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 *AMICUS CURIAE* PROSECUTORS AGAINST GUN VIOLENCE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Prosecutors Against Gun Violence ("PAGV") is an independent, nonpartisan coalition that identifies and advances prosecutorial and policy solutions to the national public-health and public-safety crises of gun violence.[1] PAGV is composed of almost sixty prosecutors, serving tens of millions of residents, in jurisdictions spanning nearly thirty States. As prosecutors, PAGV's members play a critical role in protecting the public's safety, a paramount objective of state and local government. This mission includes promoting best practices for prosecuting gun offenses, defending commonsense gun restrictions, and holding domestic abusers accountable. These interests intersect here.

Domestic-violence offenses are among the most serious, as domestic abuse too often escalates into grievous assaults and even homicides. They are also among the toughest to prosecute, as victims often fear reprisal for pressing charges. The issue before this Court is whether the government may, consistent with the Second Amendment, disarm individuals who are subject to court orders restraining them from engaging in harassing or threatening conduct towards their intimate partners or other family members—a result that federal law achieves via 18 U.S.C. § 922(g)(8).

1. PAGV certifies that this brief was not written in whole or in part by counsel for any party and that no person or entity other than PAGV, its members, and its counsel has made any monetary contribution to this brief's preparation or submission. PAGV's membership roster appears at https://prosecutorsagv.org/about.

The U.S. Court of Appeals for the Fifth Circuit answered this question in the affirmative prior to *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). But after *Bruen*, the Fifth Circuit reversed course, holding that "§ 922(g)(8) fails to pass constitutional muster." *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023). In doing so, that court removed a key tool that the government uses to protect domestic-violence victims.

From their position on the front lines of curbing gun and domestic violence in a wide cross-section of communities, PAGV's members have a keen interest in this issue's outcome. Thus, PAGV submits this amicus brief to explain how laws like § 922(g)(8) further the administration of justice and why these measures are compatible with *Bruen*.

SUMMARY OF ARGUMENT

Federal law makes it a crime for a domestic abuser to possess a gun while subject to a restraining order issued by a court. *See* 18 U.S.C. § 922(g)(8). This rule complies with the Second Amendment. Certainly, the law is facially valid, as it is possible to envision a set of circumstances under which the statute is constitutional. Indeed, such restraining orders are routinely issued in criminal domestic-violence cases while the defendant awaits trial. In that context, the Constitution indisputably permits even greater infringements on liberty—such as pretrial detention. The lesser measure of merely taking away an offender's gun thus falls squarely within a court's power.

This Court's decision in *Bruen* does not demand a different result. After all, by engaging in threatening or disruptive conduct, a person may forfeit many

important constitutional rights, and Second Amendment rights are among them. Moreover, proscriptions like § 922(g)(8) are distinguishable in several key respects from the "proper cause" licensing criteria that *Bruen* invalidated. In *Bruen*, this Court held only that law-abiding citizens who pass background checks and meet other threshold requirements have the right to carry a gun outside the home for self-defense. Nothing in *Bruen* condemns domestic-violence victims to risk retribution at gunpoint.

ARGUMENT

I. Disarming Offenders is Critical to Protecting Victims and Prosecuting Domestic Violence.

In 1994, Congress enacted 18 U.S.C. § 922(g)(8) to address a particular and growing concern: deadly violence inflicted upon intimate partners and family members (mainly, though not exclusively, women and children). This provision makes firearm possession "unlawful for any person who is subject" to a specified type of "court order that was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate." 18 U.S.C. § 922(g)(8)(A) (section breaks omitted). An order will qualify if, for example, it restrains someone "from harassing, stalking, or threatening an intimate partner" or her child, *id.* § 922(g)(8)(B), and either "includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child," *id.* § 922(g)(8)(C)(i), or "explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury," *id.* § 922(g)(8)(C)(ii).

Importantly, this provision is limited in scope. It applies only where a court—after a hearing on notice—has found that a domestic incident occurred. And it applies only where there has been a judicial finding that an intimate partner or child is in physical danger.

Many of the States in which PAGV's members practice have analogous disqualifiers that are activated by restraining orders in criminal or civil proceedings.[2] This Court's decision also could affect the validity of gun prohibitions included in orders of protection or in conditions of pretrial release in domestic-violence cases—as well as prosecutors' ability to enforce these provisions via contempt or other means. The outcome will thus have significant consequences on the ability of both federal and state authorities to protect domestic-violence victims.

Prosecuting domestic violence presents unique challenges that require interventions like the protective orders at issue here. An initial hurdle is learning of the problem at all. "Domestic violence is a widely-prevalent and underreported phenomenon." *State v. Ciskie*, 110 Wash. 2d 263, 272 (1988). Research has long shown that the true scope of intimate-partner violence remains "hidden from society's view because most incidents are not reported to the police."[3] Even where incidents

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2. *See generally* Giffords Law Center, Who Can Have a Gun, Domestic Violence & Firearms, State Domestic Violence Restraining Order Firearm Prohibitions, https://tinyurl.com/326rm6vx.

3. Richard Felson & Paul-Philippe Paré, The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police at 3 (Mar. 2005); *see* Carolyn C. Hartley, Ph.D., & Roxann

are reported and lead to criminal charges, victims are frequently reluctant to testify against their abusers.[4] Therefore, it is imperative that victims are not subjected to threats of violence, including gun violence, after an offender is arrested and charged.

This is all the more critical because victims often lose interest in criminal cases after an arrest has been made. PAGV's collective experience confirms that many victims' most immediate concern is extricating themselves from the abusive environment, which an arrest (followed by an order of protection) helps to achieve.[5] A substantial number of our offices link alleged victims with trauma-informed counseling services, as well as with housing and employment support.

Once things stabilize, however, victims frequently recant or minimize their prior assertions of abuse, or otherwise cease to cooperate.[6] Although the reasons

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Ryan, Prosecution Strategies in Domestic Violence Felonies: Telling the Story of Domestic Violence, Executive Summary at 3 (Apr. 2002) ("Domestic violence is typically a hidden crime.").

4. Nat'l Dist. Atty's Ass'n, Women Prosecutors Section, National Domestic Violence Prosecution Best Practices Guide at 7 (July 2017).

5. *See id.*; *see also* Leigh Goodmark, Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence, ch. 1 (Univ. Cal. Press 2019). Sometimes an acquaintance of the victim will have called 911, or a mandated reporter of suspected abuse will have referred the incident to local authorities.

6. The authors of a recent paper on best practices for prosecuting domestic violence estimate that "[r]ecantation encompasses a vast majority of the domestic violence prosecutor's

for this phenomenon vary, one deserves emphasis here: domestic-violence charges are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify." *Davis v. Washington*, 547 U.S. 813, 833 (2006). And perhaps understandably, pursuing a material-witness warrant to detain a complainant to coax her testimony is falling out of favor.[7] Indeed, as of last year, the Violence Against Women Act conditions prosecutors' offices' eligibility for federal grant funding on developing and implementing protocols for exhausting alternatives "before employing material witness petitions and bench warrants to obtain victim-witness testimony in the investigation, prosecution, and trial of a crime related to domestic violence." 34 U.S.C. § 10454(3).

Thus, prosecutors face extraordinary challenges in bringing a domestic-violence case to trial. Further, defendants regularly attempt to minimize the abuse, blame the victim for it, or "attack their victim's character as a way of maintaining their power and control."[8] At trial, prosecutors often require expert testimony "to help the jury understand the sometimes counterintuitive behaviors of domestic violence victims," *State v. Haskie*, 242 Ariz. 582, 587 (2017), such as why the victim delayed reporting the abuse and "kept returning to [the] relationship," *People v. Coons*, 2021 CO 70, ¶ 52 (2021), or how the victim's

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caseload, occurring in about 80% of domestic violence criminal cases." Nat'l Dist. Atty's Ass'n, *supra* note 4, at 7.

7. *See* N.Y. C.P.L. § 620.50 (authorizing material-witness orders); *see also* La. Rev. Stat. § 257.1(b) (precluding their use in misdemeanor domestic-battery prosecutions). A human-rights organization has publicly called for an end to the practice. *See* Amnesty Int'l, Fragmented and Unequal at 12-13, 111 (2019).

8. Hartley & Ryan, *supra* note 3, at 8.

"recantation is consistent with [a] form of posttraumatic stress disorder," *State v. Bednarz*, 179 Wis. 2d 460, 467 (Ct. App. 1993).

Guns are the last thing that should be injected into this combustible mix. As the alarming statistical evidence illustrates, and as prosecutors know all too well, "[f]irearms and domestic strife are a potentially deadly combination." *Voisine v. United States*, 579 U.S. 686, 689 (2016) (quotation marks omitted). Allowing a domestic abuser to possess a gun pending trial both endangers the victim and increases the likelihood that the victim, perceiving a grave threat to her safety, will refuse to testify.[9]

For these reasons, the U.S. Department of Justice has concluded that "[o]ne of the most crucial steps to prevent lethal violence is to disarm abusers and keep them disarmed."[10] Among other recommendations, it has advised prosecutors in domestic-abuse cases to "ask the court to order criminal no-contact orders against defendants so that federal firearm prohibitions apply."[11]

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9. *See also United States v. Skoien*, 614 F.3d 638, 643-44 (7th Cir. 2010) (canvassing research on impediments to domestic-violence prosecutions and role of guns in intimate-partner violence); Everytown for Gun Safety, Research & Policy Report, Guns and Violence Against Women, America's Uniquely Lethal Intimate Partner Violence Problem, https://tinyurl.com/39bynx2p.

10. Nat'l Inst. of Justice, U.S. Dep't of Justice, Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges at 27 (June 2009).

11. *Id.* (citing 18 U.S.C. § 922(g)(8)). The federal government also has urged state and local prosecutors to collaborate with the local U.S. Attorney to refer appropriate violators for federal prosecution. *See id.*

PAGV's members oversee domestic-violence prosecutions in more than half the States. Under nearly all these States' laws, felony domestic-violence charges are subject to the requirement of indictment by a grand jury. In most other cases, arrestees are entitled to a judicial probable-cause determination or to challenge the accusatory instrument's facial sufficiency, although procedures vary. *See generally County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (noting constitutional mandate of prompt and reliable probable-cause determination "as a condition for any significant pretrial restraint of liberty" (quotation marks omitted)).

To protect victims and witnesses, and to safeguard the integrity of the grand-jury and trial processes, many jurisdictions permit—and some require—courts to issue protective orders in cases charging domestic violence. Take for example New York, where PAGV co-chair Darcel Clark leads the Bronx District Attorney's Office. When a pending action involves a crime occurring between "members of the same family or household," the court may issue a temporary order of protection as a condition of releasing the defendant on recognizance or bail. *See* N.Y. C.P.L. § 530.12(1). The order may restrain the defendant "from harassing, intimidating or threatening" the alleged victim, *id.* § 530.12(1)(a)(3), or from engaging in "acts of commission or omission that create an unreasonable risk" to the alleged victim's "health, safety and welfare," *id.* § 530.12(1)(a)(4). Moreover, if circumstances evince a "substantial risk" that the defendant may "use or threaten to use a firearm" unlawfully against the person for whom the protective order is entered, then the "court shall" decree the defendant ineligible for a firearm license and direct the "immediate surrender" of any firearms possessed. *Id.* § 530.14(1)(b).

"[T]emporary orders of protection are regularly issued in domestic abuse cases in the Bronx." *Matter of Crawford v. Ally*, 197 A.D.3d 27, 32 (1st Dep't 2021) (quotation marks omitted). These "temporary orders of protection typically last for only a short duration between court appearances, often for one or two months." *Id.* They serve the important function of protecting domestic-violence victims, as domestic abusers tend to continue their pattern of abuse absent intervention.[12]

Critically, defendants have procedural protections before gun rights are forfeited. A criminal charge has already been lodged based on probable cause. Further, New York law affords the defendant the right to a hearing before being deemed ineligible to possess a firearm. *See* N.Y. C.P.L. § 530.14(7). Of course, a protective order must have teeth to be effective. Thus, intentionally violating such an order constitutes criminal contempt. *See, e.g.*, N.Y. Penal Law § 215.50(3).

Procedures are comparable in Ohio, the home base of PAGV co-chair and Columbus City Attorney Zach Klein. In a case charging a domestic-violence crime, the court may issue a temporary protective order on application by the victim, her family, a household member, or the arresting officer. Ohio Rev. Stat. § 2919.26(a)(1). Within twenty-four hours of the motion, "the court shall conduct a hearing to determine whether to issue the order." *Id.* § 2919.26(c)(1). The order's proponent "shall appear before the court and provide the court with the information that

12. Nat'l Inst. of Justice, *supra* note 10, at 21 (describing study in which two-thirds of prior defendants whose cases in Bronx Misdemeanor Domestic Violence Court had concluded, and who were "rearrested for domestic violence, reoffended within the first six months").

it requests." *Id.* After the hearing, "the court may issue a temporary protection order, as a pretrial condition of release, that contains terms designed to ensure the safety and protection of the complainant, alleged victim, or [other] family or household member." *Id.*

Alternatively, "the court, upon its own motion, may issue a temporary protection order," *id.* § 2919.26(d)(1), subject to the same requirement of a prompt hearing, *id.* § 2919.26(d)(2). In any case, the court must conduct "the requisite hearing within the statutory time frame," unless the defendant waives it. *City of Strongsville v. N.D.*, 2016 Ohio 7484, ¶ 14 (2016); *see also State v. Finley*, 2001 Ohio 4347, ¶ 5 (2001) (lack of statutorily required hearing rendered temporary protective order unenforceable).

The protective order remains effective until the criminal proceeding's disposition. Ohio Rev. Stat. § 2919.26(e)(2). Knowingly or recklessly violating the order invites sanctions. *See id.* § 2919.27(a)(1). And upon a temporary protective order's issuance, Ohio law mandates that the court inform the parties of the following, orally or in writing:

> NOTICE: As a result of this protection order, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to federal law under 18 U.S.C. 922(g)(8) for the duration of this order. If you have any questions whether this law makes it illegal for you to possess or purchase a firearm or ammunition, you should consult an attorney.

Id. § 2919.26(g)(2).

Hence, state procedures allow for protective orders, sometimes folded into conditions of pretrial release, that disarm domestic abusers while charges are pending—both directly and through disqualifiers like § 922(g)(8).[13] All of these provisions are critical to public safety, as they help shield domestic-violence victims from further harm and allow them to testify in the grand jury and at trial without fear of reprisal at the point of a gun. The Fifth Circuit's decision cast a looming shadow over these important measures that are widely used nationwide to protect our most vulnerable victims.

II. Other Potential Remedies Are Inadequate Substitutes for Protective Orders that Disarm Domestic Abusers.

The Fifth Circuit's decision mentions several potential alternatives to statutory disqualifiers like § 922(g)(8). But these alternatives are not adequate substitutes for restraining orders that disarm domestic abusers.

For example, the Fifth Circuit stated that its decision was not meant "to cast doubt" on 18 U.S.C. § 922(n), which prohibits a person under felony indictment from shipping, transporting, or receiving any firearm. *Rahimi*, 61 F.4th at 452 n.6. But that remedy would not adequately protect

13. *See also, e.g.*, Ariz. R. Crim. P. 7.3(b); Cal. Penal Code § 136.2(a)(1)(G); Colo. Rev. Stat. § 18-1-1001(6); Fla. R. Crim. P. 3.131(a)-(b); Ga. Code § 17-17-16; Iowa Stat. § 664A.3; Kan. Stat. § 21-5924(a)(4); Mass. Gen. Laws ch. 276, § 58A(4)-(5); 15 Me. Rev. Stat. § 321; Mich. Comp. Laws § 765.6b(1), (6); Minn. Stat. § 629.75(1); N.C. Gen. Stat. § 15A-534.1(a)(2)(b); Nev. Rev. Stat. § 200.591(2)-(3); 18 Pa. Cons. Stat. § 4954; Tenn. Code § 40-11-150(a)-(b); Wis. Stat. § 969.01(4).

victims. To begin, "[s]ection 922(n) does not prevent an individual from publicly carrying [firearms]; it simply limits an individual's right to receive a firearm during the pendency of an indictment." *United States v. Kays*, 624 F. Supp. 3d 1262, 1268 (W.D. Okla. 2022); *see Dixon v. United States*, 548 U.S. 1, 16 (2006) (discussing this statutory "crime of receiving a firearm while under indictment"). Thus, this provision would not require a domestic abuser to surrender any firearms that he owns, even after being indicted for a felony.

Additionally, not all domestic-violence crimes are felonies. Some troubling offenses—such as stalking, harassment, or assault that does not result in serious injury—qualify as misdemeanors in the jurisdictions of many PAGV members.[14] Indeed, "across the country,

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14. Many of these States have codified specific misdemeanor domestic-violence offenses. *E.g.*, Ala. Code § 13A-6-132(a)(c); Cal. Penal Code § 243(e)(1); Colo. Rev. Stat. §§ 18-3-204, 183601; Fla. Stat. §§ 741.28(2), 784.03(1); Ga. Code § 16-5-23.1(f)(2)(A); 720 Ill. Comp. Stat. § 5/12-3.2; Ind. Code § 35-42-2-1.3(a); Iowa Stat. § 708.2A(1)-(3); Kan. Stat. § 21-5414(a)(1); Me. Rev. Stat. tit. 17-A, §§ 207, 207-A(1)(A); Mich. Comp. Laws § 750.81(2)-(4); Minn. Stat. § 609.2242(1)-(2); Miss. Code § 97-3-7(3)(a); Mo. Rev. Stat. § 565.076; N.C. Gen. Stat. § 14-32.5 (eff. Dec. 1, 2023); Nev. Rev. Stat. § 200.485(1); Ohio Rev. Code § 2919.25; Okla. Stat. tit. 21, § 644(c); Tenn. Code §§ 39-13-101(a)(1), 39-13-111; Utah Stat. § 76-5-114(2)(c). Others continue to rely on more general assault or battery charges for misdemeanor domestic violence. *E.g.*, Ariz. Rev. Stat. § 13-1203; Del. Code tit. 11, § 611; Ky. Rev. Stat. § 508.030; Md. Crim. Code § 3-203; N.Y. Penal Law § 120.00; Or. Rev. Stat. § 163.160(1); 18 Pa. Cons. Stat. § 2701(a)(1); Tex. Penal Code § 22.01; Wash. Rev. Code § 9A.36.041(1)-(2); Wis. Stat. § 940.19(1). These statutes are in addition to state criminal prohibitions on harassment and stalking.

many perpetrators of domestic violence are charged with misdemeanors, despite the harmfulness of their conduct." *Lange v. California*, 141 S. Ct. 2011, 2020 (2021) (quotation marks omitted). Not long ago, roughly four-fifths of domestic-violence charges nationwide were misdemeanors.[15] At least in this context, "a felon is not always more dangerous than a misdemeanant." *Id.* (quotation marks omitted).

Nor is waiting until "after criminal proceedings and conviction" to disarm an offender a viable solution. *Rahimi*, 61 F.4th at 458. Federal law (like that of many States) bars firearm possession by anyone convicted either of a felony, 18 U.S.C. § 922(g)(1), or "of a misdemeanor crime of domestic violence," *id.* § 922(g)(9).[16] But this overlooks the substantial threats that domestic-violence victims face while criminal charges are pending. A primary reason for protective orders is to keep abusers from threatening or intimidating victims *before* they testify in the grand jury or at trial.

Notably, there is no guarantee that a misdemeanor conviction will be included in the National Instant Criminal Background Check System, given the "unique challenges that states face in reporting [these] records to federal databases."[17] Further, some domestic offenders

15. *See* Eric L. Nelson, FBI Law Enforcement Bulletin, Investigating Domestic Violence, Raising Prosecution and Conviction Rates (Dec. 2013), https://tinyurl.com/2mxcsmkh.

16. *See* Giffords Law Center, Who Can Have a Gun, Domestic Violence & Firearms, Domestic Violence Misdemeanor Firearm Prohibitions.

17. A. Gallegos & B. Goggins, State Progress in Record Reporting for Firearm Related Background Checks: Misdemeanor

are referred to diversionary programs, to avoid saddling particular defendants with a criminal record.[18] Many prosecutors, including PAGV's members, continue to explore the extent to which, for certain offenders, these programs may safely and effectively interrupt patterns of domestic violence.[19] Still, public safety might demand disarming the offender for a period of time.[20]

Crimes of Domestic Violence at 6 (Dec. 2016); *see id.* at 6-9 (discussing hurdles such as lack of fingerprinting records, lack of uniform reporting, dissonance between elements of state-law offenses and federal statutory disqualifier, and delays from having to determine state conviction's basis); *see also* U.S. Gov't Accountability Off., Analyzing Available Data Could Help Improve Background Checks Involving Domestic Violence Records (Jul. 2016).

18. As one example, Florida's Eleventh Judicial Circuit, encompassing Miami, has a division dedicated to monitoring compliance with court-ordered, diversionary substance-use treatment for domestic-violence defendants. *See* Eleventh Judicial Circuit, Domestic Violence Drug Court, https://www.jud11.flcourts.org/Domestic-Violence-Drug-Court.

19. One recent meta-analysis concluded that incorporating culturally relevant strategies into these programs could bring the alleged perpetrators "positive outcomes including improved mental health, reduced recidivism, behavior change, and better attitudes to gender equality." L. Satyen et al., *The Effectiveness of Culturally Specific Male Domestic Violence Offender Intervention Programs on Behavior Changes and Mental Health: A Systematic Review*, Int. J. Environ. Res. & Public Health (2022).

20. *See, e.g.*, Wash. Rev. Code § 10.05.155(7) (requiring for deferred prosecution of domestic violence that defendant comply with any treatment programs and certify "compliance with any active order to surrender weapons").

Nor should the only answer be pretrial detention. In a concurring opinion below, Judge Ho posited that detaining alleged domestic offenders pretrial would deprive them of "access to weapons." *Rahimi*, 61 F.4th at 464 (Ho, J., concurring); *see id.* ("The only way to protect the victim may be to detain as well as disarm the violent criminal."). To be sure, the Constitution permits pretrial detention "when the defendant presents a threat to the judicial process by intimidating witnesses." *United States v. Salerno*, 481 U.S. 739, 753 (1987). And in certain cases, pretrial detention of alleged domestic abusers may be appropriate for victims' safety.[21] But in many instances, it may further disrupt the familial unit, for example by eliminating children's main source of financial support. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

For defendants in cash-bail jurisdictions who lack the resources to secure their release, pretrial detention may exacerbate cycles of poverty and criminal behavior.[22] Moreover, a guarantee of extended post-arrest detention for defendants may well dissuade victims from speaking

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21. *See, e.g.*, 725 Ill. Comp. Stat. § 5/110-6.1(a)(4) (authorizing detention on domestic-battery charge where "defendant's pretrial release poses a real and present threat to the safety of any person or persons or the community," based on "specific articulable facts").

22. A recently published analysis of nearly 1.5 million arrestees in Kentucky between 2009 and 2018 showed "that any time spent in pretrial detention beyond 23 hours is associated with a consistent and statistically significant increase in the likelihood of rearrest." Arnold Ventures, The Hidden Costs of Pretrial Detention Revisited at 4 (Mar. 2022).

up and pursuing the cases in the first place. Particularly for domestic-abuse charges, decisions about whether to seek pretrial detention are complex, weighty, and (where state law permits) entrusted to prosecutorial discretion. Incarceration should not be the only available method to protect victims from threats and intimidation while a criminal charge is pending.

It might be true, as Judge Ho suggested, that "anyone who's willing to break the law when it comes to domestic violence is presumably willing to break the law when it comes to guns." *Rahimi*, 61 F.4th at 464 (Ho, J., concurring). Still, a court's issuance of a restraining order undoubtedly deters *some* gun possession. Further, with a protective order in place, a court can intercede quickly and immediately if the order is violated, before "mere" possession of a weapon escalates into deadly violence. Restrictions on gun possession by domestic abusers are associated with a decrease in intimate-partner homicide rates—and the greater the authority to enforce these measures, the larger the reductions that may result.[23] As law-enforcement officials appreciate, when "'[p]eople get emotional'" and guns are on hand, "'instead of reaching for a fist, they reach for a weapon.'"[24]

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23. *See* 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, 2369 (2018).

24. J. David Goodman, *Texas Goes Permitless on Guns, and Police Face an Armed Public*, N.Y. Times (Oct. 26, 2022), https://tinyurl.com/mw52sc2u.

Nor does it matter that Rahimi's restraining order arose from a civil as opposed to a criminal proceeding—a fact repeatedly mentioned in the Fifth Circuit's opinion and in Judge Ho's concurrence. After all, domestic violence is addressed in a wide range of court proceedings, both civil and criminal, all of which work towards the common goal of protecting victims.[25] Moreover, this case involves a "facial challenge to § 922(g)(8)." *Rahimi*, 61 F.4th at 451. This type of attack is the "most difficult challenge to mount successfully" and will fail where, as here, the statute covers a range of readily identifiable, constitutionally proscribable conduct. *Salerno*, 481 U.S. at 745; *see also, e.g.*, *Parker v. Levy*, 417 U.S. 733, 760 (1974).

III. Disarming Domestic Abusers Comports with *Bruen*.

A. Judges Routinely Issue Orders that Affect the Exercise of Important Rights, and Second Amendment Rights Are No Different.

Besides being invaluable, the use of restraining orders to disarm domestic abusers comports with the Second Amendment. The government's brief persuasively explains how these laws square with the Nation's history of relevantly similar gun regulations. *See* Br. of United States at 13-27. Indeed, lawless or irresponsible individuals have traditionally enjoyed lesser ability to possess guns than the law-abiding citizenry has. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). A person who abuses an intimate partner or a child is not

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25. For example, many States have enacted "red flag" laws that enable law enforcement to disarm dangerous individuals in civil proceedings.

a law-abiding, responsible citizen. Thus, insofar as the outcome here "turns on whether § 922(g)(8) falls within that historical tradition," *Rahimi*, 61 F.4th at 455, the statute easily survives review.

Reinforcing this result, *Bruen* observed that Second Amendment rights should not be subject "'to an entirely different body of rules than the other Bill of Rights guarantees.'" 142 S. Ct. at 2156 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.)). In both civil and criminal cases, judges routinely issue orders that limit the exercise of individual rights, based in whole or part on the participants' own conduct. As here, those orders frequently involve case-specific determinations that judicial action is needed to ensure the proceeding's integrity or to protect third parties from harm.

For example, so-called gag orders in prosecutions "exhibit the characteristics of prior restraints." *United States v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000). Nevertheless, the Constitution permits these prophylactic measures to guard against tainting jurors, witnesses, and trial outcomes. That is so where a litigant's extrajudicial statements would "add fuel to an already voracious fire of publicity," *In re Dow Jones & Co.*, 842 F.2d 603, 611 (2d Cir. 1988) (quotation marks omitted), and where alternative measures "may not suffice" to protect the proceeding, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991); *see also Brown*, 218 F.3d at 429 (basing order on participants' previously demonstrated intent "to use the press to their full advantage"). These orders thus inhibit parties' exercise of rights outside of court, during a case. Free speech is cherished, but to call it entirely immune from a judge's case-specific order "is not how the First Amendment works." *Bruen*, 142 S. Ct. at 2156.

The right to be present at one's own criminal trial is also fundamental, but not inviolate. "[T]rial judges confronted with disruptive" or "defiant defendants" may eject them from the courtroom "to meet the circumstances of each case." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Thus, a defendant whose actions derail a proceeding may "constructively waive[] his right to be present at his own trial." *Jones v. Murphy*, 694 F.3d 225, 240-42 (2d Cir. 2012) (reaching this conclusion where defendant punched through window in response to ruling and then injured marshal); *see also United States v. Hellems*, 866 F.3d 856, 864 (8th Cir. 2017) (defendant's nonstop interruption "forfeited his constitutional right to be present" for jury selection); *United States v. Daniels*, 803 F.3d 335, 347-49 (7th Cir. 2015) (defendant's "belligerent" and erratic behavior "forfeited his right to attend trial").

The principle extends as well to Confrontation Clause rights. If a defendant prevents a witness from testifying due to intimidation (or worse), "the rule of forfeiture by wrongdoing" will "extinguish[] confrontation claims on essentially equitable grounds." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). As this Court has elaborated, "[w]hile defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Davis*, 547 U.S. at 833 (citing *Reynolds v. United States*, 98 U.S. 145, 158 (1878)). A hearsay exception in the Federal Rules of Civil Procedure "codifies th[is] forfeiture doctrine." *Id.* To say that a court must abide a defendant's disruption and threats "is not how the Sixth Amendment works." *Bruen*, 142 S. Ct. at 2156.

Likewise, a defendant's conduct may result in forfeiture of the Fourth Amendment's protection against unreasonable searches and seizures. *See California v. Greenwood*, 486 U.S. 35, 39 (1988) (discarding property); *United States v. Santana,* 427 U.S. 38, 42-43 (1976) (fleeing ongoing arrest); *see also Birchfield v. North Dakota*, 579 U.S. 438, 476 (2016) (driving a car); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (transacting in firearms). In some cases, the constitutional ramifications of a person's behavior will hinge on "background social norms." *Florida v. Jardines*, 569 U.S. 1, 9 (2013). In others, this Court has called for case-specific determinations focusing in part on whether a misdemeanant "threatens [a] harm." *Lange*, 141 S. Ct. at 2024. In no event does the Constitution "demand [an] absurd and dangerous result" at odds with "common sense." *Id.* at 2028 (Roberts, C.J., joined by Alito, J., concurring). And here, it would conflict with common sense to conclude that a court may not, after holding a hearing, protect a domestic-violence victim by disarming her abuser.

Even someone's "constitutionally protected interest in avoiding physical restraint" under the Fourteenth Amendment "may be overridden" by a judicial finding, made "pursuant to proper procedures and evidentiary standards," that the person is "unable to control [his] dangerousness" and therefore threatens harm to others. *Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997). In this analysis, past misbehavior may evidence future dangerousness. *Id.* at 362. Courts may indefinitely detain these dangerous individuals even though "an erroneous [civil] commitment [can be] as undesirable as an erroneous [criminal] conviction." *Addington v. Texas*, 441 U.S. 418, 428 (1979).

Indeed, courts may go so far as to deprive one or both parents of temporary custody of children during a domestic-relations dispute. The interest on which these orders impinge—that "of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). And the "lost opportunity to spend significant time with one's child cannot be replaced." *Madigan v. Madigan*, 224 Conn. 749, 756 (1993). Yet judges enter these orders anyway, after weighing all the relevant facts, including safety concerns.

Many of these disabilities may dissipate when circumstances change. For example, a gag order may lift, a defendant who behaves may return to court, a parent may regain custody of children, and someone involuntarily committed may rejoin the community after treatment. Similarly, § 922(g)(8)'s restriction on gun possession "may be only a temporary one which will be removed" if the court "frees the defendant" from the restraining order or the underlying charges. *United States v. Graves*, 554 F.2d 65, 72 (3d Cir. 1977).

The Second Amendment's right of armed self-defense "is not a second-class right." *Bruen*, 142 S. Ct. at 2156 (quotation marks omitted). But the Fifth Circuit's decision exalts the Second Amendment above a great many equally important rights that yield to fact-specific court orders in pending criminal or civil proceedings. And *that* result "turns the typical way of conceptualizing constitutional rights on its head." *Rahimi*, 61 F.4th at 453.

B. Section 922(g)(8) Does Not Resemble the "Proper Cause" Licensing Criteria that *Bruen* Invalidated.

Bruen held only that the Second Amendment forbids restricting public carry to applicants who can demonstrate a "special need for self-defense." 142 S. Ct. at 2138. That decision and the licensing criteria that it addressed are distinguishable from disarming domestic abusers under restraining orders, in at least four significant ways.

First, *Bruen* "decide[d] nothing about who may lawfully possess a firearm," but rather only that otherwise eligible people could do so "when they venture outside their homes." 142 S. Ct. at 2157 (Alito, J., concurring). By contrast, this case concerns whether particular individuals—namely, domestic abusers—may be disarmed while subject to protective orders.

Second, the protective orders at issue here prevent specific individuals from carrying guns for a distinctly *unlawful* purpose, i.e., the act of going "armed offensively" or "bearing arms to terrorize" the person in whose favor the order was entered. *Id.* at 2143.

Third, to the extent that these protective orders incidentally diminish the defendants' self-defense ability, they do so "only after an individual [i]s reasonably accused of intending to injure another." *Id.* at 2148-49 (discussing early American surety laws). When a judge issues a protective order in a criminal case, the defendant has already been arrested and charged based on probable cause. And in all cases, the protective order must rest on a judicial determination rendered after a fair hearing. *See*

18 U.S.C. § 922(g)(8)(A) (requiring that order be issued after notice and opportunity to participate in hearing). Thus, § 922(g)(8) does the opposite of demanding that everyday citizens "show some special need . . . to possess and carry handguns for self-defense." *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring). Instead, § 922(g)(8) comes into play only where a court has made a specific finding that an abuser poses a threat of physical harm to another person.

Fourth, these overarching differences matter because § 922(g)(8) addresses a plague of modern vintage. As the government's brief demonstrates, officials from the Colonial through Reconstruction Eras could scarcely have imagined the degree to which domestic abusers today would use firearms to terrorize, injure, and kill intimate partners—that is, if they considered the problem of domestic violence at all. *See* Br. of United States at 40-41. Unlike the generalized urban handgun violence that the laws in *Heller* and *Bruen* sought to address, this issue and its regulatory challenges have not "persisted since the 18th century." *Bruen*, 142 S. Ct. at 2131. To the contrary, back then, the law condoned physical abuse by husbands towards wives who were viewed as acting out of line. *See* 1 William Blackstone, Commentaries on the Laws of England 442-45 (1765) (describing practice of domestic chastisement).

The Fifth Circuit found of "dubious" worth early gun restrictions targeting groups based on traits that would be protected today. *Rahimi*, 61 F.4th at 457. But it seemingly gave no weight to the blasé nature of early American attitudes towards intimate-partner violence, which thankfully have evolved alongside legislative

prerogatives. To conclude that outmoded mores may only vitiate, but never enhance, support for a modern gun regulation "would be the federal creation of a one-way ratchet." *Nixon v. Miss. Mun. League*, 541 U.S. 125, 137 (2004). "This 'heads I win, tails you lose' approach cannot be correct." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007).

In the last several centuries, our Nation has made profound strides in shielding intimate partners from domestic violence. There is much work to be done, and PAGV's members are on the front lines of these efforts. Nothing in *Bruen* requires that, on this issue, we turn back the clock.

CONCLUSION

The Fifth Circuit's decision should be reversed.

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August 21, 2023