

No. 22-915

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

UNITED STATES OF AMERICA, Petitioner,

v.

ZACKEY RAHIMI

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

**Brief of New York County Lawyers
Association as *Amicus Curiae*
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INTEREST OF *AMICUS CURIAE*¹

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 individuals’ constitutional rights in New York County (Manhattan).

NYCLA has actively supported reasonable gun legislation, including legislation designed to address mass shootings and regulatory measures to address the proliferation of untraceable “ghost guns.”² 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

¹ 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. This *amicus* brief was approved for filing on behalf of NYCLA by its Executive Committee.

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

programs and forums to address the problem of domestic violence in New York and elsewhere.

A gun in the hands of a domestic 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, Jened Duncan, in the head in a jealous rage, then shot her new boyfriend in the chest before killing himself.³
- In May 2020, Glorys Dominguez's estranged husband interrupted her dinner and shot and stabbed his sister-in-law, Reina Dominguez, to death.⁴ Police sources said the woman had previously called for help a few weeks before the attack.⁵
- In June 2020, 20-year-old Azsia Johnson 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,

³ Ashley Southall, *2 Die in Jealous Rampage, New York City's Third Murder-Suicide in Days*, N.Y. Times (Nov. 10, 2019), <https://perma.cc/R7AK-MNHW>.

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

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

including his beating her while she was pregnant and threatening to kill her.⁶ Law enforcement confirmed that her killing was “domestic” in nature.⁷

- 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.⁸
- 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 in her neighbors’ domestic dispute.⁹ Before

⁶ *Baby’s father charged in slaying of stroller-pushing NYC mom*, A.P. (July 1, 2022), <https://perma.cc/58N8-U7QU>.

⁷ Jack Morphet, *Young mom shot dead on Upper East Side victim of domestic violence: cops*, N.Y. Post (June 30, 2022), <https://perma.cc/4XHP-RD7Y>; Chelsia Marcius, et al., *Police Eye Domestic Violence in Upper East Side Killing of Mother*, N.Y. Times (June 30, 2022), <https://perma.cc/QWX3-Z8C2>; Michael Daly & Justin Rohrlich, *Young Mom Gunned Down in NYC Made Multiple Domestic Violence Complaints*, Daily Beast (June 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. (July 1, 2022), <https://perma.cc/A8Y5-EG7T>.

⁸ Ashley Southall, *Pregnant Woman is Strangled as N.Y.C Has 3 Domestic Killings in Days*, N.Y. Times (Oct. 27, 2020), <https://perma.cc/ZZB3-T9AR>.

⁹ Nicole Johnson, et al., *Woman shot while trying to intervene in domestic dispute in NYC building*, PIX 11 (Feb. 23, 2023), <https://perma.cc/T2TY-A77G>.

the shooting, police had routinely been called to the shooter's apartment because of domestic violence.¹⁰

- On May 7, 2023, a man shot his long-time girlfriend, 49-year-old Jacqueline Wilson, multiple times and then sparked a two-hour standoff with the NYC SWAT team after he barricaded himself in his home and threatened “to shoot everyone in the house.”¹¹

These stories are just a few examples of the tragedies that can ensue when domestic abusers have access to guns.

Research shows that gun violence and domestic violence are inextricably linked, and guns increase the likelihood that domestic violence becomes lethal.¹² Domestic abusers with access to guns are

¹⁰ Rocco Parascandola, et al., *Suspect in shooting of Harlem woman regularly abused girlfriend, neighbor says*, N.Y. Daily News (Feb. 23, 2023), <https://perma.cc/EMR7-Q837>.

¹¹ Brittany Kriegstein, *East Flatbush woman killed by gunfire in domestic violence incident Sunday*, Gothamist (May 8, 2023), <https://gothamist.com/news/east-flatbush-woman-killed-by-gunfire-in-domestic-violence-incident-sunday>; Amanda Woods, *NYC grandmother's boyfriend charged with her murder after tense SWAT standoff*, N.Y. Post (May 8, 2023), <https://nypost.com/2023/05/08/man-charged-with-murder-after-fatally-shooting-girlfriend-sparking-swat-standoff-cops/>.

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

much more likely to kill their victims.¹³ The presence of a gun in a domestic-abuse situation causes the victims to suffer severe post-traumatic stress disorder.¹⁴ The presence of a gun creates an environment of “coercive control,” defined as “an intentional pattern 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.¹⁵ 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 show that laws prohibiting individuals who have committed intimate-partner violence from possessing firearms and requiring these individuals to relinquish existing firearms result in significantly lower rates of intimate-partner homicide.¹⁶

¹³ 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>.

¹⁴ See Everytown, *supra* n.12.

¹⁵ 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>.

¹⁶ 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>.

New York has worked hard to remove guns from the hands of proven domestic abusers for good reason: guns continue to be used in a large share of domestic-violence-related homicides in New York.¹⁷ But with the help of statutes preventing abusers who have protective orders against them from possessing firearms for the duration of the protective orders, incidents of domestic-violence homicides have decreased, at least in New York City.¹⁸ NYCLA is concerned that these statutes are at risk should this Court not reverse the Fifth Circuit’s decision, which in turn, would 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

¹⁷ *Domestic Violence*, N.Y. State, <https://perma.cc/FHD5-B77L>. See also *New York State Gender-Based Violence*, at 33 (showing that firearms have been a top weapon type for intimate partner homicides in New York in recent years).

¹⁸ *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>.

the leading cause of injury to women in the United States between the ages of 15 and 44.”¹⁹ 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.”²⁰

The bill adding Section 922(g)(8) passed with bipartisan support, and the sponsors stressed the great dangers posed by firearms in the hands of domestic abusers. Senator Paul Wellstone of Minnesota 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.”²¹

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 possessing or

¹⁹ 140 Cong. Rec. S6018-02, 140 Cong. Rec. S6018-02, S6053 (May 19, 1994).

²⁰ 142 Cong. Rec. S11878 (daily ed. Sept. 30, 1996).

²¹ 140 Cong. Rec. S7884 (daily ed. June 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 [Section 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 an adverse effect on interstate commerce; and individuals with a history of domestic abuse should not have easy access to firearms.”).

obtaining a license to possess firearms. New York City has similarly imposed restrictions on licensing and possession by these individuals.²² 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 individuals and domestic abusers and to close loopholes in existing laws.²³

Despite Congress’s expressed will, and despite widespread public support for disarming domestic abusers,²⁴ the Fifth Circuit struck down Section 922(g)(8), finding that there was no “historical precedent” for regulating the ability of abusers to carry a firearm. *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023).

But there *is* historical precedent. Traditionally, individuals may be denied Second Amendment rights if, following a judicial proceeding, they were found to pose a danger to an individual or to the public at large. 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.

²² N.Y.C. Admin. Code § 10-131(h)(11).

²³ Bipartisan Safer Communities Act, Pub. L. 117-159; <https://crsreports.congress.gov/product/pdf/R/R47310>.

²⁴ 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).

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 were greatly restricted.²⁵ American women did not gain the right to vote until 1920.²⁶ Federal law did not formally grant women the right to open bank accounts without their husbands' co-signatures until 1974.²⁷ Because gun ownership has proliferated in recent years, Section 922(g)(8) was enacted to prevent abused women and children from being subjected to gun violence.²⁸ This Court,

²⁵ 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. 2023) (“At common law, a married woman could not, during the life of her husband, bind herself by a contract”).

²⁶ U.S. Const. amend. XIX.

²⁷ See Equal Credit Opportunity Act, 15 U.S.C. § 1691, *et seq.*

²⁸ 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

therefore, should reverse the Fifth Circuit’s decision. Allowing it to stand would be inconsistent with *Bruen* and *Heller* and would throw New York statutes like the Family Court Act—as well as others enacted across the country—into crisis, potentially undermining the protections in place to help prevent lethal harm to victims of domestic abuse.

ARGUMENT

***Rahimi* casts doubt on laws intended to protect victims of domestic abuse from the ultimate abuse—death.**

I. Striking down Section 922(g)(8) could endanger New York’s regulations that are designed to protect victims of domestic abuse from gun violence.

New York is a leader in preventing family and domestic violence and protecting victims of such violence.²⁹ Should the Fifth Circuit’s decision stand, New York’s statutes and licensing regimes that prevent domestic abusers from possessing guns while under orders of protection could be in jeopardy.

New York’s licensing regime allows law-abiding citizens to obtain gun permits and denies permits to

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.”).

²⁹ *Domestic Violence by State 2023*, World Population Rev., <https://perma.cc/CY7Q-5KAZ>.

persons who are not law abiding. New York City's gun license application states:

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, 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.)³⁰

This licensing regime—geared toward keeping firearms out of the hands of dangerous persons—has been in effect in New York since at least 1911.³¹

³⁰ *New Application Instructions*, N.Y.P.D., <https://perma.cc/3KGV-NWCF>.

³¹ “In 1911, New York 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

In 1996, consistent with the evolving understanding of and attitude towards domestic violence nationwide, New York's Family Court Act barred domestic abusers from possessing firearms.

The Family Court Act prohibits a person subject to a domestic violence protective order from obtaining a firearms license, and requires the revocation of any existing firearms license in the name of the 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).³² When a domestic-violence protective order is issued, the court must revoke the respondent's gun license, render him ineligible to obtain a new license, and order the immediate surrender of any firearms he owns or possesses. Notably, a finding of dangerousness is required before a person may be disarmed. The firearms restrictions are triggered only if the court finds that the respondent's conduct involved infliction of physical injury, the use or threatened use of a deadly weapon, or behavior constituting a violent felony offense. *See* N.Y. Fam. Ct. Act § 842-a(2)(a), (3).

Additionally, 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 may issue a

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.

³² *See also* N.Y. Penal Law § 400.00(1)(e), (11).

protective order and also prohibit the defendant from purchasing or possessing firearms, as well as suspend any existing firearms licenses. In other words, the defendant's guns can be removed, and he can be prevented from getting a license while the criminal charge remains pending. *See* N.Y. Crim. Proc. Law §§ 530.12(1), 530.14(1)(b), (2)(b). And, the court must suspend or revoke the defendant's firearms license if it finds a "substantial risk" that the defendant will use or threaten to use a firearm unlawfully against a domestic-violence victim. *Id.* Under these circumstances, the defendant's right to obtain or renew a gun license is also suspended.³³

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. The new law also requires the police 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. *See* N.Y. Crim. Proc. Law § 140.10(6).³⁴

³³ *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.").

³⁴ 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,

As noted above, N.Y. Penal Code Section 400.00, effective in 1967, was amended with unanimous consent of the New York State Assembly 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 existing one while under the order.³⁵ As described in the memorandum supporting the change in the law, 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.”³⁶

New York legislators acknowledged that 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

the weapon must be returned. *See* N.Y. Crim. Proc. Law § 140.10(6)(c).

³⁵ N.Y. Bill Jacket, 1996 S.B. 7631, Ch. 644.

³⁶ *Id.* By 1994, as awareness and understanding of domestic violence grew nationwide, all fifty states had adopted legislation on civil protective orders for domestic-violence victims. *See* Judith Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 *Yale L. & Pol’y Rev.* 93, 100 (2005), <https://perma.cc/ML5P-8HXM> (citing U.S. Dep’t of Justice, No. 189,190, *Enforcement of Protective Orders* 3 (2002), *available at* <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/ncj189190.pdf>).

murdered 30 percent of the 4,339 women killed in the United States in 1990.”³⁷ 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.”³⁸

Supporting the legislation, the citizens group New Yorkers Against Gun Violence applauded Republican 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 a small representation of all the victims of domestic violence in New York State for 1994.”³⁹

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. N.Y.C. Admin. Code §§ 10-131, 10-300, *et seq.* Specifically, the City Administrative Code incorporates the state law provisions discussed above, which prevent certain individuals, including domestic abusers, from accessing guns. *See* N.Y.C. Admin. Code § 10-131(h)(11).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Further, New York City specifically prohibits individuals subject to certain domestic-violence protective orders from obtaining licenses for rifles and shotguns. *See* N.Y.C. Admin. Code § 10-300, *et seq.* Notably, this provision of New York City law *is nearly identical to* the language of Section 922(g)(8). *See* N.Y.C. Admin. Code § 10-303(a)(7).⁴⁰

Striking down Section 922(g)(8) could thus call into question the validity of the City's licensing regime, especially the prohibition on licensure for individuals subject to orders of protection because of their acts of domestic violence. This would not be a salutary result. As discussed, 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.⁴¹ In the United States, an average of 70 women per month are shot to death by intimate partners.⁴² In nearly half of the mass shootings from 2015 to 2022, the shooter shot a former intimate partner or family member.⁴³ In 2020, firearms were used in nearly half of all intimate-partner homicides in New York State outside New York City and in nearly a quarter of

⁴⁰ An individual has the right to appeal if their license is revoked or suspended. *See* N.Y.C. Admin. Code § 10-303(g).

⁴¹ 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>.

⁴² *See* Everytown, *supra* n.12.

⁴³ *Id.*

intimate-partner homicides in New York City.⁴⁴ 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 lack access to firearms, there is no "substitution effect"—that is, other weapons are not substituted for firearms when the abuser's access to firearms is restricted.⁴⁵

The evidence is clear: Where domestic abusers have less access to firearms, their victims are less likely to be murdered.

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), a domestic abuser may not be disarmed even if he has been given notice and the opportunity to be heard, and even if the court has found a substantial risk of physical violence. The Fifth Circuit apparently believes that an abuser may be disarmed only after a criminal conviction.⁴⁶

⁴⁴ 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>.

⁴⁵ Natalie Nanasi, *Disarming Domestic Abusers*, 14 Harv. L. & Pol'y Rev. 559, 561 (2020), <https://perma.cc/B4T5-V5R8>.

⁴⁶ See *Rahimi*, 61 F.4th at 455 (holding that a protective order under Section 922(g)(8) cannot deprive the subject of the order

This is an absurd result. Moreover, it is contrary to key Second Amendment holdings by this Court. *Heller* and *Bruen* make clear that the Second Amendment right belongs to “law-abiding, responsible citizens,” *Heller*, 554 U.S. at 635 (2008)—or, phrased differently, “ordinary, law-abiding citizens,” *Bruen*, 142 S. Ct. at 2122. A domestic abuser subject to an order of protection is, by definition, neither law abiding nor responsible and may be denied the right to keep and bear arms. The Fifth Circuit’s holding thus conflicts with the plain language of *Bruen* and *Heller*. And, this radical interpretation of the Second Amendment not only undermines the will of Congress, which enacted Section 922(g)(8), but threatens 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 domestic violence victims’ right to life and safety.

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. Importantly, Congress included due process protections in the law. The statute applies only where, in issuing a restraining order, a court found that the respondent poses a “credible threat to the physical safety” of an intimate partner or child, or where the protective order expressly prohibits the “use, attempted use, or threatened use of physical

of “his Second Amendment right for the duration of the court’s order ... even when the individual has not been criminally convicted or accused of any offense and when the underlying proceeding is merely civil in nature.”).

force” against the intimate partner or child. The statute further limits its scope to situations where a court issued a protective order “after a hearing of which [the respondent] received actual notice, and at which [the respondent] had an opportunity to participate” 18 U.S.C. § 922(g)(8)(A).⁴⁷

Similarly, in New York, Family Courts may disarm abusers if a judge finds a “substantial risk” that the abuser⁴⁸ “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.” N.Y. Fam. Ct. Act § 842-a. When a domestic-violence victim files a family-offense petition, the court may immediately issue a temporary order of protection that suspends the respondent’s gun license, makes the respondent ineligible for a gun license, and requires the respondent to return any firearms he or she currently possesses. *See* 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*,

⁴⁷ 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 that the order include 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).

⁴⁸ “Abuser” is the person against whom the victim seeks an order of protection.

the statute requires a hearing on notice within 14 days of the order.

Section 842-a arose from an understanding that the criminal justice system alone could not keep domestic-violence victims safe when their abusers had access to guns.⁴⁹ New York’s bifurcated criminal–civil system for domestic violence was established in the 1960s, when Family Courts were given jurisdiction over “family offenses.”⁵⁰ Section 842-a was enacted in 1999, creating a means for victims to seek the disarming of their abusers in Family Courts.⁵¹

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, aligning the civil provisions with the analogous provisions in Criminal Procedure Law § 530.14.⁵² This amendment closed a gap in relief for domestic-violence victims, allowing them the same protections regardless of whether their abusers were prosecuted and convicted in criminal court, so long as the court holds a hearing and finds that the abuser seriously injured the victim or that there exists “a substantial risk that the [abuser] may use or threaten to use a

⁴⁹ Judith Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 *Yale L. & Pol’y Rev.* 93, 100 (2005), <https://perma.cc/ML5P-8HXM>.

⁵⁰ *Id.* at 127.

⁵¹ Explanation of Bill Changes, N.Y. Bill Jacket, Ch. 597, 1998 S.B. 7589, at 5.

⁵² N.Y. Bill Jacket, Ch.1, 2013 A.B. 2230.

firearm unlawfully against the person or persons for whose protection the order of protection is issued.” N.Y. Fam. Ct. Act § 842-a. Closing this remedial gap is critical for domestic-violence victims, given the many reasons that domestic abuse victims may not seek redress through the criminal justice system.⁵³

In short, Section 922(g)(8) is similar to New York’s scheme. Section 922(g)(8) bars prohibited persons—including persons subject to domestic violence orders—from possessing guns. And, like New York law, Section 922(g)(8)’s penalties apply only if a protective order “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 protective orders covered by these statutes comport with due process principles. And, they protect vulnerable victims from the exacerbated risks of domestic violence when guns are involved. These orders also empower victims to leave their abusive situations with less fear of retaliation. Orders of protection place a needed barrier between abusers and their partners and children.

Another law that could be endangered if the Fifth Circuit’s decision stands is New York’s Extreme Risk Protection Order (ERPO) statute (as well as similar

⁵³ See Nanasi, *supra* n.45, at 567 (domestic violence victims may rely on their abusers for financial or other support, 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).

statutes enacted in states across the country in response to the Consortium for Risk-Based Firearm Policy report, urging states to enact these proactive safety laws).⁵⁴ The ERPO statute allows a court temporarily to disarm dangerous individuals who pose a substantial threat to themselves or others. N.Y.C.P.L.R. Ch. 63-a. A court may, first, 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).

This is just a temporary response to an immediately threatening situation. A full hearing must be promptly held for the deprivation to continue. The ERPO statute requires respondents to be given speedy notice and opportunity to be heard “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 [New York’s principal trial court] shall hold a hearing to determine whether to issue a final extreme risk protection order and, when applicable, whether a firearm, rifle or shotgun

⁵⁴ Shannon Frattaroli & Josh Horwitz, *Extreme Risk Protection Order: A Tool to Save Lives*, Johns Hopkins Sch. Pub. Health, last accessed Apr. 19, 2023, <https://perma.cc/W7RR-LVYZ>.

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 for a period of up to one year, and respondents may submit one request while the order is effective for a hearing to set aside all or part of the order. *See* N.Y.C.P.L.R. § 6343(6). In this way, should changed circumstances justify changing the order, respondents would have an additional opportunity to be heard. These sensible procedural safeguards, like those in Section 922(g)(8), would be threatened by affirmance of the Fifth Circuit’s erroneous decision here.

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.”⁵⁵ ERPO may well be invoked in a domestic abuse situation, as “family and household members are often the first to know when someone is experiencing a crisis or exhibiting dangerous behavior. Thus, civil remedies like ERPO, as the legislature recognized, can help “keep New Yorkers safe while respecting due process rights.”⁵⁶ The Fifth Circuit’s decision here threatens state laws that allow states to prevent individuals proven to be dangerous from accessing firearms—something most Americans want,⁵⁷ as reflected in

⁵⁵ N.Y. Committee Report, 242 Legislative Session, 2019 N.Y.S.B. 2451(NS) (Jan. 26, 2019).

⁵⁶ *Id.*

⁵⁷ *See* Barry, *supra* n.24.

the Byrne State Crisis Intervention Program (authorized by the Bipartisan Safer Communities Act of 2022 and allocating over \$231 million to fund such laws).⁵⁸

By providing mechanisms for orders of protection and ERPOs, New York safeguards 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 victims would be severely impaired.

CONCLUSION

If the Fifth Circuit's decision stands, state and local governments might be deprived of important tools that have been used successfully to protect their most vulnerable residents: victims of domestic abuse. It is imperative to limit the ability of domestic abusers to possess firearms, because, quite simply, such restrictions save lives.

Section 922(g)(8) and its state-law analogs keep families and domestic violence victims safe. In doing so, New York's regulatory scheme, like Section 922(g)(8), ensures that gun rights are not taken away without due process. Instead, those laws appropriately balance public safety and individual rights.

⁵⁸ 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* (Feb. 14, 2023), <https://perma.cc/T3JD-4CQ2>.

Accordingly, this Court should reverse the Fifth Circuit's decision and uphold 18 U.S.C § 922(g)(8).

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