No. 22-915

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZACKEY RAHIMI,
Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER STATE CHIEF JUSTICES AND CHIEF JUDGES IN SUPPORT OF PETITIONER

KATHLEEN R. HARTNETT
JULIE M. VEROFF
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111

PATRICK J. HAYDEN
COOLEY LLP
55 Hudson Yards
New York, NY 10001

ADAM M. KATZ
Counsel of Record
ADAM S. GERSHENSON
RACHEL H. ALPERT
KIMBERLEY A. SCIMECA
COOLEY LLP
500 Boylston St.
Boston, MA 02116
akatz@cooley.com
(617) 937-2351

DANIEL GROOMS
COOLEY LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004

Counsel for Amici Curiae

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Amici curiae are former Chief Justices and Chief Judges of the States of Arizona (Hon. Ruth McGregor), Connecticut (Hon. Chase T. Rogers), Delaware (Hon. Leo E. Strine, Jr.), New Hampshire (Hon. John T. Broderick, Jr.), New York (Hon. Jonathan Lippman), and Texas (Hon. Wallace B. Jefferson; Hon. Thomas R. Phillips).[2] *Amici* presided over a geographically diverse array of states encompassing over 60,000,000 citizens[3] and many thousands of judicial officers and other court personnel. In their capacity as Chief Justices and Chief Judges, *amici* gained an understanding of the important role played by state judiciaries in temporarily disarming perpetrators of domestic violence. *Amici* also witnessed firsthand the important role that state judiciaries play in grappling with and applying major precedents of this Court to local laws and procedures.

Amici submit this brief to provide the Court their perspective on two critical points.

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[1] No counsel for either party authored this brief in whole or in part. No person or entity, other than *amici* and their counsel, contributed to the preparation or submission of this brief.

[2] The views expressed in this brief are those of individual *amici* and do not represent the views or positions of their affiliated institutions. Institutional affiliations are listed for identification purposes only.

[3] U.S. Census Bur., *State Population Totals and Components of Change: 2020-2022* (June 13, 2023), https://tinyurl.com/bpby2dj3.

First, *amici* address how domestic-violence restraining orders that temporarily block access to firearms play a vital part in the administration of justice and public safety. These orders allow state courts to safeguard both families and the integrity of judicial proceedings. State courts protect families by evaluating the imminence and magnitude of a threat of violence and then exercising their discretion—conferred and cabined by state law—to order tailored relief that protects partners and children. Often, this relief involves disarming the perpetrator, as logic and data confirm that a firearm can decide whether or not an abusive situation escalates to catastrophic injury or death. Such orders also help to ensure that judicial proceedings related to, or subsequent to, the domestic violence can unfold in an orderly fashion without the specter of gun-violence. Importantly, state procedures accord alleged domestic-violence perpetrators a right to an adversary proceeding in a timely period, thus guaranteeing that any deprivation of the ability to carry a firearm based on an *ex parte* application is limited to a time-period in which there are special dangers of lethal violence.

Second, *amici* explain why this Court should uphold 18 U.S.C. § 922(g)(8) as a straightforward application of its own Second Amendment precedent and not go beyond that question. A ruling limited to rejecting the specific Second Amendment challenge at issue here will adhere to the good-judging practice of minimalism, accord due respect to traditional state police powers used to promote public safety, and allow

myriad state-law frameworks to continue to evolve in light of this Court's decision in *Bruen*.

This Court should reverse the judgment below.

ARGUMENT

I. Laws Disarming Domestic Abusers Play a Vital Role in the Administration of Justice and Protection of the Public by State Courts

A. Laws Disarming Persons Subject to Domestic-Violence Restraining Orders Allow State Courts to Safeguard Families

Across the country, state courts play an essential role in implementing state law frameworks designed to protect and preserve community safety through the exercise of state police power. Domestic-violence restraining orders are a critical tool allowing state courts to protect families from imminent harm.

Consider, for example, the law in Delaware, where one of *amici* previously presided as Chief Justice. Under Delaware law, an individual who fears, *inter alia*, "physical injury," "sexual" violence, conduct designed to "cause fear or emotional distress," "[c]hild abuse," or other "threatening" behavior, may petition the court for a restraining order. Del. Code Ann. tit. 10, §§ 1041, 1042. Delaware judges "may" grant *ex parte* relief under certain exigent circumstances (*e.g.*, where there is "an immediate and present danger of domestic violence to the petitioner or to a minor child" and the petitioner has made an effort to "give notice"), or else "shall order a hearing" to consider whether, "the alleged domestic violence … occurred" such that

relief is warranted. *Id.* §§ 1043, 1044, 1045. *Amici* stress again that the Delaware statue and other state laws guarantee the alleged perpetrator a timely adversarial hearing if an *ex parte* order is entered. *Id.* § 1043(d). State court judges are well-positioned to examine the facts before them and to evaluate the credibility of petitioners seeking relief in their courtooms. Accordingly, this and similar state codes nationwide provide for state judges to use their cabined discretion to assess the severity of a threat and, where necessary, issue restraining orders to protect families from domestic violence.

Under 18 U.S.C. § 922(g)(8), the provision challenged in this case, it is unlawful for any person subject to certain domestic-violence restraining orders to possess a firearm. That prohibition reflects the commonsense reality "that the presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder." 142 Cong. Rec. S1122 (daily ed. Sept. 25, 1996) (statement of Sen. Frank Lautenberg). Or, as another sponsor of § 922(g)(8) explained, the presence or absence of a firearm held by a perpetrator of domestic violence is often the only difference between life and death of the target of that violence: "All too often the only difference between a battered woman and a dead woman is the presence of a gun." 140 Cong. Rec. S7884 (daily ed. June 29, 1994) (statement of Sen. Paul Wellstone). Data backs this up: "Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by

knives or fists." *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (Easterbrook, J.) (citing sources).

Almost every state has adopted analogues to § 922(g)(8).[4] Some statutes, like § 922(g)(8), apply if the respondent received notice and a hearing. *See, e.g.*, Conn. Gen. Stat. Ann. § 29-36k (requiring immediate transfer of "any pistol, revolver or other firearm or ammunition" from a person who is subject to a restraining or protective order issued after the provision of notice). Other statutes also allow for potential application to *ex parte* orders, where such orders are justified by the factual circumstances and corresponding judicial findings that the danger warrants immediate action. *See, e.g.*, Del. Code Ann. tit. 10, §§ 1043, 1045(a)(8) ("After consideration of a petition for a protective order, the Court may . . . [o]rder the respondent to temporarily relinquish . . . respondent's firearms and to refrain from purchasing or receiving additional firearms for the duration of the order."). These statutes, like § 922(g)(8), promote a common goal: to protect victims of domestic violence from grievous injury and death. *See, e.g.*, *Ritchie v.*

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[4] 46 States, the District of Columbia, and multiple territories have adopted such measures. The States in which *Amici* formerly served as Chief Justice or Chief Judge are among them. *See* Ariz. Rev. Stat. Ann. § 13-3602(G)(4); Conn. Gen. Stat. Ann. §§ 29-28(b)(6), 29-36f(b)(6), 29-36k, 46b-15, 53a-217, 53a-217c, 53a-223; Del. Code Ann. tit. 10, §§ 1043, 1045(a)(8); N.H. Rev. Stat. Ann. §§ 173-B:4, 173-B:5, 173-B:9; N.Y. Fam. Ct. Act § 842-a; N.Y. Crim. Proc. Law § 530.14; N.Y. Penal Law § 400.00; Tex. Fam. Code Ann. §§ 83.001(b), 85.022(b)(6), (d); Tex. Penal Code Ann. §§ 25.07(a)(4), 46.06(a)(6); Utah Code Ann. §§ 76-10-503(1)(b)(x), 78B-7-404(5), 78B-7-504(5), 78B-7-603(2)(f).

Konrad, 10 Cal. Rptr. 3d 387, 403 (Cal. Ct. App. 2004) (reasoning that "[i]f a person represents a substantial threat to inflict physical harm on another person, it appears reasonable to disarm the former, at least to take away the weapons most capable of causing death or death-threatening injury, *e.g.*, firearms" in discussing Cal. Fam. Code § 6389, California's § 922(g)(8) analogue). As the Fifth Circuit itself recognized, § 922(g)(8) aims to "protect vulnerable people in our society." *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023).

Section 922(g)(8) and its state law analogues deliver results. Study after study has shown that such laws substantially reduce mortality rates.[5] *See*, *e.g.*, April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 Am. J. Epidemiology 2365, 2365 (2018) (finding a 10% reduction in intimate partner homicide in states with laws like § 922(g)(8)); Carolina Díez et al., *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 Annals Internal Med. 536, 541 (2017) (finding a 14% reduction in states with such laws); April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large*

[5] These studies use a combination of comparisons across states (*i.e.*, to states that have and have not enacted certain laws) and comparisons within states (*i.e.*, to the time before and after a state enacted a certain law). The results hold in both research designs.

U.S. Cities, 16 Inj. Prevention 90, 90 (2010) (finding a 19% reduction in large cities in states with such laws); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from A Multisite Case Control Study,* 93 Am. J. Pub. Health 1089, 1090 (2003) (finding abusers with firearms are five times more likely to murder their intimate partners). In short, the empirics are clear: laws like § 922(g)(8) help counteract and mitigate the deadly combination of firearms and domestic violence.

B. Laws Disarming Persons Subject to Domestic-Violence Restraining Orders Allow State Courts to Safeguard the Integrity of Judicial Proceedings

In addition to protecting families from harm, laws that disarm domestic abusers protect the integrity of state judicial proceedings for two related reasons.

First, a domestic-violence victim's choice to commence legal process (*e.g.*, by seeking a restraining order) or to leave their abuser often triggers a period of increased violence. *See, e.g.*, Natalie Nanasi, *Disarming Domestic Abusers*, 14 Harv. L. & Pol'y Rev. 559, 578 (2020) ("[A]ttempting to leave a violent relationship was the precipitating factor in 45 percent of murders of a woman by a man."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 65–66 (1991) (defining "separation assault" as "the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return").

During this period of heightened emotions and risk, state laws that disarm domestic abusers help minimize the possibility of deadly violence before a formal judicial hearing can be held.[6] For example, Delaware law authorizes state judges to issue restraining orders on an *ex parte* basis under exigent circumstances, but once "an *ex parte* protective order has been issued, a full hearing shall be held within 15 days." Del. Code Ann. tit. 10, § 1043(d). During that 15-day window, Delaware law provides that judges may issue an order disarming the person subject to the *ex parte* order. *Id.* §§ 1043(d), 1045(a)(8). And under no circumstances can this window be extended "to exceed 30 days," *id.* § 1043(d), thereby strictly limiting any depriviation to the period during which the risk of lethal violence is at its highest.

Provisions like this preserve the status quo pending a hearing and reduce the likelihood that an enraged abuser will harm or kill a victim for seeking relief. *See* Mahoney, *supra*, at 65–66. At the same time, such provisions respect the due process rights of the alleged abuser by providing an expedited right to an adversary hearing on whether the restraint on firearm possession shall remain in place. That kind of regulation—a "measure[] regulating handguns" that is attentive both to the rights of would-be victims and alleged perpetrators—is what this Court envisioned when it referred to the "variety of tools for combating

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[6] *Amici* note that in order to trigger § 922(g)(8), the underlying domestic-violence restraining order must have been "issued *after a hearing*" that affords the subject notice and an "opportunity to participate." 18 U.S.C. § 922(g)(8)(A) (emphasis added).

th[e] problem" of "handgun violence" that local governments lawfully retain. *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

Second, after a victim of domestic abuse leaves their partner, other legal proceedings—aside from the charge of domestic abuse itself—often must take place and be resolved. For example, a victim of domestic abuse may petition for divorce or seek to obtain full custody of any children, among other forms of family-law relief. *See*, *e.g.*, Del. Code Ann. tit. 13, § 1507 (divorce petition); *id.* § 721 (child-custody petition). Such divorce and child-custody proceedings—like a victim's efforts to seek relief from the abuse itself—can fuel an absuer's heightened emotions and trigger additional violence.[7] Laws that disarm domestic

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[7] *See, e.g.*, State Just. Inst. & Nat'l Council Juv. & Fam. Ct. Judges, Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide at 10–11 (2006), https://tinyurl.com/vynv2bye ("Lethal violence occurs more often during and after separation than when the couple is still together . . . ."); Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J. 57, 59 (2003) ("Attempts to leave a violence partner, with children, is one of the most significant factors associated with severe domestic violence and death. Inquests into domestic homicides and Domestic Violence Fatality Reviews have consistently pointed to the period of separation as the time of highest risk for victims of domestic violence."); Clare Dalton, Judge Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications*

abusers thus protect not only the integrity of judicial proceedings directly regarding the abuse, but also the integrity of various related proceedings by reducing the intervening threat posed by lethal weapons.

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Like § 922(g)(8), state laws that disarm domestic abusers allow state courts to protect families from harm and to safeguard the integrity of legal proceedings. The Fifth Circuit's conclusion that § 922(g)(8) violates the Second Amendment, if upheld, would eliminate this critical protection for the judicial process and for spouses, partners, and children already endangered by domestic abuse.

II. 18 U.S.C. § 922(g)(8) Does Not Violate the Second Amendment and the Court Should Limit Itself to That Question

A. Under a Straightforward Application of this Court's Precedent, § 922(g)(8) is Constitutional

As this Court recognized in *Heller* and *Bruen*, laws may properly limit firearm ownership for citizens who are not "law-abiding" and whose disrespect for the law endangers others. *See Heller*, 554 U.S. at 635; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). As the United States details in its

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for Custody and Visitation Decisions, 54 Juv. & Fam. Ct. J. 11, 26 (2003) (noting increased likelihood of "fear, injury, and death . . . in cases in which one parent has already demonstrated a readiness to use threats and violence to maintain control over the family whose cohesion is threatened by the proceedings").

brief, *see* Pet. Br. 13–27, that recognition comports with our country's longstanding history and tradition of disarming dangerous individuals. *See, e.g.*, *United States v. Jackson*, 69 F.4th 495, 504 (8th Cir. 2023) ("[H]istory supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society."); *United States v. Boyd*, 999 F.3d 171, 186 (3d Cir. 2021) (finding "longstanding historical support" for the principal that "legislatures have the power to prohibit dangerous people from possessing guns") (citation omitted); *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) ("The historical evidence does, however, support a different 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."). Indeed, in *Heller*, 31 States filed an *amicus* brief to reinforce that "centuries of common law" support the conclusion that a law "prohibiting firearm possession by people with … dangerous characteristics" is "reasonable and constitutionally valid," specifically citing § 922(g)(8) as an example of this valid form of firearm regulation. *Amici* Br. of Texas, et al., *District of Columbia v. Heller*, No. 07-290, at 35 (Feb. 2008).

Section 922(g)(8) embodies and reflects the tradition of appropriately disarming dangerous individuals. The law prohibits a person subject to a domestic-violence restraining order issued by a court from possessing a firearm when, among other things, the order includes a finding that the person poses a "credible threat" to the physical safety of an intimate

partner or child, or explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child. 18 U.S.C. § 922(g)(8)(C). Persons subject to such orders are thus, by definition, *not* "law-abiding," *Heller*, 554 U.S. at 635, but instead acute threats to public safety.

The Fifth Circuit's declaration that § 922(g)(8) is an "outlier[] that our ancestors would never have accepted," *Rahimi*, 61 F.4th at 454 (quoting *Bruen*, 142 S. Ct. at 2132), fails on its own terms and misapplies *Bruen*. As this Court explained in *Bruen*, the historical-analogical inquiry requires analogizing with respect to both why *and* how the government regulated firearms in the past. *See* 142 S. Ct. at 2118. The Fifth Circuit short-circuited this inquiry by distinguishing § 922(g)(8) from ratification-era laws that disarmed dangerous individuals, claiming that the purpose of those older laws "was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of domestic gun abuse, posted by another individual." *Rahimi*, 61 F.4th at 457 (citation omitted). Even on its own flawed terms, this analysis fails: As the United States explains, there in fact *were* early disarmament laws that applied to people who posed threats to identified victims. Pet. Br. 43.

Moreover, under *Bruen*'s required analysis, the laws concerned with maintaining the "political and social order" cited by the Fifth Circuit *do* provide historical support for § 922(g)(8). Historians and legal scholars have shown how "the common law did view aggravated acts of domestic violence as a threat to

'political and social order.'" Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. Rev. (forthcoming Dec. 2023) (manuscript at 131), https://tinyurl.com/4u2db2y6 ("Blocher & Siegel") (discussing Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* 180 (2009) (describing a common law system of magistrate-issued "peace warrants" that forced abusive husbands "to post bond to keep the peace toward their wives," "ensuring public monitoring of the situation and promising penalties for further abuse" and thereby allowing "wives [to] legally transform[] their husbands' violence from personal conflicts into illegal acts that endangered the public order")); *id.* at 131 n.180 (collecting "other examples of law enforcement in the domestic violence context").

History thus supports § 922(g)(8). And this historical record is as robust as one would expect, given that at the time of the founding "guns were so cumbersome they were rarely used for domestic abuse" and "a woman was viewed as a dependent of her abuser rather than an equal and independent member of the community." *Id.* at 132; *see also United States v. Nutter*, 624 F. Supp. 3d 636, 641 (S.D. W. Va. 2022) ("Laws surrounding domestic violence have evolved, in part as women's rights and roles in society expanded. The absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a

considered judgment about the importance or seriousness of the issue.").

Section 922(g)(8) satisfies the historical-analogical inquiry *Bruen* requires. The Fifth Circuit's contrary holding is wrong and should be reversed.

B. Judicial Minimalism and Respect for State Sovereignty Favor a Decision Limited to the Question Presented

As just explained, this case is a straightforward one for reversal under this Court's precedent. And, for at least two reasons—judicial minimalism and respect for state sovereignty—this Court should limit its decision to resolving the specific question presented and go no further.

First, the well-established principle of judicial minimalism counsels for a narrow ruling. For well over a century, this Court has recognized the "rule," which "ought always to govern this court, to decide nothing beyond what is necessary to the judgment we are to render." *United States v. Joseph*, 94 U.S. 614, 618 (1876). Jurists who otherwise vary widely in judicial methodologies have extolled the virtues of minimalism. In 1917, Justice Holmes opined that judges should break new ground "only interstitially." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting); *see, e.g.*, Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory & Practice*, 37 Wm. & Mary L. Rev. 19, 45 (1995) ("The Holmesian judge is an austere minimalist . . . ."). In 1936, Justice Brandeis explained that the "Court will not 'formulate a rule of constitutional law broader than is required by

the precise facts to which it is to be applied.'" *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (concurring) (quoting *Liverpool, N.Y. & Phila. Steam-Ship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)). In 1952, Justice Frankfurther stated it is "incumbent upon this Court to avoid putting fetters upon the future by needless pronouncements today." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (concurring). Many other members of this Court have since echoed these bedrock principles.[8]

At its core, judicial minimalism entails "saying no more than necessary to justify an outcome, and leaving as much as possible undecided." Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–4 (1999). Minimalist decisions are "[a]lert to the problem of unanticipated consequences" and properly see themselves "as part of a system of democratic deliberation" that "allows continued space for democratic reflection from Congress and the states." *Id.* at ix–x. This Court has "repeatedly recognized" these and other "benefits of proceeding

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[8] *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (Thomas, J.) (noting the "fundamental principle of judicial restraint"); *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring) (referring to the "important principle of judicial restraint"); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 n.5 (2018) (Sotomayor, J.) (as an "exercise of judicial restraint," "leav[ing] for another day" questions unnecessary to the disposition fo the case); *PDK Lab'ys Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) (noting the "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more").

with caution." *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011). Particularly where, as here, the parties have not asked the Court for a ruling beyond the contours of the precise question presented, the Court should "refrain[] from addressing [other] issue[s] in detail." *Id.*

Here, a decision simply affirming the constitutionality of § 922(g)(8) would avoid the many pitfalls of non-minimalist decisions. Specifically, any exposition of how *Bruen* and related cases may apply in contexts neither argued nor briefed here could inject uncertainty into myriad state regimes, with far-reaching and hard-to-predict consequences. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions" or "decide questions of a constitutional nature unless absolutely necessary to a decision" (quotation marks omitted)). As State *amici* pointed out in their brief in support of *certiorari*, nearly every State and territory enforces various laws disarming domestic-violence offenders for the reasons stated above—such state laws protect both the judicial system and families most at risk. *See* State *Amici* Cert. Br., Add. 1–31. Those laws may pursue similar results (the protection of domestic-violence victims and the public), but in a variety of different ways, with different structures, procedures, and standards. *See id.* A ruling that pre-judges hypothetical features of state statutes could unintentionally imperil dozens of jurisdictions' laws that are not before this Court. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a

court of review, not of first view."). That would "stunt[] the natural growth and refinement of alternative principles," *California v. Carney*, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting), and prematurely cut off the "dialogue" between this Court and state courts "concerning the meaning of the Constitution," Barry Friedman, *Dialogue & Judicial Review*, 91 Mich. L. Rev. 577, 581 (1993). Such an approach would be especially ill-advised here, given that state courts have only recently begun to digest, apply, and develop the *Bruen* framework in the context of variegated state gun-regulation regimes. *See infra* section II.C.

Second, and relatedly, resolving only the question presented by this case and nothing more would accord due respect to the sovereignty and police powers of the States. This Court has unanimously recognized the "need to act with proper judicial restraint when intruding on state sovereignty." *North Carolina v. Covington*, 581 U.S. 486, 488 (2017) (per curiam). The heartland of that sovereignty is the "police power"—the "undefined residuum of power remaining after taking account of powers granted to the National Government," which "belongs to the States and the States alone." *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring). And there can be "no better example of the police power, which the Founders denied the National Government and resposed in the States, than the suppression of violent crime." *United States v. Morrison*, 529 U.S. 598, 618 (2000); *see also, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's

police power . . . .”). The police power to prevent violence has long been understood to include regulatory power over firearms. *See, e.g.*, *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443–44 (1827) (Marshall, C.J.) (“The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.”); Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 Law & Hist. Rev. 197, 198 (2007) (“The right to keep arms for civilian purposes was not removed from the sphere of legislative power, it was subject to the full scope of the state’s ample police powers.”). That is why this Court in *McDonald* made clear that the Second Amendment “by no means eliminates” the ability of states “to devise solutions to social problems that suit local needs and values.” *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

Here, a decision simply upholding the constitutionality of § 922(g)(8) would best respect the independent sovereignty of the States. As just set forth, preventing crime and promoting public safety—including with respect to firearms—lie at the heart of state police power. Any decision resolving this case that goes further to entertain and address broader questions about the meaning of *Bruen* and related cases—questions not presented or briefed here—could destabilize countless exercises of police power to address gun violence. That would inhibit the valuable “state and local experimentation with reasonable firearms regulations” that *McDonald* recognized could “continue under the Second Amendment.” 561 U.S. at

785. The Court should not cut off such efforts with a decision that is broader than necessary to resolve the specific question presented by this case.

C. Rejecting the Fifth Circuit's Specific Misapplication of *Bruen* Need Not Disrupt Healthy Percolation in the Lower Courts

This Court's decision in *Bruen* is hardly a year old. Courts across the country are still digesting, applying, and fleshing out the contours of *Bruen* in the context of countless state firearms laws. And, as a practical matter, any eventual future challenges to state firearms laws—whether in the context of domestic violence or beyond—will call upon state judges to leverage their familiarity with local laws and the ways in which these laws operate on the ground. *See, e.g.*, Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 Seton Hall L. Rev. 1203, 1207–08 (2009) (explaining that a "comprehensive examination of the demographic and experiential characteristics of all judges on the courts of last resort" revealed that the "average" judge has been "heavily involved in both the bar and the greater local community, . . . likely spent some portion, if not all, of his undergraduate law school days at a school in the state over which he would eventually preside," and has "[c]ommunity ties" that "run deep"). Thus, allowing state courts to continue to have the opportunity to interpret and resolve potential challenges to local laws in varied factual settings will aid this Court's decisionmaking process. *See* Richard A. Posner, *The Federal Courts: Crisis and Reform* 163

(1985) ("[A] difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases . . . .").

This Court has long noted the benefits of allowing State and other lower courts to consider questions as they arise, rather than preemptively deciding matters not yet before the Court with overbroad rulings. Even at common law, "[i]n the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine." Benjamin N. Cardozo, *The Nature of Judicial Process* 179 (1921). In a variety of contexts, members of this Court have emphasized that awaiting cases that tee up questions precisely "encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring); *see also, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (observing that awaiting "diverse opinions from[] . . . state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court"); *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (refusing to apply nonmutual collateral estoppel to the Government because it "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question" before that question reaches the Supreme Court).

Proceeding incrementally in this fashion is all the more valuable following consequential decisions like *Bruen*, which take time for State and lower federal courts to digest. That time is well spent—in wrestling with new law, State and lower courts may ultimately provide compelling data and reasoning to inform this Court's ultimate views on how existing doctrine can or should evolve following the major new precedent. This process is well underway right now: courts across the country are carefully considering *Bruen*'s impact, including as to various laws that disarm dangerous persons, with varying results.[9] By allowing that process to play out case-by-case—and here doing no more than affirming § 922(g)(8)'s constitutionality—this Court may "work in tandem" with lower courts to determine the reach of *Bruen*. *See* Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 Wm. & Mary L. Rev. 1, 7 (2018) (describing process by which "lower [federal] courts and the Supreme Court can work in tandem" in building on precedent). This "crucible of adversarial testing, . . . along with the

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[9] *See generally, e.g.*, *United States v. Springer*, No. 23-cv-1013-DJW-MAR, 2023 WL 4981583 (N.D. Iowa Aug. 3, 2023); *United States v. Walker*, No. 8:22-cr-291, 2023 WL 3932224 (D. Neb. June 9, 2023); *United States v. Connelly*, No. EP-22-cr-229(2)-KC, 2023 WL 2806324 (W.D. Tex. Apr. 6, 2023); *United States v. Posey*, No.l 2:22-cv-83 JD, 2023 WL 1869095 (N.D. Ind. Feb. 9, 2023); *United States v. Harrison*, No. CR-22-00328-PRW, 2023 WL 1771138 (W.D. Okla. Feb. 3, 2023); *Fried v. Garland*, No. 4:22-cv-164-AW-MAF, 2022 WL 16731233 (N.D. Fla. Nov. 4, 2022); *United States v. Kelly*, No. 3:22-cr-00037, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022); *United States v. Perez-Gallan*, No. PE:22-cr-00427-DC, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

experience of . . . thoughtful colleagues" on the lower and state-court bench, "could yield insights (or reveal pitfalls)" that this Court "cannot muster guided only by [its] own lights." *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part).

Permitting such development in State and lower courts is particularly important here, as a ruling that speaks to anything other than § 922(g)(8) could either pre-judge the constitutionality of myriad state firearms regimes without adequate data or, conversely, destabilize these regimes. States have taken a variety of approaches to this issue—some extend their laws to reach dating partners, some include temporary restraining orders, and others rely on "red flag" laws to disarm dangerous persons. *See, e.g.*, *Which States Prohibit Domestic Abusers Under Restraining Orders from Having Guns?*, Everytown Rsch. & Pol'y, https://tinyurl.com/ydpv63m3 (last updated Jan. 12, 2023) (reviewing state legislation); Kaitlin N. Sidorsky & Wendy J. Schiller, *Can Government Protect Women from Domestic Violence? Not If States Do Not Follow Up.*, Brookings (Mar. 21, 2023), https://tinyurl.com/3jwhza6e (same); *Extreme Risk Protection Order: A Tool to Save Lives*, Johns Hopkins Bloomberg Sch. of Pub. Health (last updated Aug. 1, 2023), https://tinyurl.com/wpntehhs (same). Given the variety of these state laws, they should not be lumped together, particularly when they are not before this Court for review. Rather, a ruling simply affirming the constitutionality of § 922(g)(8) will allow state law to continue to evolve without preemptively constitutionalizing it.

The Fifth Circuit's invalidation of § 922(g)(8) is wrong. That question is properly before the Court and the Fifth Circuit's ruling should be reserved. In so holding, the Court should resist any urge to go further—given the benefits from allowing state and lower courts the opportunity to apply *Bruen* in varied contexts and the related danger of inadvertently constitutionalizing entire swaths of state law.

CONCLUSION

The Fifth Circuit's decision should be reversed.

Respectfully submitted,

KATHLEEN R. HARTNETT
JULIE M. VEROFF
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111

PATRICK J. HAYDEN
COOLEY LLP
55 Hudson Yards
New York, NY 10001

DANIEL GROOMS
COOLEY LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004

ADAM M. KATZ
Counsel of Record
ADAM S. GERSHENSON
RACHEL H. ALPERT
KIMBERLEY A. SCIMECA
COOLEY LLP
500 Boylston St.
Boston, MA 02116
akatz@cooley.com
(617) 937-2351

Counsel for Amici Curiae

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