

No. 22-915

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**In the Supreme Court  
of the United States**

UNITED STATES OF AMERICA,  
*Petitioner,*

v.

ZACKEY RAHIMI,  
*Respondent.*

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

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**AMICUS BRIEF OF THE NEW YORK  
COUNTY LAWYERS ASSOCIATION  
IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The New York County Lawyers Association (“NYCLA”) is a not-for-profit membership organization founded in 1908 and was one of the first major bar associations in the country to admit members without regard to race, ethnicity, religion, or gender. NYCLA’s 7,000 members practice law throughout the New York City metropolitan area. Since its inception, NYCLA has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy. NYCLA has a particular interest in governmental actions and the constitutional rights of individuals in New York County.

NYCLA has been an active proponent of reasonable gun legislation, including legislation designed to address mass shootings and regulatory measures to address the proliferation of untraceable “ghost guns.”<sup>2</sup> NYCLA also filed an amicus brief to this Court in *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111 (2022). NYCLA has long supported survivors of domestic violence and has sponsored programs and forums to address

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<sup>1</sup> No counsel for any party authored any part of this brief. No person or entity other than *Amicus* made a monetary contribution for preparation or submission of this brief and appropriate notice was provided to the parties.

<sup>2</sup> U.S. Dep’t of Just., *Attorney General Eric Holder Speaks at the 15th Annual National Action Network Convention* (4/4/2013), <https://perma.cc/MQ3G-6U9H> (mentioning NYCLA report on mass shootings).

the problem of domestic violence in New York and elsewhere.<sup>3</sup>

A gun in the hands of an abuser increases the likelihood that violence turns lethal. NYCLA and New Yorkers are familiar with the tragedy that so often results when a domestic abuser has access to guns:

- In November 2019, a 30-year-old man in Brooklyn shot his former girlfriend in the head in a jealous rage, then shot her new boyfriend in the chest before killing himself.<sup>4</sup>
- In May 2020, a woman's estranged husband interrupted her dinner and shot and stabbed his sister-in-law to death.<sup>5</sup> Police sources said the woman had previously called for help a few weeks before the attack.<sup>6</sup>
- In June 2020, a 20-year-old was shot and killed while walking her three-month-old baby in a stroller on the Upper East Side. Johnson had suffered continuous abuse at the hands of her ex-boyfriend, including beating

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<sup>3</sup> This amicus brief was approved for filing on behalf of NYCLA by its Executive Committee.

<sup>4</sup> Ashley Southall, *2 Die in Jealous Rampage, New York City's Third Murder-Suicide in Days*, N.Y. Times (11/10/2019), <https://perma.cc/R7AK-MNHW>.

<sup>5</sup> Ashley Southall, *2 Dead in Manhattan as Police Interrupt Domestic Attack*, N.Y. Times (5/26/2020), <https://perma.cc/4U8G-5EG3>.

<sup>6</sup> Nicole Johnson, *Gunman's wife called for help weeks before deadly Harlem attack*, PIX 11 (5/21/2020), <https://perma.cc/87MA-XQT5>.

her while she was pregnant and threatening to kill her.<sup>7</sup> Law enforcement confirmed that her killing was “domestic” in nature.<sup>8</sup>

- In October 2020, 40-year-old Ai Min was shot to death while walking to work in Lower Manhattan by her estranged husband—jealous of his wife’s new relationship—who then killed himself.<sup>9</sup>
- In February 2023, 41-year-old Jemina Garay was shot multiple times—including in the head—in the hallway of her Harlem apartment building while trying to intervene

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<sup>7</sup> *Baby’s father charged in slaying of stroller-pushing NYC mom*, A.P. (7/1/2022), <https://perma.cc/58N8-U7QU>.

<sup>8</sup> Jack Morphet, *Young mom shot dead on Upper East Side victim of domestic violence: cops*, N.Y. Post (6/30/2022), <https://perma.cc/4XHP-RD7Y>; Chelsia Marcus et al., *Police Eye Domestic Violence in Upper East Side Killing of Mother*, N.Y.T. (6/30/2022), <https://perma.cc/QWX3-Z8C2>; Michael Daly & Justin Rohrlich, *Young Mom Gunned Down in NYC Made Multiple Domestic Violence Complaints*, Daily Beast (6/30/2022), <https://perma.cc/E3VJ-HD6E>. Authorities have stated that records do not show that an order of protection was filed. Aundrea Cline-Thomas, *Police: Mother of Azsia Johnson, mom who was fatally shot on Upper East Side, says daughter was domestic violence victim*, CBS N.Y. (7/1/2022), <https://perma.cc/A8Y5-EG7T>.

<sup>9</sup> Ashley Southall, *Pregnant Woman is Strangled as N.Y.C Has 3 Domestic Killings in Days*, N.Y. Times (10/27/2020), <https://perma.cc/ZZB3-T9AR>.

in her neighbors' domestic dispute.<sup>10</sup> Before the shooting, police had routinely been called to the shooter's apartment because of domestic violence.<sup>11</sup>

These stories are just a few examples of tragedy that can ensue when a domestic abuser has access to a gun.

Research shows that gun violence and domestic violence are inextricably linked, and guns increase the likelihood that domestic violence becomes lethal.<sup>12</sup> Domestic abusers with access to guns are much more likely to kill the victims of their abuse.<sup>13</sup> The presence of a gun in a situation of domestic abuse causes victims of domestic abuse to suffer severe post-traumatic stress disorder.<sup>14</sup> The presence of the gun creates an environment of “coercive control,” defined as “an intentional pattern

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<sup>10</sup> Nicole Johnson et al., *Woman shot while trying to intervene in domestic dispute in NYC building*, PIX 11 (2/23/2023), <https://perma.cc/T2TY-A77G>.

<sup>11</sup> Rocco Parascandola et al., *Suspect in shooting of Harlem woman regularly abused girlfriend, neighbor says*, N.Y. Daily News (2/23/2023), <https://perma.cc/EMR7-Q837>.

<sup>12</sup> *Guns and Violence Against Women: America's Uniquely Lethal Partner Violence Problem*, Everytown for Gun Safety (4/10/2023), <https://perma.cc/JT95-BBVQ>.

<sup>13</sup> Leonard J. Paulozzi et al., *Surveillance for Homicide Among Intimate Partners—United States, 1981–1998*, Center for Disease Control & Prevention (2001), <https://perma.cc/59F8-362Z>.

<sup>14</sup> See Everytown, *supra* n.12.

of repeated behavior by an abuser to control, denigrate, intimidate, monitor, and restrict an intimate partner,” which leads to continued physical and sexual intimate partner violence.<sup>15</sup> A gun in the hands of a domestic abuser makes it harder for a victim to escape.

But there is a proven solution for this problem: remove guns from the hands of known domestic abusers, and their victims are both less likely to die and more able to escape. Studies have shown that laws prohibiting individuals who have committed intimate partner violence from possessing firearms and requiring such individuals to relinquish existing firearms result in significantly lower rates of intimate partner homicide.<sup>16</sup>

New York has worked hard to remove guns from the hands of proven domestic abusers, and for good reason: guns continue to make up a large share of domestic violence-related homicides in New York.<sup>17</sup> But with the help of statutes preventing abusers who have protective orders against them from possessing firearms, the incidence of domestic violence homicides has decreased, at least in New

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<sup>15</sup> Susan Sorenson & Rebecca Schut, *Non-Fatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, Trauma, Violence, & Abuse (2016), <https://perma.cc/PXY8-M93Z>.

<sup>16</sup> Carolina Diez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2005*, *Annals of Internal Med.* (2017), <https://www.acpjournals.org/doi/full/10.7326/M16-2849>.

<sup>17</sup> *Domestic Violence*, N.Y. State, <https://perma.cc/FHD5-B77L>.

York City.<sup>18</sup> NYCLA is concerned that these statutes are at risk should this Court not reverse the Fifth Circuit’s decision, which in turn, will exponentially increase the number of deaths and injuries of victims at the hands of gun-wielding abusers in New York.

### SUMMARY OF ARGUMENT

The 1968 Gun Control Act, 18 U.S.C. §921 *et seq.* initially prohibited various classes of people from possessing a firearm, including those adjudged “mentally defective,” individuals addicted to controlled substances, certain noncitizens, and felons. In 1994, with the passage of the Violence Against Women Act (VAWA), the Gun Control Act was amended to add *subjects of domestic violence protective orders*—with specific findings—to the list of those individuals prohibited from possessing a firearm to address the fact that “domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44.”<sup>19</sup> In 1996, Congress further amended VAWA and the Gun Control Act to extend the firearms ban to anyone convicted of a “misdemeanor crime of domestic violence.”<sup>20</sup>

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<sup>18</sup> *New York City Domestic Violence Fatality Review Committee: 2021 Annual Report*, Mayor’s Off. to End Domestic and Gender-Based Violence, <https://perma.cc/L7EB-WK82>.

<sup>19</sup> 140 Cong.Rec. S6018-02, 140 Cong.Rec. S6018-02, S6053 (5/19/1994).

<sup>20</sup> 142 Cong.Rec. S11878 (daily ed. 9/30/1996).

The bill adding Section 922(g)(8) passed with bipartisan support, with the sponsors stressing the great dangers posed by firearms in the hands of domestic abusers. Senator Paul Wellstone stated, “I have said it once. I have said it twice. I have said it 10 times. All too often the only difference between a battered woman and a dead woman is the presence of a gun.”<sup>21</sup>

States like New York followed suit in adopting and amending various statutes—both civil, in the form of the Family Court Act, and criminal, in the form of New York’s criminal procedure and penal laws—recognizing the lethal tie between guns and domestic abuse and prohibiting abusers with protective orders against them from obtaining a license to possess or possessing firearms. New York City has similarly imposed restrictions on licensing and possession by such individuals. Indeed, Congress, in a bipartisan bill, recently provided significant funding to states, directing them to use the funds to support and create laws that remove guns from at-risk and dangerous people.<sup>22</sup>

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<sup>21</sup> 140 Cong.Rec. S7884 (daily ed. 6/29/1994); *see also* H.R. Conf. Rep. No. 103-711, at 391 (1994), *quoted in United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999) (“Congress finds with respect to this provision [§922(g)(8)] that domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44; firearms are used by the abuser in 7% of domestic violence incidents and produces [sic] an adverse effect on interstate commerce; and individuals with a history of domestic abuse should not have easy access to firearms.”).

<sup>22</sup> Bipartisan Safer Communities Act, Pub.L. 117-59.

Contrary to Congress and the view of most Americans,<sup>23</sup> *Rahimi* struck down Section 922(g)(8), finding that there must be “historical precedent” for regulating the ability of abusers to carry a firearm. *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023). Having found none, the Court ruled Section 922(g)(8) unconstitutional.

But there *is* historical precedent. Historically, dangerous people do not enjoy the same Second Amendment rights. Indeed, this Court has made clear that the Second Amendment is restricted to “law-abiding, responsible citizens,” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), and “ordinary, law-abiding citizens.” *Bruen*, 142 S.Ct. at 2122. That it took time for domestic abusers to join the ranks of those historically prohibited from possessing a gun should not be a surprise. From the nation’s founding and through much of its history, women’s rights to divorce and to own their own property have been greatly restricted.<sup>24</sup> American

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<sup>23</sup> A 2017 survey found that 81% of Americans support laws prohibiting a person subject to a domestic violence restraining order from having a gun for the duration of the order. Colleen Barry et al., *Public Support for Gun Violence Prevention Policies Among Gun Owners and Non-Gun Owners in 2017*, 108:7 Am.J. Pub. Health 878-81 (2018).

<sup>24</sup> See, e.g., *Rogers v. Rogers*, 4 Paige Ch. 516, 517 (Ch.Ct. N.Y. 1834) (“[I]t is impossible for a feme covert [married woman] to make any valid agreement with her husband to live separate from him, in violation of the marriage contract and of the duties which she owes to society, except under the sanction of the court.”); see also 5 Williston on Contracts § 11:2 (4th ed.) (“At common law, a married woman could not, during the life of her husband, bind herself by a contract”).

women only gained the right to vote in 1920.<sup>25</sup> Federal law did not formally grant women the right to open a bank account until 1974.<sup>26</sup> Because guns have proliferated in recent years, exacerbating domestic abuse, Section 922(g)(8) and its progeny were enacted to prevent such harms.<sup>27</sup> This Court should grant certiorari and reverse *Rahimi*. Allowing *Rahimi* to stand is inconsistent with *Bruen* and *Heller* and will throw New York statutes like the Family Court Act—as well as others recently enacted across the country—into crisis, potentially undermining the protections in place to help prevent lethal harm against victims of domestic abuse.

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<sup>25</sup> U.S. Const. amend. XIX.

<sup>26</sup> See Equal Credit Opportunity Act, 15 U.S.C. §1691 *et seq.*

<sup>27</sup> See 139 Cong.Rec. S16288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) (“There simply is no rational reason whatsoever to allow persons who have been deemed a clear and present danger to another person, usually a woman, to have a gun. None at all.”); 142 Cong.Rec. S11878 (“[T]his fellow is going to lose his cool at work, or with the boys, and he is going to go home one day and get into another argument with his wife. As arguments often do, it will escalate, and this time, as before, it will get out of control. As their children huddle in fear, the anger will get physical, and almost without knowing what he is doing, with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer .... But when this man’s hand reaches into that drawer, there will not be a gun there. So that fatal instant, that moment of fleeting madness, will never happen.”).

**ARGUMENT**

***Rahimi* casts doubt on New York’s longstanding gun licensing regime and laws preventing those who have been found to pose a risk of domestic violence from possessing firearms.**

**I. Striking down Section 922(g)(8) could threaten New York’s ability to protect victims of domestic abuse via its firearms licensing regime.**

New York has established itself as a leader in protecting victims of family or domestic violence, including taking action to prevent violence.<sup>28</sup> Should *Rahimi* stand, New York’s statutes and licensing regimes preventing those found to have engaged in domestic violence from possessing guns could be in jeopardy. New York City’s similar licensing regime preventing domestic abusers from obtaining licenses for and possessing guns could also be impacted.

New York’s licensing regime is designed to provide permits to law-abiding citizens and keep guns away from those who are not:

Some of the main requirements are that you must be at least 21 years of age, of good moral character, and not in a condition—mental or physical—that would make it unsafe for you to possess a firearm. A background check is conducted, in which numerous factors are considered, including, but not limited to, any history of arrests, summonses, domestic violence,

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<sup>28</sup> *Domestic Violence by State 2023*, World Population Rev., <https://perma.cc/CY7Q-5KAZ>.

orders of protection, mental illness, or mental/physical conditions and any medications taken in connection therewith. (Relevant statutes and rules include, but are not limited to, New York State Penal Law Section 400.00; Title 18 of the United States Code, Sections 921 and 922; Title 10 of the New York City Administrative Code, Section 301, and the sections immediately thereafter; and Title 38 of the Rules of the City of New York, particularly Chapters 3 and 5.)<sup>29</sup>

Although a licensing regime geared toward keeping firearms out of the hands of dangerous persons has been in effect in New York since at least as early as 1911,<sup>30</sup> a domestic abuse restraining order was not included as the basis for denial of a license until 1996.

The Family Court Act prohibits a person subject to a domestic violence protective order from having a firearms license, and requires the revocation of any existing firearms license in the name of the

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<sup>29</sup> *New Application Instructions*, N.Y.P.D., <https://perma.cc/3KGV-NWCF>.

<sup>30</sup> “In 1911, New York’s ‘Sullivan Law’ expanded the State’s criminal prohibition to the possession of all handguns—concealed or otherwise—without a government-issued license. See 1911 N.Y. Laws ch. 195, §1, p. 443. New York later amended the Sullivan Law to clarify the licensing standard: Magistrates could ‘issue to [a] person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon’ only if that person proved ‘good moral character’ and ‘proper cause.’ 1913 N.Y. Laws ch. 608, §1, p. 1629.” *Bruen*, 142 S.Ct. at 2122.

respondent under particular circumstances. N.Y. Fam. Ct. Act §§842-a(1),(2), 828(1)(a),(3); N.Y. Crim. Proc. Law §§530.12(1), 530.14(1)(a),(2).<sup>31</sup> Specifically, when a domestic violence protective order is issued, the court must revoke a license, order the respondent ineligible for a license, and order the immediate surrender of any firearms owned or possessed by respondent if the court finds that the conduct leading to an order of protection involved infliction of physical injury, the use or threatened use of a deadly weapon, or behavior constituting a violent felony offense. N.Y. Fam. Ct. Act §842-a(2)(a),(3).

Under New York's Criminal Procedure Law, when a criminal action is pending charging a crime between spouses, former spouses, parents and children, or between family members or certain household members, courts can issue a protective order and also prohibit the subject of that protective order from purchasing or possessing firearms as well as suspend any existing firearm licenses. In other words, the gun can be removed and the alleged abuser can be prevented from getting a license at the charging stage—before a conviction. N.Y. Crim. Proc. Law §§530.12(1), 530.14(1)(b),(2)(b). In these instances, the court must suspend or revoke the defendant's firearms license and order the immediate surrender of firearms where the court finds a substantial risk that the defendant may use or threaten to use a firearm unlawfully against the person for whose protection the protection order is issued. *Id.* When a license is revoked under these

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<sup>31</sup> See also N.Y. Penal Law §400.00(1)(e),(11).

circumstances following a conclusion that domestic violence with the use of a firearm is possible, the individual is no longer able to obtain or renew a gun license under New York’s licensing framework.<sup>32</sup>

Recently, New York enacted the Safe Homes and Families Act (effective November 1, 2020), which allows police responding to a family offense to take temporary custody of any firearm (and related license) that is in plain sight or discovered pursuant to a lawful search, and requires a police officer to take temporary custody of any weapon (and related license) in possession of a person arrested for, or suspected of—but who is not yet charged with—committing a family offense. N.Y. Crim. Proc. Law §140.10(6).<sup>33</sup>

As noted above, Penal Code Section 400.00, effective in 1967, was amended in 1996, making individuals who had their gun licenses revoked under section 530.14 of the Criminal Procedure Law or section 842-a of the Family Court Act—that is, on account of a court-issued domestic abuse protective order—ineligible to get a new license or renew their

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<sup>32</sup> See N.Y. Penal Law §400.00(1)(k) (“No license shall be issued or renewed except for an applicant ... who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or [§842-a] of the family court act.”).

<sup>33</sup> After a period of no less than 48 hours, absent an order of protection or other order prohibiting the owner from possessing such weapon/license, or a pending charge or conviction prohibiting the owner from possessing such weapon/license, the weapon must be returned.

existing one.<sup>34</sup> As described in the memorandum supporting the legislation, the legislation was intended to “recognize the peculiar danger to victims of domestic violence when an alleged or a convicted batterer possesses a firearm license” and “to protect all victims of domestic violence, and crime victims, in general.”<sup>35</sup>

New York legislators acknowledged that the issue of domestic violence was a serious problem as, at that time, “in New York, an average of four women a week [were] killed by abusive husbands or partners. On a national scale, boyfriends or husbands murdered 30 percent of the 4,339 women killed in the United States in 1990.”<sup>36</sup> Legislators also recognized that “[r]emoving weapons from the possession of abusers, and preventing past offenders from legally obtaining firearms could significantly reduce the risks faced by law enforcement officials responding to domestic violence calls.”<sup>37</sup>

Supporting the legislation, the citizens group New Yorkers Against Gun Violence applauded Governor Pataki’s efforts to address domestic violence in New York, writing: “Looking at the Silent Witness display in Albany on May 21st when you signed into law the bill relating to domestic violence and custody, we were struck by the fact that the four women killed on Long Island and represented in the display had all been shot. And this display was only

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<sup>34</sup> N.Y. Bill Jacket, 1996 S.B. 7631, Ch. 644.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

a small representation of all the victims of domestic violence in New York State for 1994.”<sup>38</sup>

New York City also has an administrative regime regulating the licensing and use of firearms, which relies in part on New York state laws, including those discussed above.<sup>39</sup> N.Y.C. Admin. Code §§10-131, 10-300, *et seq.* Specifically, the City Administrative Code incorporates state law preventing certain individuals from accessing guns: the City authorizes possession of a pistol or revolver “if such person is authorized to possess a pistol or revolver within the city of New York pursuant to this section, section 10-302 or section 400.00 of the penal law, or is exempt pursuant to section 265.20 of the penal law from provisions of the penal law relating to possession of a firearm and is authorized pursuant to any provision of law to possess a pistol or revolver within the city of New York without a license or permit therefor.” N.Y.C. Admin. Code §10-131(h)(11). This provision also authorizes a person to possess a rifle in the City “if such person is authorized to possess a rifle within the city of New York pursuant to section 10-303, or is a person permitted pursuant to section 10-305 to possess a rifle without a permit therefor.” *Id.*

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<sup>38</sup> *Id.*

<sup>39</sup> New York City additionally requires that firearm applicants be given written notice stating: “Warning: The presence of a firearm in the home is associated with an increased risk of suicide, death during domestic violence disputes, and unintentional deaths to children and others.” N.Y.C. Admin. Code §10-313.

New York City further prohibits individuals subject to certain domestic violence protective orders from obtaining licenses for rifles and shotguns. N.Y.C. Admin. Code §10-300, *et seq.* Specifically, individuals subject to certain orders of protection are prohibited from obtaining a permit to purchase and possess rifles and shotguns. Notably, this provision prohibiting these individuals from obtaining licenses *is nearly identical to* the language of Section 922(g)(8). N.Y.C. Admin. Code §10-303(a)(7).

Striking down Section 922(g)(8) could pose a significant threat to the City's licensing regime, especially the prohibition on licensure for individuals subject to orders of protection because of their acts of domestic violence. New York State and New York City have good reason to restrict domestic abusers' access to firearms. Where a firearm is present in a domestic violence situation, the risk of homicide increases by 500 percent.<sup>40</sup> In the United States, an average of 70 women per month are shot to death by intimate partners.<sup>41</sup> In nearly half of the mass shootings from 2015 to 2022, the shooter shot a former intimate partner or family member.<sup>42</sup> In 2020, firearms were used in nearly half of all intimate partner homicides outside New York City and in nearly a quarter of homicides in New York

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<sup>40</sup> Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, *Am.J. Pub. Health* 93(7), 1089-97 (2003), <https://perma.cc/H29L-EX29>.

<sup>41</sup> *See* Everytown, *supra* n.12.

<sup>42</sup> *Id.*

City.<sup>43</sup> However, even as gun violence by abusers remains a serious problem, measures to restrict abusers' access to guns have been proven to help. Where domestic abusers do not have access to firearms, there is no "substitution effect"—that is, firearms are not substituted with other weapons when the abuser's access to firearms is restricted.<sup>44</sup>

The data is clear: Where domestic abusers have less access to firearms, their victims are less likely to die.

**II. Striking down Section 922(g)(8) could threaten New York's ability to disarm dangerous individuals through Family Court Orders of Protection or under the state's Extreme Risk Protection Order (ERPO) statute.**

Under the Fifth Circuit's reading of Section 922(g)(8), even notice and opportunity to be heard and significant findings of substantial risk might not be enough for removal of a gun under an order of protection to pass muster under the Second Amendment. The Fifth Circuit appears to believe that *Bruen* stands for the proposition that only a

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<sup>43</sup> See *Domestic Violence*, *supra* n.17; see also *Domestic Homicide in New York State 2020*, N.Y. State Div. of Crim. Just. Servs. (2021), <https://perma.cc/6RTC-7LRN>.

<sup>44</sup> Natalie Nanasi, *Disarming Domestic Abusers*, 14 Harv.L. & Pol'y Rev. 559, 561 (2020), <https://perma.cc/B4T5-V5R8>.

criminal conviction can impinge on a person's Second Amendment right.<sup>45</sup>

That is contrary to key Second Amendment holdings by this Court. *Heller* and *Bruen* reinforce that the Second Amendment is restricted to “law-abiding, responsible citizens,” *Heller*, 554 U.S. at 635 (2008) and “ordinary, law-abiding citizens,” *Bruen*, 142 S.Ct. at 2122. A person subject to an order of protection after having been found by a civil or criminal court to have engaged in and be at risk of continuing to engage in domestic violence is not a person with a presumptive right to keep and bear arms. The Fifth Circuit's dangerous and incorrect interpretation of this Court's Second Amendment jurisprudence threatens not only Section 922(g)(8), but other sensible gun laws—like New York's—that balance Second Amendment rights against the known threat that guns in the hands of abusers pose to the safety of domestic violence victims.

Section 922(g)(8)(C) prohibits individuals subject to domestic violence restraining orders from “possessing” or “receiving” firearms or ammunition provided the orders contain certain language or findings. Specifically, the statute applies where a restraining order includes a finding that the individual poses a “credible threat to the physical safety” of an intimate partner or child, or expressly

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<sup>45</sup> See *Rahimi*, 61 F.4th at 455 (person subject to a protective order as contemplated by Section 922(g)(8) “forfeits his Second Amendment right for the duration of the court's order. This is so even when the individual has not been criminally convicted or accused of any offense and when the underlying proceeding is merely civil in nature.”).

prohibits the “use, attempted use, or threatened use of physical force” against the intimate partner or child. The statute specifically provides that the court order may only be issued “after a hearing of which such person [respondent] received actual notice, and at which [respondent] had an opportunity to participate ....” 18 U.S.C. §922(g)(8)(A).<sup>46</sup>

Orders of protection issued by New York family courts have a similar purpose to the statute at issue in *Rahimi*: preventing domestic abusers from using guns against their victims. Family Court orders of protection allow victims to obtain orders disarming their abusers or preventing their abusers from obtaining firearms. N.Y. Fam. Ct. Act §842-a. Where a judge determines that there is “substantial risk” that the abuser<sup>47</sup> “may use or threaten to use a firearm, rifle or shotgun unlawfully against the person or persons for whose protection the order of protection is issued,” the judge “shall” suspend or revoke the abuser’s existing gun license, order the abuser ineligible for a gun license, and order the abuser to surrender any guns that the abuser currently possesses. *Id.*

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<sup>46</sup> The statute also requires that the order “restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child” and includes a finding that the person restrained “represents a credible threat” to the intimate partner’s or child’s safety. 18 U.S.C. §922(g)(8)(B)-(C)(i).

<sup>47</sup> “Abuser” is the person against whom the victim seeks an order of protection.

Section 842-a was borne of an understanding that the criminal system alone could not keep domestic violence victims safe when their abusers had access to guns. New York’s bifurcated criminal–civil system for domestic violence was established in the 1960s, when family courts were given jurisdiction over “family offenses.”<sup>48</sup> Section 842-a was enacted in 1999, creating a means for victims to seek the disarming of their abusers in family courts.<sup>49</sup>

In 2013, additional protections were added for victims with orders of protection: Family Courts were required to suspend or revoke firearms licenses in certain circumstances enumerated in the law, aligning the civil provisions with the analogous criminal code provisions in Criminal Procedure Law §530.14.<sup>50</sup> This amendment closed a gap in relief for domestic violence victims, allowing them the same protections against their abusers whether their abusers were prosecuted and convicted in criminal court or whether their abusers had not been subject to criminal prosecution but had undergone a hearing concluding in a finding that the abuser had seriously injured the victim or “where the court finds a substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of

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<sup>48</sup> Judith Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 Yale L. & Pol’y Rev. 93, 127 (2005), <https://perma.cc/ML5P-8HXM>.

<sup>49</sup> Explanation of Bill Changes, N.Y. Bill Jacket, Ch. 597, 1998 S.B. 7589, at 5.

<sup>50</sup> N.Y. Bill Jacket, Ch.1, 2013 A.B. 2230.

protection is issued.” N.Y. Fam. Ct. Act §842-a. Closing this remedial gap was critical for domestic violence victims, given the many reasons that victims may not seek help through the criminal system for issues of domestic violence.<sup>51</sup>

Section 922(g)(8) penalizes prohibited purchasers—including those prohibited by orders of protection like those authorized under the Family Court Act—who are found to possess guns, which heightens NYCLA’s concern that striking down Section 922(g)(8) would threaten New York’s order of protection law, which includes notice and hearing requirements. When a domestic violence victim files a family offense petition, the court may immediately issue a temporary order of protection that suspends the gun license of the respondent, makes the respondent ineligible for a gun license, and requires the respondent to return any firearms he or she currently possesses. N.Y. Fam. Ct. Act §842-a(1). However, the statute also provides “the right to a hearing before the court regarding any revocation, suspension, ineligibility, surrender or seizure order issued pursuant to this section.” N.Y. Fam. Ct. Act §842-a(7). Where a court issues an order *ex parte*, the statute requires a hearing within 14 days of the order.

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<sup>51</sup> See Nanasi, *supra* n.44, at 567 n.44 (domestic violence victims may rely on their abusers for financial or other supports, may fear escalation of violence resulting from the arrest of their abusers, or may be disinclined to report abuse because of concerns about differential treatment due to the victim’s ethnicity, immigration status, gender, or other characteristics).

Section 922(g)(8) incorporates precisely the type of protective order that the New York statute envisions: one that “was issued after a hearing of which such person had an opportunity to participate” and that “includes a finding that such person represents a credible threat.” 18 U.S.C. §922(g)(8)(A),(C). The Fifth Circuit reasoned: “When he was charged, Rahimi was subject to an agreed domestic violence restraining order that was entered in a civil proceeding. That alone does not suffice to remove him from the political community within the amendment’s scope.” *Rahimi*, 61 F.4th at 452. Striking down the federal statute would call into question whether an order of protection requiring its subject to not have a gun can form the basis of a criminal statute penalizing that subject for having the gun without running afoul of the Second Amendment. If it were found unconstitutional to penalize an abuser for having a gun in violation of a properly adjudicated protective order, then it could follow that the protective order requiring the subject to not have a gun would be unconstitutional.

These civil orders of protection protect vulnerable New Yorkers from the exacerbated risks of domestic violence when guns are involved. Such orders empower individuals to leave domestic violence situations with less fear of retaliation by their abusers. Orders of protection place a needed barrier between abusers and their partners and children.

Another law that could be endangered is New York’s Extreme Risk Protection Order (ERPO) statute (as well as similar statutes enacted in states across the country in response to the Consortium for

Risk-Based Firearm Policy report that followed the Sandy Hook massacre, urging states to enact these proactive safety laws).<sup>52</sup> The ERPO statute similarly provides that a court may disarm dangerous individuals or prevent dangerous individuals from harming themselves. N.Y.C.P.L.R. §63-a. This “Red Flag” law allows a reviewing court to issue a temporary extreme risk protection order (TERPO) either ex parte or otherwise, “to prohibit the respondent from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun, upon a finding that there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others.” N.Y.C.P.L.R. §6342(1).

Similar to New York’s Family Court Act authorizing guns to be removed via civil orders of protection, and Section 922(g)(8) penalizing only those with guns and in violation of domestic abuse protection orders issued only after notice and an opportunity to be heard, ERPO requires speedy notice and opportunity to be heard for respondents: “no sooner than three business days nor later than six business days after service of a temporary extreme risk protection order and, alternatively, no later than ten business days after service of an application under this article where no temporary extreme risk protection order has been issued, the supreme court shall hold a hearing to determine whether to issue a final extreme risk protection

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<sup>52</sup> Shannon Frattaroli & Josh Horwitz, *Extreme Risk Protection Order: A Tool to Save Lives*, Johns Hopkins Sch. Pub. Health, <https://perma.cc/W7RR-LVYZ>.

order and, when applicable, whether a firearm, rifle or shotgun surrendered by, or removed from, the respondent should be returned to the respondent.” N.Y.C.P.L.R. §6343(1). ERPOs are time-limited, and respondents may submit one request while the order is effective for a hearing to set aside all or part of the order. N.Y.C.P.L.R. §6343(6). In this way, should a change in circumstances justify changing the order, respondents have an additional opportunity to be heard. These are sensible procedural safeguards like those in Section 922(g)(8), and they would similarly be threatened by the interpretation of the Second Amendment to bar such statutes.

New York enacted ERPO “[t]o prevent individuals from accessing firearms, rifles, and shotguns who have been deemed, through judicial process, likely to engage in conduct that would result in serious harm to themselves or others.”<sup>53</sup> The legislature recognized that “family and household members are often the first to know when someone is experiencing a crisis or exhibiting dangerous behavior. They may even report their fears to law enforcement, but in New York, as in many other states, law enforcement officers may not have the authority to intervene based on the evidence they are provided, sometimes resulting in preventable tragedies, including interpersonal gun violence or suicide involving a gun.” *Id.* Specifically, the legislature determined that enacting this statute “would keep New Yorkers safe while respecting due

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<sup>53</sup> N.Y. Committee Report, 242 Legislative Session, 2019 N.Y.S.B. 2451(NS) (1/26/2019).

process rights.”<sup>54</sup> *Rahimi* threatens state laws that allow states to prevent individuals proven to be dangerous from accessing firearms—something most Americans want,<sup>55</sup> as reflected in the Byrne State Crisis Intervention Program (authorized by the Bipartisan Safer Communities Act of 2022 and allocating over \$231 million to fund such laws).<sup>56</sup>

By providing mechanisms for orders of protection and ERPOs, New York has sought to protect its residents from the heightened danger that guns create in domestic violence situations. Were *Rahimi* to stand, New York’s ability to protect its most vulnerable residents would be severely impaired.

## CONCLUSION

The Fifth Circuit’s decision threatens reasonable and effective actions that state and local governments have taken to keep many of their most vulnerable residents safe from the threat of guns held by their abusers. It is imperative to limit the ability of domestic abusers to possess firearms. Such restrictions save lives.

By fostering protection against abusers, the present regulatory scheme has helped to make families and domestic violence victims in New York safer. New York’s regulatory scheme appropriately

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<sup>54</sup> *Id.*

<sup>55</sup> See Barry, *supra* n.23.

<sup>56</sup> Press Release No. 23-167, U.S.D.O.J., Off. of Pub. Affs., *Justice Department Announces Over \$200 Million in Investments in State Crisis Intervention* (2/14/2023), <https://perma.cc/T3JD-4CQ2>.

and necessarily balances public safety and individual rights. This Court should grant certiorari.

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