IN THE SUPREME COURT OF IOWA
Supreme Court No. 23-0598
Black Hawk County No. AGCR246143

STATE OF IOWA,
Plaintiff–Appellee,

vs.

EZEKIEL KIEFFER,
Defendant–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE PATRICE J. EICHMAN, JUDGE

BRIEF FOR APPELLEE

BRENNA BIRD
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Tim.Hau@ag.iowa.gov

Brian Williams
Black Hawk County Attorney

Erich Priebe
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF–APPELLEE

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C. Section 724.31A violates neither the Second Amendment nor Iowa Constitution Article I, sec. 1A. 43

1. Domestic violence poses a significant danger; when combined with firearms it results in lethal outcomes. 43

2. Our history and traditions support disarming domestic abusers because they are dangerous, so Iowa Code Section 724.31A does not violate the Second Amendment. 48

a. The State can enact gun regulations consistent with this nation's history and traditions of firearm regulations. The "history and tradition" test *Bruen* announced is not a "regulatory straightjacket." 48

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether there was substantial evidence to support the jury's verdict Kieffer and D.A. were in a domestic relationship at the time he assaulted and strangled her.

Authorities

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State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
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II. Whether the district court abused its discretion when it denied Kieffer's motions for mistrial.

Authorities

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III. Whether Kieffer may challenge a firearms prohibition notification for the first time on appeal and whether such notification violates the United States and Iowa Constitutions.

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ROUTING STATEMENT

Kieffer's challenge to a statute under the United States Supreme Court's new "history and tradition" test announced in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022) and the construction and application of Article I, Section 1A of the Iowa Constitution each present an issue of first impression. See Iowa R. App. 6.1101(2). Under this framing, the case is appropriate for retention. That said, neither challenge is preserved for this Court's review and no exception applies. This Court should not reach them, especially where each constitution places an evidentiary burden on the State and it has had no prior opportunity to build a record to meet it.

Kieffer's challenges to the sufficiency of the evidence and the district court's denial of a mistrial are routine. *See, e.g.*, *State v. Kellogg*, 542 N.W.2d 514, 518 (Iowa 1996) (discussing factors for determining cohabitation); *See State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986); *State v. Smith*, No. 22-1848, 2023 WL 8069248, at *2–3 (Iowa Ct. App. Nov. 21, 2023) (applying *Kellogg*). If this Court finds Kieffer's constitutional challenges unpreserved, transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

NATURE OF THE CASE

After a jury convicted him of domestic abuse assault causing bodily injury and domestic abuse assault—strangulation, Ezekiel Kieffer appeals his convictions. He alleges there was insufficient evidence for the jury to convict him of domestic abuse, the district court abused its discretion when it denied his motions for mistrial, and that a notice sent because of his conviction violates the Second Amendment to the United States Constitution and Article I, Section 1A of the Iowa Constitution.

STATEMENT OF THE FACTS

In the early hours of June 25, 2022, it was storming in and outside 1923 Ashland Avenue in Cedar Falls, Iowa. *See* D0124, DVD, Exh.E Fey's BodyCam 00:00–00:20. D.A. had stayed there with her boyfriend, Ezekiel Kieffer, repeatedly in the weeks before and had moved in earlier that day. D0111, Trial Tr.1 46:2–14; 61:7–14; 90:16–91:4; 102:11–21 (5/25/2023). Then she, Kieffer and their roommate, A.J. Fernau, had gone drinking at Sturgis Falls, a local community event. D0111 at 63:7–11; 90:12–19; 101:1–4. When they got home after midnight, Kieffer accused her of being unfaithful and became aggressive—he pushed her into appliances. D0111 at 46:21–48:18. The argument escalated. D.A. damaged Kieffer's television and Kieffer struck her and wrapped his legs around her neck, choking her.

D0111 at 29:9–16; 48:18–49:13; 50:2–25; 66:22–67:3. D.A. could not free herself. *Id*. Eventually, their roommate, A.J. Fernau intervened on her behalf. D0111 at 93:17–96:25; 105:13–15. As she tried to leave, Kieffer choked her again with his hands. D0111 at 51:10–18. D.A. could not recall how she freed herself. *Id*.

As this was happening, Wyatt Ohm was relaxing after attending Sturgis Falls. Despite the lateness of the hour, he suddenly heard yelling and screaming outside. D0111 at 16:4–17:8. Ohm looked out a window and saw two men in the middle of the road in the rain. D0111 at 17:7–25. One of those men was Kieffer, the other was Fernau. D0111 at 18:1–3. Ohm got his shoes to investigate; once outside he watched as a woman fell over on the sidewalk. D0111 at 17:4–12, 18:17–25, 19:23–20:3. Kieffer told him to "leave her alone" and "[f]orget about it." D0111 at 18:12–16; 19:1–5. He ignored Kieffer.

When he reached her, Ohm saw her lip was bleeding and "bruises and stuff on her back and stuff." D0111 at 20:4–16; *see also* D0111 at 37:13–38:7. She was frozen in shock. D0111 at 20:16–23; *see also* D0111 at 38:8–15. Ohm got his truck and Fernau helped him pick D.A. up and the two brought her to the house Ohm had been in earlier. D0111 at 19:19–20:3; 27:23–28:15; 97:4–98:18. As Ohm described it, "We tried to just calm her

down and stuff and tried to make her feel, like, welcome, like someone actually wanted her[.]" D0111 at 28:1–23. D.A. had bruising on her forehead, bruising and scrapes to her right cheekbone with blood around her eyebrow piercing, she was bleeding from the mouth, she had marks on her neck, a blood vessel in her eye ruptured—Kieffer inflicted them all. D0111 at 64:23–67:25; 68:6–8; *see also* D0068, Exh.B (2/24/2023).

Ohm did not stay, he then walked across the street to talk with Kieffer. D0111 at 28:19–29:3. Kieffer was still angry and did not want police involved. D0111 at 29:4–8; 30:13–5. In time, D.A. returned to their shared residence—she was now upset and told Ohm to get out. D0111 at 30:4–12. Although Ohm did not call them, police officers arrived shortly after—he directed them to 1923 Ashland which was tucked behind a different street-facing building. D0111 at 31:6–18; 36:2–20; 39:6–22.

Once they found it, officers conducted a welfare check on D.A. *See* D0124, DVD, Exh.E Fey's BodyCam 00:50–01:50. Officer Thomas Fey was the first to enter and encounter her. When she met him, D.A. was withdrawn and initially hesitant to explain what happened. D0124, DVD, Exh.E Fey's BodyCam 01:30–02:35. Fey could see she was injured. D0108, Trial Tr.2 7:20–9:2 (5/1/2023). After he reassured her, D.A. told him Kieffer was her boyfriend and that they were living in the house together.

DVD, Exh.E Fey's BodyCam 01:50–03:18; D0108 at 7:18–8:18. She also told him that she thought Kieffer had choked her. D0124, DVD, Exh.E Fey's BodyCam 02:35–02:59. Outside, Kieffer continued insisting that D.A. was fine. D0108 at 5:18–23; 6:20–23; *see* D0124, DVD, Exh.E Fey's BodyCam 00:13–01:35. All three—Kieffer, D.A., and Fernau—were brought to the Cedar Falls Police Department. As he was transported, Kieffer insisted he had never put his hands on D.A.; he complained officers were persecuting him and that D.A. had given him an "asswhooping." *See* D0124, DVD, Exh.G Young's Fleet Vehicle 01:44–02:50; 05:30–08:15. Police later arrested him. *See generally* D0124, DVD, Exh.I 00:00–07:25.

ARGUMENT

I. There was a substantial basis to conclude Kieffer and Adams were in a sexual relationship and living together when he assaulted and strangled her.

Preservation of Error

The State does not contest error preservation. *See State v. Crawford*, 972 N.W.2d 189, 202 (Iowa 2022).

Standard of Review

This Court reviews sufficiency-of-the-evidence claims for corrections of errors at law. *Crawford*, 972 N.W.2d at 202.

A defendant's challenge to the sufficiency of the evidence is not grounds for the reviewing court to reweigh evidence or determine the jury

weighed the evidence incorrectly. "'Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence.'" *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)). "[R]eview on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury." *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (internal string cite omitted). This occurs when "a rational trier of fact" viewing the evidence in the light most favorable to the State "could have found that the elements of the crime were established beyond a reasonable doubt." *State v. Keopasaeuth*, 645 N.W.2d 637, 640 (Iowa 2002).

Merits

On appeal, Kieffer takes no issue with the jury's conclusion he assaulted and strangled D.A.—he alleges only that the State failed to establish that they were in a "domestic relationship." Appellant's Br. 22–26.

To establish a domestic relationship for purposes of Iowa Code sections 708.2A(1) and 236.2(a), the State had to prove Kieffer and D.A. were "cohabiting" household members. *See* Iowa Code §§ 708.2A(1), 236.2(a). One recognized definition of "cohabiting" is "to live together in a sexual relationship when not legally married." *State v. Kellogg*, 542 N.W.2d

514, 517 (Iowa 1996) (cleaned up). In *Kellogg*, the Iowa Supreme Court also set out a set of non-exclusive factors to use when analyzing whether cohabitation exists. *Id.* at 518. The common dictionary definition of "cohabiting" the *Kellogg* court acknowledged applies here: persons who "live together in a sexual relationship when not legally married." *Id.* at 517.

Consistent with this, the marshalling instructions told Kieffer's jury before it could find him guilty on either count of domestic abuse assault the State needed to prove beyond a reasonable doubt his assaults on D.A. occurred at a time they were "family or household members who resided together at the time of the incident." D0082, Jury Instrs. at 9, 10 and 11 (2/27/2023); App. 19–20. A supplemental instruction defined the terms "family or household members" as "persons cohabitating with each other." D0082 at 17. Likewise, that

> "Cohabitating" does not require a sexual relationship, but does require more than dwelling or living together in the same place. To determine if the Defendant and [D.A.] were cohabitating at the time of the alleged offense, you may consider whether they had sexual relations while sharing the same living quarters; they shared income or expenses; they jointly used or owned property together; they held themselves out as husband and wife; the continuity and length of their relationship, and any other facts shown by the evidence bearing on their relationship with each other.

Id. As the instruction explained, the criteria is not exclusive—"any other facts shown by the evidence" could assist the jury in determining whether Kieffer and D.A. cohabitated. *Id*. This record contains substantial evidence Kieffer and D.A. were cohabitating household members.

D.A. had not lived at 1923 Ashland long, but she intended to. She had been staying there "pretty consistently" in the weeks since she and Kieffer's romantic relationship had begun. D0111 at 46:2–14. The reason was straightforward enough—D.A. loved Kieffer. D0111 at 61:7–18. The two were in an intimate, sexual relationship. D0108 at 105:13–20. For a time both believed she was pregnant with his child. D0108 at 72:20–24; 105:8–12; *see* D0124, DVD, Exh.G Young Fleet Camera at 02:20–02:50 (Officer Young: "You guys have kids together, anything like that? Kieffer: About to. Officer Young: You're about—is she—she's pregnant? Kiefer: She's pregnant with."). Although a negative test dispelled this belief, she still intended to continue residing with Kieffer. *Compare* D0111 at 61:7–18 *with* D0108 at 72:20–24.

Believing in their relationship's future, she had had moved her possessions into the house. D0111 at 46:2–14; D0108 at 9–105:3; D0124, DVD, Exh.G Young Fleet Camera at 02:20–02:28 (Kieffer: "She literally just moved her stuff in today."). She and Kieffer continued sharing a

bedroom, as they had in the weeks before June 25. D0111 at 51:1–2. She anticipated meeting Kieffer's mother that weekend. D0108 at 71:4–14. And when explaining what had happened that night, she told Officer Fey that Fernau was her roommate. D108 at 8:10–18; *see* D0124, DVD, Exh.E Fey's BodyCam at 02:41 (Officer Fey: Who's the other guy? D.A.: That's A.J., our roommate. He was helping me."). She told the jury the same:

> Q: Okay. But at least as of the 24th you had moved in and you were one of the roommates then?
>
> A: Yes.

D0111 at 46:9–11. This was a substantial basis supporting the jury's conclusion Kieffer and D.A. had a sexual relationship while sharing the same living quarters, that D.A. cohabitated with Kieffer, and thus the two were "household members" when he assaulted and strangled her.

And if that was not enough, Kieffer emphasizes he "repeatedly and unequivocally denied" that D.A. cohabitated with him. D0108 at 71:2–5, 71:15–17; Appellant's Br. 24. He likewise minimized her presence at the residence and insisted her staying over was only for the weekend. D108 at 71:2–21; 72:2–14. But this was difficult to square with his and her statements to police that night. *See* D0124, DVD, Exh.G Young Fleet Camera at 02:20–02:50. Critical to his sufficiency challenge—the jury did not believe him. *Compare* D0082 at 10, 11, 17 *with* D0083, Verdict Count 1

(2/27/2023) *and* D0084, Verdict Count 2 (2/27/2023). It rejected his explanation just as it rejected his assertion his conduct that night was justified. *Id.* That was the jury's role, and its credibility determination is due deference. *See, e.g.*, *State v. Williams*, 695 N.W.2d 23, 28 (2005).

II. The district court reasonably exercised its discretion to deny Kieffer's requests for mistrial based on two statements that did not prejudice him.

Preservation of Error

The State does not contest error preservation. Kieffer twice objected and moved for mistrial; the district ruled on each.[1] D0111 at 54:8–60:2; 154:1–162:6. Error was preserved.

Standard of Review

This Court reviews the lower court's denial of a motion for mistrial motion under the abuse of discretion standard. *State v. Plain*, 898 N.W.2d 801, 811 (Iowa 2017). An abuse of discretion occurs when the court exercises its discretion on grounds clearly untenable or clearly unreasonable. *Id.* This standard is more deferential in the context of a motion for a mistrial. *See State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986). In this context, the Court will only find an abuse of discretion where "there is no support in the record for the trial court's determination." *State*

[1] Kieffer moved for mistrial a third time after the close of evidence. *See* D0108 at 122:18–123:21; 135:4–19. Kieffer does not challenge this ruling on appeal.

v. Jirak, 491 N.W.2d 794, 796 (Iowa Ct. App. 1992). This is because trial judges "are present throughout the trial and are in a better position than the reviewing court to gauge the effect of the matter in question on the jury." *Id.*

Merits

"[T]o show an abuse of discretion by the district court in denying a motion for mistrial, the defendant must show prejudice that prevented the defendant from having a fair trial." *State v. Tewes*, No. 20–0253, 2021 WL 1904693, at *5 (Iowa Ct. App. May 12, 2021) (citing *State v. Callender*, 444 N.W.2d 768, 770 (Iowa Ct. App. 1989)). This is a heavy burden Kieffer cannot overcome. *See Brown*, 397 N.W.2d at 699. The reason is that the statements he objected to were vague, the district court responded by having each witness give clarifying testimony, and the jury instructions educated the jury about what they could consider in reaching their verdict.

First, the statements Kieffer believes required a new trial were not prejudicial. Video evidence showed that D.A. initially hesitated to discuss what happened that night. D0124, DVD, Exh.E Fey's BodyCam at 01:30–04:20. During her testimony, D.A. was asked to explain why she would return to the house where she had just been assaulted:

> Q: Eventually you did go back to the house that you lived at with Mr. Kieffer; right?

> A: Yes.
>
> Q: Here's where I am interested. Law enforcement came; right?
>
> A: Yes.
>
> Q: Did you have some reluctance to involve law enforcement or to tell them who had caused those injuries?
>
> A: Yes.
>
> Q: Why?
>
> A: I just didn't want it to come to this because I've been in this situation before and it's a long process.
>
> MS. FORCIER: Objection, Your Honor. May we approach?

D0111 at 53:7–20. The court held a hearing outside the presence of the jury. There, defense counsel argued D.A.'s statement violated the motion in limine, asked for a mistrial based on her belief "I don't think we can unring the bell," and anticipatorily rejected a curative instruction. D0111 at 54:10–55:6, 58:11–22. But D.A.'s statement was not about a prior instance of abuse involving Kieffer—she was referring to a different person altogether. D0111 at 55:24–58:4. The district court responded reasonably and ordered the State to elicit testimony explaining this fact to the jury:

> All right. At this point because we do know now that the witness was not talking about a prior incident with the defendant and so I don't think that the mistrial would be appropriate at this time. I also

> don't think a curative instruction is going to do anything at this point. But I do think that now, whether it's through the state or the through the defense, that this is an issue that can be briefly talked about and explained so that the jury knows we're not talking about the defendant. And I don't want to go into any details about what happened, but I do want it explained that we are talking about a different person. The defense can ask some cross-examination questions about that. I don't want it go very deep into that so that we're trying that case, but I do want it out to the jury then what we were talking about because if we just move on, they're not going to have any idea and they're led to be able to assume that it was the defendant. So I think we'll just go with that and let the testimony come out then.

D0111 at 59:7–60:13. D.A. then clarified her earlier statement was about a different former boyfriend. D0111 at 61:23–62:7.

There was no prejudice to Kieffer. The district court's quick action to avoid a mistrial from this single statement shows it reasonably exercised its discretion to deny one. *See State v. Newell*, 710 N.W.2d 6, 33 (Iowa 2006) ("When the solitary reference to drug charges is considered in the context of the entire trial and all the properly admitted evidence, we think the trial court reasonably concluded this comment did not prevent the defendant from receiving a fair trial with impartial jurors."); *State v. Lawrence*, 559 N.W.2d 292, 294–95 (Iowa Ct. App. 1996) (trial court's quick response to witness's statement defendant had been recently released from prison in

violation of motion in limine was reasonable—court told jury to disregard statement).

The same is true of the second mistrial motion. Evidence showed how Kieffer's residence was set off from the street behind another building. D0067, Exh.A (2/24/2023); D0124, DVD, Exh.E Fey's BodyCam at 00:00–01:07; D0111 at 30:25–31:18; 36:2–20; 39:6–22. When Officer Fey described his arrival at Kieffer's residence he unexpectedly over-explained:

> Q: And so when you arrived at the scene were you directed towards where the interested parties might be?
>
> A: Yes, and I had been to that residence.
>
> MS. FORCIER: Objection. May we approach?

D0111 at 153:17–20. Another hearing then took place outside the jury's presence, and again defense counsel sought a mistrial:

> MS. FORCIER: Your Honor, the State just elicited testimony from the officer that is in direct violation of the motion in limine that was entered in this case. The State was ordered to tell their witnesses to comply with the motion in limine. That officer was not supposed to be talking about any prior contact at this residence or with the individuals that lived there. Now again we're in a situation where we can't unring the bell. Any curative instruction given to the jury about how this officer may or may not know why he was at this residence before—I mean, we can ask the officer but I'm pretty sure it's going to be about either Mr. Kieffer or Mr. Fernau, which are not things that should be before this jury as they are prior bad acts that are inadmissible. So for those

> reasons I would be asking for a mistrial as it is in direct violation again of the motion limine.

D0111 at 154:5–20. The State resisted, pointing out again that the objected testimony was vague: "There's nothing to unring cause nothing has rung out." D0111 at 155:20–156:5; 158:23–159:8.

As they had with D.A., the parties questioned Fey further. He confirmed his past visit to the residence was due to a psychiatric incident with Fernau, not a criminal encounter with Kieffer. D0111 at 157:6–158:11. The district court took a quick break and decided against a mistrial when it returned:

> At this point I am gonna deny the request for a mistrial. I am going to tell the State that the cumulative effect of the prior violation, of the having the domestic abuse before that the victim testified to, plus this is—is getting close to me to being a cumulative effect that might be a mistrial. So I would ask the State to be very careful with its witnesses and perhaps go overboard in directing them on certain issues.
>
> I'm going to direct the State to question the officer in front of the jury regarding this issue and cure it by asking a leading question regarding that the incident that he was referring to was an unrelated matter that did not relate to the defendant or somehow how you want to word that. I want it be specifically that it had nothing to do with the defendant and it had nothing to do with—however you want to word it, assaultive behavior or violence or something of that nature. I don't want to go into what it was with the psychiatric nature cause I think

> that's somewhat in violation of the roommates rights and his rights not to have that come out in open court. And he's not even here so I feel strongly we should not talk about the exact psychiatric nature or the mental health nature of it. But if we can formulate a question that is—was unrelated, not criminal in nature, not related to the defendant, we will use that as a curative question and we will move on from there.

D0111 at 159:9–162:24. The State complied, the jury was told the visit was due to Fernau. D108, Trial Tr.2 4:20–5:3. As with D.A.'s statement, no prejudice occurred from this testimony.

Kieffer advances a theory the jury was "likely to give an excessive weight to evidence [he] was some type of serial offender" and that the statements "appealed to the jury's instincts to punish" him. Appellant's Br. 34–37. He is incorrect. There was nothing from the challenged statements the jury could base an improper inference on.[2] The record does not support the inferential steps Kieffer asks this Court to find the jury made. *See State*

[2] Kieffer omits his own testimony was more telling as to his earlier trouble with law enforcement. Before the jury, he explained his decision not to call police was because "I—I honestly don't like involvement with police officers. I haven't had good interactions with—especially Cedar Falls police." *See* D0108 at 92:20–94:19. He later testified he did not tell officers about D.A. stabbing the wall because "I haven't had good dealings with police officers," which his attorney then attempted to correct: "Q: Right, based on this? Right? A: Correct." D0108 at 96:12–97:11. The same was true of his decision not to tell police about his claim D.A. bit him: "Once again, I don't like speaking with law enforcement." D0108 at 101:19–22. In terms of potential prejudice, Fey's statement pales in comparison.

v. Stechcon, No. 22-1448, 2024 WL 1549258, at *2–*3 (Iowa Ct. App. Apr. 10, 2024) (rejecting defendant's claim district court erred in denying mistrial after witnesses recalled stating "enjoy the next fucking seventeen years of your life" in violation of the motion in limine).

Kieffer's claim relies on a series of unfounded assumptions. First, that the jury disregarded the clarifying testimony and instead drew an improper inference and then convicted him because of it. Appellant's Br. 34–37. He points out twice that no curative instruction on this testimony was given.[3] Again, this was not necessary. *See Stechcon*, 2024 WL 1549258, at *2–*3. Even then, the district court instructed the jury before it deliberated about how the presumption of innocence required it to "put aside all suspicion which might arise from the arrest, charges, or present situation of the defendant." *See* D0082 at 6. It also instructed the jury the State had to carry the burden of proof beyond a reasonable doubt on every element of the charged offenses, based on *evidence* presented at trial. *See* D0082 at 5, 9, 30. A separate instruction told jurors to "evaluate the evidence carefully. You must avoid decisions based on things such as generalizations, gut

[3] Kieffer states the district court "declined to either grant the mistrial or issue a curative instruction" and "Again, as with the first violation, the court declined to either issue a curative instruction or grant Kieffer's renewed request for a mistrial." Appellant's Br. 30, 33. In fairness to the district court, Kieffer anticipatorily declined a curative instruction to stand on the request for a mistrial. D0111 at 55:1–6; 154:11–20

feelings, prejudices, fears, sympathies, stereotypes, or inward or outward biases." D0082 at 29.

Taken together, these instructions would have prevented jurors from using these two vague statements as a reason to infer Kieffer was guilty—if it was even possible to do so given the clarifying testimony. It was clear it was the State's burden to prove its case. The jury concluded it did, likely due to Ohm's unbiased observations, D.A.'s credible account, her injuries when compared to Kieffer's minimal ones, and his denials on the evening of the assault and after. *Compare* D0111 at 16:4–25; 18:1–19:18; 20:11–23; 28:4–15; 29:4–8; *with* 46:21–49:20; 50:21–51:18; *with* D0068, Exh.B (2/24/2023), *with* D0070, Exh.D (2/24/2023) *with* D0108 at 107:18–108:20; 117:5–10; *with* D0124, DVD, Exh.E Fey's BodyCam at 00:00–01:07.

To summarize, two witnesses offered unprompted, vague testimony. There is no indication the prosecutor intentionally elicited it to violate the motion in limine. Defense counsel remedied this surprise issue when she twice objected and addressed the issue outside the jury's presence. The district court then provided a reasonable remedy when it directed the State elicit *more* testimony eliminating any improper inferences. Assuming for a moment that these witnesses' statements were somehow prejudicial, the

district court cured it when it provided the jury time-tested jury instructions informing them what was and was not evidence. *See Brown*, 397 N.W.2d at 699 ("Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice.").

This is not an instance in which there is no support for the district court's determination; the district court correctly declined to terminate this trial. *See Newell*, 710 N.W.2d at 33. Kieffer has not met his heavy burden. *See id.*; *Brown*, 397 N.W.2d at 699; *Jirak*, 491 N.W.2d at 796.

III. Kieffer's constitutional challenges to Iowa Code section 724.31A are not properly before this Court and are unpersuasive. The Federal and Iowa Constitutions permit the State to disarm those who cannot abide by its laws and pose a danger to others.

Ripeness and Preservation of Error

This Court should not consider Kieffer's challenge for two reasons. First, the claim is not ripe. Second, he failed to raise the issue below.

Kieffer's constitutional challenge to the statute is not ripe. There is no indication that Kieffer owns a firearm or intends to obtain one. He failed to use the administrative remedy available to him to challenge his placement on the list of persons prohibited from possession. The law he challenges

already allows him to request the Department of Public Safety remove him from the background check system database. Iowa Code § 724.31A(2). If he had and the department of public safety denied that request, he could seek judicial review including his constitutional challenge to section 724.31A. *See* Iowa Code § 17A.19. At that point his claim would be ripe.

And what is more, error was not preserved. He did not challenge the district court's notification of firearms disability under Iowa Code section 724.31A. *See, e.g.*, *Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 491 (Iowa 2003); *see generally State v. Hanes*, 981 N.W.2d 454, 460 (2022) ("A supreme court is 'a court of review, not of first view.'" (quoting *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 552 (Iowa 2021))).

To get around his failure to preserve error, Kieffer suggests the lower court's notification is an "immediate and mandatory penalty" and thus a part of his sentence that he may challenge without preserving error. Appellant's Br. 40–41. He is factually and legally mistaken.

Factually, the notice was not part of his sentence. It came via a separate, unchallenged order. D0096, Order for Gun Right Prohibition (3/31/2023); App. 40–41 ("Pursuant to I.C. 724.31A, the court hereby notifies the party named above that, in the case number indicated above, the court issued an order or judgment by which the party named above lost

firearm rights because the party named above met one or more of the following criteria . . ."); D0098, Judgment at 4 (3/31/2023); App. 38 ("A notice of Firearm Prohibition Pursuant to Code of Iowa 724.31A will be entered as a separate order.").

Legally, the notice is not a punishment that can be challenged as an attack on an illegal sentence, it is a collateral consequence of his conviction. *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986). There are multiple consequences that follow from a conviction—this does not make them part of the sentence. *See State v. Hess*, 983 N.W.2d 279, 285–86 (Iowa 2022) (sex offender registration is a mandatory collateral consequence of conviction); *Doss v. State*, 961 N.W.2d 701, 710–11 (Iowa 2021) (although special sentence of parole was a part of the sentence, the rules and conditions of that parole were not). *But see State v. Fisher*, 877 N.W.2d 676, 683–84 (Iowa 2016) (Iowa Code § 901.5's requirement for district courts to order revocation of defendant's license upon conviction for controlled substance possession was "mandatory, immediate, and part of the punishment for that offense"); *see generally State v. Cole*, No. 06-0579, 2007 WL 257856, at *1 (Iowa Ct. App. Jan. 31, 2007) (sex offender registration was a collateral consequence of conviction that could not be attacked by a motion to correct an illegal sentence, "While the above

consequences may to a varying degree impact a person's daily life, our supreme court has not denominated them as punishment, but as collateral to the plead offense"). Because it is not part of his sentence, Kieffer cannot attack it for the first time on appeal nor rely on the "illegal sentence" exception to the error preservation requirement. This Court should not address his challenges.

Standard of Review

This Court reviews claims a statute is unconstitutional de novo. *See, e.g.*, *State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019). "Because we presume statutes are constitutional, the challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt." *Id.* (cleaned up). "Such a party must negate every reasonable basis upon which the court could hold the statute constitutional." *Id.* (quoting *State v. Biddle*, 652 N.W.2d 191, 200 (Iowa 2002)).

Merits

Kieffer attacks the constitutionality of Iowa Code Section 724.31A's notice provision under the Federal and Iowa Constitutions. Both Second Amendment to the United States Constitution and Article I, Section 1A of the Iowa Constitution provide an individual right to keep and bear arms:

U.S. Const., Second Amend.:	Iowa Const., Article I, Section 1A:
A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.	The right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right shall be subject to strict scrutiny.

Kieffer's attacks on the statute fail for three reasons: (A) Kieffer is not among the people to whom either constitutional amendment applies, (B) section 724.31A(2) does not "infringe" his right "to keep and bear arms," and (C) even if the amendments applied, section 724.31A(2) violates neither constitution. The State makes each point in turn.

A. Because Kieffer was convicted of domestic abuse assault he is not among "the people" who have a constitutional right to keep and bear arms.

First, as a person convicted of a crime of domestic violence, Kieffer categorically no longer has the right to possess a gun under either constitution. Having had the full due process provided by his trial, his conviction sets him in a different class. Now a convicted domestic abuser, he is not a "law abiding citizen" as a member of the people. *See New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 31 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). The right to bear arms no

longer applies to Kieffer. *See* Todd E. Pettys, *The N.R.A.'s Strict-Scrutiny Amendments*, 104 IOWA L. REV. 1455, at 1467–69 (2019) (noting courts have concluded that felons, juveniles, and non-citizens all fall outside the Second Amendment's protection).

In *Heller*, the Supreme Court described the keeping and bearing arms as a "right of law-abiding, responsible citizens." 554 U.S. at 635. The *Bruen* Court used this particular "law-abiding, responsible citizens" phrase or its variant a dozen times. *See id.* at 9, 15, 26, 29, 30, 31, 33 n.8, 38, 39 n.9, 60, 70, 71. The *Heller* majority clarified that categorical limitations on the possession of arms by those who do not abide by our laws are "presumptively lawful regulatory measures." *Id.* at 626, 627 n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786, 790 (2010) ("observing the Second Amendment protects "the safety . . . of law-abiding members of the community" and re-avowing that Congress may disarm felons), 561 U.S. at 636 (Breyer, J. dissenting) ("Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank[.]").

Unlike the petitioners in *Bruen*, *Heller*, and *McDonald*, Kieffer is not a "law-abiding" citizen. *See Bruen*, 597 U.S. at 31–32. As the result of due

process, he is a convicted domestic abuser. That process has rebutted any presumption he is a "law-abiding, responsible" citizen and it sets him apart from "the people." The Second Amendment no longer protects his right to possess a firearm. *See United States v. French*, No. CR 23-00064-01, 2023 WL 7365232, at *2 (W.D. La. Nov. 7, 2023) ("[T]his Court is of the opinion that French, as someone who was convicted of two counts of possession with intent to distribute schedule II narcotics in 2018 and thus who is not "law-abiding," is not facially protected by the Second Amendment."); *United States v. Jackson*, 661 F.Supp.3d 392, 402–03 (D. Md. 2023) (collecting cases, assuming arguendo that Second Amendment applies to indictee); *see generally United States v. Sitladeen*, 64 F.4th 978, 983–87 (8th Cir. 2023) (unauthorized aliens were not part of the "the people" protected by the second amendment); *Vincent v. Garland*, 80 F.4th 1197, 1203 (10th Cir. 2023) (Bacharach, J., concurring) ("[D]oes the term the people include individuals convicted of nonviolent felonies? The answer is debatable. . . . If individuals convicted of nonviolent felonies aren't among *the people* protected under the Second Amendment, I would regard the ban as constitutional without further historical inquiry."). *But see Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 101–03 (3d Cir. 2023) ("[W]e reject the Government's contention that only 'law-abiding, responsible

citizens' are counted among 'the people' protected by the Second Amendment."); *Rahimi*, 61 F.4th at 451–52 (rejecting government's argument that Rahimi fell outside the "the people" because "Rahimi was not a convicted felon or otherwise subject to another 'longstanding prohibition[ ] on the possession of firearms" that would have excluded him'" thus, "the 'strong presumption' that he remained among 'the people' protected by the amendment holds"); Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WY. L. REV. 249, 275–285 (2020) (attacking the "virtuous citizen" theory and concluding that "violent and other dangerous persons have historically been banned from keeping arms in several contexts—specifically, persons guilty of committing violent crimes, persons expected to take up arms against the government, persons with violent tendencies, distrusted groups of people, and those of presently unsound mind") (hereafter "Greenlee, *The Historical Justification*"). Because he is no longer part of "the people" his challenge categorically fails.

B. Kieffer asserts that section 724.31A violates both constitutions but it is a notice provision that does not infringe his right to keep or bear arms.

Second, in each of his challenges, Kieffer alleges Iowa Code section 724.31A is an unconstitutional infringement on his right to bear arms. *See*

Appellant's Br. 41–49. Not so. The statute does not infringe on the right to bear arms; it is a notice provision. It requires a sentencing court to provide notice to certain law enforcement entities that maintain the lists of people disabled from possessing revolvers or pistols due to convictions. It does not itself bar or limit the keeping of a firearm. A notice does not "infringe" on the right the constitutions provide. *See Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 549–50 (Iowa 2019) (discussing fundamental right to travel: "The term 'infringement' in this context is a term of art with at least some ambiguity, but it clearly does not mean anything that impacts travel"); *see also Hensler v. City of Davenport*, 790 N.W.2d 569, 581–83 (Iowa 2010) (city ordinance providing notice of juvenile delinquency and sanctions did not infringe on the fundamental right to parent a child). Other Iowa law code provisions forbid Kieffer from possessing a firearm but 724.31A is not one of them.

Because it does not infringe on any right, it is categorically distinct from a law that does. Constitutional avoidance warrants waiting until that case arrives. *See, e.g.*, *State v. Iowa Dist. Ct. Ex rel. Story Cnty.*, 843 N.W.2d 76, 85 (Iowa 2014) ("The doctrine of constitutional avoidance suggests the proper course in the construction of a statute may be to steer clear of 'constitutional shoals' when possible."). Other states' experiences

discussed in subdivision III(C)(3) make clear a challenge to Iowa's firearm laws will arrive in due course. *See State v. McCoy*, 468 S.W.3d 892, 898–99 (Mo. 2015); *State v. Webb*, 144 So.3d 971, 980 (La. 2014); *State in Int. of J.M.*, 144 So.3d 853, 860 (La. 2014). This Court need not approach those constitutional shoals until such time a defendant with a right to bear arms articulates a challenge to a statute that truly "infringes" on the right.

C. Section 724.31A violates neither the Second Amendment nor Iowa Constitution Article I, sec. 1A.

If this Court reaches the merits, it should reject Kieffer's claims and affirm. Even if section 724.31A infringes on the right to keep or bear arms it does not violate the United States or Iowa Constitutions. Domestic abusers who possess firearms are dangerous. Both constitutions permit the State to prohibit dangerous persons who assault others from possessing them. The State addresses this danger before addressing each challenge in turn.

1. Domestic violence poses a significant danger; when combined with firearms it results in lethal outcomes.

Along with its innately corrosive effect on tranquility in the home, domestic violence presents a disturbing public safety concern. *See* Kelly Roskam, et al., *The Case for Domestic Violence Protective Order Firearm Prohibitions Under* Bruen, 51 FORDHAM URB. L. J. 221, 246–49 (2023) (surveying public health research, "The use of firearms in domestic violence

is an urgent threat to the public.") (hereafter "Roskam, *Firearm Prohibitions Under* Bruen"). Iowa, sadly, is no stranger to it. *See, e.g.*, *In re J.P.* 574 N.W.2d 340, 344 (Iowa 1998) ("Domestic abuse against women is a serious problem in Iowa and the nation as a whole."); *State v. Davis*, 493 N.W.2d 820, 824 (Iowa 1992) ("We agree with the State that the legislature's aim in imposing a mandatory minimum jail term [for violations of Iowa Code section 708.2A] was to deter domestic violence, a problem that has reached alarming proportions in this state.").

Its consequences are lethal. Between 1995 and 2023, 386 Iowan domestic abusers killed their partner or a bystander. *See Domestic Violence Fatality Chronicle, January 1995–September 2023*, IOWA ATTORNEY GENERAL'S OFFICE, *available at* https://www.iowaattorneygeneral.gov/media/documents/Complete_DV_Fatality_Chronicle_Narr_9D5545EAD6731.pdf (last visited April 15, 2024) (hereafter "*Domestic Violence Fatality Chronicle*"). More than half used a gun. *Id.* This reflects national trends showing firearms distinctly increase domestic violence's lethality:

> - "Between 1976 and 1996, intimates murdered 6 out of every 100 male victims and 30 out of every 100 female victims." *Linn v. State*, 929 N.W.2d 717, 734 (Iowa 2019) (quoting Elizabeth Dermody Leonard, *Convicted*

Survivors: The Imprisonment of Battered Women Who Kill 8 (2002))).

- "[N]early 52,000 individuals were murdered by a domestic intimate between 1976 and 1996, and the perpetrator used a firearm in roughly 65% of the murders." *See United States v. Chovan*, 735 F.3d 1127, 1140 (9th Cir. 2013) (quoting *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011)).

- "The presence of a gun in the home of a convicted domestic abuser is 'strongly and independently associated with an increased risk of homicide.'" *United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) (quoting Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENGLAND J. MEDICINE 1084, 1087 (1993)).

- "When an abuser has access to firearms, the risk the female partner will be killed increases by 400%." Geller, L.B., et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 Inj. Epidemiology 38, at 2 (2021) *available at* https://doi.org/10.1186/s40621-021-00330-0 (hereafter "Geller, *Domestic Violence in Fatal Mass Shootings*"); *see also* Roskam, *Firearm Prohibitions Under* Bruen at 247–48.

The reason for firearms' dominance in domestic violence fatalities is intuitive: "guns are more lethal than knives and clubs once an attack begins." *Skoien*, 614 F.3d at 643 (citing Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J.L. MED. &

ETHICS 34 (2004)). Handguns such as pistols and revolvers contribute heavily to these deaths. In an empirical review of 2020's domestic homicides, "handguns were clearly the weapon of choice over rifles and shotguns . . . 64 percent of female firearm homicide victims (675 out of 1,057) were killed with handguns." *When Men Murder Women*, VIOLENCE POLICY CENTER, *available at* *https://vpc.org/when-men-murder-women-section-one/* (last visited 4/16/2024) (hereafter "*When Men Murder Women*").

It is not just lethal for those within the relationship, either. Between 2000 and 2009, close to 8% of enforcement officer fatalities in the line of duty related to domestic disturbance calls. *See Booker*, 644 F.3d at 26 n.8 (citing FEDERAL BUREAU OF INVESTIGATION, *Law Enforcement Officers Killed and Assaulted 2009* Table 19 (law 2010)). This high risk to law enforcement endures. From 2015 to 2019, 9% of officers killed in the line of duty were responding to domestic disturbance calls. *See* FEDERAL BUREAU OF INVESTIGATION, *Law Enforcement Officers Killed and Assaulted 2019* Table 23 (showing that out of 257 officer victims, 25 were dispatched on reports to a domestic disturbance or domestic violence), *available at* https://ucr.fbi.gov/leoka/2019/resource-pages/tables/table-23.xls. Bystanders, including children, are murdered as well. *See Domestic*

Violence Fatality Chronicle, at 5–7 (showing 74 bystanders killed). And developing research shows a disturbing relationship between domestic abusers and mass shootings. Geller, *Domestic Violence in Fatal Mass Shootings* at 5 ("Between 2014 and 2019, in 68.2% of mass shootings, the perpetrator either shot or killed at least one partner or family member or had a history of [Domestic Violence]."); *see also* Rosker, *Firearm Prohibitions Under* Bruen at 252–54 ("Robust findings illuminate how intimate partner homicides frequently include additional fatal victims."). Domestic violence is dangerous in the private and the public sphere.

Worse yet, the recidivism rate for domestic abusers is high. *See generally United States v. Staten*, 666 F.3d 154, 164–66 (4th Cir. 2011) ("[A] conservative conclusion to be drawn from such reports is that the actual recidivism rate among domestic violence misdemeanants (including re-arrests and unreported incidents) is *at least 33.3%*. This is a substantial rate of recidivism." (emphasis added)); *Skoien*, 614 F.3d at 644 ("No matter how you slice these numbers, people convicted of domestic violence remain dangerous to their spouses and partners."). This true in Iowa as well and is one reason Iowa's legislature enhanced the punishment for domestic violence with each conviction. *See* Iowa Code § 708.2A(2), (3), (4), (6).

All this paints a grim picture. It provides the State paramount and compelling reason to act.

2. Our history and traditions support disarming domestic abusers because they are dangerous, so Iowa Code Section 724.31A does not violate the Second Amendment.

a. The State can enact gun regulations consistent with this nation's history and traditions of firearm regulations. The "history and tradition" test Bruen *announced is not a "regulatory straightjacket."*

While the Second Amendment—applied to the states via the Fourteenth Amendment—to the United States Constitution protects the right of individuals to "keep and bear" firearms for self-defense, the right has never been unlimited. *See Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 626); *McDonald*, 561 U.S. at 791, 806. Recently, the Supreme Court eschewed "means-ends" scrutiny review for Second Amendment challenges in favor of a "history and tradition" test. *Bruen*, 597 U.S. at 17, 23, 24. It held that

> when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. . . . Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 17; *see also Bruen*, 597 U.S. at 102–05 (Breyer, J., dissenting) (discussing "means-end" scrutiny that arose after *Heller*). The Court held that regulations were permissible so long as the government can identify a "well-established and representative historical *analogue.*" 597 U.S. at 30. It emphasized the government need not offer "a historical *twin*." *Id.*

The majority's ruling was defined by the question presented in the case—could New York present "historical analogues" where the government restricted the issuance of a gun permit based on whether the requestor could demonstrate "proper cause?" *See id.* at 11–12, 70. New York failed to carry its burden because it could not point to analogues sustaining its regulation. *Id.* at 30–31 ("Respondent's argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense[.]"); 39–70.

The Court's new test has proved difficult to apply, yielding different results. *Compare United States v. Daniels*, 77 F.4th 337, 345–50 (5th Cir. 2023) (finding prohibition under 18 U.S.C. § 922(g)(3) unconstitutional in light of *Bruen*) *with Vincent*, 80 F.4th at 1202 (following pre-*Bruen* precedent upholding the constitutionality of a felon ban against a challenge based on non-violent felons) *with United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023) (same) *with Atkinson v. Garland*, 70 F.4th 1018,

1019–20 (7th Cir. 2023) (remanding to the district court to for *Bruen* analysis); *see also* Kevin G. Schascheck II, *Recalibrating Bruen: The Merits of Historical Burden-Shifting in Second Amendment Cases*, 11 BELMONT L. REV. 38, 41 (2023) ("*Bruen's* attempted elucidation of the Second Amendment begets more confusion than clarity.").

The Court is likely to clarify its test in *United States v. Rahimi*, a case arising from the Fifth Circuit testing the constitutionality on a federal law barring those subject to a no-contact order from possessing firearms. *See United States v. Rahimi*, No. 22-915, 143 S.Ct. 2688, 2689 (2023) (granting certiorari review); *see also Rahimi*, 61 F.4th at 455–61. An opinion will issue shortly after the time of the State's writing, and an opinion in the United States' favor likely resolves this case in the State's favor here. If the Court sustains a complete prohibition on possessing firearms under the Second Amendment, a notice that does not infringe on the right passes constitutional muster as well.

In any event, this Court can conclude that section 724.31A does not violate the Second Amendment. It is a "presumptively valid" regulation that fits firmly within the nation's history and traditions of firearm regulation.

b. Section 724.31A is a "presumptively valid" regulation that facilitates disarming convicted domestic abusers.

Although it announced a new test, the *Bruen* principal opinion left other portions of the Court's other Second Amendment holdings intact. It did not disavow the Court's past announcements in *Heller* and *McDonald* that the right to possess a gun was not unlimited. *See* 597 U.S. at 21. Those opinions recognized that historical analysis should not be "taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or . . . laws imposing conditions and qualifications on the commercial sale of arms." *See Heller*, 554 U.S. at 626–627, 627 n.26; *see also McDonald*, 561 U.S. at 786 ("We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms."). Justice Kavanaugh (joined by Chief Justice Roberts) in a concurring opinion to *Bruen* reavowed the "presumptive validity" of these regulations. *Id.* at 80–81 (Kavanaugh, J., concurring). Justice Alito did the same. *Id.* at 72, 76 (Alito, J., concurring). Thus, most of the United States Supreme Court believes that laws restricting gun possession by felons and the mentally ill are presumptively valid. Giving notice to prevent convicted domestic abusers from acquiring handguns is a similar presumptively valid regulation. It warrants this Court to reject Kieffer's claim outright.

If it applies the *Bruen* Court's "history and tradition" test, this Court should conclude that section 724.31A survives because it fits firmly within the nation's history and tradition of disarming those who cannot abide by the law and pose a danger to others.

c. Kieffer has been convicted of strangling someone. Section 724.31A fits firmly within the nation's history and tradition of disarming those society deems dangerous.

America has a long history and tradition of disarming people society considers dangerous. Prior to, at the time of, and after the founding, governments prevented transferring weapons to and disarmed those posing a danger to themselves and others.

Before the founding, the English Parliament first codified the right to bear arms in the Bill of Rights: "Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." Bill of Rights, 1 W.&M. Sess. II, c.2 (1688); *see* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. 1, 22 (2024) (hereafter "Greenlee, *Disarming the Dangerous*"). Parliament limited the right to bear arms to Protestants and disarmed Catholics because it perceived them as potential insurrectionists. *Id.* at 22–23. Laws before the Bill of Rights permitted local officials to disarm "disaffected" individuals and those who "disturbed the

public Peace." *Id.* at 11–13. Disarmament of those who were believed dangerous to the government continued after the Bill of Rights' adoption. *Id.* at 22–24.

And during colonial times and America's founding, governments disarmed and prevented the transfer of firearms to those perceived to be dangerous or who could not be trusted with firearms. *Disarming the Dangerous*, 16 DREXEL L. REV. at 1, 28–48, 50, 81–82 (collecting historical laws and concluding that in "17th- and 18th-century America, dangerousness was always the touchstone of disarmament laws. . . . In colonial- and founding-era America, although most restrictions on arms possession were discriminatory, every restriction was designed to disarm people who were perceived as posing a danger to the community."); Greenlee, *The Historical Justification*, 20 WY. L. REV. at 262–67 (discussing colonial and founding era laws disarming "those perceived as dangerous"); *see also* Mark Frasetto, Mark Frasetto, *Firearms and Weapons Legislation Up to the Early Twentieth Century* at 40–43 (Jan. 15, 2013) (unpublished manuscript) https://ssrn.com/abstract=2200991 (collecting firearms laws and identifying laws targeted at Native Americans and other groups).

Aside from these categorical restrictions, when someone's conduct showed they were unfit, States disarmed them if they could not post a bond. See *Bruen*, 597 U.S. at 55–58, 56 n.23 (collecting statutes). The firearm rights of anyone likely to "breach the peace" could be burdened when "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them." *Id.* at 56 (quoting William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (2d ed. 1829)). At least ten states adopted variants of a surety law during the 19th century. *Id.* The purpose of those laws was to prevent harm. *Id.* at 57. As with the categorical disarmament laws, these laws confirm that founding-era governments limited dangerous individuals' access to firearms.

Applying these principles, other courts considering the constitutionality of federal law prohibiting persons convicted of domestic violence from possessing weapons have upheld them. *See United States v. Nutter*, 624 F.Supp.3d 636, 643–44 (S.D. W.Va. 2022); *United States v. Bernard*, No. 22-CR-03 CJW-MAR, 2022 WL 17416681, at *7–*8 (N.D. Iowa Dec. 5, 2022) (collecting cases). As the *Nutter* court put it: "The prohibition on possession of firearms by those convicted of misdemeanor crimes of domestic violence fits easily within this framework of regulation consistent with the history and purposes of the Second Amendment and

designed to keep firearms away from dangerous people." *Nutter*, 624 F.Supp.3d at 643–44.

To be clear, many of these historical examples are would not pass constitutional muster today. But they show that the founders permitted disarmament based on perceptions of dangerousness. They are historical analogues of disarming the dangerous. And unlike many of these laws which relied on presumptive dangerousness, Kieffer has been specifically proven to be dangerous via due process. *See Nutter*, 624 F.Supp.3d at 644 ("A law prohibiting a domestic violence misdemeanant from possessing a firearm restricts only those found, following due process, to pose a special danger of misusing firearms based on their own actions.").

Kieffer points to commentary that there were no founding or reconstruction era analogues "prohibiting gun possession" . . . for people convicted of misdemeanors or subject to civil protection orders." Appellant's Br. 45 (quoting David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis L. J. 193, 244 (Winter 2007)). True, but inconsequential. The lack of a "historical twin" for Iowa Code section 724.31A is not surprising nor required under *Bruen*. This historical absence may be explained by the fact that there few felonies

in the founding era and they were often punished with death.[4] *See Range*, 69 F.4th at 103–04; *see also Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 903–04 (3d Cir. 2020), abrogated on other grounds by *Range*. *Bruen* anticipated that its test would need to be applied to "unprecedented societal concerns or dramatic technological changes" and observed "a more nuanced approach" might be necessary. *Bruen*, 597 U.S. at 27.

Domestic violence is exactly such a social concern. Assaulting a spouse was not even a crime at the time of the founding—perversely, it was treated as *virtue* and the law turned an unconscionable blind eye to it. *See* Raven Peña, Bruen's *Effect on 18 U.S.C. 922(g)(8) and (9): A Major Threat to the Safety of Domestic Violence Victims*, 48 T. MARSHALL L. REV. 133, 135–36, 176–78 (2023) (observing that "'Domestic violence' is a relatively new notion" and pointing to why laws outlawing it did not exist until the 20th century) (hereafter, "Peña, Bruen's *Effect*"); *see also Linn*, 929 N.W.2d at 733–34 ("In the past, '[i]f a woman showed any signs of having a will of her own, the husband was expected by both church and state to

[4] Dangerous felons were not prohibited from possessing firearms under federal law until 1938. The categorical ban on all felons possessing a firearm did not arrive until 1961. *See Range*, 69 F.4th at 103–04. One offered explanation for this is that the matter was left to the states, not the United States: "The most obvious explanation for a century and a half of congressional inaction is not lack of political will but dual sovereignty and respect for state police power." *See Range*, 69 F.4th at 106–09 (Porter, J., concurring).

chastise her for transgressions.'"). The lack of any particular "historical twin" for section 724.31A is a reflection that those "most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue." *Nutter*, 624 F.Supp.4th at 641. Which is to say, this Court should employ a "nuanced approach" when reviewing legislation to combat this previously "unprecedented societal concern." *See Bruen*, 597 U.S. at 27; Peña, Bruen's *Effect* at 183 (observing that at the time of the founding women were excluded from political society; they had no right to vote, sit on juries, hold elected office, or draft legislation). It should not require a "historical twin" because the Second Amendment does not "straightjacket" legislatures to only create those regulations that existed in the 18th and 19th centuries. *See Bruen*, 597 U.S. 1 at 30; *Heller*, 554 U.S. at 582, 626.

In conclusion, it should reject Kieffer's argument because "History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019), *abrogated by Bruen*, 597 U.S. 1, (Barrett, J., dissenting). Convicted perpetrators of domestic violence are such people. While the record is silent on whether Kieffer owned a firearm, section 724.31A decreases the chances he will obtain a pistol or a revolver in

the future. Given the clear danger domestic violence and firearms present, a history and tradition of disarming those society considers dangerous, and Kieffer's own demonstrated dangerousness, this Court should conclude Iowa Code section 724.31A does not violate the Second Amendment.

3. Iowa Code section 724.31A's "notice" passes the Iowa Constitution's "strict scrutiny" test.

In 2022, Iowa adopted a constitutional amendment adding the right to keep and bear arms to the Iowa Constitution. *See* Iowa Acts 2019 (88 G.A.) ch. 168, S.J.R. 18, § 1, and Iowa Acts 2021 (89 G.A.) ch. 185, S.J.R. 7, § 1. Article I, section 1A states that the right "of the people keep and bear arms shall not be infringed" and that "Any and all restrictions of this right shall be subject to strict scrutiny." Iowa Const. Art. I, Sec. 1A.[5] Kieffer alleges that Iowa Code section 724.31A fails to meet the amendment's stated but undefined "strict scrutiny" standard.[6] Already discussed, Kieffer

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[5] Iowa was not the first to do so. Three other states previously adopted "strict scrutiny" firearm amendments to their state constitutions. *See* Ala. Const. art. I, § 26(a); La. Const. art. I, § 11; Mo. Const. art. I, § 23. Discussed throughout this subdivision, litigation over the contours of similar amendments from those jurisdictions is informative here.

[6] Kieffer does not say whether his challenge is "as-applied" to his particular circumstance or a "facial" challenge to the statute in every application. Appellant's Br. 46–49. Because he focuses on himself instead of rebutting all its applications, he is making an "as-applied" challenge only. *See generally State v. Robinson*, 618 N.W.2d 306, 312 (Iowa 2000) (discussing defendant's vagueness challenge); *accord. Newton*, 929 N.W.2d

is neither among the people with the right to possess a firearm nor does this notice provision infringe the right. But even if this Court bypasses those arguments, section 724.31A's notice provision survives strict scrutiny.

a. Strict scrutiny is not a death knell for a challenged statute.

"[T]here is no settled analysis as to how strict scrutiny applies to laws affecting the fundamental right to bear arms, which has historically been interpreted to have accepted limitations." *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. 2015). "[T]he application of strict scrutiny depends on context, including the controlling facts, the reasons advanced by the government, relevant differences and the fundamental right involved." *State v. Merritt*, 467 S.W.3d 808, 813–14 (Mo. 2015).

Generally, the first step in the analysis relates to the asserted fundamental liberty interest. *See State v. Groves*, 742 N.W.2d 90, 92 (Iowa 2007). Next, the Court applies strict scrutiny—it determines whether the government has offered a compelling interest for its law and whether the law is narrowly tailored to advance that compelling interest. *Id.*

Applying strict scrutiny does not mean the statute will necessarily fall—the analysis itself "says nothing about the ultimate validity of any particular law[.]" *Merritt*, 467 S.W.3d at 813–14 (quoting *Dotson*, 464

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at 254–55 (where statute is constitutional as applied to litigant, that litigant lacks standing to mount facial challenge).

S.W.3d at 204); *see generally Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'"); *accord*. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96, 869–70 (2006) (summarizing that "Courts routinely uphold laws when applying strict scrutiny, and they do so in every major area of law."). Which is to say strict scrutiny is a robust but not insurmountable standard of review. A law may survive strict scrutiny where it is "based solely on history, consensus, and 'simple common sense.'" *Webb*, 144 So.3d at 980 (quoting in part *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

Fundamental rights are not absolute and statutes infringing on them can survive. *See Hensler*, 790 N.W.2d at 583 ("[I]t is important to note the fundamental parental right to exercise care, custody, and control over children is not absolute."); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238–40 (Iowa 2002) (finding Iowa's material witness statute survives strict scrutiny analysis). For instance, even the fundamental right to parent one's child may give way where the parent's conduct exposes the child to danger—in those instances, "the state can use a wide range of powers to limit parental freedom and authority." *See Hensler*, 790 N.W.2d at 583 (citing *City of Panora v. Simmons*, 445 N.W.2d 363, 369 (Iowa 1989)). This

is especially germane in the constitutional realm of firearm possession, where the right to bear arms has always been subject to limitations. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

Thus, applying strict scrutiny requires this Court to engage in a "more searching judicial inquiry" to test the sincerity of the State's offered objective for the law against its impact. *See Grutter*, 539 U.S. at 327; *Winkler*, 59 VAND. L. REV. at 799–801; *accord. United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). For the reasons laid out below, Iowa Code section 724.31A survives that inquiry. The State first explains its interests in providing notice under section 724.31A and then explains why that notice is narrowly tailored to advance those interests.

b. Protecting human life, safety of law enforcement, and security of the public are compelling government interests.

The State has multiple compelling interests in providing notice to agencies which may limit firearm access to those convicted of a crime of domestic violence: (1) protecting human life and preventing harm, (2) the public's safety, and (3) law enforcement's safety.

The first is the protecting of human life and preventing harm. *See State v. Musser*, 721 N.W.2d 734, 748 (Iowa 2006) (citing *Cuzan v. Director, Dep't of Health*, 497 U.S. 261, 282 (1990)) and recognizing its

holding "a State [has] an unqualified interest in the preservation of human life"). Consider the alarming combination of domestic violence, the crime's recidivism rate, and firearms. The State has a strong interest in preventing future harm after the convicted domestic abuser is released from its custody. *See generally State v. Epping*, 878 N.W.2d 277, 279 (Iowa Ct. App. 2016) (finding no-contact order between parent and child was supported by "compelling interest in protecting the child victims from future harm"); *accord. In re D.J.R.*, 454 N.W.2d 838, 844–45 (Iowa 1990) (in termination of parental rights case, "Protecting a child from harm is an equally compelling state interest" whether the State or the parent presently has custody of the child).

The second is ensuring the public's safety. Like felons, those who assault those closest to them reveal a dangerous disregard for the law and the rights of others; they present a threat of further and future criminal activity. *See State v. Eberhardt*, 145 So.3d 377, 384–85 (La. 2014) (applying strict scrutiny and finding state had a compelling government interest in disarming felons, the law "serves a compelling government interest that has long been jurisprudentially recognized and is grounded in the legislature's intent to protect the safety of the general public"); *see also Merritt*, 467 S.W.3d at 814 ("The State has a compelling interest in

ensuring public safety and reducing firearm-related crime."); Geller, *Domestic Violence in Fatal Mass Shootings* at 5.

Another is law enforcement officers' safety. Kieffer was sentenced to probation and is under the supervision of the State as he serves his suspended sentence. D0098 at 1–2, 3 ("The defendant is placed on informal probation for a period of 2 years."); App. 35–36, 37. He will have regular interactions with his supervising officers. As the Louisiana Supreme Court in applying its own "strict scrutiny" amendment in *Draughter* observed:

> For these persons still under state supervision, we easily find there to be a compelling state interest for the state's limited infringement of even fundamental constitutional rights, including the right to possess a firearm. These persons are still serving a portion of a criminal sentence. There will necessarily be intrusion into their lives by state actors administering the supervision required by their status. The possession of a firearm is inconsistent with that status and would subject the individuals tasked with their supervision to an untenable safety risk.

State v. Draughter, 130 So.3d 855, 867–68 (La. 2013).

Taken together or independently, the State's interests are compelling. The only question then is of the fit between those interests and the way the statute advances them. Iowa Code section 724.31A satisfies the strict scrutiny inquiry on that element, too.

c. Section 724.31A's notice is narrowly tailored to further the State's compelling interests.

Iowa Code section 724.31A is narrowly tailored to protect victims, the public, and law enforcement from the threat posed by convicted domestic abusers with firearms. It does so by providing notice to relevant law enforcement agencies and databases of the event of a qualifying conviction. *See* Iowa Code §§ 724.31A(1). It also notifies the defendant. *Id*. This deters a convicted domestic abuser from obtaining any new pistol or revolvers. And if he or she tries to do so, the individual will presumably fail a background check. *See* Iowa Code §§ 724.31A(1); 724.15(1), (2)(d).

Its reach is narrow and closely tied to the interests at stake. The statute only addresses pistol and revolver acquisition. *Id.* Recall handguns' status as the most prominent weapon used in domestic slayings. *When Men Murder Women*, *available at* https://vpc.org/when-men-murder-women-section-one/. And its effect is limited. It does not deprive ordinary, law-abiding citizens of their gun rights. A section 724.31A notice is issued only after a qualifying event—for Kieffer, his convictions of domestic abuse. Its limited reach supports finding ruling the statute is constitutional. *See Hernandez-Lopez*, 639 N.W.2d at 239 ("The material witness statute limits the circumstances under which an individual may be detained as a material witness."); *see also State In Int. of D.W.*, 125 So.3d 1180, 1194 (La. Ct. App.

2013) (addressing statute's limited reach and holding juvenile handguns prohibition survived strict scrutiny review).

In this way, it is analogous to Iowa's restrictions on felons. *See* Peña, *Bruen's Effect* at 158; *see also* Iowa Code § 724.26(1). As with those laws, people maintain the right to possess a gun until they show they are unfit to possess it through their conduct. *See generally In re K.M.*, 653 N.W.2d 602, 607–08 (Iowa 2002) (sustaining the constitutionality of termination of parental rights statutes notwithstanding the fundamental right to parent); *accord*. *State v. Schnieders*, No. 14-1675, 2015 WL 4233382, at *5 (Iowa Ct. App. July 9, 2015) (affirming sentencing no-contact order between mother and children over claim they interfered with fundamental right to parent children, "While the State has no reason to 'inject itself into the private realm of the family' so long as a parent adequately cares for her children, we conclude Schnieders's convictions for child endangerment of her own children rebuts the presumption of fitness. The State's interest in protecting these children is compelling." (citations omitted)). And it is not until a court renders a judgment of conviction that the right is impacted. *See* Iowa Code § 724.31A. At that point, the defendant has had the full protections due process provides. *See* Peña, *Bruen's Effect* at 158; *Nutter*, 624 F.Supp.3d at 644.

And as with felon-in-possession laws, it is conceivable some domestic abusers never again violate the law, but narrow tailoring "does not require exhaustion of every conceivable . . . alternative." *Grutter*, 539 U.S. at 339; *cf. McCoy*, 468 S.W.3d at 898–99 (applying *Grutter*, rejecting claim that Missouri's felon-in-possession prohibition was overbroad and underinclusive, and ruling the law survived strict scrutiny); *State v. Smith*, 571 A.2d 279, 281 (N.H. 1990) ("Conceivably some felons falling within the reach of [New Hampshire law prohibiting felons from having firearms] are not potentially dangerous. However, on the standard we apply here, the statute need not be perfectly tailored, simply narrowly tailored."). The statute already permits the defendant to file a written request to be removed from these databases if they are "no longer prohibited from acquiring" such weapons, such as after a successful direct appeal or postconviction relief application. Iowa Code § 724.31A(2). And on the opposite side of the balance, it is all-too conceivable a defendant just convicted of domestic abuse would retaliate and use a gun to do so. *See* Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L. J. 525, 567, 567 n.178 (2003) (discussing the increase risk of domestic violence after victim obtains an ex parte no-contact order, "Research has shown that the risk of domestic violence escalates shortly after the victim attempts to

separate from the abuser. . . . Anecdotal evidence of such reprisals is abundant"). The fit between section 724.31A's means and the State's compelling interests means this Court should reject Kieffer's challenge.

While this is enough to affirm, Kieffer will not be the last to use this amendment to invalidate criminal laws. If it reaches his claim, the Court should announce that Article 1, Section 1A did not invalidate Iowa's preexisting common-sense firearm regulations. The simple reason is the language of the amendment itself.

Rather than amend or strike various provisions of chapter 724, instead our legislature twice approved the language of article I, section 1A and submitted it to referendum. *See* 2019 Iowa Acts ch. 168, S.J.R. 18, § 1; 2021 Iowa Acts 2021 ch. 185, S.J.R. 7. The people adopted it. Micheaela Ramm, *Iowans approve right 'to keep and bear arms' in state's constitution*, DES MOINES REGISTER, Nov. 8, 2022, https://www.desmoinesregister.com/story/news/politics/elections/2022/11/09/iowa-gun-constitutional-amendment-election-results-ballot-question-2022/69610351007/.

The amendment's language did not strike *all* restrictions on the right to bear arms. It did not state that the Iowa legislature "shall not" pass laws restricting the criminal use, transfer, or possession of firearms; "[w]ere that

the case, the amendment would have been very short indeed and would not have needed to address the level of scrutiny to be applied to regulations of the right to bear arms, *for there could be no such regulation*." *State v. Clay*, 481 S.W.3d 531, 537 (Mo. 2015) (emphasis added). The amendment contemplates restrictions on the right it announces, or its "strict scrutiny" clause would instantly be reduced to surplusage. *Id.*; *cf. State v. Ochoa*, 792 N.W.2d 260, 269 (Iowa 2010) (applying the canon against surplusage in interpreting the Iowa Constitution). The Louisiana Supreme Court's commentary following the adoption of its "strict scrutiny" amendment is persuasive on this point:

> The voters of Louisiana did not ratify this constitutional amendment in a vacuum. In our opinion, the reference to restrictions on the right to keep and bear arms in the proposition reflects an expectation of sensible firearm regulation held by the voters, and comports with historical restrictions with respect to the acquisition, possession or use of firearms for lawful purposes found in Louisiana law.
>
> . . . .
>
> [T]he voters' ratification of strict scrutiny as a review standard of alleged infringements on the right to keep and bear arms was not meant to invalidate every restriction on firearms, whether in existence at the time the amendment was ratified or yet to be enacted. Rather, the strict scrutiny standard adopted by the voters "is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by

> the governmental decisionmaker" for firearm regulation within the context of the fundamental right to keep and bear arms.
>
> . . . .
>
> Strict scrutiny requires a careful examination by our courts, keeping in mind that the fundamental right at issue is one where some degree of regulation is likely to be necessary to protect the public safety.

Int. of J.M., 144 So.3d at 860 (quoting *Grutter*, 539 U.S. at 327).

Like Louisianans, Iowans did not adopt article I, section 1A in a vacuum. For at least a century the Iowa Code has contained various firearm restrictions. *See* Iowa Code §§ 12936, 12937, 12938, 12947, 12950, 12958 (1924) (outlawing concealed carrying and sale of dangerous weapons without a permit and restricting sale of firearms to minors); *see also* Iowa Code ch. 564-B1 (1931) (restricting possession of machine guns); Iowa Code §§ 724.1, 724.26 (1979). These were common sense limitations. If Iowans wished for the statutes within the Iowa Code to fall, then their elected representatives in the legislature would have acted on that wish. Instead, the legislature twice approved and Iowans adopted an amendment to our constitution to enshrine a right that previously went unenumerated. This Court should decide the amendment's adoption did not invalidate Iowa's preexisting statutes.

D. The foregoing leads to a sensible conclusion: this Court should reject Kieffer's attacks on Iowa Code Section 724.31A.

In sum, this Court should affirm. Kieffer's challenges are unpreserved and unripe. Moreover, he challenges are categorically misdirected—due to his conviction for domestic abuse he is no longer among "the people" and a notice statute does not "infringe" on the right to possess firearms. Even if it did, it passes the Second Amendment's "history and tradition" test and survives Article I, Section 1A's strict scrutiny standard because it is narrowly tailored to the compelling government interest of protecting human life from those proven to be dangerous. The statute can be sustained based on "history, consensus, and 'simple common sense.'" *See Webb*, 144 So.3d at 980. This Court should affirm.

CONCLUSION

A substantial basis supported the jury's verdicts. The district court correctly denied Kieffer's requests for mistrial. His constitutional challenges are unpreserved and unpersuasive. The State asks this Court to affirm.

REQUEST FOR NONORAL SUBMISSION

While the State believes the parties' briefs are enough to resolve this appeal, if the Court orders oral argument, the State would be heard.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Tim.Hau@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(e), (f) and 6.903(1)(g)(1) or (2) (2023) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **12,575** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Tim.Hau@ag.iowa.gov