No. 22-915

In The
Supreme Court of the United States

UNITED STATES, PETITIONER

v.

ZACKEY RAHIMI

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

BRIEF OF THE CALIFORNIA LEGISLATIVE WOMEN'S CAUCUS AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the California Legislative Women's Caucus, a bicameral, bipartisan voluntary unincorporated association composed of all 50 women members of the California State Legislature. First established in 1985 by nine Democratic and six Republican legislators, the California Legislative Women's Caucus promotes legislative policies and sets budget priorities that protect the well-being of women, children, and families throughout California. Since its formation, the California Legislative Women's Caucus has prioritized writing and supporting legislation that addresses domestic violence and firearm violence, recognizing that women and children are overwhelmingly the victims of such violence.

Members of the California Legislative Women's Caucus have authored and passed legislation limiting access to firearms for people who have domestic violence restraining orders. This proactive approach seeks to prevent gun violence in the home before it occurs, by allowing intervention once there is a demonstrable threat of violence, rather than waiting for that threat to become deadly action. Caucus members have authored and supported legislation that takes this same approach and applies it in other areas where swift intervention can save lives: namely, where law enforcement or family members report that an individual has threatened harm and has access to a firearm.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission.

Gun violence restraining orders and domestic violence restraining orders are lifesaving legal tools. California law makes these orders available only when an individual is demonstrably at risk of harming someone—a prophylactic measure that has no impact on a responsible gun owner. The analysis employed by the Fifth Circuit in *United States v. Rahimi*, Pet. App. 1a-41a, threatens to dismantle these laws and leave California without any prophylactic against threats of firearm violence. The California Legislative Women's Caucus has a profound interest in continuing to prevent firearm violence in California. The fact that women were not able to legislate, let alone vote, when this country was founded must not shackle current women legislators from enacting reasonable, limited and effective laws to address the scourges of domestic violence and mass shootings.

INTRODUCTION AND SUMMARY OF ARGUMENT

The presence of a gun in domestic violence situations increases the risk of homicide for women by 500%. More than half of women killed by gun violence are killed by family members or intimate partners.[2]

[2] National Domestic Violence Hotline, *Domestic Violence Statistics* (last accessed Aug. 15, 2023), https://www.thehotline.org/stakeholders/domestic-violence-statistics/ (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub.

1. This staggering statistic has long informed bipartisan efforts across all branches of California state and local government to provide tools that the courts and law enforcement can employ to *prevent* gun violence by taking away firearms from persons whose conduct indicates they are a risk.

2. California laws provide for civil domestic violence restraining orders that can be requested ex parte or after notice and a hearing before the courts. Cal. Fam. Code §§ 6320, 6340. An emergency protective order can be issued if a law enforcement officer proves to the court's satisfaction that "an immediate and present danger of domestic violence exists" and the emergency order "is necessary to prevent the occurrence or recurrence of domestic violence. . . ." Cal. Fam. Code § 6251. Persons subject to domestic violence restraining orders are prohibited from owning, possessing, purchasing or receiving a firearm, or attempting to do so, during the pendency of the restraining order. *Id.* § 6389. The domestic violence restraining order with its associated gun relinquishment requirement allows law enforcement to step in before a threat escalates to irreversible deadly action.

3. After a college student whose parents repeatedly tried to get assistance from law enforcement used legally purchased guns and hundreds of rounds of ammunition to terrorize a college town, eventually killing himself and six other innocent persons and injuring

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Health 1089, 1092 (2019), http://pubmed.ncbi.nlm.nih.gov/12835191).

thirteen, California enacted legislation extending the concept of a violence restraining order to circumstances where law enforcement or close family members have reason to believe that an individual is about to use firearms to kill innocent people or themselves, or both. Cal. Penal Code §§ 18100-18205. Research has demonstrated that the use of such gun violence restraining orders, or "Red Flag Laws," can prevent mass shootings. Univ. Cal. at Davis Violence Prevention Rsch. Program, *Extreme Risk Protection Orders to Prevent Mass Shootings: What do Researchers Know?* 2 (2022).[3]

4. If the analysis of *United States v. Rahimi* is allowed to stand, then all of these prophylactic tools for preventing gun violence will be at risk.

5. The Court of Appeals misread this Court's opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). It cannot be said in modern times that a person who engages in domestic violence is the "law-abiding" and "ordinary" citizen whose right to possess firearms is absolutely protected under the Second Amendment.

6. The Court of Appeals erred in declaring 18 U.S.C. § 922(g)(8) facially unconstitutional regardless of the behavior to which it was applied. Here, Mr. Rahimi not only was a threat, he also voluntarily

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[3] https://health.ucdavis.edu/vprp/pdf/VPRP-ERPO-Mass-Shooting-Memo-June-2022.pdf.

waived his rights by agreeing to the restraining order that explicitly warned him about section 922.

7. The Court of Appeals failed to conduct a factual analysis because it believed it was confined to historical precedents that are antithetical to our laws today. When a court puts on blinders like that, it threatens the very bedrock of our current constitutional understanding. *Compare Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) (reviewing historical precedent and concluding "that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety").

8. The Court of Appeals never considered two issues that are key to the statute's constitutionality: (1) whether it affords individuals constitutional due process before taking away their Second Amendment rights, and (2) what kind of evidence should be required before such an order can be obtained. Section 922 requires notice and findings that a credible threat or other circumstance justifies the order.

9. The Court of Appeals used far too blunt an instrument to decide the outcome of this case. Its ruling has the potential to invalidate carefully crafted gun violence restraining order statutes like California's that protect due process rights but still work prophylactically to prevent someone from committing violence when the threat they will do so is clear to law enforcement and the courts. Waiting for the criminal justice system to handle matters, as the Court of Appeals

suggests, leaves law enforcement and families with no means to prevent the violence in the first instance.

ARGUMENT

I.

THE *RAHIMI* ANALYSIS IMPERILS CALIFORNIA LAWS THAT ARE PROVEN TO REDUCE THE RISK THAT GUNS WILL BE USED TO KILL DOMESTIC VIOLENCE VICTIMS OR PERFORM MASS SHOOTINGS

A. California's Domestic Violence Restraining Order Statute Is Carefully Tailored to Address the Known Connection Between Guns and Violent Behavior By Domestic Abusers

As a blue-ribbon task force appointed by then-California Supreme Court Justice Ronald George wrote:

> Ultimately, public safety is best served when law enforcement and the entire justice system take immediate action to remove firearms, whether registered or not, from the hands of a person who is statutorily barred from possessing them.

Jud. Council of Cal., Admin. Off. of the Cts., *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases:*

Final Report of the Domestic Violence Practice and Procedure Task Force 21 (Jan. 2008).[4]

This is particularly true in domestic violence situations and as such has been a legislative priority for the bipartisan California Legislative Women's Caucus. In the United States, in 2021, 34% of women homicide victims were killed by an intimate partner; an additional 16% were killed by a non-intimate family member, such as a parent, grandparent or sibling. Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship*, U.S. Dep't of Just. Bureau of Just. Stat. (2021).[5]

According to a researcher from the Harvard T.H. Chan School of Public Health:

> Women in the US are more likely to be murdered during pregnancy or soon after childbirth than to die from the three leading obstetric causes of maternal mortality (hypertensive disorders, hemorrhage, or sepsis). These pregnancy associated homicides are preventable, and most are linked to the lethal combination of intimate partner violence and firearms. Preventing men's violence towards women, including gun violence, could save the lives of hundreds of women and their unborn children in the US every year.

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[4] https://www.courts.ca.gov/documents/dvpp_rec_guidelines.pdf.

[5] https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021.

Rebecca B. Lawn & Karestan C. Koenen, *Homicide is a Leading Cause of Death for Pregnant Women in U.S.*, Brit. Med. J. (Oct. 19, 2022).[6]

In response to the deadly mix of firearms and domestic violence, members of the California Legislative Women's Caucus have authored legislation limiting access to firearms for people who are subject to domestic violence restraining orders. California Family Code section 6389 has long prohibited persons subject to civil domestic violence restraining orders from purchasing a firearm during the pendency of the restraining order. In 1999, Senator Hilda Solis sponsored Senate Bill 218, which expanded the law to prohibit not only a new purchase but also the possession of a firearm during the pendency of the protective order.

The California Legislative Women's Caucus has worked to tighten and strengthen the laws requiring firearm relinquishment by persons subject to domestic violence restraining orders. In 2012, Senator Elaine Alquist sponsored Senate Bill 1433, which required courts issuing a domestic violence protective order to determine if the person possessed firearms and if so, allow peace officers serving the protective order to have the firearms relinquished to them. In 2014, the state Judicial Council adopted Rule of Court 5.495 to improve the procedures for ensuring firearms are relinquished when a civil domestic violence restraining order has been issued. In 2021, California Legislative Women's Caucus member Senator Susan Eggman

[6] https://www.bmj.com/content/379/bmj.o2499.full.

sponsored Senate Bill 320 to codify the court rule and further strengthen the procedures for relinquishment.

Currently, California laws provide for civil domestic violence restraining orders that can be as short as seven days, if sought by law enforcement or a family member victim ex parte; or they can remain in place for a more extended period after notice and hearing before the courts. Cal. Fam. Code §§ 6200-6389. When law enforcement officers seek an emergency protective order, they must prove to the court's satisfaction "[t]hat reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists" and "[t]hat an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence. . . ." *Id.* § 6251. The officer may request the emergency order only "if the officer believes that the person requesting an emergency protective order is in immediate and present danger." *Id.* § 6275(b). Otherwise, the restraining order may issue only "after notice and a hearing." *Id.* § 6340.

Persons subject to civil domestic violence restraining orders are prohibited from owning, possessing, purchasing or receiving a firearm, or attempting to do so, during the pendency of the restraining order. *Id.* § 6389. The domestic violence restraining order with its associated gun relinquishment requirement allows law enforcement to step in before a threat escalates to irreversible deadly action. *See*, *e.g.*, *Ashby v. Ashby*, 68 Cal. App. 5th 491 (2021) (restraining order with gun relinquishment issued against abusive spouse who had more than 100 guns in the house, always carried a

gun on his person and would take the gun out of its holster and lay it on the table in front of his spouse when they argued; no gun violence occurred during pendency of the order).

California's laws thus work proactively to prevent gun violence in the home. This Court knows that "[d]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *United States v. Castleman*, 572 U.S. 157, 160 (2014) (citations omitted). The domestic violence restraining order with its associated gun relinquishment requirement allows law enforcement to step in before a threat becomes deadly.

B. California Statutes Providing for Gun Violence Restraining Orders at the Behest of Law Enforcement or Family Members Are An Effective Means of Preventing Significant Harm

California Legislative Women's Caucus members have also been instrumental in expanding the use of restraining orders to reach other situations where immediate action can help avert a deadly shooting. The initial impetus was a horrific mass shooting committed by a college student in Isla Vista, California who, after stabbing to death his two roommates and a friend, sped across the heavily populated student town and in only eight minutes fired more than 55 times, killing three and wounding 13 others before shooting himself. The

student, who had been targeting women, had 550 rounds of ammunition on him when he was captured. Joseph Serna, *Elliot Rodger Meticulously Planned Isla Vista Rampage, Report Says*, Los Angeles Times (Feb. 19, 2015).[7]

Prior to the attack, his parents had expressed concern about their son after viewing videos he posted and requested a welfare check. The deputies who went to his apartment concluded after a brief interview that he did not appear to pose an immediate threat and had not committed a crime, so they had no basis for searching his apartment or putting him on a mental health hold. The night of the shooting, the student emailed his parents and others a "manifesto" and uploaded a video vowing to take revenge on the women of Isla Vista. *Id.*[8] His parents were speeding to his apartment when the shootings occurred.[9] Even then, under California law no legal mechanism existed to separate him from the guns and hundreds of rounds of ammunition he had legally purchased over the past few months and was storing in his student apartment. Waiting until he had committed a crime was obviously too late; the law needed to evolve to let family members and law enforcement work together to *prevent* reasonably foreseeable shootings of innocent people.

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[7] https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-isla-vista-rampage-investigation-20150219-story.html.

[8] *See* Santa Barbara Cty. Sheriff's Off., *Isla Vista Mass Murder May 23, 2014 Investigative Summary* 1 (Feb. 18, 2015), https://documents.latimes.com/isla-vista-investigative-summary/.

[9] Santa Barbara Cty. Sheriff's Off., *supra*, at 3.

In response, then-Assemblymember and now Senator Nancy Skinner, current Chair of the California Legislative Women's Caucus, sponsored Assembly Bill 1014 of the 2014-15 legislative session. Drawing on the experience with domestic violence restraining orders, Assembly Bill 1014 authorized a law enforcement officer or immediate family member to seek a judicial gun violence restraining order (GVRO) prohibiting a person from having in their custody or control, owning, purchasing, possessing, or receiving any firearms. Now codified as California Penal Code sections 18100-18205, California's law was the first in the United States to allow immediate family members of a person threatening violence to petition for the order. In 2018 the law was strengthened by passage of Senator Skinner's Senate Bill 1200, a Legislative Women's Caucus priority, which among other things requires GVROs issued for an initial 21-day period to have a hearing held within that time period to ensure due process and allow for up to a year extension. The law was expanded in 2020 by Assembly Bill 61, which allowed certain coworkers, employers and teachers to file for GVROs; and by Assembly Bill 2870, which allowed people who are dating or share children with the gun owner to apply for GVROs.

Preliminary research shows that GVROs, like their domestic violence counterparts, can be successful in curbing gun violence. A study conducted in 2022 of 379 GVROs issued in California from 2016-2018 found that only one person died from a firearm injury inflicted by someone subject to a GVRO; in that instance,

from injuries sustained in a suicide attempt that had prompted issuance of the GVRO. Univ. Cal. at Davis Violence Prevention Rsch. Program, *supra*, at 2.[10] The study further found that 58 cases during those years involved threatened mass shootings; a separate in-depth analysis of 21 of those cases found that none of the threatened shootings occurred after the firearm(s) were relinquished. *Id.* Indeed, GVROs are so impactful that the San Diego City Attorney's Office has created a special task force just to implement the law. Alexei Koseff, *Inside the Team Pioneering California's Red Flag Law*, CalMatters (Sept. 19, 2022).[11]

C. California Statutes Removing Guns From Persons Subject to a Violence Restraining Order Provide a Non-Controversial Prophylactic With Proven Effect

Both domestic violence restraining orders and gun violence restraining orders provide a multitude of due process protections and layers of judicial review. Emergency ex parte orders are limited in duration, and longer orders require full notice and hearing. In California's experience, these targeted orders have been demonstrably successful at keeping firearms out of the hands of someone who has been shown to the court's satisfaction to pose a threat to themselves or others.

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[10] https://health.ucdavis.edu/vprp/pdf/VPRP-ERPO-Mass-Shooting-Memo-June-2022.pdf.

[11] https://calmatters.org/justice/2022/09/red-flag-laws-california/.

These laws are not controversial: a national public opinion survey conducted in January 2017 found that 81% of respondents favored gun prohibitions on persons subject to temporary domestic violence restraining orders and almost 79% favored laws creating a civil process for families to petition the court for temporary removal of a firearm from an individual deemed to be at serious risk of harming themself or others, with little differences between gun owners and non-gun owners in their responses. Colleen L. Barry et al., *Public Support for Gun Violence Prevention Policies Among Gun Owners and Non–Gun Owners*, 108 Am. J. Pub. Health 878, 880 (2018).[12]

Without these laws, law enforcement has no ability to proactively disarm someone who has committed domestic violence or made a credible threat to harm someone; and desperate family members have no recourse to stop a loved one from committing suicide by firearm or inflicting immeasurable harm on others.

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[12] https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2018.304432.

II.

THE FIFTH CIRCUIT'S REASONING MISREADS THIS COURT'S OPINIONS IN *HELLER* AND *BRUEN*

A. Mr. Rahimi Is Not the "Law Abiding" and "Ordinary Citizen" Whose Rights Are Protected By the Second Amendment

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), this Court held that Second Amendment protection is restricted to "law-abiding, responsible citizens" or "ordinary, law-abiding citizens." *Heller*, 554 U.S. at 635; *Bruen*, 142 S. Ct. at 2122, 2131. The Fifth Circuit interpreted that language to allow restrictions only for "groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." Pet. App. 9a. In so doing, the Court of Appeals ignored Justice Alito's admonition that: "All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense. . . ." *Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring).

When an individual like Mr. Rahimi blatantly ignores a restraining order to which he actually *agreed*,[13] having been warned of the consequences under federal law, he cannot be described as "law-abiding" or an

[13] Pet. App. 3a.

"ordinary" citizen. As the facts of this case demonstrate, Mr. Rahimi is anything but that. Mr. Rahimi's assault on his girlfriend that served as the basis for the restraining order was violent in itself, but when he realized that a bystander had witnessed it, he retrieved a gun and fired a shot. Pet. 2 (citing C.A. ROA 217). Thus, even if he had not agreed to the restraining order, Mr. Rahimi's Second Amendment rights could be restricted, because such behavior is not tolerated in our society, either at the federal or state level.[14] No person who violates a valid protective restraining order based on this kind of behavior can fall within any definition of law-abiding.[15]

Rather than examine the facts before it, however, the Fifth Circuit held that under this Court's decisions in *Heller* and *Bruen*, section 922(g)(8) is facially unconstitutional, regardless of the behavior to which it was applied. Pet. App. 27a. That was error. Normally, a plaintiff bringing a facial challenge must "establish that no set of circumstances exists under which the [law] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

The facts of Mr. Rahimi's case demonstrate that, properly understood, the law could validly be applied to him. First, the Fifth Circuit acknowledged that the

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[14] *See* 34 U.S.C. §§ 10461-10465, 12291-12514 (grants to support domestic violence protection order programs and Violence Against Women Act); Cal. Fam. Code §§ 6200-6389 (prevention of domestic violence).

[15] The Fifth Circuit did not question the validity of the restraining order itself. *See* Pet. App. 3a n.2.

order's underlying prohibitions—committing or threatening family violence, harassing his ex-girlfriend, or going within 200 yards of her or their child—"are plainly lawful and enforceable." Pet. App. 3a n.2. It also recognized that Mr. Rahimi agreed to entry of the order, including the part that prohibited him from possessing a firearm. Pet. App. 3a. When police searched Mr. Rahimi's home and uncovered the firearms, a copy of the restraining order was also found in his home, and that order made specific reference to 18 U.S.C. § 922 and its consequences. Pet. 3 (citing C.A. ROA 210-11). Given these facts, the Fifth Circuit should have simply held that to the extent any Second Amendment claim was at issue, Mr. Rahimi knowingly waived his Second Amendment rights and the statute could constitutionally be applied to him.

Even if that were not the case, however, the Fifth Circuit should have asked what actions on Mr. Rahimi's part preceded entry of the restraining order. Mr. Rahimi admitted he agreed to the restraining order after allegedly assaulting his ex-girlfriend, with whom he had a child, and who sought an order restraining him from committing or threatening family violence and from going within 200 feet of her or their child. Pet. App. 3a & n.2. That behavior should have been enough to demonstrate that Mr. Rahimi was a threat at least to them and therefore should not have been allowed to possess a firearm. As it turned out, Mr. Rahimi was a threat to society at large and used his unlawful firearm on at least three subsequent

occasions against other members of the public, including a constable. Pet. App. 2a.

The Fifth Circuit failed to conduct any inquiry like this because it believed it was confined to historical precedents that are antithetical to our laws today. When a court puts on blinders like that, it threatens the very bedrock of our current constitutional understanding.

B. The Court of Appeals Erred In Its Application of *Bruen*'s Historical Approach

The narrow nature of the Fifth Circuit's historical inquiry inevitably led to error. Even if the court had looked at firearm statutes as they existed when the Fourteenth Amendment was adopted in 1868, many states did not prohibit wife abuse or other kinds of domestic violence until much later. An Alabama court was apparently the first to so hold in 1871, but a Pennsylvania bill proposing to make wife beating a crime failed in 1886, and it was not until the early twentieth century that the law protected women from domestic violence in most states.[16] Yet the *Rahimi* court concluded that an individual's right to possess a firearm

[16] U.S. Comm'n on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 2 (1982); Jeannie Suk, *At Home in the Law* 13 (2009) ("Although wife beating was formally illegal in all U.S. states by 1920, it was not until the 1970s that efforts by the women's movement to recast [domestic violence] as a public concern began to succeed.").

had to be judged by standards that our society has long since repudiated.

This method of determining the scope of Second Amendment protection is particularly flawed when applied to domestic violence abusers. It ignores the fact that even though 18th century laws often permitted wife-beating and threats of physical violence to a woman or her children,[17] our society has advanced far beyond that to the point where it can no longer be said that a man who engages in such conduct is either "law-abiding" or "ordinary."

The Fifth Circuit read this Court's decisions in *Heller* and *Bruen* far too narrowly, ignoring the Court's admonition that in order to uphold a firearm restriction, the government need only "identify a well-established and representative historical *analogue*, not a historical *twin*." *Bruen*, 142 S. Ct. at 2133. While sitting on the Seventh Circuit, Justice Barrett followed that approach when she carefully reviewed the historical analogues surrounding adoption of the Second Amendment and concluded that the historical evidence supports the proposition "that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

Justice Barrett's conclusion would preserve the viability of the California statutes described above and

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[17] *See*, *e.g.*, *Bradley v. State*, 1 Miss. 156, 157 (1824); U.S. Comm'n on Civil Rights, *supra*, at 2.

those in other states designed to protect women and children from the grave danger posed by allowing firearms to remain in the hands of their abusers. By contrast, if allowed to stand, the Court of Appeals' reasoning would invalidate not only section 922(g)(8), but every underlying restraining order on which it is based if that restraining order prohibits possession of a firearm. If domestic abusers do not fall within one of the historically limited categories of citizens whose Second Amendment rights could be curtailed, it will make no difference whether the law at issue is a federal one or a state statute.

Thus, the California statutes described above, and those in many other states, would be invalid under the Fifth Circuit's reasoning in *Rahimi.* It cannot be the case that these states lack the power to protect women and their children by prohibiting abusers from possessing firearms.

III.

GUN VIOLENCE RESTRAINING ORDER STATUTES CAN AND SHOULD BE UPHELD IF THEY PROVIDE BASIC DUE PROCESS PROTECTIONS

The Court of Appeal's reasoning also violated the general rule that if possible, courts should give a statute a saving construction in order to avoid unconstitutionality:

> [I]t is well established that if a statute has two possible meanings, one of which violates

> the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." . . . Justice Holmes made the same point a century later: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012) (quoting *Parsons v. Bedford*, 28 U.S. 433, 448 (1830) and *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

The Fifth Circuit made no attempt to construe section 922(g)(8) in any way that would save its constitutionality. As a result, it never considered two issues that are key to the statute's constitutionality: (1) whether it affords an individual constitutional due process before his Second Amendment rights may be taken away, and (2) what kind of evidence should be required before such an order can be obtained.

Section 922(g)(8) provides for due process by requiring that the court order had to have been "issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate. . . ." 18 U.S.C. § 922(g)(8)(A). Thus, although courts can and should be able to issue ex

parte gun violence restraining orders to protect individuals from imminent threat,[18] such an order generally could not be the basis for a conviction under section 922(g)(8), because that section requires actual notice, something that usually cannot be accomplished in an emergency situation.

As for the basis for issuance of such an order, section 922(g)(8) does not expressly state, but strongly implies, that there must be evidence that the person restrained poses a credible threat of violence. The underlying order must not only "restrain[] 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," but it must either "include[] a finding that such person represents a credible threat to the physical safety of such intimate partner or child" or "by its terms explicitly prohibit[] the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. . . ." 18 U.S.C. § 922(g)(8)(B), (C).

The latter requirement is intended to encompass situations where a specific immediate threat of physical injury may not have been made, but the subject of

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[18] *See*, *e.g.*, Cal. Penal Code § 18125 (providing conditions under which a temporary emergency gun violence restraining order may be issued on an ex parte basis). Section 18125(b) requires that such an order expire 21 days from the date of issuance. *Id.* § 18125(b).

the order has a history of threats of violence or there is other credible evidence that violence may occur. For example, prior to issuance of a domestic violence restraining order in California, courts must ensure that a search be conducted of records to determine whether the subject of the proposed restraining order has prior criminal convictions, is currently on parole or probation, has a registered firearm, or has a prior restraining order or a violation of such an order. Cal. Fam. Code § 6306. This kind of evidence is extremely probative even in situations where there has not yet been physical violence.

A court considering application of section 922(g)(8) can also consider other aspects of the state law under which a restraining order was issued. For example, in his concurrence in *Rahimi*, Judge Ho referred to the practice of "mutual" protective orders, saying that "[i]n any domestic violence dispute, a judge may see no downside in forbidding *both* parties from harming one another." Pet. App. 39a (Ho, J., concurring). As Judge Ho rightly pointed out, often such an order "effectively disarms *victims* of domestic violence." Pet. App. 40a. That need not be the case, however, because a well-crafted statute will prevent the kinds of "perverse" consequences that Judge Ho described. *See* Pet. App. 39a. Section 6305 of the California Family Code, for example, prohibits courts from issuing mutual protective orders unless both parties personally appear and present evidence and the court "makes detailed findings of fact indicating that both parties acted as a primary

aggressor and that neither party acted primarily in self-defense."

The point is that the Court of Appeals used far too blunt an instrument to decide the outcome of this case. Its ruling has the potential to invalidate carefully crafted gun violence restraining order statutes like California's without ever considering whether they properly protect not only Second Amendment rights, but the women and children whose lives are at risk from their abusers.

In his concurrence, Judge Ho justified the Fifth Circuit's failure to find a saving construction of section 922 because "[t]hose who commit violence, including domestic violence, shouldn't just be disarmed—they should be detained, prosecuted, convicted, and incarcerated." Pet. App. 34a. It may be, as the concurrence states, "that's exactly why we have a criminal justice system. . . ." Pet. App. 34a. But the criminal justice system kicks in too late in the day to prevent the violence from happening in the first instance. The point of restraining guns as part of the domestic violence restraining order or other gun violence restraining order is to prophylactically prevent someone from committing violence when the threat they will do so is clear to law enforcement and the courts. The Fifth Circuit wipes these prophylactic measures off the books, taking away one of the most valuable tools for preventing gun violence before it occurs.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of the Petitioner and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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