No. 22-915

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF JOSHUA HORWITZ, KELLY ROSKAM, TIMOTHY CAREY, AND 12 OTHER PUBLIC-HEALTH RESEARCHERS AND LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARK G. HANCHET
WAJDI C. MALLAT*
Mayer Brown LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

* *Admitted only in Utah*

NICOLE A. SAHARSKY
Counsel of Record
MINH NGUYEN-DANG
ERIK P. FREDERICKSEN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
nsaharsky@mayerbrown.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

Amici are public-health researchers focused on promoting evidence-based solutions to reduce gun violence.[1] Joshua Horwitz is the Dana Feitler Professor in Gun Violence Prevention and Advocacy and Professor of the Practice at the Johns Hopkins Bloomberg School of Public Health, and the Co-Director of the School's Center for Gun Violence Solutions (the Center). Kelly Roskam is the Center's Director of Law and Policy, and Timothy Carey is a Law and Policy Advisor at the Center. The other *amici* are:

- Shani Buggs, PhD, MPH, Assistant Professor at the University of California, Davis, Violence Prevention Research Program
- Spencer Cantrell, JD, Director of Federal Affairs at the Center and Co-Director of the Extreme Risk Protection Order Training and Technical Assistance Center
- Cassandra Crifasi, PhD, MPH, Associate Professor in the Department of Health Policy and Management at the Johns Hopkins Bloomberg School of Public Health and Co-Director of the Center
- Shannon Frattaroli, PhD, MPH, Professor in the Department of Health Policy and Management at the Johns Hopkins Bloomberg School of Public Health

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amici* to file this brief.

- Lisa Geller, MPH, Director of State Affairs at the Center and Co-Director of the Extreme Risk Protection Order Training and Technical Assistance Center
- Natalie Nanasi, JD, Associate Professor and Director of the Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women at SMU Dedman School of Law
- Keshia Pollack Porter, PhD, MPH, Chair of the Department of Health Policy and Management at the Johns Hopkins Bloomberg School of Public Health
- Susan B. Sorenson, PhD, Professor of Social Policy, Professor of Health & Societies, and Senior Fellow in Public Health at the University of Pennsylvania
- Jon S. Vernick, JD, MPH, Professor and Associate Chair of the Department of Health Policy and Management at the Johns Hopkins Bloomberg School of Public Health
- Daniel W. Webster, ScD, MPH, Bloomberg Professor of American Health in the Department of Health Policy and Management at the Johns Hopkins Bloomberg School of Public Health and Distinguished Scholar at the Center
- Garen J. Wintemute, MD, MPH, Distinguished Professor of Emergency Medicine and Baker-Teret Chair in Violence Prevention at the University of California, Davis
- April M. Zeoli, PhD, MOH, Associate Professor of Health Management and Policy Core Director of the Institute for Firearm Injury Prevention at the University of Michigan

Amici work to reduce gun violence by using public-health research and health-equity analysis to find

innovative solutions to gun violence and put those solutions into action.[2]

Amici have a strong interest in ensuring that the Court's Second Amendment analysis is informed by empirical public-health research, especially in the context of restrictions on gun ownership for dangerous individuals, where significant data exist. They have participated as *amici curiae* in many firearms-related cases in this Court. See, *e.g.*, *New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111 (2022); *United States* v. *Castleman*, 572 U.S. 157 (2014); *McDonald* v. *City of Chi.*, 561 U.S. 742 (2010).

This case involves the constitutionality of the federal statute that prohibits domestic abusers who are subject to protective orders from possessing firearms, 18 U.S.C. 922(g)(8). The Fifth Circuit held that the statute is unconstitutional because, in its view, its restriction on firearm possession is inconsistent with our Nation's historical tradition of firearm regulation. *Amici* submit this brief to provide their unique perspective on the danger posed by domestic abusers having ready access to firearms, and to explain how Section 922(g)(8) fits comfortably within our Nation's historical tradition of disarming individuals who are perceived to be dangerous. *Amici* urge the Court to grant the government's certiorari petition and to hold that Section 922(g)(8) is constitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 922(g)(8) is a critical tool for preventing domestic abuse from escalating into deadly violence.

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[2] *Amici* submit this brief in their individual capacities, and not on behalf of their organizations or academic institutions.

As this Court repeatedly has recognized, domestic abuse is a serious and widespread problem in the United States. See, *e.g.*, *Castleman*, 572 U.S. at 159-160. The presence of a firearm can cause domestic abuse to lead to serious injury or death. *Id.* at 160. The statistics are staggering: Over twelve million U.S. adults are the victims of domestic abuse each year, and the presence of a firearm increases the likelihood that domestic abuse turns deadly by five-fold.

Congress enacted Section 922(g)(8) to address gun violence by domestic abusers. It prohibits individuals who present a heightened risk of engaging in domestic violence but who have not yet been convicted of a crime of domestic violence from owning firearms. Three requirements must be met. First, the person must be subject to a protective order prohibiting him or her from harassing, stalking, or threatening a partner or partner's child. Second, the person must have received actual notice of the hearing that led to issuance of the protective order and been given the opportunity to participate at that hearing. And third, the order either must include a finding by the court that the person represents a credible threat to the partner or child, or must expressly prohibit the person from using, attempting to use, or threating to use force against the partner or child. Courts do not enter those protective orders without determining that an abuser is likely to use physical violence, so only abusers who pose a serious threat of danger are covered by Section 922(g)(8).

The Fifth Circuit held that Section 922(g)(8) is facially unconstitutional under the Second Amendment. That court's invalidation of that important federal statute warrants this Court's review, particularly because cases arise under the statute with great

frequency. Review is especially warranted because the decision below created a circuit split. Before the Court's decision in *New York State Rifle & Pistol Association* v. *Bruen*, *supra*, five courts of appeals had rejected Second Amendment challenges to Section 922(g)(8). The Fifth Circuit has now taken the opposite view, holding that Section 922(g)(8) is not consistent with our Nation's historical tradition of firearm regulation. It suggested that the existing federal appellate decisions are no longer valid in light of *Bruen*, but at least two courts of appeals had upheld Section 922(g)(8) using reasoning that is consistent with *Bruen*. And it cast doubt on the constitutionality of a related statute, Section 922(g)(9), which prohibits those convicted of misdemeanor crimes of domestic violence from owning firearms.

The decision below is profoundly wrong. The *Bruen* Court explained that a firearm regulation is constitutional if it is consistent with our Nation's historical tradition of firearm regulation. The historical evidence shows a longstanding practice in this Nation of disarming people who are perceived to be dangerous. For example, founding-era regulations prohibited disloyal persons, enslaved persons, free Black persons, and Indians from owning firearms because they were thought to be particularly dangerous. Similarly, historical surety laws placed restrictions on gun access by individuals who threatened to do harm. Although some of the historical regulations were based on discriminatory stereotypes and outdated generalizations that would not be accepted today, those regulations reflect the general principle that legislatures may constitutionally prohibit people they deem dangerous from owning firearms.

Here, the empirical evidence firmly establishes that individuals subject to the protective orders described in Section 922(g)(8) are particularly dangerous. Those individuals are significantly more likely to resort to gun violence, often with deadly consequences for their partners. They also pose a threat to others, including other family members, neighbors, law enforcement officers, other first responders, and the general public. The ample experience under Section 922(g)(8) bears that out; the statute has significantly reduced gun violence. The statute thus fits comfortably within our Nation's historical tradition of disarming persons deemed to be dangerous.

In holding otherwise, the Fifth Circuit adopted an unduly restrictive approach to assessing historical firearm regulations. Under that approach, a modern regulation would effectively need to mirror a historical regulation to pass constitutional muster. That approach, if accepted, would present an unjustified and profoundly dangerous expansion of *Bruen*. The Court should grant the certiorari petition and reverse the decision below.

ARGUMENT

I. The Decision Below Warrants This Court's Immediate Review

A. Section 922(g)(8) Addresses The Serious Problem Of Gun Violence Committed By Domestic Abusers

1. Congress enacted Section 922(g)(8) to address a particular problem: domestic abusers who have ready access to firearms. "[D]omestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44." H.R. Rep. No. 395, 103rd Cong., 1st Sess. 14 (1993) (citing Antonia C.

Novello et al., *From the Surgeon General, U.S. Public Health Service, A Medical Response to Domestic Violence*, 267 J. Am. Med. Ass'n 3132, 3132 (1992)). There are "more than a million acts of domestic violence" reported in the United States each year, resulting in "hundreds of deaths." *Castleman*, 572 U.S. at 159-160.

Recent research suggests that the true number of victims is far higher. A CDC report from October 2022 estimated that over twelve million adults in the United States are victims of domestic violence each year. CDC, Nat'l Ctr. for Injury Prevention & Control, *2016/2017 Report on Intimate Partner Violence* 20 tbl.1, 21 tbl.2 (2022). Another recent study found that, in 2017, there were 2,237 intimate partner homicides – a 26% increase from 2010. Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in US Homicide, 1976-2017*, 6 Violence & Gender 27, 36 (2019). Over half of the victims were women. *Ibid.*

When an abuser has access to a firearm, that significantly increases the risk that domestic violence will turn deadly. As this Court has explained, "[d]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 572 U.S. at 160 (citations omitted); see *Voisine* v. *United States*, 579 U.S. 686, 689 (2016) ("[F]irearms and domestic strife are a potentially deadly combination." (quoting *United States* v. *Hayes*, 555 U.S. 415, 427 (2009))). Indeed, the evidence shows that a domestic abuser's access to firearms is one of the most significant risk factors for the escalation of domestic violence: an abused partner is five times more likely to be killed when there is a firearm in the house. Jacquelyn C. Campbell et al., *Risk Factors for*

Femicide in Abusive Relationships: Results from a Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1092 (2019) (Campbell, *Risk Factors*).

The evidence also shows that domestic violence involving firearms is widespread. Approximately one million U.S. women alive today have been shot or shot at by intimate partners. Susan B. Sorenson & Rebecca A. Schut, *Non-Fatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 Trauma, Violence & Abuse 431, 431 (2016). Approximately 4.5 million U.S. women alive today have had intimate partners threaten them with firearms. *Id.* at 432. And more than half of all women murdered in the United States are killed by current or former intimate partners. Neil Websdale et al., *The Domestic Violence Fatality Review Clearinghouse: Introduction to a New National Data System with a Focus on Firearms*, 6 Injury Epidemiology 1, 1 (2019). More than half of these homicides were committed with firearms. *Ibid.*

2. Section 922(g)(8) is a crucial tool for preventing domestic abuse from escalating to serious injury or death. Other related statutory provisions restrict abusers from owning firearms after they have been convicted of felonies, 18 U.S.C. 922(g)(1), or misdemeanor crimes of domestic violence, 18 U.S.C. 922(g)(9). But many abusers are not prosecuted for crimes of domestic violence, in part because victims can be reluctant to pursue prosecutions. See Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St. Louis U. Pub. L. Rev. 7, 16-18 (2004).

Section 922(g)(8) targets individuals who pose a physical threat to their partners but who have not yet

been convicted of crimes of domestic violence. The statute bars those individuals from owning firearms when three requirements are met. First, the person must be subject to a court order that expressly prohibits the person from "harassing, stalking, or threatening" the person's partner or the partner's child. 18 U.S.C. 922(g)(8)(B). Second, the person must have received actual notice of the hearing that led to the protective order and must been given the opportunity to participate at that hearing. 18 U.S.C. 922(g)(8)(A). And third, the protective order either must include a finding by the court that the person "represents a credible threat" to the partner or child or must "explicitly" prohibit the person from using, attempting to use, or threating to use physical force against the partner or child. 18 U.S.C. 922(g)(8)(C).

Only domestic abusers who pose a real danger to their partners or children are covered by Section 922(g)(8). Although in theory a court could issue a protective order prohibiting an abuser from using physical force without expressly finding that the abuser is likely to be violent, see Pet. App. 26a (citing 18 U.S.C. 922(g)(8)(C)(ii)), it is an "almost universal rule of American law" that a court will not issue a protective order enjoining an abuser from using force without first determining that there is a likelihood that the abuser will use force, *United States* v. *Emerson*, 270 F.3d 203, 262 (5th Cir. 2001); see, *e.g.*, Ala. Code § 30-5-5 (2019); Ky. Rev. Stat. Ann. § 403.740(1) (2022); Or. Rev. Stat. Ann. § 107.710 (2015); Utah Code Ann. § 78B-7-603 (2022). It simply is not the case that courts enter these types of orders "automatically" and "despite the absence of any real threat of danger." Pet. App. 39a (Ho, J., concurring).

Section 922(g)(8) thus applies only to abusers who "reflect[] a real threat or danger of injury" to others. *Emerson*, 270 F.3d at 262. By "deter[ring]" those individuals from owning firearms, Section 922(g)(8) "promote[s] public safety" and prevents serious injury and death. *Castleman*, 572 U.S. at 174 (Scalia, J., concurring in part and concurring in the judgment).

In the decision below, the Fifth Circuit did not acknowledge the serious, widespread problem of domestic abuse, or the critical role that Section 922(g)(8) plays in preventing that abuse from escalating. See Pet. App. 11a. Yet for many abuse victims – and their family members, friends, neighbors, and local law enforcement officers – the validity of Section 922(g)(8) is literally a matter of life or death. See 142 Cong. Rec. S2646 (Mar. 21, 1996) (statement of Sen. Lautenberg) ("Often, the only difference between a battered woman and a dead woman is the presence of a gun.").

B. The Decision Below Invalidated An Important Federal Statute And Created A Circuit Split

The Court's immediate review is warranted because the Fifth Circuit invalidated a longstanding, important Act of Congress and created a circuit split on a question that arises with great frequency.

1. Congress enacted Section 922(g)(8) nearly thirty years ago. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110,401, 108 Stat. 1796. The decision below is the first appellate decision to conclude that Section 922(g)(8) is unconstitutional. The Fifth Circuit's facial invalidation of the statute warrants this Court's review. See, *e.g.*, *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019).

2. The Fifth Circuit's decision also creates a circuit split. As a result, an individual subject to a protective order described in Section 922(g)(8) can legally own a firearm in Texas but not across the border in Arkansas. The Court should grant review to prevent that patchwork application of this important law.

Before the Fifth Circuit's decision, five courts of appeals (including the Fifth Circuit) had rejected Second Amendment challenges to the statute. See *United States* v. *Boyd*, 999 F.3d 171, 186 (3d Cir. 2021); *United States* v. *McGinnis*, 956 F.3d 747, 758 (5th Cir. 2020), cert. denied, 141 S. Ct. 1397 (2021); *United States* v. *Chapman*, 666 F.3d 220, 231 (4th Cir. 2012); *United States* v. *Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011); *United States* v. *Reese*, 627 F.3d 792, 801-804 (10th Cir. 2010); *Emerson*, 270 F.3d at 264-265; see also *United States* v. *Haas*, No. 22-5054, 2022 WL 15048667, at *2 n.1 (10th Cir. Oct. 27, 2022) (per curiam) (noting that, as of October 2022, "no court has found § 922(g)(8) unconstitutional").

The Fifth Circuit concluded that previous decisions upholding the constitutionality of Section 922(g)(8) were no longer good law in light of this Court's decision in *New York State Rifle & Pistol Association* v. *Bruen*, *supra*. Pet. App. 6a-7a. Before *Bruen*, the courts of appeals generally applied a two-step test to determine whether a gun restriction was constitutional under the Second Amendment. See 142 S. Ct. at 2125. At the first step, a court considered whether the conduct at issue fell within the scope of the Second Amendment as it was historically understood. See *id.* at 2126. If the historical evidence was "inconclusive or suggest[ed] that the regulated activity is *not* categorically unprotected," then at the second step the court upheld the restriction if it satisfied

strict or intermediate scrutiny. *Ibid.* (quoting *Kanter* v. *Barr*, 919 F.3d 437, 441 (7th Cir. 2019)). In *Bruen*, the Court endorsed the first step, but rejected the second step. *Id.* at 2127. Because many of the previous court of appeals decisions upholding Section 922(g)(8) had relied on the second step of the pre-*Bruen* framework, the court below concluded that *Bruen* abrogated those decisions. Pet. App. 6a-7a.

But the decisions of the Third and Eighth Circuits did not rely on the approach rejected in *Bruen*, and thus remain good law following that decision.[3] The Third and Eighth Circuits upheld Section 922(g)(8) on the basis that the statute "is consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens" and did not reach the second step. *Bena*, 664 F.3d at 1184; see *Boyd*, 999 F.3d at 186-188 (concluding that domestic abusers fall into "the class of presumptively dangerous persons who historically lack Second Amendment protections"). Thus, because *Bena* and *Boyd* rely solely on the "Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2130, those decisions are consistent with *Bruen*. See *United States* v. *Hammond*, No. 22-cr-177, 2023 WL 2319321, at *2-4 (S.D. Iowa Feb. 15, 2023) (concluding that *Bena* remains good law after *Bruen*).

3. The question whether Section 922(g)(8) comports with the Second Amendment is frequently litigated. As noted, five courts of appeals already have addressed that question. Many cases presenting the issue have recently arisen in the federal district

[3] The Tenth Circuit also has suggested that Section 922(g)(8) remains constitutional after *Bruen*, albeit in an unpublished decision. See *Haas*, 2022 WL 15048667, at *2.

courts. See *United States* v. *Guthery*, No. 22-cr-173, 2023 WL 2696824, at *4-10 (E.D. Cal. Mar. 29, 2023); *United States* v. *Combs*, No. 22-cr-136, 2023 WL 1466614, at *5 (E.D. Ky. Feb. 2, 2023), appeal pending, No. 23-5121 (6th Cir. filed Feb. 23, 2023); *United States* v. *Jordan*, No. 22-cr-339 (W.D. Okla. Oct. 25, 2022), slip op. 5, appeal pending, No. 23-6027 (10th Cir. filed Mar. 3, 2023); *United States* v. *Kays*, No. 22-cr-40, 2022 WL 3718519, at *3-4 (W.D. Okla. Aug. 29, 2022); *United States* v. *Perez-Gallan*, No. 22-cr-427, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022), appeal pending, No. 22-51019 (5th Cir. filed Nov. 17, 2022). More cases are likely to follow.

Notably, those district courts have reached different conclusions. Compare *Guthery*, 2023 WL 2696824, at *9 (Section 922(g)(8) is constitutional), *Kays*, 2022 WL 3718519, at *4 (same), and *Jordan*, slip op. 10 (same), with *Combs*, 2023 WL 1466614, at *5 (Section 922(g)(8) is unconstitutional), and *Perez-Gallan*, 2022 WL 16858516, at *13 (same). And the courts have been candid in the need for additional guidance from this Court on how to apply *Bruen*. See *Kays*, 2022 WL 3718519, at *5 ("[T]he effect of the Supreme Court's decision in *Bruen* on longstanding criminal prohibitions such as § 922(g) * * * remains unclear."); *Perez-Gallan*, 2022 WL 16858516, at *13 ("[O]ne could easily imagine a scenario where separate courts can come to different conclusions on a law's constitutionality, but both courts would be right under *Bruen*."). The Court should grant review to provide that needed guidance.

C. The Decision Below Casts Doubt On The Constitutionality Of A Related Federal Statute

The Court's review also is warranted because the decision below casts doubt on the validity of Section 922(g)(9), which applies to individuals who have been convicted of misdemeanor crimes of domestic violence. See 18 U.S.C. 922(g)(9). As this Court has explained, Congress enacted Section 922(g)(9) "to close a dangerous loophole in the gun control laws: While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors." *Castleman*, 572 U.S. at 160 (internal quotation marks omitted).

As with Section 922(g)(8), every court of appeals that considered Second Amendment challenges to Section 922(g)(9) before *Bruen* rejected those challenges. See *Stimmel* v. *Sessions*, 879 F.3d 198, 212 (6th Cir. 2018); *United States* v. *Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013); *United States* v. *Booker*, 644 F.3d 12, 22-26 (1st Cir. 2011); *United States* v. *Staten*, 666 F.3d 154, 160-161 (4th Cir. 2011); *United States* v. *Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc); *United States* v. *White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010). After *Bruen*, district courts have unanimously concluded that those decisions remain valid, because Section 922(g)(9) falls comfortably within the Nation's longstanding tradition of disarming those convicted of violent crimes.[4]

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[4] See *United States* v. *Padgett*, No. 21-cr-107, 2023 WL 2986935, at *11 (D. Alaska Apr. 18, 2023); *United States* v. *Bruner*, No. 22-cr-518, 2023 WL 2653392, at *2 (W.D. Okla. Mar. 27, 2023); *United States* v. *Hoeft*, No. 21-cr-40163, 2023 WL 2586030, at *3-4 (D.S.D. Mar. 21, 2023); *United States* v. *Porter*,

The Fifth Circuit did not directly address Section 922(g)(9) in the decision below. But it strongly hinted that, given the opportunity, it would facially invalidate that statute as well. The court quoted with approval four law review articles that argued that "there is simply no tradition * * * of prohibiting gun possession * * * for people convicted of misdemeanor[]" crimes of domestic violence – *i.e.*, those to whom Section 922(g)(9) applies. Pet. App. 27a n.11 (quoting David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis L. J. 193, 244 (2017)). Thus, if left unreviewed, the decision below will cast a cloud over Section 922(g)(9), another important tool for preventing domestic abusers from committing gun violence. See *Hayes*, 555 U.S. at 426.

II. The Decision Below Is Profoundly Wrong

The *Bruen* Court explained that when the plain text of the Second Amendment covers an individual's conduct, a regulation restricting that conduct is constitutional if the regulation "is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2129-2130. A modern-day regulation is consistent with historical tradition if it operates in a similar way as a historical regulation and has a similar rationale as a historical regulation. *Id.* at 2133

No. 22-cr-277, 2023 WL 2527878, at *3-4 (W.D. La. Mar. 14, 2023); *Hammond*, 2023 WL 2319321, at *4; *United States* v. *Farley*, No. 22-cr-30022, 2023 WL 1825066, at *3 (C.D. Ill. Feb. 8, 2023); *United States* v. *Gleaves*, No. 22-cr-14, 2023 WL 1791866, at *4 (M.D. Tenn. Feb. 6, 2023); *United States* v. *Bernard*, No. 22-cr-03, 2022 WL 17416681, at *6 (N.D. Iowa Dec. 5, 2022); *United States* v. *Anderson*, No. 21-cr-13, 2022 WL 10208253, at *1 (W.D. Va. Oct. 17, 2022); *United States* v. *Nutter*, No. 21-cr-142, 2022 WL 3718518, at *6-7 (S.D. W. Va. Aug. 29, 2022); *United States* v. *Jackson*, No. 22-cr-59, 2022 WL 3582504, at *3 (W.D. Okla. Aug. 19, 2022).

(modern regulation is constitutional if "how and why" it restricts firearms is comparable to a historical regulation). The Court emphasized that the Second Amendment is not a "regulatory straightjacket": the government need only identify "a well-established and representative historical *analogue*, not a historical *twin*." *Ibid.*; see *Kanter*, 919 F.3d at 464-465 (Barrett, J., dissenting) (modern regulations do not need to "mirror limits that were on the books in 1791" (internal quotation marks omitted)).

Here, even assuming that the plain text of the Second Amendment covers respondent's conduct, Section 922(g)(8) fits comfortably within the Nation's historical tradition of disarming individuals who are perceived to be dangerous, and the Fifth Circuit erred in concluding otherwise.

A. Our Nation Has A Long History Of Disarming Individuals Perceived To Be Dangerous

To determine whether a regulation is consistent with historical tradition, courts look to the firearm regulations that were in effect around the ratification of the Second and Fourteenth Amendments. See *Bruen*, 142 S. Ct. at 2127-2131. That history demonstrates that our Nation has a longstanding tradition of restricting people deemed to be dangerous from possessing firearms. See, *e.g.*, *Kanter*, 919 F.3d at 453-458 (Barrett, J., dissenting); *Binderup* v. *Attorney General*, 836 F.3d 336, 367-371 (3d Cir. 2016) (Hardiman, J., concurring); *United States* v. *Bartucci*, No. 19-cr-244, 2023 WL 2189530, at *7-8 (E.D. Cal. Feb. 23, 2023).

Many founding-era regulations prohibited specified categories of persons perceived to be dangerous to

public safety from owning firearms. For example, Massachusetts, Pennsylvania, and Virginia enacted laws that prohibited those who refused to swear loyalty to the government from owning firearms, on the theory that those persons were untrustworthy. See Act of Mar. 14, 1776, Ch. VII, 1775-1776 Mass. Acts 31-32, 35; An Act . . . for Disarming Persons Who Shall not Have Given Attestations of Allegiance and Fidelity to this State, §§ 4-5, 1779 Pa. Laws 193; Act of May 5, 1777, Ch. 3 (Va.). Other States enacted laws prohibiting enslaved persons, free Black persons, or Indians from possessing weapons, again on the theory that those persons posed a special danger to public safety. See, *e.g.*, An Act in Relation to Free Negroes and Mulattoes, § 7, 1863 Del. Laws 332, Ch. 305; 1798 Ky. Acts 106, § 5; A Law Respecting Slaves, § 4, 1804 Ind. Acts 108.

Many of those historical regulations are based on classifications that are "repugnant" today. *Range* v. *Attorney General*, 53 F.4th 262, 277 n.19 (3d Cir. 2022), reh'g en banc granted, 56 F.4th 992 (3d Cir. 2023). Nonetheless, these regulations firmly establish that it was generally accepted, from the founding and through the ratification of the Fourteenth Amendment, that a legislature could "take the right to bear arms away from a category of people that it deem[ed] dangerous." *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting). Modern legislatures do not have to rely on discriminatory stereotypes or outmoded generalizations about who might be dangerous; they can make "present-day judgments about categories of people whose possession of guns would endanger the public safety" based on empirical evidence. *Id.* at 464-465.

Proposals made at state ratifying conventions confirm that dangerous people who pose risks to public health and safety can be lawfully disarmed. This Court has explained those proposals can be "highly influential" in understanding the scope of the Second Amendment during the founding era. *District of Columbia* v. *Heller*, 554 U.S. 570, 604 (2008). As relevant here, one proposal presented at Pennsylvania's convention stated that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971). And at Massachusetts' convention, Samuel Adams presented a proposal that stated that Congress should not "prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 265-266 (2020) (internal quotation marks omitted). At the time, "peaceable" meant non-violent. *Ibid.* These proposals demonstrate that the founding-era understanding of the Second Amendment permitted legislatures to disarm dangerous persons.

Historical surety laws further confirm the longstanding tradition of regulating firearm possession by persons who pose a danger to others. Surety laws were firearm restrictions that "typically targeted only those threatening to do harm." *Bruen*, 142 S. Ct. at 2148. Those laws prevented a person from carrying weapons if there was a "just cause to fear" that the person would injure others or destroy property unless they paid a surety fee. 4 William Blackstone, *Commentaries on the Laws of England* 18, 255 (1769). Surety fees thus were preventative tools used to mitigate the risks of foreseeable violence; for many, the

fees likely acted as barriers from owning firearms altogether.

Taken together, the historical evidence is clear: Our Nation always has permitted the government to disarm a person it deems to be dangerous or otherwise restrict that person from owning firearms.

B. Domestic Abusers Subject To Section 922(g)(8) Are Particularly Dangerous

Section 922(g)(8) fits comfortably within the Nation's historical tradition of disarming persons deemed to be dangerous. Indeed, it is more well-grounded than many of those laws. Unlike historical laws that relied on stereotypes or generalizations, Section 922(g)(8) is based on robust empirical evidence that shows that individuals subject to the protective orders described in the statute endanger the safety of intimate partners, children, extended family members, first responders, and the general public.

Section 922(g)(8) also is more protective of the Second Amendment right than many historical regulations, because it requires individualized determinations of dangerousness, rather than relying on generalizations about entire classes of people. Further, it applies only while the underlying protective order remains in effect, rather than for the person's lifetime.

The evidence firmly establishes that individuals subject to protective orders are particularly prone to committing gun violence. One study of domestic violence in Texas found that victims who sought protective orders were significantly more likely to report that their abusers threatened them with guns, pointed guns at them, coerced them at gunpoint, and hurt them with guns. Kellie R. Lynch et al., *Firearm-Related Abuse and Protective Order Requests Among*

Intimate Partner Violence Victims, 37 J. Interp. Violence 12,974, 12,984 tbl.2 (2021) (Lynch, *Firearm-Related Abuse*). Another study found that abusers who previously threatened to kill their partners were more likely to carry out those threats, and to use a gun to do so. Campbell, *Risk Factors*, at 1090.

The evidence also establishes that individuals subject to protective orders pose a heightened risk of danger to people other than their partners. Nearly thirty percent of intimate partner homicides involve additional victims. Sharon G. Smith et al., *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System, 2003-2009*, 104 Am. J. Pub. Health 461, 463 (2014). Other family members and friends are particularly at risk: The Texas study found that victims who sought protective orders were significantly more likely to report that their abusers threatened to shoot their children, family, or friends. Lynch, *Firearm-Related Abuse*, at 12,984 tbl.2; see Sierra Smucker et al., *Suicide and Additional Homicides Associated with Intimate Partner Homicide: North Carolina 2004–2013*, 95 J. Urban Health 337, 337 (2018) (most common additional victims of domestic violence are the victim's children, current partner, and friends or roommates). Domestic abusers also pose a particular risk to first responders: Between 2011 and 2020, nationwide 43 law enforcement officers were killed responding to domestic disturbance or domestic violence calls. Emma Tucker, *Domestic Incidents are Highly Dangerous for Police Officers, Experts Say*, CNN (Jan. 22, 2022), https://perma.cc/MH33-2RUT; see *Skoien*, 614 F.3d at 644 (responding to domestic violence incidents is "among an officer's most risky duties").

Individuals subject to protective orders also pose a danger to the general public. The Texas study found that victims who sought protective orders were significantly more likely to report that their abusers threatened to shoot others in public places, such as strangers. Lynch, *Firearm-Related Abuse*, at 12,983. Another study found that the shooter in 68% of mass shootings between 2014 and 2019 either had killed an intimate partner or other family member or had a history of domestic violence. Lisa B. Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014-2019*, 8 Injury Epidemiology 38, 43 (2021). This case demonstrates the threat that domestic abusers pose to the broader public: When respondent realized that a bystander had seen him grabbing his girlfriend's wrist, knocking her to the ground, and dragging her to his car, he retrieved his gun and fired a shot. Pet. 2.

Studies have found that Section 922(g)(8) is effective in reducing violence, which confirms that the individuals subject to the statute are dangerous. One study found that Section 922(g)(8) is associated with a 27% reduction in intimate partner homicide. Mikaela A. Wallin et al., *The Association of Federal and State-Level Firearm Restriction Policies with Intimate Partner Homicide: A Re-Analysis by Race of the Victim*, 37 J. of Interpersonal Violence 17, 17 (2022). Another study showed that state laws similar to Section 922(g)(8) that restrict domestic abusers subject to protective orders from accessing guns are associated with significant reductions in intimate partner homicide. April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 Am. J. of Epidemiology 2365, 2368 tbl.1 (2018).

In sum, the evidence shows that the individuals subject to Section 922(g)(8) are particularly dangerous. The statute thus fits comfortably within the Nation's longstanding practice of disarming people who are perceived to be dangerous.

C. The Fifth Circuit Misapplied *Bruen*

The court below held that Section 922(g)(8) is not consistent with the Nation's historical tradition of firearm regulation. Pet. App. 17a. The court discounted all of the historical regulations that the government presented on the ground that those regulations are not sufficiently similar to Section 922(g)(8). See *id.* at 17a-27a. For example, the court below took the view that Section 922(g)(8) is not analogous to historical prohibitions on disloyal persons, enslaved persons, free Black persons, and Indians from owning firearms because (in its view) those prohibitions were based on a desire to "preserv[e] political and social order," rather than protecting "an identified person from the threat of domestic gun abuse." *Id.* at 20a (internal quotation marks omitted).

As the government's petition explains, the Fifth Circuit sliced the historical evidence too thinly. See Pet. 11-13. Section 922(g)(8) only needs to be "comparably justified" to a historical regulation; it does not need to be a "twin." *Bruen*, 142 S. Ct. at 2133 (emphasis omitted). The fundamental rationale behind the historical status-based prohibitions was that the classes of persons targeted were deemed dangerous to others, including society at large. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 156-160 (2007). As explained, Congress reasonably determined that domestic abusers who are particularly

likely to use physical violence are dangerous to others, including society at large. See pp. 19-21, *supra*.

The Fifth Circuit's unduly cramped approach to historical analysis, if accepted, would turn the Second Amendment into precisely the "regulatory strait-jacket" that this Court warned against. *Bruen*, 142 S. Ct. at 2133. The Court should grant review to prevent that unwarranted expansion of *Bruen*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK G. HANCHET
WAJDI C. MALLAT*
Mayer Brown LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

* *Admitted only in Utah*

NICOLE A. SAHARSKY
Counsel of Record
MINH NGUYEN-DANG
ERIK P. FREDERICKSEN
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
nsaharsky@mayerbrown.com

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