

No. 22-915

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

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

**BRIEF OF AEQUITAS AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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BRIEF OF AEQUITAS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The undersigned respectfully submits this *amicus* brief in support of Petitioner.¹

INTEREST OF *AMICUS CURIAE*

AEquitas is a technical assistance provider for prosecutors, law enforcement, advocates, and allied professionals who respond to crimes of domestic violence, stalking, human trafficking, exploitation, sexual violence, and related offenses. AEquitas, whose staff is primarily composed of former prosecutors with expertise in domestic violence, stalking, and human trafficking law, provides training, research assistance, consultation services, and other resources to improve the investigation and prosecution of these offenses. Their work incorporates best practices and up-to-date research in the disciplines of law, social science, medicine, forensic sciences, police science, and related fields. As recently as last Term, AEquitas participated as *Amicus* in another case before this Court, *Counterman v. Colorado*, involving a First Amendment challenge to a stalking conviction. AEquitas also submitted an *amicus* brief in *Voisine v. United States*, in which this Court held that a reckless domestic assault qualifies as a “misdemeanor crime of domestic

¹ No counsel for any party authored this brief in whole or in part, no party, or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the *amicus curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

violence” under the firearm prohibition in 18 U.S.C. § 922(g)(9).

Amicus has a strong interest in ensuring that the Court’s Second Amendment analysis is informed by well-founded research on domestic violence and the role of firearms in exacerbating abuse, as well as the important role civil protection orders play in preventing future violence even where a criminal prosecution is being pursued. *Amicus* also has a deep interest in providing examples of analogous scenarios in which Second Amendment rights have historically been circumscribed or limited, as well as circumstances in which defendants have forfeited other constitutional rights by wrongdoing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner explains why 18 U.S.C. § 922(g)(8) (“Section 922(g)(8)”), which prohibits those subject to domestic violence protection orders from possessing firearms, reflects a longstanding tradition in this country of disarming those who are considered particularly dangerous. We do not repeat those arguments.

Instead, *AEquitas* provides more background on the dangers posed by domestic abusers who possess firearms, the role of civil protection orders in relation to criminal prosecutions, and other historical limitations on firearms. We also provide examples of other constitutional rights that are forfeited by wrongdoing, to further underscore Petitioner’s historical Second Amendment analysis.

ARGUMENT**I. Perpetrators of Domestic Violence Who Possess Firearms Pose Serious Threats to Their Partners, Family Members, and the Public.**

As this Court has explained, “firearms and domestic strife are a potentially deadly combination.” *Voisine v. United States*, 579 U.S. 686, 689 (2016) (quoting *United States v. Hayes*, 555 U.S. 415, 427 (2009)); see also *United States v. Castleman*, 572 U.S. 157, 160 (2014) (“[d]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide”); *Georgia v. Randolph*, 547 U.S. 103, 117-18 (2006) (recognizing that “domestic abuse is a serious problem in the United States”).²

Indeed, “[d]omestic violence is deeply connected with guns. Of physically abused women who live in households with guns, about two-thirds report that their partner used it against them, most often by threatening to shoot or kill them. And guns make it

² As a recent report on violence against women further notes: “Guns amplify the inherent power and control dynamics characteristic of abusive intimate relationships, whether as lethal weapons to injure and kill or as a tool to inflict emotional abuse without ever firing a bullet.” Everytown for Gun Safety, *Guns and Violence Against Women: America’s Uniquely Lethal Intimate Partner Violence Problem* (April 10, 2023) at 4.

more likely that domestic abuse will turn to murder: When a gun is present in a domestic violence situation, it increases fivefold the risk of homicide for women.” Everytown for Gun Safety, *A Census of Domestic Violence: Gun Homicides in Arizona* (May 7, 2015) at 6 (62 percent of women killed by intimate partners in Arizona between 2009 and 2013 were shot to death); see also *Guns and Violence Against Women: America’s Uniquely Lethal Intimate Partner Violence Problem*, *supra*, at 1, 8 (“It is widely known that abusers exploit guns to exert power and control over their partners. Over 4.5 million women in the United States today report having been threatened with a gun by an intimate partner”); Aaron J. Kivisto and Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, *Journal of the American Academy of Psychiatry and the Law Online* (Nov. 2019), available at <https://jaapl.org/content/jaapl/early/2019/11/21/JAAPL.003888-20.full.pdf> (noting that the presence of a firearm significantly increases the risk of death for victims, and that nearly 71 percent of intimate partner violence homicides involve a gun); Everytown for Gun Safety, *Domestic Abuse Protective Orders and Firearm Access in Rhode Island* (Sept. 2015) at 1, 2 (“Between 2008 and 2012, 28 percent of Rhode Island women killed by intimate partners were shot to death” and “[a]lmost 40 percent of final domestic abuse protective orders were precipitated by complaints that described abusive behavior matching at least one ‘lethality risk factor’”); John Wilkinson & Toolsi Gowin Meisner, *Domestic Violence and Firearms: A Deadly Combination*, STRATEGIES: The Prosecutors’ Newsletter on Violence Against Women (March 2011) at 1.

Children are also severely impacted; they may watch their parent die or be killed themselves. *A Census of Domestic Violence: Gun Homicides in Arizona, supra*, at 8; Maricke Liem et al., *The Nature and Prevalence of Familicide in the United States, 2000-2009*, 28 J. Fam. Viol. 351, 354-55, 356 (2013) (familicide, which involves the murder of multiple family members most often an intimate partner and child(ren), is often committed by men who have come to the attention of authorities for involvement in domestic violence, including those who previously were subject to a restraining order). Domestic violence perpetrators may also shoot neighbors, friends, or family members. *A Census of Domestic Violence: Gun Homicides in Arizona, supra*, at 8; *Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem, supra*, at 1, 2 (“The ripple effects of firearms in the hands of an abuser extend far beyond the intimate relationship – affecting children who witness or live with it and the family members, coworkers, and law enforcement officers who respond to it.”).

“Because of the risk that firearms pose when they intersect with domestic violence, a patchwork of federal and state laws” – including Section 922(g)(8) – “are in place to keep guns out of the hands of the most dangerous domestic violence offenders.” *A Census of Domestic Violence: Gun Homicides in Arizona, supra*, at 6; see also Benjamin Thomas Greer & Jeffrey G. Purvis, *Judges Going Rogue: Constitutional Implications When Mandatory Firearm Restrictions are Removed from Domestic Violence Restraining Orders*, 26 Wis. J.L. GENDER & Soc’y 275, 290 n.85 (2011) (listing state domestic violence restraining order statutes

that either require or authorize the removal of firearms).

Many of these laws, like Section 922(g)(8), tie the removal of firearms to a court's issuance of a domestic violence protective order after an adversarial hearing. See *Domestic Abuse Protective Orders and Firearm Access in Rhode Island, supra*, at 3 (noting that as of 2015, fifteen states "require that people subject to final domestic abuse protective orders turn in their guns for the length of the order").

These laws reduce the number of domestic violence homicides and shield abuse survivors from further violence. "States that restrict access to firearms by those under domestic violence protective orders see a 25 percent reduction in intimate partner gun deaths." *A Census of Domestic Violence: Gun Homicides in Arizona, supra*, at 6; see also Greer & Purvis, *Judges Going Rogue, supra*, 26 Wis. J.L. GENDER & Soc'y at 281 (nationwide studies have shown an 8 percent decrease in the rate of domestic violence homicide from firearm restrictions). And according to one study, Section 922(g)(8), the federal statute at issue, is associated with a 27 percent reduction in intimate partner homicide. Mikaela A. Wallin et al., *The Association of Federal and State-Level Firearm Restriction Policies with Intimate Partner Homicide: A Re-Analysis by Race of the Victim*, 37 J. of Interpersonal Violence 17, 17 (2022).

II. Civil Protection Orders Keep Domestic Violence Victims Safe and Reduce Opportunities for Witness Intimidation While a Criminal Prosecution is Pending.

The Fifth Circuit opinion’s concurrence in this case criticizes civil protection orders, urges that “[a]busers must be detained, prosecuted, and incarcerated,” and takes the position that “enacting laws that tell them to disarm is a woefully inadequate solution.” *United States v. Rahimi*, 61 F.4th 443, 467 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023). This suggests that the criminal justice system is the only way to address domestic abuse, and ignores the powerful synergistic effect of criminal prosecution and civil protection orders.

Criminal prosecutions can take years to reach completion. Civil protection orders, which can be obtained more quickly, keep victims safe while criminal charges are pending and await trial. And, by prohibiting a defendant from contacting or being near the victim, they reduce the opportunity for witness intimidation. By making domestic violence victims more willing to testify and participate in the prosecution, more domestic violence prosecutions become possible.

But protection orders must be enforced to be effective. They are effective only when the restrained party is convinced the order will be enforced. “[U]nequivocal, standardized enforcement of court orders is imperative if protective orders are to be taken seriously by the offenders they attempt to restrain.” National Council of Juvenile and Family Court Judges, *Civil Protection Orders* (2010) at 4 (quoting U.S. Dep’t

of Justice, *Enforcement of Protective Orders, Legal Series Bulletin #4* (2002), available at http://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin4/welcome.html). In some jurisdictions, protection order violations constitute separate criminal offenses that can be prosecuted independent of the original domestic violence charges. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6-803.5 (West 2022); Idaho Code § 39-6312 (1999); Miss. Code Ann. § 93-21-21 (West 2020); Mo. Ann. Stat. § 455.085 (West 2022); Mont. Code Ann. § 45-5-626 (West 2017); N.C. Gen. Stat. Ann. § 50B-4.1 (West 2015); S.C. Code Ann. § 16-25-20 (West 2015); S.D. Codified Laws § 22-19A-2 (2013); Va. Code Ann. § 16.1-253.2 (West 2021).

Statutes like Section 922(g)(8), which remove firearms from the hands of abusers, offer another form of protection.

III. Historically, Individuals who Pose Particularized Risks of Danger Have Been Precluded from Possessing Firearms.

Constitutional rights, including Second Amendment rights, are not unlimited. As this Court acknowledged in *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008): “[w]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.” There have been “longstanding prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and

government buildings,” and “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27.

A modern statute regulating firearms is constitutional if the “how and why” of its restriction on firearms is comparable or analogous to a historical regulation in effect around the ratification of the Second and Fourteenth Amendments. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022). The Government identifies many founding-era regulations that restricted the possession of firearms by categories of people who were thought to be dangerous to public safety in some way (including felons, minors, drunken individuals, and those who refused to swear loyalty to the government). Pet. Brief at 10-27.

Except for surety laws, those historical regulations largely relied on generalized perceptions of the dangerousness of certain categories of people; a domestic violence protective order requires a much more particular and individualized assessment of risk by a court. If regulations that rely on more generalized conclusions about dangerousness are permissible, a firearm restriction that relies on a particularized assessment of dangerousness should pass constitutional muster as well, since it is more protective of the Second Amendment.

IV. This Court and Others Have Recognized that Constitutional Rights Can be Forfeited by Wrongdoing.

Many constitutional rights can be forfeited by a defendant’s misconduct. This Court and others have long recognized, for example, that under the fugitive disentitlement doctrine appellate courts may dismiss

the appeal of a criminal defendant whose fugitive status has a sufficient connection to the appeal. See *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993); *Molinero v. New Jersey*, 396 U.S. 365 (1970) (per curiam). “Federal courts have the discretion to dismiss an appeal without hearing the merits ‘if the party seeking relief is a fugitive while the matter is pending’”; “[the doctrine] targets litigants who try to ‘reap the benefit of the judicial process without subjecting [themselves] to an adverse determination.’” *In re Kupperstein*, 943 F.3d 12, 20 (1st Cir. 2019).

A criminal defendant can similarly forfeit his Sixth Amendment right to confront a witness at trial through his own wrongful conduct. *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Washington*, 547 U.S. 813, 833 (2006) (“the rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds ... That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation”); *Giles v. California*, 128 S. Ct. 2678, 2688 (2008). See generally Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for its Place in Florida*, 9 Florida Coastal L. Rev. 525 (2008).³

³ As this Court has recognized, domestic violence related crimes are “notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial.” *Davis v. Washington, supra*, 547 U.S. at 833. “Prosecutors and advocates have known for many years that witness tampering is a significant problem in domestic violence cases, and that victims recant and/or refuse prosecution due, in part, to perpetrators’ threats of retaliation.” Amy E. Bonomi et al., “*Meet me at the hill where we*

In *Reynolds v. United States, supra*, the defendant, who was on trial for bigamy, had procured the absence of one of his wives from testifying against him at trial by concealing her and preventing the State from serving her with a subpoena. He argued that the use of his wife's testimony from a prior trial violated his rights under the Confrontation Clause, but this Court rejected that argument, stating that the "Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Id.* at 158.

Thus, "[f]orfeiture by wrongdoing is a longstanding exception to a defendant's Sixth Amendment right to confront the witnesses against him. If a defendant causes a witness to be unavailable for trial through his wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior 'testimonial' statements is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution." AEquitas, *The Prosecutors' Resource: Forfeiture by Wrongdoing* (Oct. 2012) at 1. "[R]elationships involving domestic violence typically involve behavior that may result in forfeiture (such as threats, intimidation, actual violence, or 'loving' contrition)." *Id.* "Preponderance of the evidence is the standard [of proof] in the majority of states." *Id.* at 3.

The principle of forfeiture by wrongdoing supports Section 922(g)(8)'s limitations on the Second Amendment rights of domestic abusers who have

used to park": *Interpersonal processes associated with victim recantation*, 73 *Social Science & Medicine* 1054, 1054 (2011).

been found by a court to pose a danger to an intimate partner.

CONCLUSION

For these reasons, and for the reasons stated in Petitioner's briefs, this Court should reverse and uphold the constitutionality of Section 922(g)(8).

Respectfully submitted,

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