APPEAL NO. 14-16514

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIRK C. FISHER, Plaintiff-Appellant, vs. LOUIE KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police, et al. Defendants-Appellees.	On Appeal from the United States District Court for the District of Hawaii The Honorable Alan C. Kay D.C. Civil No. 11-00589 ACK-BMK

AMICUS CURIAE BRIEF OF THE STATE OF HAWAII IN SUPPORT OF DEFENDANTS-APPELLEES, IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Amicus Curiae is the State of Hawaii, whose interest is in defending the constitutionality of its own laws, specifically, Hawaii Revised Statute (HRS) §134-7(a), barring ownership, possession, or control of firearms by those prohibited from possessing firearms under federal law. Hawaii thus seeks to preserve its ability to protect its residents' health and safety. This brief urges this Court to affirm the decision below upholding 18 U.S.C. §922(g)(9) (the Lautenberg Amendment) and HRS § 134-7(a),[1] as applied to the facts of this case. This brief is filed pursuant to FRAP 29(a), allowing any **State** to file an amicus brief without leave.

I. Persons convicted of common law battery on (offensively touching) a spouse, like Fisher, are barred by both state and federal statutes from owning or possessing a firearm.

A. The Lautenberg Amendment bars Fisher from possessing firearms.

The Lautenberg Amendment, 18 U.S.C. § 922(g)(9), prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing any firearm or ammunition. A "crime of domestic violence" must have "as an element,

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[1] Because the District court below correctly upheld the denial of Fisher's application for a firearms permit under HRS §134-7**(a)**, there is no need to reach the constitutionality of HRS §134-7**(b)**, barring firearms possession by those convicted of "any crime of violence." However, because Fisher in his brief does appear to challenge subsection (b)'s constitutionality as well, see, e.g., Open. Br. at 16 (referencing "Hawaii's 'crime of violence' provision), we will briefly address that claim, and show that subsection (b), if it were to also bar Fisher from firearms possession, is constitutional as well, if applied to this case. See footnote 13, infra.

the use or attempted use of physical force … committed by a current or former spouse [or] parent." §921(a)(33)(A). The Supreme Court in United States v. Castleman, 134 S. Ct. 1405 (2014), held that the "physical force" requirement is satisfied by the degree of force that supports a common-law battery conviction -- namely, **offensive touching**. Castleman, 134 S.Ct. at 1410. Because, as the District Court noted, Fishers' harassment conviction under HRS §711-1106(1)(a) had as an element "Strik[ing], shov[ing], kick[ing], or otherwise touch[ing] another person in an offensive manner or subject[ing] the other person to offensive physical contact," his conviction involved the use of "physical force" as defined in Castleman. See Fisher v. Kealoha, 2014 WL 3565664 at *8-*10 (D. Haw. July 18, 2014). And because his crime was committed against his wife, Fisher's convictions qualified as a "misdemeanor crime of domestic violence" under the Lautenberg Amendment. See id. at *10-*12. The Lautenberg Amendment thereby precluding him from possessing firearms. Id. at *12.

B. HRS §134-7(a) bars Fisher from owning or possessing firearms.

The District Court below held that HRS §134-7(a) -- which bars a person "prohibited from possessing firearms or ammunition under federal law" from owning, possessing, or controlling any firearm or ammunition -- applied to Fisher because, as explained above, he was barred by the federal Lautenberg Amendment from possessing firearms. Fisher, 2014 WL 3565664 at *20-*21. In essence, HRS

§134-7(a), as applied to the facts of this case involving a person barred from firearms possession by the Lautenberg Amendment, effects a state law equivalent ban on firearms possession that exactly matches the Lautenberg Amendment's ban.

Therefore, if the Lautenberg Amendment's ban is constitutional, then necessarily HRS §134-7(a)'s ban (as applied to this case) is, too. After all, HRS §134-7(a)'s ban is, as applied to this case, no more restrictive of Fisher's right to bear arms than is the Lautenberg Amendment. Because this Court in United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013), upheld the Lautenberg Amendment from a Second Amendment challenge, see discussion, infra at 5-8, HRS §134-7(a) necessarily also survives Second Amendment scrutiny. As explained in greater detail, infra at 8-20, Chovan controls this case and dictates affirmance.

C. The Lautenberg Amendment's ban applies even in states that do not make available an expungement or set aside option.

Fisher wrongly claims that the Lautenberg Amendment requires that "H.R.S. §134-7[(a)] [have a] means to expunge or set-aside a conviction as Federal law requires[2] in order to properly apply the Lautenberg Amendment." Open. Br. at 8, 9-10.[3] As a statutory construction theory, that view is utterly baseless. Nothing in

[2] Of course, if a conviction is expunged or set aside in a manner that lifts the Lautenberg Amendment's ban, that would also automatically lift any HRS §134-7(a) ban as well, given that §134-7(a) only bans persons banned under federal law.

[3] Hawaii allows expungement of arrest records for those "arrested for, or charged with but not convicted of a crime." HRS §831-3.2. Of course, improper or invalid

the Lautenberg Amendment requires that a state have expungement or set aside options for the Amendment to apply. Rather, the Lautenberg Amendment merely allows an exception to the firearms ban for the convicted person **if** the person's conviction is expunged or set aside (or if the person has had civil rights restored, or is pardoned). See 18 U.S.C. §921(a)(33)(B)(ii). That is far different from requiring a State to provide an expungement or set aside option, as a condition to application of the Lautenberg Amendment's ban. Had Congress intended Fisher's construction, it would have specifically exempted from the firearms ban persons convicted in states without an expungement or set aside option. Congress created no such exemption.[4] Fishers' statutory interpretation violates the plain language of the statute and borders on the frivolous.

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convictions can be set aside on appeal, or via state or federal post-conviction relief. See footnote 11, infra.

[4] The Lautenberg Amendment's expungement or set aside exceptions are clearly not rendered pointless just because some states may not provide for expungement or set aside; any convicted person who successfully obtains an expungement or set aside in a state that allows expungement or set aside may be freed from the fire-arms ban. As the United States Supreme Court recognized in Logan v. U.S., 552 U.S. 23, 34 (2007), quoting McGrath v. U.S., 60 F.3d 1005, 1009 (2d Cir. 1995):

> "[Congress'] decision to have restoration triggered by events governed by state law insured anomalous results. The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights. Furthermore, states have drastically different policies as to when and under what circumstances such discretionary acts of grace should be extended .... [Anomalies generated by §921(a)(20)] are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states."

We will also demonstrate in the next section that having no expungement or set-aside option does not render the Lautenberg Amendment or the Hawaii statute unconstitutional.

II. Like the Lautenberg Amendment, HRS §134-7(a) as applied here does not violate the Second Amendment.

In Chovan, the Ninth Circuit upheld against **Second Amendment challenge** the Lautenberg Amendment's ban on firearms possession by persons convicted of misdemeanor crimes of domestic violence.

A. *Chovan* ruled the Lautenberg Amendment consistent with the Second Amendment.

Chovan applied a two-step Second Amendment inquiry that:

> (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.

735 F.3d at 1136. As to the first step, "[b]ecause of 'the lack of historical evidence in the record before [it] … that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence **misdemeanors**,' " the Chovan Court "**assume[d]** that [plaintiff's] Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense." Id. at 1137 (emphases added).[5]

[5] It is worth noting that the Eleventh Circuit found the Lautenberg Amendment constitutional on the ground that it was a "presumptively lawful longstanding prohibition," by comparing its ban on firearms possession by *domestic* ***violence***

Moving on to step 2, Chovan determined that:

> the level of scrutiny should depend on (1) "how close the law comes to the **core** of the Second Amendment right," and (2) "the severity of the law's burden on the right."

Id. at 1138. As to factor (1), Chovan noted that "Heller tells us that the core of the Second Amendment is 'the right of **law-abiding, responsible citizens** to use arms in defense of hearth and home.' " Id. It then concluded that the Lautenberg Amendment "does not implicate this core Second Amendment right because it regulates firearm possession for individuals **with criminal convictions**." Id. (citing the Fourth Circuit's Chester decision).

As to factor (2), however, Chovan concluded that the burden placed upon domestic violence misdemeanants' rights "is quite substantial" because the Lautenberg Amendment "amounts to a 'total prohibition' on firearm possession for a class of individuals -- in fact, a 'lifetime ban.'" Id. Although noting that the burden is "lightened by" the exemptions for those with expunged, pardoned, or set-aside convictions, Chovan still concluded that the ban "does place a substantial burden on the right." Id. Because the Lautenberg Amendment did not implicate the **core** Second Amendment right, but did substantially burden the right, Chovan

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misdemeanants to ***non-violent*** *felon*-in-possession bans that Heller explicitly found to be presumptively lawful. United States v. White, 593 F.3d 1199, 1205-06 (11th Cir. 2010). However, neither the District Court below, nor this brief, relies upon such a "presumptively lawful" theory; instead, both apply intermediate scrutiny -- as Chovan did, see infra at 6-7 -- to uphold Fisher's firearms disqualification.

concluded that "intermediate rather than strict scrutiny is the proper standard to apply." Id. (Fisher is thus flatly wrong in asserting in his Opening Brief at 16 -- and elsewhere -- that **strict** scrutiny must apply in this case.)

In applying intermediate scrutiny, Chovan requires:

> (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.

Id. at 1139. Chovan held that the governmental interest behind the Lautenberg Amendment was preventing domestic gun violence, and that such an interest was important. Id. at 1139-40.

Finally, Chovan found that "[k]eeping guns from domestic violence misdemeanants is substantially related to the … interest of preventing domestic gun violence for four related reasons." Id. at 1140. Those reasons were 1) the fact that Congress "sought to reach the people who had demonstrated violence, but were not kept from possessing firearms … because domestic abusers are not often convicted of felonies," 2) "a high rate of domestic violence recidivism exists," 3) "domestic abusers use guns," and 4) "the use of guns by domestic abusers is more likely to result in the victim's death." Id.

Chovan thus concluded that the Lautenberg Amendment satisfied intermediate scrutiny and was consistent with the Second Amendment. Id. at 1141 (The Lautenberg Amendment's "prohibition on gun possession by domestic

violence misdemeanants is substantially related to the important government interest of preventing domestic gun violence," and thus "passes constitutional muster under intermediate scrutiny.").[6]

B. In light of *Chovan*, HRS §134-7(a) as applied here also does *not* violate the Second Amendment.

As alluded to earlier, if the Lautenberg Amendment passes constitutional muster, then necessarily **HRS §134-7(a)** does so as well. HRS §134-7(a) bars a person "prohibited from possessing firearms or ammunition **under federal law**" from owning, possessing, or controlling any firearm or ammunition. Fisher, as explained supra at 1-2, was prohibited by the **federal** Lautenberg Amendment from possessing firearms due to his Hawaii conviction for a "misdemeanor crime of domestic violence." Thus, HRS §134-7(a), by its very terms, necessarily also bars Fisher from owning or possessing a firearm.

Accordingly, HRS §134-7(a) -- although encompassing persons barred not only by the Lautenberg Amendment, but by any number of other federal laws -- **as applied to the facts of this case**, which involves a person barred from firearms possession **by the Lautenberg Amendment**, effects a **state law equivalent ban**

[6] Because Chovan, and the district court below, applied intermediate scrutiny, all of Fisher's discussion about how his conviction for a common law misdemeanor battery does not *presumptively* remove him from the scope of the Second Amendment, Open Br. at 12-16, 22, is beside the point. The district court below, and this brief, both assume Fisher has some Second Amendment interest at stake, and each applies intermediate scrutiny, not presumptive exclusion.

on firearms possession that **exactly matches the Lautenberg Amendment's ban**.

Consequently, if the Lautenberg Amendment's ban is constitutional, as Chovan has already held, then necessarily HRS §134-7(a)'s ban (as applied to this case) is, too. HRS §134-7(a)'s ban, as applied to this case, is, after all, necessarily no more restrictive of Fisher's right to bear arms than is the Lautenberg Amendment itself. Because this Court in Chovan upheld the Lautenberg Amendment against a Second Amendment attack, see discussion, supra at 5-8, HRS §134-7(a), too, necessarily does not violate the Second Amendment. Chovan thus requires affirmance here.

Although Fisher's Opening Brief is not entirely clear as to exactly what he is appealing, it appears to make two related arguments to try and avoid Chovan's evisceration of his Second Amendment challenge. (We have already disposed of Fisher's erroneous claim that federal **statutory** law -- i.e., the Lautenberg Amendment -- only bans Fisher's possession of firearms if Hawaii provides for expungement, set aside, or restoration of civil rights. See supra at 3-4). First, he appears to argue that because he claims to be a "rehabilitated misdemeanant[], with a long history of law-abiding conduct since [his] conviction," Open. Br. at 16, that the Second Amendment gives him the right to possess firearms despite his prior domestic violence conviction.

Second, he claims that if Hawaii does not provide for expungement, set aside, or restoration of civil rights, then the domestic violence triggered ban on his ownership of firearms violates the Second Amendment "to the extent that [Hawaii] fails to provide a procedure for restoration of his Second Amendment rights." Open. Br. at 16-17. There is no merit to any of these claims, as demonstrated below.[7]

> 1. Fisher claims that a "rehabilitated misdemeanant" with a "long history of law-abiding conduct since ... conviction" escapes *Chovan*'s general conclusion that firearm bans imposed on domestic violence misdemeanants are consistent with the Second Amendment. *Chovan*, however, has already rejected such a distinction.

Even if one assumes that 1) Fisher has been "rehabilitated," whatever that

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[7] Nor is there any merit to Fishers' suggestion -- citing Binderup v. Holder, 2014 WL 4764424 (E.D. Pa. Sept. 25, 2014) -- that his crime was so **minor** as to not warrant a long-term firearms possession ban. Open. Br. at 20. Fisher's crime was not minor, but was in fact a "misdemeanor crime of **domestic violence**" as defined in the Lautenberg Amendment. See supra at 1-2. Indeed, Chovan has already upheld (under the Second Amendment) imposition of a firearms ban for commission of such a misdemeanor crime of domestic violence. See supra at 7-8. And it did so even though the crime was long ago and not repeated. See infra at 10-12.

And Binderup, a Pennsylvania district court ruling only (which thus cannot trump the Ninth Circuit's Chovan ruling), is totally distinguishable in any event because it did not involve a domestic crime at all, and, equally importantly, did not involve the use of violence, or even force of any kind. See Binderup, 2014 WL 4764424 at *26 (In large part because "[p]laintiff … was not convicted of … any … crime involving force or violence," the district judge "conclude[d] that plaintiff has demonstrated that, if allowed to keep and bear arms in his home for purposes of self-defense, he would present no more threat to the community that the average law-abiding citizen."). Fisher's crime here, in sharp contrast, involved "physical force" as defined in Castleman, **and** was a domestic crime against his wife.

may mean (although his brief does not cite anything in the record to establish such "rehabilitation"), and assumes that 2) he has been law-abiding ever since his 1997 harassment conviction, that conviction -- which is a "misdemeanor crime of domestic violence" under the Lautenberg Amendment -- deprives him of any Second Amendment right to own or possess firearms. **This Court in Chovan, as explained below, has already so ruled.** Although Chovan initially analyzed, and rejected, a **facial** Second Amendment challenge to the Lautenberg Amendment, see discussion, supra at 5-8; Chovan, 735 F.3d at 1139-41, it then immediately proceeded to also reject an **as-applied** challenge to the Lautenberg Amendment **identical to the one made by Fisher here**.

> Chovan argues that § 922(g)(9) [the Lautenberg Amendment] is unconstitutional **as applied to him** because **his 1996 domestic violence conviction occurred fifteen years before** his § 922(g)(9) conviction**, he is unlikely to recidivate, and he has in fact been law-abiding for those fifteen years**.

Chovan, 735 F.3d at 1141. It is clear, therefore, that Fisher's argument here is identical to the plaintiff's argument in Chovan. And the Ninth Circuit in Chovan flatly rejected that argument because:

> **[even] assum[ing] that Chovan has had no history of domestic violence since 1996**, Chovan has not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high. **Nor has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again.** In the absence of such evidence, we conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence.

735 F.3d at 1142.[8]

In sum, Fisher's argument that his alleged "rehabilitation" and "long history of law-abiding conduct since 1997" make a firearms ban based upon his domestic violence conviction in 1997 unconstitutional was already rejected by the Ninth Circuit in Chovan. This Court, therefore, is bound by Chovan to reject Fisher's identical claim here as well.

> 2. Fisher claims that if Hawaii does not provide a method for expungement, set aside, or restoration of civil rights, then *Chovan*'s rejection of the Second Amendment challenge there is distinguishable. Fisher is wrong.

Fisher's main argument (which is distinct from, but related to, the previous argument concerning his alleged longstanding law-abiding conduct) is his claim

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[8] Chovan went on to note that:

> If congress had wanted § 922(g)(9) to apply only to individuals with recent domestic violence convictions, it could have easily created a limited duration rather than lifetime ban. Or it could have created a good behavior clause under which individuals without new domestic violence arrests or charges within a certain number of years of conviction would automatically regain their rights to possess firearms. **But Congress did not do so.** Congress **permissibly** created a broad statute that only excepts those individuals with expunged, pardoned, or set aide convictions and those individuals who have had their civil rights restored. See Skoien, 614 F.3d at 641 ("[S]ome categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court.") The breadth of the statute and the narrowness of these exceptions reflect Congress's express intent to establish a "zero tolerance policy" towards guns and domestic violence.

735 F.3d at 1142.

that if Hawaii does not provide a method for expungement, set aside, or restoration of civil rights, the Lautenberg Amendment's and/or HRS §134-7(a)'s firearm bans violates the Second Amendment. Fisher argues that Chovan's rejection of the Second Amendment claim in that case for California law -- which allows for liberal or generous expungement or set aside of misdemeanor convictions -- is thereby distinguishable. This argument lacks merit.[9]

California does provide a generous expungement or set aside policy, allowing set aside of most misdemeanor convictions after completion of sentence if the person has not been charged with or convicted of a further crime and has "lived an honest and upright life." See California Penal Code §1203.4a(a).[10] The Ninth Circuit majority in Chovan, however, did **not** rely upon California's generous set aside policy **at all** in upholding the Lautenberg Amendment. See Chovan, 735 F.3d at 1138-42 (in upholding Lautenberg Amendment from Second Amendment attack, both facially and as applied, the Chovan majority did not even mention California's generous set aside policy ever). That generous set aside policy, therefore, was necessarily not relevant to the majority's rejection of the Second

[9] To repeat, this subsection discusses the **Second Amendment** implications of a State not having an expungement, set aside, or other restoration process. We have already addressed, and rejected, Fisher's claim that the Lautenberg Amendment's ban, as a **statutory** matter, only applies if a State has an expungement, set aside, or restoration of civil rights process. See supra at 3-4.

[10] But see infra at 18-19, showing that California set aside law is actually not generous at all in terms of restoring firearms ownership or possession rights.

Amendment challenge. Although the majority did mention the Lautenberg Amendment's exceptions for expungement, set aside, civil rights restoration, and pardon, and did note that the exceptions "lighten" the burden on Second Amendment rights somewhat (presumably in states where those options are available), 735 F.3d at 1138, what is critical is that the majority did not mention California's generous set aside policy at all in upholding the Lautenberg Amendment. Indeed, the majority still found the Lautenberg Amendment to "substantially burden" Second Amendment rights. Id. Most importantly, the Chovan majority never suggested that a state must make available any or all of these processes -- expungement, set aside, civil rights restoration, or pardon -- in order for the Lautenberg Amendment's ban to withstand Second Amendment scrutiny. Instead, the majority upheld the ban on the straightforward reasoning, discussed supra at 7-8, that banning firearms possession by persons convicted of domestic violence misdemeanors is substantially related to the important government interest in preventing domestic gun violence. Chovan, 735 F.3d at 1139-42.

Although technically not necessary because the Chovan majority position is binding precedent, the Chovan majority was **right** to lend no significance to California's set aside policy in upholding the Lautenberg Amendment. After all, if one is validly convicted of a misdemeanor crime of domestic violence, as opposed

to wrongfully convicted of that crime, then there is no constitutional reason to mandate lifting the ban after a certain time period has passed.[11] Fisher would argue, however, that after a certain period of time passes with him not being convicted of any additional crimes, that the Second Amendment constitutionally requires lifting the ban (e.g., via an expungement or set-aside process) because his possession of firearms would, in his view, no longer pose a danger. But that argument is no different than the argument the Chovan majority already put to rest when it rejected Mr. Chovan's **as-applied** challenge, which was based upon the fact that his 1996 domestic violence conviction occurred fifteen years before, and he had been law-abiding ever since. See discussion supra at 11-12; Chovan, 735 F.3d at 1141-42 (**rejecting** Second Amendment attack based upon unproven theory that a "domestic abuser [who] has not committed domestic violence for fifteen years … is highly unlikely to do so again").

California's generous set aside policy -- allowing for set aside after one's sentence is served, and one is not convicted of a further crime (among other requirements) -- is thus plainly not constitutionally mandated. The Lautenberg

[11] Persons in Hawaii, of course, like persons in all states, can have wrongful or invalid convictions set aside. That is accomplished through the ordinary appeal process, which will set aside wrongful convictions. Hawaii also provides for petitions for post-conviction relief, see Haw. Rules Penal Procedure 40. (Federal habeas corpus, of course, is also available to set aside certain improper convictions). Thus, Hawaii does in fact have, like all states, a "set aside" process available for wrongful or otherwise improper convictions.

Amendment does allow states to voluntarily lift the Lautenberg ban, given the Amendment's exception for expunged or set aside convictions, and does allow states to provide as generous (or as narrow) an expungement or set aside policy as they wish. But as noted before, Congress left that policy decision to the states. See supra at 3-4. And, as explained above at 13-14, the Chovan majority effectively condones the Lautenberg ban applying -- without violating the Second Amendment -- even in those states that choose to have a narrow (or even non-existent) expungement or set aside process. And that makes sense because the Chovan majority found that even after the passage of many years with no new convictions, there is no proof that the "abuser is highly unlikely to do so again." 735 F.3d at 1142. There is thus no reason to mandate an expungement process.

Fisher tries to blatantly mislead this Court by citing to the single judge concurring-in-the-result **minority** opinion of Judge Bea in Chovan as if it were the controlling opinion, Open. Br. at 18-19, which it clearly is not. Judge Bea admittedly did attach significance to California's generous set aside policy, but only did so under his **strict** scrutiny analysis, which contradicted the majority's **intermediate** scrutiny analysis. See 735 F.3d at 1151-52 (Bea, J., concurring in the result). Moreover, that section is still part of a **minority** opinion, which directly conflicts with the **majority** Chovan opinion that did not rely at all upon

California's generous set aside policy. It thus can carry no weight (absent the majority Chovan opinion being overturned *en banc*).

Fisher also attempts to mislead this Court by falsely quoting the 7th Circuit's opinion in United States v. Skoien, 614 F.3d 638 (7th Cir. 2010), as purportedly saying that "[r]estoration procedures … [are] essential to upholding its constitutionality." Open. Br. at 17. That quotation does **not** exist in Skoien. In fact, Skoien specifically stated that the question of "[w]hether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy § 921(a)(33)(B)(ii) [the expungement, set aside, civil rights restoration, and pardon provision], is a question **not** presented today." 614 F.3d at 645.[12] Of course, **this Circuit** in Chovan has answered that very question with a clear "no." See supra at 11-12.

In sum, even if Hawaii does not have as generous a set aside policy as California, that is no ground whatsoever to distinguish Chovan. The Chovan majority's ruling -- which is binding on this Court, and jurisprudentially sound in any event -- made clear that a firearms ban on domestic violence misdemeanants is constitutional regardless of whether the state has a generous expungement/set-aside policy or not.

[12] Contrary to Fisher's suggestion in his Opening Brief at 11-12, Caron v. United States, 524 US. 308 (1998), also provides no support whatsoever for his restoration-procedures-are-required theory. The citation is a non-sequitur.

And if that weren't enough, it turns out that California's expungement/set-aside policy is actually not generous at all when it comes to **restoring firearms ownership or possession rights** in particular. For although the misdemeanor convictions are liberally set aside, **subsection (c)(2)** of Cal. Pen. Code §1203.4a (the set aside provision) specifically states that "[d]ismissal … pursuant to this section **does not permit a person to own, possess, or have in his or her custody or control any firearm."** Therefore, although the conviction is set aside, **firearms ownership or possession rights are not restored.** Indeed, because of this California (c)(2) provision, the set-aside exception of the Lautenberg Amendment does not apply at all. The Lautenberg exception states:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored … **unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms**.

18 U.S.C. §921(a)(33)(B)(ii). Given subsection (c)(2) of the California set aside law -- providing that "[d]ismissal … pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm" -- it would appear that any California expungement/set-aside is legally required to "provide[] that the person may not … possess, or receive firearms," thereby fulfilling the "unless" clause of §921(a)(33)(B)(ii).

Thus, even in California, convicted domestic violence misdemeanants do not

have an easy path towards restoration of firearm rights. This makes the Chovan **concurring** opinion's reliance on California's purported generous expungement/ set-aside policy particularly unsound. (Of course, as a one-judge **minority** opinion contradicted by the two-judge majority opinion in Chovan, that concurrence's reliance on California's expungement/set-aside policy automatically loses to the majority as a matter of **precedent**.) We now have two reasons why the minority opinion's reliance on California's expungement/set-aside policy was wrong, as a matter of **legal reasoning**. First, as argued supra at 11-12, and as the Chovan majority correctly concluded, 735 F.3d at 1142, there is **no** evidence that domestic violence misdemeanants who have not repeated the offense for a long period of time are "highly unlikely to do so again." There is, therefore, no constitutional reason to demand generous restoration provisions.

Second, California's expungement/set-aside policy turns out to be highly restrictive, not generous, after all, in terms of not restoring gun ownership or possession rights. The Chovan majority was thus right to not attach any weight to California's expungement/set-aside policy for this additional reason: California's set-aside policy is not generous at all with respect to restoring gun rights. There is thus no reason to distinguish Chovan based upon **Hawaii** purportedly being more restrictive than California in restoring firearm rights. Both states are very restrictive on that front.

In sum, Fisher's Second Amendment challenge here to both the Lautenberg Amendment and HRS §134-7(a) is not distinguishable from the challenge the Ninth Circuit rejected in Chovan.

III. HRS §134-7**(b)**, if applied to also bar Fisher from firearms possession, is also consistent with the Second Amendment.

HRS §134-7**(b)** -- as distinct from §134-7**(a)** -- bars ownership or possession of any firearm by a "person who … has been convicted in this State or elsewhere of having committed … any crime of violence." The District Court did not address the subsection (b) provision in its July 18, 2014 order, because it did not have to, having found the Lautenberg Amendment, as well as HRS §134-7**(a)**, sufficient to bar Fisher from possessing firearms. See Fisher, 2014 WL 3565664 at *21 n.20 ("Because [the Lautenberg Amendment] and H.R.S. § 134-7(a) bar Plaintiff from possessing firearms, the Court finds it unnecessary to address subsection[] (b) … of H.R.S. § 134-7"). Despite this, Fisher's Opening Brief appears to challenge the constitutionality of HRS §134-7(b) as well.[13] For the sake of completeness, we

[13] We do not address whether Fisher's harassment conviction under HRS §711-1106(1)(a) qualifies as a "crime of violence" under HRS §134-7(b), which term is defined by HRS §134-1 as "any offense, as defined in title 37, that involves injury or threat of injury to the person of another." Indeed, the District court below, in a prior order dated September 30, 2013, concluded that Fisher's harassment conviction was not a "crime of violence" under HRS §134-7(b), because the elements of Fisher's harassment conviction did not necessarily require injury or threat of injury. Fisher v. Kealoha, 976 F.Supp.2d 1200, 1215-24 (D. Haw. 2013).

Nevertheless, for purposes of this section, we assume §134-7(b) does apply to bar Fisher, and address its constitutionality assuming it applies. Obviously, if,

submit that subsection (b), as applied to the domestic violence situation involved here, is constitutional as well. Just as with the constitutionality of subsection **(a)**, Chovan's upholding the constitutionality of the Lautenberg Amendment also dictates the constitutionality of subsection **(b)**, as applied to these facts, involving domestic violence.

For if the Lautenberg Amendment passes constitutional muster (as Chovan ruled), then necessarily HRS §134-7(b) -- as applied to one with a conviction for a "misdemeanor crime of domestic violence" as defined in the Lautenberg Amendment, which includes Fisher -- does so as well.

Although HRS §134-7(b)'s ban extends to persons who committed **non-domestic** crimes of violence, too, if §134-7(b) is applied here, it would be applying to a person convicted of a **domestic** crime of violence. Because a firearms ban for such persons has been upheld in Chovan as consistent with the Second Amendment, HRS §134-7(b)'s ban, **as applied to the facts of this case (involving a domestic crime**), is necessarily consistent, too.

IV. Fisher has no standing to raise his procedural due process challenge to Hawaii's pardon process; in any event, that challenge lacks any merit.

Fisher also raises a meritless procedural due process challenge to Hawaii's pardon process.

---

as a matter of statutory construction, §134-7(b) did not apply to bar Fisher, there would be no need to address its constitutionality.

First, Fisher has no standing to even challenge the pardon process, as he has not even alleged, must less proven, that he ever desired, much less sought, a pardon for his harassment convictions. See Complaint; Clerk's Record 31 (never once suggesting he desired, much less sought, a pardon for his harassment convictions). He thus fails every one of the required three prongs required to establish standing -- injury in fact, injury traceable to challenged conduct, and redressability. Fisher's claim must be rejected for lack of standing alone.

Second, Fisher's procedural due process claim fails on the merits. The Governor's authority to grant pardons is, as Fisher correctly notes, completely unfettered. See Haw. Const. art. V, Section 5 ("The governor may grant reprieves, commutations and pardons, after conviction, for all offenses, subject to regulation by law as to the manner of applying for the same."). Although some "regulation" of pardons by the legislature is permissible, such regulation is limited to "the manner of applying for the same." Hawaii's Constitution does not allow any regulation as to the standards the Governor must employ in granting or denying a pardon. Indeed, the legislature has enacted only the following statutory provision concerning the pardon process.

> The director of public safety and the Hawaii paroling authority shall consider every application for pardon which **may** be referred to them by the governor and shall furnish the governor, as soon as may be after such reference, all information possible concerning the prisoner, together with a recommendation as to the granting or refusing of the pardon.

HRS §353-72. Pursuant to that statute, the Governor is not required to refer a pardon application to the director of public safety or the Hawaii paroling authority, nor is the Governor bound to follow their recommendation if he does refer an application to them. The Governor's discretion to grant or deny pardons is thus not in any way limited by this provision. Accordingly, the Governor's pardon authority is completely unfettered, and as a consequence, it creates no protected liberty interest subject to procedural due process requirements. This is made very clear by the United States Supreme Court.

> a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," the State has not created a constitutionally protected liberty interest.

Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (citations omitted). Because Hawaii's Constitution and laws "place no substantive limitations on official discretion" regarding the Governor's pardon authority, they "create no liberty interest entitled to protection under the Due Process Clause." Id. at 249.

The United States Supreme Court has even ruled this way in the very context of unfettered governmental **pardons or commutations**. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981).

> … In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he

> will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope.
> ….
> … The statute imposes no limit on … what criteria are to be applied by the Board. …
> This contrasts dramatically with the Nebraska statutory procedures in *Greenholtz*, which expressly mandated that the Nebraska Board of Parole "shall" order the inmate's release "unless" it decided that one of four specified reasons for denial was applicable. 442 U.S., at 11, 99 S.Ct., at 2106. **The Connecticut commutation statute, having no definitions, no criteria, and no mandated "shalls," creates no analogous duty or constitutional entitlement**.
> ….
> … When Nebraska statutes directed that inmates who are eligible for parole "shall" be released "unless" a certain finding has been made, the statutes created a right. By contrast, the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or "entitlement." **A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.**
> We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond the right to seek commutation.

452 U.S. at 465, 466-467 (emphases added). Fisher's procedural due process attack on Hawaii's pardon process, therefore, is wholly without merit.

That Fisher's conviction, under the Lautenberg Amendment and HRS §134-7(a), results in his losing any right to own or possess firearms does not, contrary to Fisher's suggestion, change the procedural due process analysis as to the pardon process. After all, a criminal conviction, with proper procedural protections, can

deprive the convicted person of his liberty interest in **not being confined in prison** (a right at least as fundamental as one's right to bear arms), and Olim and Dumschat make clear that the convicted person can not demand procedural protections in seeking to have that conviction pardoned (so that he can be released from prison), if the pardon authority is wholly unfettered. Similarly, then, Fisher cannot demand procedural protections for that same unfettered pardon process, just because the conviction results in his legal inability to possess firearms. Freedom from confinement in prison is at least as great a liberty interest as the right to bear arms. If one is properly convicted, however, all of those liberty interests may disappear.

> There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. **But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty."**

Dumschat, 452 U.S. at 464 (quoting Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979)) (emphasis added).

Fisher lost any Second Amendment right to possess firearms once he was properly convicted of a misdemeanor crime of domestic violence, as we demonstrated supra at 7-8, and as Chovan has already held. An unfettered pardon process that Olim and Dumschat make clear are not subject to procedural due

process protections does not suddenly become subject to such protections just because one or more fundamental liberty interests may have been lost due to the conviction. The conviction, after all, "constitutionally deprived" Fisher of "his liberty" interest in bearing arms (quoting from above Dumschat quotation, quoting Greenholtz). We know this because Chovan makes clear that a person convicted of a misdemeanor crime of domestic violence loses his Second Amendment right to possess firearms. It is then purely a matter of gubernatorial grace (in a pardon system left to the Governor's sole discretion) -- subject to no procedural due process protections; see Olim; Dumschat -- whether the convicted person obtains the pardon, and thereby regains his liberty, whether that liberty be in the form of freedom from prison confinement, freedom from parole or probation restrictions, or freedom from firearm restrictions.

In sum, Fisher lacks standing to bring his Due Process attack against Hawaii's pardon process, and that attack fails badly on the merits in any event.

CONCLUSION

For the foregoing reasons, the State of Hawaii respectfully asks that this Court reject Fisher's unjustified **statutory** interpretation of the Lautenberg Amendment (and/or HRS §134-7(a)) as imposing their firearm prohibitions only if generous restoration options are available. Furthermore, this Court, respectfully, should also reject Fisher's Second Amendment and Due Process challenges in their

entirety. Accordingly, the State of Hawaii asks this Court to AFFIRM the District Court's July 18, 2014 order below.

DATED: Honolulu, Hawaii, January 21, 2015.

s/ Girard D. Lau

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CERTIFICATE OF COMPLIANCE

I certify that the brief is proportionately spaced, has a typeface of 14 points or more and contains 6,737 words. See FRAP 29(d) (half of maximum 14,000 words for a principle brief is 7,000 words).

DATED: Honolulu, Hawaii, January 21, 2015.

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INDEX TO ADDENDA

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18 U.S.C. §922(g)(9) ["Lautenberg Amendment"]:

§922. Unlawful acts

….

(g) It shall be unlawful for any person --

….

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm of ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §921(a)(33)(A) and 18 U.S.C. §921(a)(33)(B)(ii):

§921. Definitions

(a) As used in this chapter --

….

(33) (A) [] the term "misdemeanor crime of domestic violence" means an offense that --

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B) ….

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

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Haw. Rev. Stat. (HRS) §134-7(a), (b) & (h):

§134-7. Ownership or possession prohibited, when; penalty
(a) No person who is a fugitive from justice or is a person prohibited from possessing firearms or ammunition under federal law shall own, possess, or control any firearm or ammunition therefor.
(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.
….
(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony.

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Cal. Pen. Code §1203.4a:

§1203.4a. Misdemeanor or infraction sentence served; dismissal of charge; release from penalties and disabilities; discretion of the court; exceptions; subsequent offenses; reimbursement of city and county; notice to prosecuting attorney

(a) Every defendant convicted of a misdemeanor and not granted probation, and every defendant convicted of an infraction shall, at any time after the lapse of one year from the date of pronouncement of judgment, if he or she has fully complied with and performed the sentence of the court, is not then serving a sentence for any offense and is not under charge of commission of any crime, and has, since the pronouncement of judgment, lived an honest and upright life and has conformed to and obeyed the laws of the land, be permitted by the court to withdraw his or her plea of guilty or nolo contendere and enter a plea of not guilty; or if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusatory pleading against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Chapter 3 (commencing with Section 29900) of Division 9 of Title 4 of Part 6 of this code or Section 13555 of the Vehicle Code.

(b) If a defendant does not satisfy all the requirements of subdivision (a), after a lapse of one year from the date of pronouncement of judgment, a court, in its discretion and in the interests of justice, may grant the relief available pursuant to subdivision (a) to a defendant convicted of an infraction, or of a misdemeanor and not granted probation, or both, if he or she has fully complied with and performed the sentence of the court, is not then serving a sentence for any offense, and is not under charge of commission of any crime.

(c) (1) The defendant shall be informed of the provisions of this section, either orally or in writing, at the time he or she is sentenced. The defendant may make an application and change of plea in person or by attorney, or by the probation officer authorized in writing, provided that, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if relief had not been granted pursuant to this section.

(2) **Dismissal of an accusatory pleading pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm** or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(3) Dismissal of an accusatory pleading underlying a conviction pursuant to this section does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

(d) This section applies to any conviction specified in subdivision (a) or (b) that occurred before, as well as those occurring after, the effective date of this section, except that ….

….

(f) A petition for dismissal of an infraction pursuant to this section shall be by written declaration, except upon a showing of compelling need. Dismissal of an infraction shall not be granted under this section unless the prosecuting attorney has been given at least 15 days' notice of the petition for dismissal. It shall be presumed that the prosecuting attorney has received notice if proof of service is filed with the court.

….

9th Circuit Case Number: 14-16514

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date): January 21, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format): s/Girard D. Lau

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