

No. 22-915

In The
Supreme Court of the United States

—◆—
UNITED STATES, PETITIONER

v.

ZACKEY RAHIMI
—◆—

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
—◆—

**BRIEF FOR CALIFORNIA GOVERNOR
GAVIN NEWSOM AS AMICUS CURIAE
SUPPORTING PETITIONER**
—◆—

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INTEREST OF AMICUS CURIAE¹

Gavin Newsom is the Governor of California. As the executive of the nation’s largest State, the Governor has an obligation to ensure the safety of California’s residents from the horrors of gun violence—including gun violence by intimate partners and family members. In pursuing that goal, the Governor has consistently advocated for commonsense gun regulations that save lives without infringing on individuals’ constitutional rights. Those regulations include requirements for background checks and mental-health reporting, prohibitions on marketing firearms-related products to minors, restrictions on so-called “ghost guns” designed to stymie law-enforcement investigations of gun crimes, and limitations on the assault weapons responsible for mass-casualty attacks on the public.

The Governor has demonstrated a particular commitment to protecting survivors of domestic violence by signing legislation and launching a campaign to bolster the efficacy of gun-violence restraining orders—“red flag laws”—that allow law-enforcement officers, family, coworkers, or friends to petition a court to temporarily remove weapons from individuals the court finds are dangerous to themselves or others.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus or his counsel made a monetary contribution to its preparation or submission. All counsel of record were given timely notice of amicus’s intent to file this brief.

California's gun safety laws work. The State's gun-death rate is the 43rd lowest in the country and 39 percent lower than the national average.² Californians are 25 percent less likely to die in a mass shooting compared to residents of other states. And since the early 1990s, when some of California's most significant gun safety laws took effect, California has cut its gun death rate by more than half. The Governor has a profound interest in ensuring that California can continue to protect its residents through these commonsense, effective laws.

² Giffords Law Center, *Annual Gun Law Scorecard—California*, <https://giffords.org/lawcenter/resources/scorecard/?scorecard=CA> (last visited Apr. 15, 2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Amendment is not a suicide pact. In *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), as in previous decisions, this Court took pains to emphasize that the Second Amendment right “is not unlimited.” *Id.* at 2128 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). While it protects “the right of *law-abiding, responsible* citizens to use arms’ for self-defense,” it does not disable states from enacting a variety of critical gun regulations that have existed for decades—including restrictions on gun possession by dangerous individuals. *Id.* at 2131 (emphasis added) (quoting *Heller*, 554 U.S. at 635). In striking down a federal statute prohibiting firearms possession by those a court has found to pose a credible threat to the physical safety of an intimate partner or child, the Fifth Circuit failed to heed this Court’s express limits and assurances.

The Fifth Circuit’s decision threatens the lives of countless Americans, enabling entirely foreseeable acts of gun violence. Approximately one in five homicide victims in the United States are killed by an intimate partner. Alexia Cooper & Erica L. Smith, U.S. Dep’t of Just., Bureau of Just. Stat., *Homicide Trends in the United States, 1980-2008* 17-18 (2011).³ More than half of all female homicide victims are killed by a current or former male intimate partner. Ctrs. for Disease Control & Prevention, *Preventing Intimate*

³ <https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf>.

Partner Violence (Oct. 11, 2022).⁴ The harms that will result from the decision below are not hypothetical. If left uncorrected, the Fifth Circuit’s errors risk frustrating the ability of government officials charged with protecting public safety to enforce longstanding, commonsense gun safety regulations that the *Bruen* Court intended to preserve. The petition should be granted and the decision below reversed.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW AND REAFFIRM THAT COMMONSENSE GUN SAFETY REGULATIONS REMAIN CONSTITUTIONAL

A. *Bruen* Maintained Important Limits On Second Amendment Rights

In *Bruen*, the Court rejected the two-step approach the federal courts of appeals had uniformly applied in assessing Second Amendment challenges. *See* 142 S. Ct. at 2126-27. *Bruen* held that “when the Second Amendment’s plain text covers an individual’s [regulated] conduct,” *id.* at 2126, “the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 2127.

But even as the Court revised the Second Amendment analysis to focus on text and history, rather than means-ends balancing, it repeated its prior assurances

⁴ <https://www.cdc.gov/violenceprevention/intimatepartner-violence/fastfact.html>.

that this constitutional right “is not unlimited.” *Id.* at 2128 (quoting *Heller*, 554 U.S. at 626); *see also id.* at 2162 (same) (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626-27 & n.26). In particular, the Court maintained two key limitations.

First, *Bruen* reiterated that the Second Amendment is concerned primarily with “the right of *law-abiding, responsible* citizens to use arms’ for self-defense.” *Id.* at 2131 (emphasis added) (quoting *Heller*, 554 U.S. at 635).

Second, the Court held that for the government to justify a firearms regulation, it need only “identify a well-established and representative historical *analogue*, not a historical *twin*.” *Id.* at 2133 (emphasis in original). “[E]ven if a modern-day regulation is not a dead ringer for historical precursors,” it withstands constitutional scrutiny if it is “relevantly similar” to a historical law. *Id.* at 2132-33. Thus, the Court emphasized, the “analogical reasoning” *Bruen* requires is not “a regulatory straightjacket.” *Id.* at 2133.

These principles are particularly important in assessing firearms regulations that address new societal concerns. This Court acknowledged that “[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868.” *Id.* at 2132. And it clarified that federal, state, and local governments are not powerless to meet those new challenges: “[T]he Founders created a Constitution—and a Second Amendment—‘intended to endure for ages to

come, and consequently, to be adapted to the various crises of human affairs.’” *Ibid.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)). Because “the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated,” the Court explained, “other cases implicating unprecedented societal concerns * * * may require a more nuanced approach.” *Ibid.*

Three members of the six-Justice *Bruen* majority separately highlighted these important limits on the Court’s decision and the new Second Amendment analysis it announced. As Justice Alito’s concurrence observed, *Bruen* “decide[d] nothing about who may lawfully possess a firearm.” *Id.* at 2157 (Alito, J., concurring). And Justice Kavanaugh, joined by the Chief Justice, confirmed that “[p]roperly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.” *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636). These concurring opinions made clear that this Court had not intended to remove all guardrails on courts’ application of the Second Amendment.

B. The Fifth Circuit Disregarded *Bruen*’s Instructions In Invalidating A Longstanding Gun Regulation

In the decision below, the Fifth Circuit crashed through those guardrails. The court assessed the constitutionality of 18 U.S.C. § 922(g)(8), which protects against domestic gun violence by prohibiting an individual from possessing firearms if a judge has issued a

restraining order premised on a determination that the individual poses a threat to the physical safety of an intimate partner or child. *See* 18 U.S.C. § 922(g)(8).

While the Fifth Circuit purported to apply this Court’s new framework in invalidating § 922(g)(8), it flouted *Bruen*’s instructions. Rather than engage in a meaningful analogical inquiry, the Fifth Circuit rejected a host of “relevantly similar” historical regulations based on irrelevant and immaterial differences, effectively demanding a “historical twin” for § 922(g)(8). Only by fundamentally misapplying *Bruen* could the Fifth Circuit reach the perverse conclusion that § 922(g)(8)—which assures “the protection of an identified person from the threat of domestic gun abuse” that a court has found another specific individual to pose—bears no relationship to historical laws that sought to protect “society” and “political and social order” by “disarming dangerous classes of people.” Pet. App. 20a, 24a (quotation marks omitted).⁵

The Fifth Circuit’s mode of analysis is particularly misguided in the context of § 922(g)(8), which could have no historical twin. Domestic violence was not

⁵ Even if one accepts the Fifth Circuit’s premise that “the preservation of political and social order” is meaningfully distinct from “the protection of an identified person from the threat of domestic gun abuse,” Pet. App. 20a (quotation marks omitted), nearly 70 percent of mass shootings—indisputably a threat to “social order”—feature a perpetrator who first killed a partner or 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 (2021), <https://pubmed.ncbi.nlm.nih.gov/34053458>.

civily or criminally prohibited at the founding, at ratification, or during the Reconstruction period; “most states” made intrafamily abuse illegal only in “the late nineteenth century.” Deborah Epstein, *Effective Intervention in Domestic Violence Cases*, 11 *Yale J.L. & Feminism* 3, 3 (1999). Yet there should be no dispute that our historical tradition allows elected leaders to define new crimes and enact new laws to reflect contemporary morals and address modern social ills: *Heller* itself “tell[s] us that * * * the legislative role did not end in 1791.” *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (Easterbrook, J.) (citing *Heller*, 554 U.S. at 626-27). Nor should there be any dispute that *Bruen* and *Heller*’s emphasis on “‘the right of law-abiding, responsible citizens to use arms’ for self-defense” referred to those who abide by *today*’s laws. *Bruen*, 142 S. Ct. at 2131 (emphasis added) (quoting *Heller*, 554 U.S. at 635); cf. *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (“[T]he pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes *today*.”) (emphasis in original).

In failing to recognize that § 922(g)(8) seeks to address an “unprecedented societal concern[],” the Fifth Circuit necessarily failed to apply the “more nuanced approach” that *Bruen* mandated for such circumstances. 142 S. Ct. at 2132.

C. This Court’s Intervention Is Urgently Needed

This Court should correct the Fifth Circuit’s errors and clarify that *Bruen*, by preserving real limits on the Second Amendment’s scope, allows states to continue to implement reasonable regulations on gun possession, use, or transfer. That intervention is needed immediately. The decision below is just one example of lower courts misreading *Bruen* to require striking down even reasonable restrictions well-grounded in our nation’s historical tradition of regulating firearms. *See, e.g., United States v. Quiroz*, No. 22-CR-0104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022) (concluding that 18 U.S.C. § 922(n), which prohibits a person under felony indictment from receiving firearms, is unconstitutional); *United States v. Price*, No. 22-CR-0097, 2022 WL 6968457, at *1 (S.D.W. Va. Oct. 12, 2022) (concluding that 18 U.S.C. § 922(k), which prohibits possession of a firearm with an altered, obliterated, or removed serial number, is unconstitutional); *Rigby v. Jennings*, No. 21-1523 (MN), 2022 WL 4448220 (D. Del. Sept. 23, 2022) (enjoining state ban on untraceable ghost guns as likely unconstitutional); *United States v. Harrison*, No. CR-22-0328, 2023 U.S. Dist. LEXIS 18397 (W.D. Okla. Feb. 3, 2023) (concluding that 18 U.S.C. § 922(g)(3), which prohibits possession of firearms by users of substances made unlawful by the Controlled Substances Act, is unconstitutional).

These decisions impose precisely the “regulatory straightjacket” that *Bruen* disavowed. 142 S. Ct. at 2133. They erroneously quash any attempt to regulate

firearm use, possession, or transfer—no matter how narrow, effective, or reasonable. This Court should establish, firmly and promptly, that it meant what it said when it reaffirmed that the Second Amendment right “is not unlimited.” *Id.* at 2128 (quoting *Heller*, 554 U.S. at 626); accord *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (“incorporation does not imperil every law regulating firearms”).

These decisions also put countless individuals in immediate danger of injury and death. According to the Centers for Disease Control and Prevention, “[f]irearm deaths continue to be a significant and growing public health problem in the United States.” Ctrs. for Disease Control & Prevention, *Firearm Deaths Grow, Disparities Widen*.⁶ “In 2020, 79% of all homicides and 53% of all suicides involved firearms.” *Ibid.* In particular, from 2019 to 2020 the firearm death rate increased by approximately 35 percent, to the highest rate recorded in the past 25 years. *Ibid.* Also in 2020—for the first time—firearm-related injuries surpassed motor vehicle accidents as the leading cause of death among children and adolescents. Jason E. Goldstick et al., *Current Causes of Death in Children and Adolescents in the United States*, 386 *New Eng. J. Med.* 1955, 1955 (2022).⁷

While important to every individual in the United States, this issue has special importance to

⁶ <https://www.cdc.gov/vitalsigns/firearm-deaths/index.html> (last visited Apr. 18, 2023).

⁷ <https://www.nejm.org/doi/full/10.1056/NEJMc2201761>.

state executives like Governor Newsom, who is responsible for protecting California’s nearly 40 million residents from the modern horror of gun violence. California’s many efforts to combat this scourge have kept Californians safer from gun violence than residents of most other States, but nonetheless, 3,576 Californians were killed by guns in 2021. *See* Ctrs. for Disease Control & Prevention, *Firearm Mortality by State* (Mar. 21, 2022).⁸ And gun-inflicted deaths stemming from domestic violence persist, making § 922(g)(8)’s protections vital. *See* David M. Studdert et al., *Homicide Deaths among Adult Cohabitants of Handgun Owners in California, 2004 to 2016*, 175 *Annals Internal Med.* 804, 804-11 (2022) (Californians living with a handgun owner have a sevenfold-increased risk of being shot and killed at home by a spouse or intimate partner).

To meaningfully fulfill his responsibilities, the Governor (and other state leaders) must be able to rely on this Court’s explication of the Second Amendment’s scope and limits. As members of the *Bruen* majority themselves assured, the Second Amendment permits “a ‘variety’ of gun regulations,” *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636), and the Court’s decision did nothing to expand the group of people “who may lawfully possess a firearm,” *id.* at 2157 (Alito, J., concurring).

⁸ https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm.

If these assurances mean anything, § 922(g)(8)'s commonsense restriction must be one of those permissible limits on the right to bear arms. As the United States has explained (Pet. 7-11), “[h]istory 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) (Barrett, J., dissenting). In enacting § 922(g)(8), Congress exercised that power by disarming only those individuals whom a court has determined “have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.” *Id.* at 454; see *United States v. Boyd*, 999 F.3d 171, 188-89 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 511 (2021) (explaining that § 922(g)(8) “applies only * * * after a court has found it appropriate to enter an order that explicitly prohibits the use, attempted use, or threatened use of physical force against” intimate partners or children).

The Fifth Circuit’s decision undermines this Court’s reassurances to the American people. It calls into question the safeguards that this Court maintained in its own decisions, and it guarantees that more domestic-violence victims will be injured and killed. See, e.g., Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 Am. J. Pub. Health 1089, 1092 (2003) (domestic violence victims are five to eight times more likely to be killed when their abuser has access to a gun);⁹ Avanti Adhia

⁹ <https://ajph.aphapublications.org/doi/pdfplus/10.2105/AJPH.93.7.1089>.

et al., *Nonfatal Use of Firearms in Intimate Partner Violence*, 147 *Preventive Med.* 106500 (2021) (25 million adults in the United States have been threatened or nonfatally injured by an intimate partner with a firearm);¹⁰ Matthew R. Durose et al., U.S. Dep't of Just., Bureau of Just. Stat., *Family Violence Statistics* 64 (2005) (nearly half of inmates convicted of family violence and over two-thirds of those convicted of a violent crime against their spouse were subject to a restraining order at some time in their lives);¹¹ Ctrs. for Disease Control & Prevention, *Preventing Intimate Partner Violence*, *supra* (one in five homicide victims are killed by an intimate partner and more than half of female victims are killed by a current or former male intimate partner).

This Court should grant certiorari to correct this error, make clear to lower courts that they cannot pick and choose which pieces of *Bruen* and *Heller* to follow, and confirm that the Second Amendment allows governments to enact reasonable regulations disarming dangerous individuals.

¹⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8096701/pdf/nihms-1694140.pdf>.

¹¹ <https://bjs.ojp.gov/content/pub/pdf/fvs.pdf>.

CONCLUSION

This Court should grant the petition for certiorari and reverse the decision of the Fifth Circuit.

Respectfully submitted,

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