their actions. The remaining provisions of the Act require stiffer proof that the defendant 'willfully' violated the statute.")

B. State and Federal Courts Have Interpreted Their Prohibited Possessor Laws in Parallel.

This parallel development of state and federal prohibited possessor statutes is mirrored by the parallel development of state and federal interpretations and applications of the required mens rea under prohibited possessor laws. Despite significant differences in mens rea language and the precise scope of the prohibited possessor categories, federal and state courts have interpreted the status element of their prohibited possessor statutes roughly identically, with state courts at times relying on or citing federal case law, as well as that of sister states, for guidance on the application of their own prohibitions.

For example, in *State v. Howard*, a Kansas intermediate court of appeals found that "[a]lthough mental culpability varies based on the wording of a specific statute, . . . several other state and federal courts have interpreted similar felon-in-possession statutes and concluded that the prosecution does not have to prove the defendant knew of his or her felon status." 339 P.3d 809, 822 (Kan. Ct. App. 2014). Similarly, the Washington state intermediate court of appeals likewise looked to the federal courts' interpretation of § 922(g) in rejecting the argument that the state's prohibited possessor statute required "knowledge that the possession is unlawful." *State v. Semakula*, 946 P.2d 795, 798 (Wash. Ct. App. 1997). And in *Saadiq v. State*, the Iowa Supreme Court explained that its application of that state's law was "in accord with the California Supreme Court as well as federal decisions under the federal statute proscribing

firearm possession by convicted felons." 387 N.W.2d 315, 323-24 (Iowa 1986).

II. State Courts Have Consistently Interpreted their Prohibited Possessor Laws as Not Requiring a Mens Rea for Prohibited Status.

Like the federal courts of appeals, state courts have consistently interpreted state prohibited possessor laws to require a mens rea only for the possession element of the crime. While there are certainly significant variations in the statutory language and legal traditions across the states, the understanding on this issue has been remarkably consistent. *See, e.g.*, *Rainoldi*, 268 P.3d at 577 n.1 (citing cases). Whether based on specific or general statutory text or other judicial interpretation of the state's criminal law, each of these state cases reaches the same conclusion – consistent with the conclusion reached by the federal circuits and urged here by the United States: there is not and should not be a mens rea requirement for the prohibited status element of prohibited possessor crimes.[10]

[10] Everytown was able to find relevant materials for forty-four states and the District of Columbia. Massachusetts does not have an analogous law and instead applies its prohibited possessor categories through its licensing law. Everytown was unable to find relevant materials from Montana, South Dakota, Rhode Island, South Carolina, and West Virginia.

A. State Courts Have Interpreted Prohibited Possessor Statutes Lacking a Statutory Mens Rea to Require Knowledge of Possession, But Not of Prohibited Status.

As noted above (at p. 5 n.6), the majority of state prohibited possessor laws lack a specific statutory mens rea. The courts in these jurisdictions have therefore decided the scope of the mens rea requirement by looking to a catch-all mens rea statute or through case law requiring a guilty mind to convict for most criminal statutes. In these states, the courts have consistently applied a knowledge requirement to the possession element, while not requiring any mens rea for the prohibiting status.

In *State v. Rainoldi*, for example, the Oregon Supreme Court rejected a claim that in order to be guilty of "felon in possession of a firearm, the jury had to conclude that defendant knew that he was a felon." 268 P.3d at 570. Oregon law required "a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state." *Id.* However, the court rejected the application of a culpable mental state to the status element, finding it inconsistent with the text of the statute, with "the nature of the element at issue" which pertains to "the status of the defendant" and not his conduct, and with the underlying legislative purpose to prevent the possession of firearms by individuals with dangerous histories. *Id*. at 573-578.[11]

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[11] The *Rainoldi* case addresses Or. Rev. Stat. Ann. § 166.270, a prohibition on possession of firearms by felons that does not include mens rea in the statute's text. Another broader prohibited possessor statute, Or. Rev. Stat. Ann. § 166.250,

Other states with similar statutes have reached the same result. In *State v. Howard*, a defendant appealed the exclusion of evidence from his prohibited possessor trial, claiming it was exculpatory because it proved he did not know he was a felon. 339 P.3d at 819. Kansas's prohibited possessor statute does not set forth a mens rea, so the defendant relied on another statute, which makes a "culpable mental state . . . an essential element of every crime defined by this code." *Howard*, at 823 (citing Kan. Stat. Ann. § 21-5202). The court rejected this argument, finding: "[T]he State only has to prove the defendant intentionally, recklessly, or knowingly engaged in the conduct that constitutes the crime. Here the prohibited conduct is possessing the firearm." *Id.*; *see also State v. Reed*, 928 P.2d 469, 471 (Wash. Ct. App. 1997) (allowing evidence about defendant's lack of knowledge about previous conviction only as relevant to determining whether the prohibiting conviction was obtained in an unconstitutional manner and therefore could not serve as the predicate for the offense).

Other state courts interpreting prohibited possessor laws lacking a statutory mens rea have not directly addressed the argument that the prosecution should be required to prove knowledge of status. But in a number of these states the courts have upheld convictions obtained using jury instructions requiring mens rea only for the possession element, or have described the necessary elements of the crime as only requiring mens rea for the possession element. For example, in *State v. Stratton*, the New Hampshire Supreme Court found that "[t]he prosecution was

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requires knowing possession.

required to prove that the defendant knowingly owned, possessed or controlled the firearms and that he was a convicted felon." 567 A.2d 986, 990 (N.H. 1989). Similarly, in *Nicholson v. State*, an Alabama appellate court interpreted the state's prohibited possessor statute to require "knowing possession of the gun," and simply a "prior conviction for a crime of violence." 77 So.3d 1214, 1215-1216 (Ala. Crim. App. 2011). Many other states without statutory mens rea in their prohibited possessor statutes have taken the same path, requiring knowledge of possession but not of a defendant's prohibited status.[12]

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[12] **Arkansas:** *Fisher v. State*, 290 Ark. 490, 493-94 (Ark. Sup. Ct. 1986) ("[t]he requisite mens rea is that the defendant 'purposely, knowingly, or recklessly' . . . 'possess[ed] or own[ed] any firearm'"); **Connecticut:** *State v. Boyd*, 973 A.2d 138, 144 (Conn. App. Ct. 2009) (requiring intent to possess and status as a felon); **District of Columbia:** *Myers v. United States*, 56 A.3d 1148, 1149 (D.C. 2012) ("[T]he Government must prove. . . One, that the Defendant possessed a firearm; two, that he did so knowingly and intentionally. . . And three, that at the time the Defendant possessed the firearm, the Defendant had been convicted of a felony.") (internal quotation marks omitted); **Florida:** *Creamer v. State*, 605 So. 2d 541, 542-43 (Fla. Dist. Ct. App. 1992) (requiring prior felony conviction and knowing possession of a firearm); **Hawaii:** *State v. Valentine*, 998 P.2d 479, 482, 489 (Haw. 2000) ("A person commits the offense of Prohibited Possession of a Firearm if having been previously convicted of committing a felony he intentionally, knowingly or recklessly owns, possesses or controls any firearm."); **Idaho:** *State v. Dolsby*, 145 P.3d 917, 920 (Idaho Ct. App. 2006) ("[T]he act of knowingly possessing the firearm is all that the state is required to prove."); **Kentucky:** *Foister v. Commonwealth*, No. 2004-CA-002409-MR, 2005 WL 3334518, at *1, *3 (Ky. Ct. App. Dec. 9, 2005) (Commonwealth required to show defendant "knew the gun was present"); **Louisiana:** *State v. Storks*, 836 So. 2d 638, 640 (La. Ct. App. 2002) (to convict a defendant of illegal possession of a firearm by a

convicted felon, the State must prove that "the offender was aware that a firearm was in his presence and that the offender had a general criminal intent to possess the weapon"); **Maine:** *State v. Heald*, 382 A.2d 290, 297 (Me. 1978) ("Possession statutes such as 15 M.R.S.A. § 393, making it unlawful for a felon to possess a firearm, require no particular scienter, except the knowledge of the presence of the firearm and its character as such."); **Maryland:** *Samba v. State*, 49 A.3d 841, 858 (Md. Ct. of Spec. App. 2012) ("The possession charge requires an affirmative showing of knowledge in order to establish appellants dominion and control over the weapon."); **Michigan:** *People v. Tice*, 558 N.W.2d 245, 247-48 (Mich. Ct. App. 1996) (allowing defendant to argue he was not legally a felon, but not considering his lack of knowledge); **Mississippi:** *Billups v. State*, No. 2016-KA-01378-COA, 2018 Miss. App. LEXIS 461, *9-10 (Miss. Ct. App. 2018) (felon-in-possession statute requires that defendant "unlawfully, willfully, and feloniously . . . possess[ed] a firearm . . . and ha[ve] been previously convicted of a felony"); **Nebraska:** *State v. Hall*, No. A-15-548, 2016 Neb. App. LEXIS 125, *5-6 (Neb. Ct. App. June 21, 2016) (felon-in-possession conviction valid because there was sufficient evidence that defendant "knowingly possessed three firearms after having been previously convicted of a felony offense"); **New Mexico**: *State v. Haddenham*, 793 P.2d 279, 286 (N.M. 1990) ("[Defendant] only had to have known that the gun [possessed] was a firearm."); **Oklahoma:** *Williams v. State*, 565 P.2d 46, 49 (Okla. Crim. App. 1977) ("intent or knowledge" of possession necessary to convict defendant); **Pennsylvania:** *Commonwealth v. McGee*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 393, at *27 (Pa. C.P. Berks Cty., Feb 26, 2015) (possession element requires "both the knowledge to control and the intent to exercise that control"), *aff'd*, No. 73 MDA 2015, 2016 PA. Super. Unpub. LEXIS 259 (Pa. Super Ct. Jan. 29, 2016) **Tennessee:** *State v. Holman*, No. W201501744-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 790, *7-8 (Tenn. Crim. App. 2016) ("'intent, knowledge, or recklessness suffice[] to establish the culpable mental state' . . . Here, the defendant, a convicted felon, acted at least recklessly by driving a vehicle that he knew had a firearm inside"); **Texas:** *Johnson v. State*, No. 01-13-00213-CR, 2014 Tex. App. LEXIS 3732, *4-5 (Tex. App. 2014) ("To establish unlawful possession of a firearm by a felon, the State must prove . . . that

In a number of other states where the prohibited possessor statutes do not set forth a mens rea, the courts have interpreted the prohibited possessor statutes to be strict liability offenses. This interpretation necessarily excludes a mens rea requirement for the status element. *See, e.g., People v. Nieto*, 247 Cal. App. 2d 364, 368 (Ct. App. 1966) (applying strict liability); *Malone v. State*, 786 S.E.2d 558, 560 (Ga. Ct. App. 2016) ("[T]he State need only prove that the accused is a convicted felon and in possession of a firearm." (internal quotation marks and citation omitted)).[13]

In practice, however, these strict liability states are not substantially different from other states' laws

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the accused was previously convicted of a felony offense and possessed a firearm. . . . Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed . . ."); **Vermont:** *State v. Stern*, 186 A.3d 1099, 1104-05 (Vt. 2018) (prohibited possessor conviction requires defendant to have "intentionally possessed a firearm").

[13] *See also Gabrelcik v. State*, No. A07-0627, 2008 Minn. App. Unpub. LEXIS 579, at *7 (Minn. Ct. App. 2008) ("In Minesota, the elements of the offense of being a person ineligible to possess a firearm do not include knowledge."); *Bibbins v. State*, 367 P.3d 750, 2010 WL 3341923, at *1 (Nev. 2010) (crime "completed when the ex-felon obtains possession of a firearm"); *State v. Jones*, 487 A.2d 1278, 1284 (N.J. Super. Ct. App. 1985) (applying strict liability, but requiring evidence that defendant intended to use the object as a deadly weapon); *State v. Bailey*, 757 S.E.2d 491, 493 (N.C. Ct. App. 2014) (applying strict liability but requiring something approaching knowledge to prove possession); *State v. Elred*, 564 N.W.2d 283, 290 (N.D. 1997) ("Section 62.1-02-01 does not have a culpability requirement. It is a strict liability statute."); *State v. Buchholz*, 723 N.W.2d 534, 538 (N.D. 2006) ("[t]he offense of felon in possession of a firearm is a strict liability offense").

with a mens rea requirement because possession is interpreted to require some level of knowledge. For example, in *In re Ronnie L.*, a minor defendant in a juvenile delinquency hearing was charged with possession of a firearm found in a jacket he had borrowed from a friend. 463 N.Y.S.2d 732, 732 (Fam. Ct. 1983). He claimed that he was unaware of the presence of the firearm and therefore could not be adjudicated delinquent. *Id*. The court accepted that defendant's lack of knowledge could be a defense, before ultimately rejecting it on the facts, finding that the prohibited possessor statute at issue is "a strict liability crime," but still requires "a voluntary act," which must be done "intentionally" or "knowingly." *Id*. at 733-34. The court acknowledged that the distinction between strict liability and knowledge in possession crimes was illusory because both "necessarily involve[] a culpable mental state." *Id*. at 734. Similarly, in Wisconsin, courts have interpreted the prohibited possessor statute "to impose strict criminal liability," *State v. Phillips*, 493 N.W.2d 238, 240 (Wis. Ct. App. 1992), but to convict under the statute the state is "required to show that the felon 'possessed' the firearm with knowledge that it is a firearm" and "knowingly had actual physical control" over it. *State v. Black*, 624 N.W.2d 363, 371 (Wis. 2001).

B. State Courts Have Also Interpreted Prohibited Possessor Statutes with a Textual Mens Rea Element to Exclude Knowledge of Status.

Like the federal law, several states' prohibited possessor statutes have a statutorily defined mens rea. In these cases, the mens rea applied through the statute consistently has been found to extend only to the prohibited possession, and not to the defendant's status as a person prohibited from possessing firearms.

One example is Colorado. Similar to the federal law, Colorado's prohibited possessor statute initially lacked a statutory mens rea, but was interpreted by the state courts to require knowledge of possession. *See People v. Tenorio*, 590 P.2d 952, 957 (Colo. 1979) (requiring knowledge of possession). Colorado's statute was subsequently amended, adding a mens rea requirement obligating prosecutors to prove a defendant "knowingly possesse[d], use[d], or carrie[d] upon his or her person a firearm. . . subsequent to the person's conviction for a felony." Colo. Rev. Stat. § 18-12-108. When a defendant in a prohibited possessor case claimed that the revised statute required the application of the "knowingly" mens rea to the prohibited status element of his crime, the court rejected that claim as inconsistent with the text and purpose of the statute. Instead, the court held, the "'[k]nowingly' mental state" applied only "to the possession element of the offense, and not to the prior felony conviction element." *DeWitt*, 275 P.3d at 735.

Other state courts, interpreting statutes with a statutory mens rea more clearly limited to only the

possession element, have unsurprisingly come to the same conclusion. The Wyoming Supreme Court found that "[t]he only mens rea requirement for a conviction is knowledge that the instrument possessed is a firearm" and that "no requirement exists that the defendant know his status as a convicted felon." *Poole v. State*, 152 P.3d 412, 414 (Wyo. 2007). The Iowa Supreme Court found that "[k]nowledge of felony status is not an element of this crime." *Saadiq*, 387 N.W. at 324. In *Kipp v. State*, the Delaware Supreme Court found that "to be guilty of the offense, the defendant need only know that he or she possessed the weapon." *Kipp v. State*, 704 A.2d 839, 842 (Del. 1998). And the Ohio Supreme Court likewise ruled that "the state need not prove a culpable mental state for the element that a defendant is under indictment for or has been convicted of [the legally relevant offense]." *State v. Johnson*, 942 N.E.2d 347, 348 (Ohio 2010); *see also Branch v. Commonwealth*, 593 S.E.2d 835, 836 (Va. Ct. App. 2004) ("the pertinent conduct proscribed . . . is merely that of 'being a felon' and 'knowingly and intentionally being in possession of a firearm'"); *Rhone v. State*, 825 N.E.2d 1277, 1286 (Ind. Ct. App. 2005) (Indiana law "does not require proof that [defendant] knew he was a serious violent felon")*; see also People v. Adams*, 903 N.E.2d 892, 896-97 (Ill. App. Ct. 2009) ("the State must show that the defendant had a prior felony conviction and knowingly possessed a firearm")*; State v. Harmon*, 541 P.2d 600, 602 (Ariz. Ct. App. 1975) ("The intent which the legislature has chosen to punish is the intent to possess the pistol."); *State v. Jones*, 865 S.W.2d 658, 662 (Mo. 1993) (applying a knowledge requirement to the possession element); *State v. Ojeda*, 350 P.3d 640, 645 (Utah Ct. App. 2015)

(distinguishing between prohibition on firearms possession by unlawful users of controlled substances, which requires no mens rea as to status, and the prohibition on those in possession of controlled substances, which statutorily requires knowledge or intent).[14]

C. State Courts Have Provided A Variety of Reasons for Excluding Knowledge of Status as an Element in Prohibited Possessor Crimes.

State courts interpreting statutes both with and without statutory mens rea provisions have offered a range of justifications for concluding that proof

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[14] While the case law cited above is all consistent in the result reached, model jury instructions from Hawaii and Alaska do extend mens rea to a defendant's prohibited status. *See* Hawaii Rev. Crim. Jury Instr. 15.07 ("There are five material elements of the offense of Possession or Control of a Firearm or Ammunition for a Firearm by a Person Convicted of Specified Crimes . . . . 5. That, . . . the Defendant believed, knew, or recklessly disregarded the substantial and unjustifiable risk, that he/she had previously been convicted of committing [a prohibiting crime]"); AK Pattern Jury Ins. – Crim. 11.61.200(A)(1) (requiring that "the defendant was aware of or recklessly disregarded the fact that he had been [convicted of a prohibiting crime] by a court of this state, a court of the United States, or a court of another state or territory"). As discussed above, however, Hawaii case law appears to be inconsistent with such an approach. *See Valentine*, 998 P.2d at 489 (prohibited possessor crime occurs when a defendant who "previously [was] convicted of committing a felony . . . intentionally, knowingly, or recklessly owns, possesses[,] or controls any firearm"). Alaska lacks sufficient case law to judge the significance of the model jury instruction.

of a defendant's knowledge of his prohibited status is not required. Many have broadly adopted the reasoning of the court of appeals here, distinguishing between a defendant's knowledge of his "own status" and his knowledge of his prohibited conduct. *United States v. Rehaif*, 888 F.3d 1138, 1146 (11th Cir. 2018); *accord Rainoldi*, 268 P.3d at 574 (distinguishing between "status" and "conduct" elements and finding that status "ordinarily does not require proof of a culpable mental state"); *State v. Valentine*, 998 P.2d 479, 486-88 (Haw. 2000) (distinguishing between "conduct," which requires mental culpability, and "attendant circumstances," which do not); *Saadiq,* 387 N.W.2d at 323 (general intent crimes require that defendant "intended to do the proscribed act") (citation omitted); *Howard,* 339 P.3d at 823 ("[T]he State only has to prove the defendant intentionally, recklessly, or knowingly engaged in the conduct that constitutes the crime. Here the prohibited conduct is possessing the firearm.").[15]

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[15] Contrary to petitioner's assertions, Pet. Br. 26-27, this approach is fully consistent with *Staples v. United States*, 511 U.S. 600, 619 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994), because it still requires proof of a defendant's knowledge of the "elements of an offense that concern the characteristics of other people and things." *Rehaif,* 888 F.3d at 1146; *see* U.S. Br. 22-26, 44-45. Thus, while states overwhelmingly exclude knowledge of one's own status as an element, they universally require knowledge that the object possessed is a firearm. *See, e.g*, *Black*, 624 N.W.2d at 371 (to obtain a conviction under prohibited possessor law, "the State is only required to show that the felon 'possessed' the firearm with knowledge that it is a firearm"); *In re Ronnie L.*, 463 N.Y.S.2d at 734 (although statute was strict liability, it still required knowledge that the object possessed is a firearm).

State courts have also looked to the statutes' underlying policy when assessing whether to apply mens rea to the status element. In *Rainoldi*, for example, the Oregon Supreme Court found that the risk "that persons who have been convicted of a felony pose . . . to the public" "exists regardless of a person's knowledge of the legal significance of the conviction." *Rainoldi*, 268 P.3d at 577. Similarly, a Colorado intermediate court of appeals found that because the prohibited possessor statute's purpose is to prevent "all convicted felons from possessing a firearm to avoid 'substantial risk to the public,'" it would be "inconsistent . . . to require proof of defendant's knowledge of his or her convicted felon status before prohibiting the possession of a firearm." *Dewitt*, 275 P.3d at 736 (citation omitted).

* * * * *

The overwhelming body of federal and state precedent, legislative history, and case law applying and interpreting prohibited possessor statutes weighs strongly against revising the current interpretation of the federal law. Such a change, occurring thirty-three years after the enactment of the Firearms Owners Protection Act, and after multiple subsequent revisions of federal firearms law, *see* U.S. Br. 33 & n.*, would be inconsistent with the near-uniform interpretation of both § 922(g) and its state law counterparts. It would make prosecutions of those illegally in possession of firearms under § 922(g) more difficult. And while not binding on state courts, the Court's ruling here could also be used to call into question the settled application of any number of states' prohibited

possessor laws, which have been interpreted consistently with the federal law.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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State Prohibited Possessor Statutes

Ala. Code § 13A-11-72
Alaska Stat. § 11.61.200
Ariz. Rev. Stat. § 13-3102
Ark. Code Ann. § 5-73-103
Cal. Penal Code § 29800
Colo. Rev. Stat. § 18-12-108
Conn. Gen. Stat. § 53a-217
D.C. Code § 22-4503
Del. Code Ann. tit. 11, § 1448
Fla. Stat. Ann. § 790.23
Ga. Code Ann. § 16-11-131
Haw. Rev. Stat. Ann. § 134-7
Idaho Code Ann. § 18-3316
720 Ill. Comp. Stat. Ann. 5/24-1.1
Ind. Code Ann. § 35-47-4-5
Iowa Code § 724.26
Kan. Stat. Ann. § 21-6304
Ky. Rev. Stat. Ann. § 527.040
La. Rev. Stat. Ann. § 14:95.1
Me. Rev. Stat. tit. 15, § 393
Md. Code Ann., Pub. Safety § 5-133
Mich. Comp. Laws Serv. § 750.224f
Minn. Stat. Ann. § 624.713
Miss. Code Ann. § 97-37-5
Mo. Rev. Stat. § 571.070
Mont. Code Ann. § 45-8-313
Neb. Rev. Stat. Ann § 28-1206
Nev. Rev. Stat. Ann. § 202.360
N.H. Rev. Stat. Ann. § 159:3
N.J. Rev. Stat. § 2C:39-7
N.M. Stat. Ann. § 30-7-16

N.Y. Penal Law § 265.02
N.C. Gen. Stat. § 14-415.1
N.D. Cent. Code § 62.1-02-01
Ohio Rev. Code Ann. § 2923.13
Okla. Stat. tit. 21, § 1283
Or. Rev. Stat. § 166.250
Or. Rev. Stat. § 166.270
18 Pa. Cons. Stat. Ann. § 6105
R.I. Gen. Laws § 11-47-5
S.C. Code Ann. § 16-23-500
S.D. Codified Laws § 22-14-15
Tenn. Code Ann. § 39-17-1307
Tex. Penal Code § 46.04
Utah Code Ann. § 76-10-503
Vt. Stat. Ann. tit. 13, § 4017
Va. Code Ann. § 18.2-308.2
Wash. Rev. Code Ann. § 9.41.040
W. Va. Code § 61-7-7
Wis. Stat. Ann. § 941.29
Wyo. Stat. Ann. § 6-8-102