No. 22-915

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZACKEY RAHIMI,
Respondent.

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

BRIEF *AMICUS CURIAE* FOR THE TEXAS ADVOCACY PROJECT IN SUPPORT OF PETITIONER

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Statement of Interest of Amicus Curiae[1]

Texas Advocacy Project is a Texas non-profit, the mission of which is to end dating and domestic violence, sexual assault, and stalking in Texas. Texas Advocacy Project empowers survivors through free legal services and access to the justice system, and advances prevention through public outreach and education. Its vision is that all Texans live free from abuse. As a threshold matter, that vision can be realized only when domestic violence victims survive, the possibility of which is diminished by the presence of a gun at critical junctures in an abusive relationship.

Statement of the Case

The Texas court order on which Rahimi's conviction was predicated found that Rahimi had committed domestic violence and posed a risk of further violence. Rahimi's protective order had been preceded by domestic violence, including firing a gun, a death threat, and dragging and hitting. Rahimi had notice and an opportunity to respond to the allegations, appeared in court, and agreed to entry of the domestic violence protective order ("DVPO"). Among other restrictions, the DVPO prohibited

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[1] Pursuant to Rule 37.2, counsel for amicus curiae provided timely notice to all parties of its intent to file this amicus brief and those parties acknowledged receipt. Further, per this Court's Rule 37.6, amicus curiae affirm no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation of this amicus brief.

Rahimi from possessing firearms. Despite that, he then participated in a series of shootings. Rahimi had received and possessed, at the time a search warrant was executed, a copy of the DVPO prohibiting him from possessing firearms. He also possessed, at the time the search warrant was executed, a .45-caliber pistol, a .308-caliber rifle, pistol and rifle magazines, and ammunition. Rahimi was charged under 18 U.S.C. § 922(g)(8)(C)(i). Pet. Br. 2-4.

Summary of the Argument

The Fifth Circuit's decision below erred in holding that Section 922(g)(8) is facially unconstitutional under the Second Amendment. The court of appeals misapplied this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), misconstrued historical precedent, and ignored Article III case-or-controversy limitations. Further, the court of appeals seems to misunderstand DVPOs, and, citing largely hypothetical concerns and dated anecdotes, invalidated Section 922(g)(8) based in part on that misunderstanding. As a direct result of the court of appeal's decision, domestic partners and children, and also first responders, by-standers and the general public, are at risk of serious or fatal injury.

Argument

I. The Fifth Circuit ignored the conditional nature of the English Bill of Rights.

Although the Fifth Circuit states that the 1689 English Bill of Rights, which guaranteed "[t]hat the subjects which are Protestants may have arms for

their [defense] suitable to their Conditions and as allowed by Law," 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441, was a predecessor to the Second Amendment, it ignores that the bill of rights was ***conditional***. Pet. App. 18a. The guarantee extended only to arms "suitable to" the "Conditions" of such persons and even then, only as "allowed by Law." Congress, by Section 922(g)(8), made a reasonable determination that, during the limited period that potentially violent persons are under a protective order, they pose an unacceptable risk to others. For those offenders, and during that crucial time, a gun is not "suitable to their Conditions" and is not "allowed by Law."

II. The Fifth Circuit ignored *Bruen's* exhortation that analogues need not be "dead ringers."

A. The "dangerousness" laws are analogues.

That the "dangerousness" laws disarmed people by class, rather than an individual evaluation of dangerousness, does not mean that such laws are not analogues for Section 922(g)(8). Pet. App. 19a-20a. While we no longer view certain religions, races or economic classes as dangerous, Congress can rationally determine, in a way not constitutionally suspect, that certain classes are dangerous. Certainly, classifying persons as criminal based on their actions—rather than their identity—is fundamental to our criminal justice system. Here, Congress rationally determined that this class of potentially violent domestic offenders, i.e., those who have acted

in such a way that there is a reasonable fear of bodily injury to their partner or child, and who had notice and an opportunity to state his or her case, should not possess a gun for the generally short period of time most persons are subject to a state-issued protective order. The "dangerousness" laws are analogues for Section 922(g)(8).

B. The "going armed" laws are analogues.

1. The Fifth Circuit's concern that the underlying protective order issues in a civil proceeding is misplaced: the crime prosecuted, under both state and federal law, is the violation of the civil order.

The Fifth Circuit held that the "going armed" cases were not analogues to Section 922(g)(8) because ***in the underlying state court civil proceeding***, Rahimi agreed to an order "without counsel or other safeguards that would be afforded him" in a criminal proceeding. Pet. App. 23a-24a. But Rahimi was not criminally charged in that proceeding. Under both state and federal law, criminal exposure arises only if and when the person subject to a protective order violates that order. *See, e.g.,* TEX. PEN. CODE ANN. § 25.07 (West 2021); 18 U.S.C. § 922(g)(8). Rahimi's DVPO expressly advised him that violating the order was punishable either by contempt or as a separate criminal violation and that he was forbidden by federal law from possessing a gun. Rahimi had direct personal notice of the effect of violating the DVPO.

Rahimi's current Section 922(g)(8)(C)(i) charge is based on his violation of a prohibition in the underlying agreed DVPO, i.e., possessing a firearm, and he was ably represented by counsel in this proceeding. The Fifth Circuit mischaracterized the protective order process, leading to its erroneous decision to overturn Section 922(g)(8). The Fifth Circuit's holding below also conflicts with decisions from the Seventh, Eighth and Tenth Circuits, all of which held that a person need ***not*** be represented by counsel in the underlying state proceeding. *See United States v. Bena*, 664 F.3d 1180, 1185 (8th Cir. 2011); *United States v. Edge*, 238 F. App'x 366, 369 (10th Cir. 2007); *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir.1998), *cert. denied*, 527 U.S. 1024 (1999).

2. The Fifth Circuit wrongly discounted the "going armed" analogues based on its mistaken assumption that predicate Section 922(g)(8) orders are routinely entered in divorce cases.

The Fifth Circuit mistakenly asserted that predicate domestic violence orders are commonly issued in divorces in which there has been no violence. Pet. App. 24a. The court stated, "§ 922(g)(8) works to disarm not only individuals who are threats to other individuals but also every party to a domestic proceeding (think: divorce court) who, with no history of violence whatever, becomes subject to a domestic restraining order that contains boilerplate language that tracks § 922(g)(8)(C)(ii)." *Id.* It is true that a court, in a divorce, may issue a temporary restraining

order ("TRO") without notice or hearing to restrain the parties from, among other things, secreting assets or disparaging their partner to their children—and that the TRO can sometimes restrain one or both parties from violence. *See, e.g.,* TEX. FAMILY CODE ANN. § 6.501 (West 2020). In Texas, the TRO, which cannot be a predicate Section 922(g)(8) order, may be replaced with temporary orders, after notice and hearing. TEX. FAMILY CODE ANN. § 6.502 (West 2020). An order issuing from that hearing could possibly be a Section 922(g)(8)(C)(ii) predicate order: that was the type of order upheld by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001), *cert. denied*, 536 U.S. 907. In that case, Emerson had been enjoined from threatening or injuring his family after a hearing in which the court found he had threatened the life of his wife's paramour and had testified that he was suffering from "anxiety" and was not "mentally in a good state of mind." *Emerson*, 270 F.3d at 211. The *Emerson* court upheld the Section 922(g)(8)(C)(ii) conviction, holding that even though the underlying order contained no express findings, a Texas injunction would not issue unless the issuing court concluded, based on adequate evidence developed at a hearing, "that the party restrained would otherwise pose a realistic threat of imminent physical injury to the protected party." *Emerson*, 270 F.3d at 264.

Additionally, some courts sign standing orders that issue in certain family law cases, on a pro forma basis. That is apparently the type of order that the Fifth Circuit addressed below. Pet. App. 24a. But as discussed above, such orders, issued without notice and an opportunity to participate in a hearing, are not

and cannot be predicate Section 922(g)(8) orders.[2] The Fifth Circuit cited no support for its assertion that the language of pro forma standing orders ordinarily tracks Sections 922(g)(8)(B) and (C)(ii), or that such orders are issued ***after*** notice and hearing, as they must be, to be predicate orders. In Texas, standing orders are issued without notice or a hearing under Texas Family Code § 6.501, and, if a party requests a hearing under Texas Family Code § 6.502, the court would have to make the implied findings required by Texas law and upheld by the *Emerson* court, for the order to issue. It is only then that such an order could possibly serve as a predicate Section 922(g)(8)(C)(ii) order.

By contrast, DVPOs issue after notice and a hearing, and, in at least forty-six states, state law requires that the trial court find that domestic violence has occurred or is likely to occur, before issuing a DVPO.[3] For example, under Texas Family

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[2] For purposes of § 922(g)(8), notice "necessarily means that the hearing must have been set for a particular time and place and the defendant must have received notice of that and thereafter the hearing must have been held at that time and place." *United States v. Spruill*, 292 F.3d 207, 220 (5th Cir. 2002).

[3] *See, e.g.,* ALASKA STAT. § 18.66.100(b) (2022); ARIZ. REV. STAT. ANN. § 13-3602(E) (2022); ARK. CODE ANN. § 9-15-205(a) (West 2022); CAL. FAM. CODE § 6300(a) (West 2022); COLO. REV. STAT. ANN. § 13-14-106(1)(a) (West 2022); D.C. CODE § 16-1005(c) (2022); DEL. CODE ANN. TIT. 10 § 1043(e) (2022); DEL. CODE ANN. TIT. 10 § 1044 (2022); FLA. STAT. ANN. § 741.30(6)(a) (West 2022); GA. CODE ANN. § 19-13-3(b) and (c) (West 2023); HAW. REV. STAT. § 586-4 (2023); HAW. REV. STAT. § 586-5.5 (2023); IDAHO CODE ANN. § 39-6306(1) (2022); 750 ILL. COMP. STAT. ANN. § 60-214(a) (West 2022); IND. CODE ANN. § 34-26-5-9(a) and (h) (West 2023);

Code § 82.005, a person seeking a protective order who is a party to a suit for dissolution of marriage must file a petition, as all DVPO applicants must, under Texas Family Code § 85.001, which the trial court will grant only if it finds that family violence has occurred ***and*** is likely to occur again in the future. *See, e.g.,* TEX. FAMILY CODE ANN. §§ 82.005; 85.001 (West 2019). Section 85.001 was also the basis of the DVPO issued against Rahimi. These procedural protections are

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IND. CODE ANN. § 34-26-6-10 (West 2023); IOWA CODE ANN § 236.5(1) (West 2023); KAN. STAT. ANN. § 60-3106(a) (West 2023); KY. REV. STAT. ANN. § 403.740(1) (West 2023); MASS. GEN. LAWS ANN. CH. 209A § 4 (West 2022); MD. CODE ANN. FAM. LAW § 4-506(c)(1)(ii) (West 2022); ME. REV. STAT. ANN. TIT. 19-A § 4110 (2022); MICH. COMP. LAWS ANN. § 600.2950(4) (West 2023); MISS. CODE ANN. § 93-21-15 (West 2023); MO. ANN. STAT. § 455.040 (West 2022); MONT. CODE ANN. § 40-15-202(1) (2023); N.C. GEN. STAT. ANN. § 50B-2(c)(5) (West 2022); N.D. CENT. CODE ANN. § 14-07.1-02(2)-(3) (2023); N.H. REV. STAT. ANN. § 173-B-3(VII)(a) (2023); N.J. STAT. ANN. § 2C-25:29(a) (West 2023); N.M. STAT. ANN. § 40-13-4 (West 2023); N.Y. FAM. CT. ACT. § 842 (West 2023); NEV. REV. STAT. ANN. § 33.020(5)-(6) (West 2023); OHIO REV. CODE ANN. § 3113.31(2)(a) (West 2023); OKLA. STAT. ANN. TIT. 22 § 60.3 (West 2023); 23 PA. CONS. STAT. ANN. § 6107(a) (West 2022); R.I. GEN. LAWS ANN. § 15-15-4 (2023); S.C. CODE ANN. § 20-4-50 (2023); S.C. CODE ANN. § 20-4-70(A) (2023); S.D. CODIFIED LAWS § 25-10-6 (2023); TENN. CODE ANN. § 36-3-605(a)-(b) (West 2023); TEX. FAM. CODE ANN. § 84.001(a)(b) (West 2021); UTAH CODE ANN. § 78B070604(1)(a)(b) (West 2023); VA. CODE ANN. § 16.1-253(F) (West 2023); VA. CODE ANN. § 16.1-253.1(D) (West 2023); VT. STAT. ANN. TIT. 15 § 1103(c)(1) (2022); W. VA. CODE ANN. § 48-27-501 (West 2023); WASH. REV. CODE ANN. § 7.105 (West 2023); WIS. STAT. ANN. § 813.0250(2) (West 2022); WYO. STAT. ANN. § 35-21-104 (2023). In other states, a different procedure, like Connecticut's risk analysis, may be performed. CONN. GEN. STAT. ANN. § 46b-15 (West 2023).

typical of modern DVPOs. The Fifth Circuit was simply mistaken.

Importantly, if the Fifth Circuit was right, we would have seen many, many Section 922(g)(8)(C)(ii) cases in which there had been no history of actual or threatened violence. Section 922(g)(8) was promulgated in 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103–322, § 110401(c), 108 Stat. 1796, 2014–2015 (1994). Between 2000 and 2021, in 45 reporting states—not including California—18,363,289 divorces were granted. Centers for Disease Control and Prevention, National Center for Health Statistics, Marriages and Divorces, *Provisional number of divorces and annulments and rates: United States, 2000-2021*, available at https://www.cdc.gov/nchs/data/dvs/marriage-divorce/national-marriage-divorce-rates-00-21.pdf (last visited Apr. 14, 2023). Roughly 40% of American households own guns. Kim Parker, Juliana Menasce Horowitz, Ruth Igielnik, J. Baxter Oliphant and Anna Brown, *The demographics of gun ownership*, Pew Research Center (2017), available at https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/. If state courts regularly imposed pro forma conditions during a typical divorce that created a violation of Section 922(g)(8), regardless of a history of actual or threatened domestic violence, we would expect to have seen many thousands (or hundreds of thousands) of such prosecutions. Instead, we've found ***none***. Comparing the number of divorces that occur with the distinct lack of Section 922(g)(8) prosecutions of persons with no history of violence or threatened

violence, it is clear that Section 922(g)(8) has worked as intended for almost thirty years. The Fifth Circuit's speculative concerns are misplaced. Further, as discussed below, the court wrongly considered hypothetical Section 922(g)(8)(C)(ii) prosecutions in a case charged under Section 922(g)(8)(C)(i).

C. The surety laws are analogues.

The Fifth Circuit held that the surety laws were not analogues because they were less restrictive than Section 922(g)(8). Pet. App. 26a. But the surety laws allowed the potentially dangerous person to be imprisoned before trial if he or she could not produce a surety. The imprisoned person—more likely an impoverished person or one of ill-repute—was completely deprived of his or her freedom as well as his access to arms. The Fifth Circuit also justified its rejection of the surety laws as analogues, as it did with the "going armed" laws, on its mistaken assumption that predicate domestic violence orders are commonly issued in divorces in which there has been no violence or threat of violence. Pet. App. 26a. Here, again, the Fifth Circuit's assumption is wrong.

III. By dispensing with the requirements for facial constitutional challenges, the Fifth Circuit flipped and increased the burden of proof, elevating the Second Amendment to a "super-amendment"—and disregarding the Constitution's case-or-controversy limitation.

The Fifth Circuit effectively held that the Supreme Court, in *Bruen*, had *sub silencio* overturned years of jurisprudence that would require the person

claiming an act is facially unconstitutional to establish that no set of circumstances exists under which the act would be valid. *See, e.g., United States v. Salerno*, 481 U.S. 739, 755 (1987). It turned the inquiry on its head: instead of the petitioner proving that the challenged statute is unconstitutional in all circumstances, it requires the government to prove the statute ***is*** constitutional in all circumstances. By doing so, the Fifth Circuit elevated the Second Amendment to preeminent status among all constitutional amendments.

The court of appeals thereby ignored Article III's case-or-controversy requirement, untethering its analysis from the facts and the law of the case before it—something other post-*Bruen* cases have refused to do.[4] That was reflected in the court's free-ranging discussion of hypothetical statutes (one that disarms for failure to drive an electric vehicle or recycle, Pet. App. 11a), speculative events (that pro forma family law court orders are routinely predicate Section 922(g)(8) orders, Pet. App. 24a, and that DVPOs are particularly abused, Pet. App. 37a-41a (Ho, J.,

[4] At the time of drafting, only district courts have published opinions. *See, e.g., United States v. Lindsey,* No. 4:22-cr-00138-SMR-HCA-1, 2023 WL 2597592, at *2 (S.D. Iowa Mar. 10, 2023); *United States v. Gore*, No. 2:23-CR-04, 2023 WL 2141032, at *1 (S.D. Ohio Feb. 21, 2023); *United States v. Wendt*, No. 4:22-CR-00199-SHL-HCA-1, 2023 WL 166461, at *6 (S.D. Iowa Jan. 11, 2023); *California Rifle & Pistol Ass'n, Inc. v. City of Glendale*, No. 2:22-CV-07346-SB-JC, 2022 WL 18142541, at *8 (C.D. Cal. Dec. 5, 2022).

concurring)),[5] and irrelevant events (the ludicrous but irrelevant temporary restraining order issued against David Letterman, which was not a Section 922(g)(8) order because the parties were not intimate partners and it was not issued after notice and a hearing, Pet. App. 39a (Ho, J., concurring)). But Justice Thomas, in *Washington State Grange v. Washington State Republican Party*, warned that, "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."

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[5] The concurring opinion was broadly critical of DVPOs. The concurrence's principal authority for its quotes regarding gamesmanship and strategy in obtaining protective orders are from a single original source, in which the author discussed conversations in mediation with three couples some thirty years ago. *See, e.g.*, Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L. Rev. 441, 448 (1997) (cited in Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 62 n.257 (2006)). Not only did the author fail to show that three anecdotes were representative of the roughly million divorces taking place each year, but the law governing protective orders has changed significantly in thirty years. As discussed below, most states now require particular findings to issue a DVPO. Even the mutual protective orders with which the concurrence expressed concern, Pet. App. 39a-41a, are often prohibited by modern protective order statutes; instead, a court must evaluate each application for a protective order on its own facts and are often prohibited from issuing mutual protective orders. *See, e.g.*, TEX. FAMILY CODE ANN. § 85.003 (West 2019). Finally, in every judicial proceeding, from criminal prosecutions to garden-variety contract cases, there is a possibility that a party will perjure himself or herself, that a court will rule injudiciously, or that the application of law to particular facts may be unfair. These risks and concerns are not unique to DVPOs.

552 U.S. 442, 449–50 (2008). Justice Thomas further explained perils of facial challenges:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."

Washington State Grange, 552 U.S. 450–51 (citations omitted). *See also United States v. Raines*, 362 U.S. 17, 20–21 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them.").

Moreover, while overbreadth challenges based on the First Amendment are sometimes allowed, the Supreme Court has held that facial overbreadth adjudication is an exception and that its limited function "***attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct***." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Here, the issue is conduct, not speech, and even an overbreadth-type challenge should not be countenanced. *See United States v. Smith*, 945 F.3d 729, 735 (2d Cir. 2019). *See also People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1239 (D.C. Cir. 2003).

Under Article III's case-or-controversy stricture, the Fifth Circuit wrongly, in the context of a Section 922(g)(8)(C)(i) prosecution, bootstrapped its Section 922(g)(8)(C)(ii) concerns in order to invalidate Section 922(g)(8) on its face. The Fifth Circuit used the theoretical possibility of a Section 922(g)(8)(C)(ii) prosecution occurring based on an order issued with no previous actual or threatened domestic violence—which we could not find has ever occurred, and did not happen here—to justify allowing Rahimi, who assaulted and threatened the life of his partner and another woman, and who participated in five different shootings in a six-week period, to remain armed, despite the likelihood of harm to the woman, their child, and to society as a whole. The Fifth Circuit fell

prey to the perils that come from straying from consideration of the case or controversy before it. *Compare Bena*, 664 F.3d at 1185 (refusing to consider possible deficiencies under § 922(g)(8)(C)(ii) in a facial challenge brought by a defendant who had been found to have committed family violence).

IV. Statistics show—unsurprisingly—that modern domestic violence is made more deadly by the presence of a gun.

The Texas Council on Family Violence ("TCFV"), the sole coalition of domestic violence providers in Texas, cites the following statistics about domestic violence:

- In 2021 alone, more than 70% of domestic violence victims in Texas were killed with a firearm. Texas Council on Family Violence, *Honoring Texas Victims*, Family Violence Homicides in 2021, Analysis Report, p. 23 (2021).
- 100% of all bystanders, family and friends killed in 2021 domestic violence situations in Texas were killed with a firearm. Texas Council on Family Violence, *Texas Intimate Partner Fatality Report Summary Facts* (2021), p. 2.
- More than two-thirds of mass shootings are domestic violence incidents or are perpetrated by shooters with a history of domestic violence. Geller, L.B., Booty, M. & Crifasi, C.K., *The role of domestic violence in fatal mass shootings in*

the United States, 2014–2019. Inj. Epidemiol. 8, 38 (2021). https://doi.org/10.1186/s40621-021-00330-0).

- Over the past 10 years, the number of women murdered by an intimate partner with a firearm in Texas has nearly doubled. Texas Council on Family Violence, *Honoring Texas Victims: Family Violence Homicides in 2021*, p.23 (2022).

V. Temporarily prohibiting guns while the abuser is under a protective order saves lives.

Lethal violence can be reduced by prohibiting the abuser from possessing a gun for the duration of the protective order: states that require the surrender of firearms in the respondent's possession have been associated with a 9.7% lower total domestic violence murder rate and 14% lower firearm-related domestic violence murder rates than states without these laws. Diez C, Kurland RO, Rothman EF, et al: *State intimate partner violence-related firearm laws and intimate partner homicide rates in the United States*, 1991 to 2015. Ann Intern Med 167:536–43, 2017. Congress reasonably concluded that preventing such lethal violence against family members is a valid public concern.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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