

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 AMICI CURIAE FOR
SENATOR AMY KLOBUCHAR,
REPRESENTATIVE BRIAN FITZPATRICK, AND
REPRESENTATIVE DEBBIE DINGELL
IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE¹

Amici curiae are Members of Congress—from both the Democratic and Republican parties and from both the House and the Senate—who have spearheaded legislative efforts to support and defend survivors of domestic violence. Amici have a unique interest in the enforceability and constitutionality of bipartisan laws enacted by Congress to protect survivors of domestic violence: their constituents have been victims of domestic violence with firearms; amici have partnered with advocates for survivors of domestic violence and law enforcement leaders in their communities to address the crime of domestic violence; and amici have relied on the constitutionality of 18 U.S.C. § 922(g)(8) as they have worked across the aisle to build upon that statute’s proven record of effectiveness.

Amicus Senator Amy Klobuchar of Minnesota serves on the Senate Judiciary Committee, and she has led bipartisan efforts to protect survivors of domestic violence. As a former prosecutor and a member of the Senate Law Enforcement Caucus, Senator Klobuchar has seen firsthand the devastating effect of domestic violence with firearms.

Amicus Representative Brian Fitzpatrick of Pennsylvania was a leader of the bipartisan

¹ Pursuant to this Court’s Rule 37.6, counsel for amici curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amici curiae, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

reauthorization of the Violence Against Women Act (VAWA), and he introduced the Bipartisan Background Checks Act to further prevent domestic abusers and other dangerous individuals from obtaining firearms while continuing to protect the constitutional rights of law-abiding citizens.

Amicus Representative Debbie Dingell of Michigan, herself a survivor of family violence, is the co-chair of the Bipartisan Working Group to End Domestic Violence and a leader on legislation to support and protect survivors of domestic violence.

SUMMARY OF ARGUMENT

As the United States notes in its opening brief, Congress enacted 18 U.S.C. § 922(g)(8) to address the danger presented by the deadly combination of firearms and domestic violence. Pet. Br. 1–2, 7–8. This brief provides additional background on the bipartisan, consensus-driven process by which Congress did so.

Congress enacted § 922(g)(8) almost three decades ago to protect survivors of domestic violence while guaranteeing the protections afforded by the Second Amendment. Section 922(g)(8) was included with the Violent Crime Control and Law Enforcement Act of 1994, a comprehensive bill designed to, *inter alia*, combat crimes against women by punishing perpetrators, supporting survivors, and equipping law enforcement with the tools needed to do both.

Presented with substantial and compelling evidence demonstrating the ongoing problem of domestic violence with firearms in this country, Congress concluded that individuals subject to domestic violence restraining orders pose immense

and immediate danger to those closest to them and therefore should not have easy access to firearms. This Court has since agreed with that assessment, recognizing that “[a]ll too often, . . . the only difference between a battered woman and a dead woman is the presence of a gun,” *United States v. Castleman*, 572 U.S. 157, 160 (2014) (record citation omitted), and that “[f]irearms and domestic strife are a potentially deadly combination,” *United States v. Hayes*, 555 U.S. 415, 427 (2009).

Section 922(g)(8) is the product of a deliberate and bipartisan legislative process that included input from law enforcement officials, leading advocates for survivors of domestic violence, public health experts, and some of Congress’s most dedicated defenders of Second Amendment rights. Since its enactment, § 922(g)(8) has provided the foundation for further bipartisan efforts to protect and defend survivors of domestic violence, and the evidence Congress has gathered substantiates its bipartisan conclusion that survivors of domestic violence are safer when abusers subject to restraining orders do not have unfettered access to deadly weapons.

This is, frankly, common sense. And nothing in the text or history of the Second Amendment says or requires otherwise. Rather, § 922(g)(8) accords with the centuries-old tradition of legislatures regulating the possession of arms by individuals who pose a heightened danger to others, particularly to the most vulnerable among us.

At a time when our political parties can feel very divided, § 922(g)(8) serves as a reminder of what Congress is capable of accomplishing when members

of both parties work across the aisle. Section 922(g)(8) has saved lives while honoring the Second Amendment's text and history. In finding § 922(g)(8) unconstitutional, the Fifth Circuit assumed for itself the task of making a complex policy decision that long has been understood to fit comfortably within Congress's legislative purview. The decision below is wrong, and it jeopardizes decades of bipartisan efforts to protect some of our country's most vulnerable citizens.

ARGUMENT

Congress has received substantial and overwhelming evidence that domestic violence with deadly weapons is a grave problem that requires congressional action. Based on that evidence, and rooted in its understanding that the Second Amendment is consistent with firearm restrictions for dangerous people, Congress enacted § 922(g)(8) through a bipartisan and deliberative legislative process, and Congress has continued to build on that foundation in a deliberative and bipartisan manner.

I. Domestic violence with deadly weapons is a grave problem that requires congressional action.

The evidentiary record before Congress—both in the 1990s prior to the enactment of § 922(g)(8) and in the decades since—establishes that domestic violence is prevalent, chronic, and requires a federal response.

First, in the years prior to enactment of § 922(g)(8), the record before Congress showed that domestic violence occurred far too often in America

and that it is most deadly when the perpetrator is armed. Between 1990 and 1991, Congress held four hearings that documented the crisis of violence against women in the United States. S. Rep. No. 102-197, at 35 (1991). Congress found that “one-third of all women murdered in America”—approximately 4,000 per year (or four women per day)—“were murdered by present or former husbands or boyfriends.” *Id.* at 38; S. Rep. No. 101-545, at 37 (1990). When § 922(g)(8) was enacted, the United States family homicide rate was higher than the *total* homicide rate in peer countries, S. Rep. No. 102-197, and more than half of the women in the United States who were murdered were killed by a male partner, *Women and Violence: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 114 (1990).

Second, the evidence before Congress has shown that domestic abuse is chronic: *a partner who abuses once is likely to do so again*. S. Rep. No. 101-545. Family homicides tend to be “the culmination of repeated, but lesser, abuse.” *Id.* at 36. In most instances of husbands murdering their wives, for example, police were called to the residence for domestic violence complaints multiple times within the preceding year. *Id.* at 37. And studies show that those who have been physically abused by family members are five times more likely to be murdered in a shooting. 139 Cong. Rec. S14,012 (daily ed. Oct. 20, 1993) (statement of Sen. Wellstone).

Third, the record before Congress made clear that uniform federal legislation is necessary to protect survivors of domestic violence. While Congress long has acted with the understanding that it has

authority to restrict dangerous individuals' firearm access, the federal laws on the books before 1994 did not sufficiently protect survivors of domestic violence. At that time, federal statutes regulated firearm access for a too limited set of dangerous individuals—generally those with a felony conviction or an adjudication of mental illness. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220 (codified as amended in scattered sections of 18 and 26 U.S.C.). Violent domestic abusers often fell through those cracks in federal law.

Meanwhile, state laws addressing domestic abusers' access to firearms depended largely on judicial or prosecutorial discretion. Many of those statutes either explicitly or implicitly left forfeiture of firearms to a court's discretion.² In states with laws that did not address further relief under protective orders, domestic abusers' ability to possess firearms often depended on prosecutors' discretion in charging domestic assault as either a misdemeanor or a felony. *See* 140 Cong. Rec. S7884 (daily ed. June 29, 1994) (statement of Sen. Wellstone).³ As Senator Wellstone

² *See, e.g.*, Del. Code Ann. tit. 10, § 1045(a)(8) (1993) (“[T]he Court may grant relief[, including ordering] the respondent to . . . refrain from purchasing or receiving additional firearms for the duration of the order[.]”); Md. Code Ann., Fam. Law § 4-506(d)(14) (1991) (“The final protective order. . . [may] order any other relief [a]s necessary.”); Ky. Rev. Stat. Ann. § 403.740(1)(f) (1992) (granting authority to “[e]nter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse”).

³ *See also* Natalie Nanasi, *New Approaches to Disarming Domestic Abusers*, 67 Vill. L. Rev. 561 (2022).

explained during debates over VAWA, many batterers avoided firearm forfeiture by pleading to misdemeanor assault charges, thereby avoiding felony charges that would result in firearm restrictions being imposed. 140 Cong. Rec. S7884.

The patchwork of state laws and the reliance on judicial and prosecutorial discretion meant that limitations on abusers' ability to access firearms were inconsistent, unpredictable, and left many survivors at risk of grave harm.⁴

II. Section 922(g)(8) is the product of a bipartisan and deliberative legislative process rooted in Second Amendment considerations.

A. Congress understood that the Second Amendment is consistent with firearm restrictions for dangerous people, including individuals subject to domestic violence restraining orders.

In enacting § 922(g)(8), Congress concluded that: “(1) domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44; (2) firearms are used by the abuser in 7 percent of domestic violence incidents . . . and (3) individuals with a history of domestic abuse should not have easy access to firearms.” H.R. Rep. No. 103-395, at 14 (1993). In drawing those conclusions, Congress undertook considerations that

⁴ See Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 543 & n.78 (2003) (citing, inter alia, 139 Cong. Rec. S16,288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) (expressing need for more “definite protection”)).

mirrored those undertaken from the historical regulation of dangerous persons' access to firearms.

During congressional floor debates, Members emphasized that the Second Amendment protects the right of law-abiding citizens to own and use guns responsibly—and that principle is consistent with limits on firearm access by individuals subject to domestic violence restraining orders. For example:

Senator Kerrey (R-NE) noted that even “dedicated and principled” Second Amendment advocates “do not oppose . . . the prohibition of gun sales to, and possession by, persons subject to family violence restraining orders.” 140 Cong. Rec. S12,435 (daily ed. Aug. 24, 1994).

Senator Wellstone (D-MN) underscored the sentiment among his constituents, many of whom were responsible gun-owners, saying the same people who warned him not to “ever take our sporting rifles away from us,” or “go overboard on gun control,” agreed that domestic abusers should not own firearms. 140 Cong. Rec. S7481 (daily ed. June 23, 1994).

Senator Chafee (R-RI) explained that the amendment was modest and incremental in that it simply built upon the list of “prohibited persons” already covered by § 922(g) to “ensure that a person whom the court says is a threat may not have a gun during the time that he or she is subject to the restraining order.” 139 Cong. Rec. S16,292–93 (daily ed. Nov. 19, 1993). It was, he explained, “nothing short of insanity” to allow firearm access by a person deemed a clear and present danger to those in their household. *Id.* at S16,293.

B. Section 922(g)(8) was not controversial in Congress.

Debates over the Omnibus Crime Bill focused on provisions like the assault weapons ban and VAWA's civil rights sections. Section 922(g)(8), by contrast, was widely supported, and nothing in the legislative history of which amici are aware indicates that § 922(g)(8) was controversial.

To the extent there was debate over § 922(g)(8), it largely was focused on whether the law should go *further* by banning firearm possession by individuals convicted of domestic violence misdemeanors *in addition to* those subject to domestic violence restraining orders. Every version of the legislation that would eventually become § 922(g)(8) included the provision restricting access to firearms by individuals subject to domestic violence restraining orders, and there was little discernible concern about the constitutionality of this provision.

The Senate approved two versions of the amendment. One version, sponsored by Senator Wellstone (D-MN), banned possession of firearms by persons subject to domestic violence restraining orders *and* persons convicted of domestic violence misdemeanors. *See* 139 Cong. Rec. S14,012 (daily ed. Oct. 20, 1993). A second version drafted by Senator Chafee (R-RI) was co-sponsored by Senator Hatch (R-UT) and offered on the floor by Senator Dole (R-KS)—two of Congress's most ardent advocates for Second

Amendment rights.⁵ *See* 139 Cong. Rec. S15,623 (daily ed. Nov. 10, 1993). Senator Chafee’s version was limited to individuals subject to domestic violence restraining orders. *Id.* It also required that the respondent receive actual notice and an opportunity to be heard, and it provided that firearm restrictions would not apply unless a judge expressly found a “credible threat to the physical safety” of another. *Id.* Both amendments passed the Senate by voice vote, and both amendments were included in the Senate’s Crime Bill, which passed with overwhelming support—95 yeas and 4 nays. 139 Cong. Rec. S16,301 (daily ed. Nov. 19, 1993); H.R. 3355, 103d Cong. §§ 301, 4203 (as amended by the Senate, Nov. 19, 1993).

In the House, Representative Torricelli (D-NJ) sponsored a companion to Senator Wellstone’s amendment. The National Rifle Association (NRA) was “openly hostile” to that bill,⁶ but *even leaders of the NRA agreed that individuals subject to protective orders should not have access to firearms,*⁷ and the

⁵ The National Rifle Association (NRA) described Senator Dole as “[a] staunch supporter of the Second Amendment,” and gave Senator Hatch “an ‘A+’ rating.” NRA-ILA, *Bob Dole: Veteran, Senator, and Friend to the Second Amendment* (Dec. 13, 2021), <https://tinyurl.com/5f6u7vaf>; Press Release, NRA-PVF, *NRA-PVF Endorses Orrin Hatch for U.S. Senate in Utah* (Sept. 26, 2012), <https://tinyurl.com/ytkhfne>.

⁶ Lininger, *supra* note 5, at 539 & n.64.

⁷ *See, e.g.*, Crystal Humphress, *Austin’s Approach to Brady Law Splits U.S. Senate Campaign Rivals*, Dallas Morning News,

NRA supported a House amendment like Senator Chafee's, which covered persons subject to domestic violence restraining orders.⁸

The House subsequently passed relatively narrow text that, like Senator Chafee's amendment, applied only to persons subject to domestic violence restraining orders. The House language also reinforced due process protections by requiring actual or constructive notice to the respondent and mandating a judicial finding of a "credible threat" to an intimate partner as a condition for firearm restrictions to take effect. *See* 140 Cong. Rec. H2996 (daily ed. Apr. 14, 1994). The House's Crime Bill passed with 285 yeas and 141 nays. 140 Cong. Rec. H2608 (daily ed. Apr. 21, 1994).⁹

The final legislation produced by the House and Senate Conference Committee represented significant bipartisan compromise, and it most closely resembled the language the NRA had supported in the House. *See* H.R. Rep. No. 103-711, at 227–28 (1994) (Conf.

July 20, 1994, at 24A ("The head of the Texas chapter of the National Rifle Association said that someone under a protective order should not be sold a gun.").

⁸ *See* Ellen J. Silberman, *Measure to Keep Guns Away From Abusers May Be in Jeopardy*, State News Serv. (June 28, 1994) ("Weaker language, supported by the NRA, is in the House version of the bill.").

⁹ Regarding debates in the Wisconsin state legislature, a spokesperson for the NRA expressed that the pro-gun lobby "is opposed to spouse- or child-abusers obtaining weapons, but everyone deserves a hearing on whether he is dangerous." Matt Pommer, *Even Mild Gun Controls Lose to NRA*, Capital Times, March 29, 1994, at 3A.

Rep.). The Conference bill prohibited possession of firearms by individuals subject to restraining orders (but not those with misdemeanor convictions). It clarified that the “reasonable fear of bodily injury” required to trigger the statute is limited to fear of injury to an intimate partner or child. The Conference Committee’s bill went even further than the House’s bill to protect respondents’ due process rights by requiring actual notice and an opportunity to respond. Finally, it added that a restraining order qualifies a respondent for restrictions if the order “explicitly prohibits” the use of physical force against an intimate partner or child.

III. Amici have relied on § 922(g)(8)’s constitutionality in taking further bipartisan action to protect survivors of domestic violence.

In the almost three decades since § 922(g)(8) was enacted, Congress has continued to take measured, bipartisan steps to protect survivors of domestic violence based on the evidence before it and Congress’ understanding that § 922(g)(8) is constitutional.

Since 1996, spousal homicides have dropped by approximately fifty percent. *Stop Gun Violence: The Jackson-Elias Domestic Violence Survivor Protection Act: Hearing Before the Subcomm. on the Const. of the S. Comm. on Judiciary*, 117 Cong. 7 (May 2022) [hereinafter *The Jackson-Elias Domestic Violence Survivor Protection Act*] (statement of Roberta Valente, Policy Consultant, Nat’l Coal. Against Domestic Violence). Firearm restrictions for persons subject to domestic violence restraining orders are associated with at least “an 8% reduction in the rate”

of all intimate-partner homicides. *Id.* app., Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms From Their Abusive Partners: Results From an Exploratory Study*, 19 J. Women’s Health 93, 93 (2010). Section 922(g)(8) helped keep deadly weapons out of the hands of hundreds of thousands of people most likely to commit violence against their families.¹⁰

Even as the United States has made significant gains in protecting families from domestic violence with firearms, there is still more that needs to be done to address gun violence and keep firearms out of the hands of abusers.¹¹ Congress is currently working to strengthen protections for survivors of domestic violence, building on § 922(g)(8)’s foundation.

A. Congress enacted § 922(g)(9) to prohibit individuals convicted of a misdemeanor crime of domestic violence from possessing a firearm.

Approximately two years following enactment of § 922(g)(8), Senator Lautenberg (D-NJ) introduced

¹⁰ See Brady Campaign to Prevent Gun Violence, *Special Report: Expanding Brady Background Checks to Internet Gun Sales in Oregon* 5 (2015) <https://tinyurl.com/325yzmrv>.

¹¹ Press Release, Sen. Klobuchar, *Klobuchar, Dingell, Fitzpatrick Introduce Bipartisan, Bicameral Legislation to Strengthen Provisions Closing the Boyfriend Loophole* (Feb. 10, 2023); see also *The Jackson-Elias Domestic Violence Survivor Protection Act 7*, *supra* (“[W]hile spousal homicides have decreased by 50% since [§§ 922(g)(8) and (g)(9)] were enacted, homicides of dating partners have decreased only 5% in this same period.”).

“[a] bill to prohibit persons convicted of a crime involving domestic violence from owning or possessing firearms.” 142 Cong. Rec. S2646 (daily ed. Mar. 21, 1996) (statement of Sen. Lautenberg). Senator Lautenberg partnered with Senators Lott (R-MS), Craig (R-ID), and Bailey Hutchison (R-TX)—some of Congress’s most vocal supporters of Second Amendment rights—to reach an agreement on final legislative text. *See* 142 Cong. Rec. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg); 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg). The amendment was approved in the Senate by a voice vote of 97–2. 142 Cong. Rec. S10,380 (daily ed. Sept. 12, 1996).

A version of the legislation was later incorporated into an omnibus spending bill and further negotiated with House Republican leadership. 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg). The resulting bipartisan agreement narrowed the initial bill by including a “use of force” requirement for qualifying misdemeanors, and it added stronger due process protections.¹² Section 922(g)(9) requires those who committed misdemeanors to be represented by counsel, or have knowingly waived their right to counsel, for the prohibition to take effect, and it protects individuals convicted without a jury trial. 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg); 142 Cong. Rec. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen.

¹² Lininger, *supra* note 5, at 554–55, 554 n.134.

Lautenberg); 142 Cong. Rec. S8922 (daily ed. July 25, 1996). The conference report, with these protections, was approved by the House by a vote of 370–37. 142 Cong. Rec. H12,110 (daily ed. Sept. 28, 1996).

B. Amici have worked together to reinforce § 922(g)(8)’s protections.

More recently, Congress has enacted several measures to strengthen protections for survivors of domestic violence. Last year, Congress enacted the VAWA Reauthorization Act, in which Congress empowered the Attorney General to appoint Special Assistant United States Attorneys in jurisdictions where enhanced enforcement of sections 922(g)(8) and (9) is necessary to reduce firearm homicides and injury rates. Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, § 1103, 136 Stat. 49, 921 (2022) (codified at 18 U.S.C. § 925D).

Congress also enacted the landmark Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022), which took an important step toward closing the “boyfriend loophole” by addressing misdemeanor crimes of domestic violence committed by people who are dating rather than married. *Id.* § 12005, 136 Stat. at 1332. Under the updated law, those who “have recently had a continuing serious relationship of a romantic or intimate nature” are now better protected from intimate-partner gun violence. *Id.* § 12005(a)(2).

The Bipartisan Safer Communities Act was a “compromise measure” spearheaded by a bipartisan

group of 20 senators.¹³ Minority Leader Mitch McConnell (R-KY) stated that the bill “will help make these horrifying incidents less likely *while fully upholding the Second Amendment rights of law-abiding citizens.*”¹⁴ Senator Bill Cassidy (R-LA) explained that such commonsense legislation is part and parcel with the right to bear arms: “[I]f you consider yourself a supporter of the Second Amendment, you absolutely want to do something about . . . the murders related to domestic violence You cannot be pro-Second Amendment unless you care deeply about these issues.” 168 Cong. Rec. S3140 (daily ed. June 23, 2022).

Amici have introduced additional bipartisan legislation to fully close the “boyfriend loophole” once and for all. *See* S. 321, 118th Cong. (2023); H.R. 905, 118th Cong. (2023). The Strengthening Protections for Domestic Violence and Stalking Survivors Act would update § 922(g)(8)’s definition of “intimate partner,” and it would further modernize the definition of “dating relationship” to cover “serious relationship[s] of a romantic or intimate nature,” regardless of when the relationship occurred. *See* S. 321, 118th Cong.; H.R. 905, 118th Cong.

Like the legislation that came before it, the Strengthening Protections for Domestic Violence and Stalking Survivors Act takes a measured approach to prevent abusers and stalkers from accessing weapons

¹³ Press Release, Sen. Murkowski, *Senate Passes Gun Safety, Mental Health Measure* (June 24, 2022).

¹⁴ Press Release, Sen. McConnell, *McConnell Statement on Bipartisan Negotiations* (June 21, 2022) (emphasis added).

while respecting Second Amendment rights.¹⁵ Amici have seen firsthand the serious emotional and physical toll domestic violence can take on victims, particularly when a gun is involved.¹⁶

All this bipartisan legislation is built on the long-held understanding that the Second Amendment is “not unlimited,” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), and that Congress can disarm individuals subject to domestic violence restraining orders consistent with the Second Amendment’s protections.

* * *

Members of Congress from both parties have worked together for decades to protect families from domestic violence with firearms. The decision below threatens to unravel these efforts. It threatens to reverse critical gains, short-circuit further efforts, and put lives in danger. The Court must not stymie further work by Congress in this crucial area of law and policy. It should reverse.

¹⁵ See Press Release, Sen. Klobuchar, *Klobuchar, Dingell Introduce Legislation to Keep Guns From Stalkers and Protect Women From Domestic Abuse* (Mar. 2, 2021).

¹⁶ Press Release, Sen. Klobuchar, *Klobuchar, Dingell, Fitzpatrick Introduce Bipartisan, Bicameral Legislation to Strengthen Provisions Closing the Boyfriend Loophole* (Feb. 10, 2023).

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the judgment of the court below.

Respectfully submitted,

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