

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* PROSECUTOR AND
LAW ENFORCEMENT ASSOCIATIONS AND
OFFICE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici, listed below, are three associations of prosecuting attorneys and law enforcement officers and a major prosecutor's office. Collectively *amici* and their members have prosecuted millions of domestic violence cases. Like prosecutors and law enforcement officers across the nation, *amici* and their members are committed to preserving and enhancing public safety. *Amici* and their members believe that the decision below seriously threatens public safety.

Guns and domestic violence present an especially deadly combination. Prosecutors depend on 18 U.S.C. § 922(g)(8) and similar state laws to help protect victims, their families, third parties, and the public at large by temporarily removing firearms from domestic violence perpetrators who have proven to be dangerous. *Amici* and their members are particularly concerned about the effect that affirmance of the decision below would have on police officers, who face special dangers when responding to domestic violence calls.

The Association of Prosecuting Attorneys (APA) is a national non-profit organization created by prosecutors from across the country to strengthen their efforts in ensuring safer communities and improving their performance in the criminal justice system. The APA provides resources such as training and technical assistance to develop proactive and

¹ *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

innovative prosecutorial practices. It acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, including by submitting briefs as *amicus curiae* in appropriate cases. The APA's board of directors includes current prosecutors from states throughout the nation. The APA has sixteen attorneys on staff with over 350 years of collective criminal justice experience.

The California District Attorneys Association (CDA) is the statewide organization of California prosecutors. It has been in existence since 1910 and was incorporated as a non-profit corporation in 1974. CDA has over 2,500 members, with membership open to all elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. It is dedicated to promoting justice, education and training, effective advocacy, integrity, and compliance with constitutional and other legal mandates. CDA presents prosecutors' views in appellate cases when it concludes that the issues raised will significantly affect the administration of criminal justice.

The Small & Rural Law Enforcement Executives Association (SRLEEA) is the only 501(c)(3) non-profit organization solely devoted to supporting and advancing law enforcement executives and agencies serving small, rural, tribal, and special jurisdiction communities across the United States. The overwhelming majority of state and local law

enforcement agencies in the country, over ninety-two percent, operate with fewer than 100 sworn officers, with over eighty-four percent having fewer than fifty officers, and sixty-nine percent having fewer than twenty-five officers. With approximately ninety-seven percent of the nation consisting of rural regions and seventy percent of counties housing populations under 50,000 people, SRLEEA's dedication to supporting and promoting these law enforcement executives and agencies is vital in fostering safer communities and a stronger nation. As the only organization in the United States solely dedicated to small, rural, and tribal law enforcement, SRLEEA remains steadfast in its commitment to championing the interests of these law enforcement executives and agencies, ultimately contributing to the safety, security, and well-being of the diverse communities they serve.

The New York County District Attorney's Office, led by Alvin L. Bragg, Jr., is responsible for prosecuting crimes in Manhattan, the most densely populated county in the nation and home to more than 1.5 million residents. Among the District Attorney's top priorities have been combating the illegal possession or use of firearms and protecting victims of domestic and intimate partner violence. Last year, the District Attorney created a Special Victims Division (SVD), which includes a new Intimate Partner and Sexual Violence Bureau, staffed by specially trained prosecutors, investigators, counselors, and other professionals. SVD lawyers and staff not only pursue criminal prosecutions, but also work closely with civil legal providers to ensure that survivors have access to a full range of legal remedies, treatments, and other services. As the experience of

the New York County District Attorney's Office shows, gun violence is particularly pernicious in cases involving intimate partners, where social and psychological factors both increase the likelihood and lethality of violence and make it more difficult to prevent and prosecute such violence.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decision below, if affirmed, would have catastrophic consequences for public safety nationwide. It would imperil the lives of domestic violence victims, their families, the public at large, and particularly law enforcement officers responding to domestic violence calls.

1. The deadly combination of domestic violence and firearms is not theoretical. Studies show that a majority of intimate partner homicides in the United States are committed with firearms, and a substantial percentage of these homicides also result in the deaths of other individuals. Of particular concern from a public safety perspective, studies show a connection between domestic violence and mass shootings.

The decision below presents special risks for law enforcement officers. Domestic violence incidents are among the most common, and among the most dangerous, calls to which law enforcement officers respond. Unquestionably, these risks are exacerbated when the domestic abuser is armed.

2. When a court issues a domestic violence protective order, it is critically important to restrict the perpetrator's access to firearms. Perpetrators

often escalate their violence following issuance of a protective order. Domestic violence protective orders thus provide an appropriate basis for imposing firearms restrictions. The criteria for imposing such restrictions under 18 U.S.C. § 922(g)(8) and similar state laws are rigorous, ensuring that restrictions based on protective orders are limited to individuals known to be dangerous. And in the experience of *amici* and their members, domestic violence protective orders are not imposed lightly by courts, nor are they excessive in duration.

The Court should carefully consider the collateral consequences that affirmance of the decision below would have, particularly in disabling another key provision of federal law. Striking down Section 922(g)(8) would presumably nullify point-of-sale background checks and denial of purchases based on domestic violence protective orders, eliminating a Brady Act safeguard that for the last twenty-five years has kept tens of thousands of firearms from flowing into the hands of domestic violence perpetrators.

3. Prosecutors' ability to use civil domestic violence protective orders as a basis for restricting access to firearms is a critical complement to the criminal prosecution of domestic violence. Prosecutors can use the violation of such orders (including provisions restricting access to firearms) as a basis for criminal contempt charges against perpetrators, providing prompt relief for victims while a domestic violence prosecution goes forward or where such prosecution is not feasible.

Domestic violence protective orders accompanied by firearms restrictions can also help prosecutors persuade victims to engage with the criminal process. Timely protective orders with a disarming effect provide victims the physical space and peace of mind that is often necessary for their participation in the prosecution of their abusers without fear of deadly retaliation.

When a criminal prosecution goes forward, restricting access to firearms based on a protective order is critical to holding domestic violence perpetrators accountable. Victim testimony is often essential in domestic violence cases. When victims recant or otherwise refuse to participate as a result of intimidation by their abuser, domestic violence cases are exceedingly difficult to pursue. If witnesses are too afraid to testify because they fear retaliation by an armed abuser, prosecutors will have great difficulty obtaining convictions, and the cycle of domestic violence will continue.

ARGUMENT

Prosecutors and front-line law enforcement officers have a fundamental duty to advance public safety through both the criminal and civil justice systems. Perpetrators of domestic violence who have access to dangerous weapons present a serious threat to public safety in this country. The decision below significantly undermines public safety by gutting an important mechanism that Congress created to ensure these perpetrators cannot purchase or possess firearms. If the decision stands, it will threaten the safety of victims, their families, the general public,

and law enforcement officers in particular. The Court should reverse.

I. Armed Domestic Violence Perpetrators Are a Major Threat to Public Safety.

This Court has recognized the serious risk that domestic violence perpetrators with access to firearms poses to public safety. *See United States v. Hayes*, 555 U.S. 415, 427 (2009) (“Firearms and domestic strife are a potentially deadly combination nationwide.”). In deciding this case, the Court must consider the dangers a ruling for respondent would create for victims of domestic violence, their families, law enforcement officers, and other third parties.

A. Armed Perpetrators Pose a Serious Threat to Intimate Partner Victims, Their Families, and Third Parties.

Indisputably, guns in the hands of domestic violence perpetrators exact a deadly toll on their intimate partners. “In the [U.S.], nearly half of all female and one-tenth of male homicide victims are killed by intimate partners.”² And “[t]wo-thirds of intimate partner homicides in the U.S. are committed using guns.” Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly*

² Millan A. AbiNadder et al., *Examining Intimate Partner Violence-Related Fatalities: Past Lessons and Future Directions U.S. National Data*, 38 J. Fam. Viol. 1243, 1243 (2023).

Combination, The Juxtaposition of Federal and Florida Laws, 79 Fla. B.J. 79, 79 (2005).³

Domestic violence assaults involving guns are twelve times more likely to result in death than those involving other weapons or bodily force.⁴ Having one or more guns in the home makes it five times more likely that an episode of domestic violence will result in death. *See Zeoli & Webster*, 16 Inj. Prevention at 90.

The risk of nonfatal harm is also significant. Domestic violence perpetrators often use guns to threaten and terrorize their victims, including children who may be present. As of 2016, approximately 4.5 million women had been threatened by an intimate partner with a gun, and nearly one million women had been shot, or shot *at*, by an intimate partner.⁵

In many cases, intimate partner violence affects not only the immediate victim, but also family

³ *See also* April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 Inj. Prevention 90, 90 (2010) (over 60% of intimate partner homicides are committed with firearms).

⁴ *See* Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Med. Ass'n 3043, 3044 (1992).

⁵ *See* Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 Trauma Viol. & Abuse 431 (2016).

members, new intimate partners, friends, acquaintances, and even bystanders. According to one study, twenty percent of those killed in the course of such incidents are corollary victims, *i.e.*, individuals other than the intimate partner.⁶

A perpetrator's access to firearms drastically increases the likelihood of harm to corollary victims. To take just one astonishing example from Texas, in 2021, 100% of all bystanders, family, and friends killed in domestic violence situations were killed with a firearm.⁷ And eighty-six percent of corollary victims who were injured in a domestic violence situation were shot (as opposed to being stabbed or otherwise physically assaulted).⁸

Children especially are at risk when firearms are present. Nearly two-thirds of all child fatalities related to domestic violence involved guns.⁹ Between 2017 and 2022, 866 children were shot during

⁶ See Sharon G. Smith et al., *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System, 2003–2009*, 104 Am. J. Pub. Health 461, 463 (2014); see also Laurie M. Graham et al., *Disparities in Potential Life Years of Life Lost Due to Intimate Partner Violence: Data from 16 States for 2006–2015*, PLoS One (Feb. 17, 2021), <https://perma.cc/JJL2-GL2B>.

⁷ See Tex. Council on Family Violence, *Honoring Texas Victims: Family Violence Fatalities Summary Facts 2* (2021), <https://perma.cc/D2KB-WPBU>.

⁸ *Id.*

⁹ See Avanti Adhia et al., *The Role of Intimate Partner Violence in Homicides of Children Aged 2–14 Years*, 56 Am. J. Preventive Med. 38, 43 (2019).

domestic violence incidents, and over two-thirds died from their injuries.¹⁰

Especially disturbing from a public safety perspective, studies have shown a connection between domestic violence and mass shootings. More than two-thirds of mass shootings occur in the context of domestic violence incidents or are perpetrated by shooters with a history of domestic violence.¹¹ An analysis of every identifiable mass shooting between 2009 and 2013 found that in fifty-seven percent of those incidents, the shooter killed a current or former intimate partner or a family member of the immediate victim.¹²

B. Law Enforcement Officers Face Especially Serious Risks When Responding to Domestic Violence Calls.

Police officers are at particular risk when responding to volatile scenes of domestic violence. As the Chairman and CEO of the National Law Enforcement Officers Memorial Fund has explained, “[n]o assignment poses more uncertainty and danger to a law enforcement professional than a domestic

¹⁰ See Jennifer Mascia, *Dangerous Homes: Guns and Domestic Violence Exact a Deadly Toll on Kids*, The Trace (updated June 2, 2023), <https://perma.cc/Q6RA-N3FR>.

¹¹ See Lisa B. Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 *Inj. Epidemiol.* 38, at 5 (2021), <https://rdcu.be/djR58>.

¹² See Everytown for Gun Safety, *Analysis of Recent Mass Shootings* 3 (Aug. 2015), <https://perma.cc/5XUT-SV3K>.

disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.”¹³

Statistics confirm that domestic disturbance calls are among the most dangerous for police. According to data from the FBI’s Law Enforcement Officers Killed and Assaulted database (LEOKA), more than twenty-eight percent of officer assaults occur during such calls. FBI, *2021 LEOKA Annual Report*, tbl. 84. And of the 515 officers nationwide who were feloniously killed between 2013 and 2022, fifty were responding to a domestic disturbance. FBI, *2022 LEOKA Annual Report*, tbl. 23.

The presence of firearms makes domestic disturbance calls especially dangerous for officers. Ninety-five percent of officers slain while responding to domestic disturbance calls between 1996 and 2010 were killed by a firearm. Cassandra Kercher et al., *Homicides of Law Enforcement Officers Responding to Domestic Disturbance Calls*, 19(5) *Inj. Prevention* 331, 331–33 (2013).

Affirming the decision below would exacerbate the already significant danger that officers face when responding to domestic violence calls. Each year law enforcement receives and responds to tens of thousands of calls reporting violations of domestic

¹³ Campus Safety, *Domestic Violence Takes a Heavy Toll on the Nation’s Law Enforcement Community* (Oct. 8, 2007), <https://perma.cc/CPU5-LAHP>.

violence protective orders (“DVPOs”). The Los Angeles Police Department alone receives more than 5,000 calls reporting such violations each year.¹⁴ And in 2022, officers in Connecticut made more than 9,000 arrests for DVPO violations.¹⁵

Under Section 922(g)(8) as it stands today, individuals subject to DVPOs that meet rigorous statutory requirements may not possess firearms. Forty eight states and the District of Columbia have similar laws prohibiting firearm possession by individuals who are subject to DVPOs. U.S. Br. 34–35 & nn. 22, 23. In addition, laws in at least twenty-two states affirmatively require perpetrators to surrender their firearms upon the issuance of a DVPO.¹⁶ And as discussed below, *infra* Part II.C., the federal background check system effectively prevents thousands of such individuals from purchasing firearms at the point of sale. As a result, when officers respond to domestic violence calls, perpetrators are

¹⁴ See Isabelle Zavarise, *For Domestic Violence Survivors, Restraining Orders Offer Little Protection*, Crosstown LA (Nov. 15, 2021), <https://perma.cc/6AAN-RC33>.

¹⁵ Jacqueline Rabe Thomas & Taylor Johnston, *In CT, Survivors Face Domestic Violence ‘Over And Over’ As Abusers Increasingly Violate Orders*, CT Insider (May 18, 2023), <https://www.ctinsider.com/projects/2023/ct-restraining-order-violations/>.

¹⁶ See Everytown Research & Policy, *Which States Require Prohibited Domestic Abusers to Turn in Any Guns While Under a Restraining Order?* (2023), <https://perma.cc/4RVT-FZD5> (compiling state laws requiring affirmative removal of firearms from individuals subject to DVPOs). See also Section III.A, *infra*, (discussing various mechanisms for enforcing firearm surrender provisions under state law).

significantly less likely to be armed, reducing the risk of an officer injury or fatality. But if the Court should affirm the decision below, tens of thousands of domestic abusers would be re-armed, creating far more dangerous situations for law enforcement officers when they respond to domestic violence calls.

II. Once Domestic Violence Perpetrators Are Subject to a Protective Order, Restricting Their Access to Firearms Is Essential to Avoid Further Violence.

A. Domestic Violence Perpetrators Are Likely to Escalate Violence After Victims Seek Protective Orders.

Once a DVPO issues, limiting the perpetrator's access to firearms is essential to public safety. All too often, a prohibition against harming a victim or a stay-away order does not eliminate the risk that the perpetrator will harm or threaten the victim. Indeed, perpetrators often continue their behavior and may well escalate the severity of the abuse.¹⁷ Domestic violence perpetrators are also more likely to commit other types of violent crime.¹⁸

To be sure, protective orders offer some protection for victims, but studies have shown that abusers

¹⁷ See Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. Police Crisis Negots. 199, 201, 203, 212 (2012).

¹⁸ See Elizabeth A. Tomsich et al., *Intimate Partner Violence and Subsequent Violent Offending Among Handgun Purchasers*, 37 J. Interpers. Viol. 23–24 (Dec. 12, 2021).

regularly violate such orders. While results vary, some studies have shown a violation rate as high as eighty-one percent.¹⁹ Among domestic violence prevention advocates, the fact that abusers routinely violate protective order provisions is “common knowledge.” Zavarise, *supra*. One study found that almost half of all perpetrators re-abused victims within two years of the order’s issuance.²⁰

Moreover, domestic violence often escalates after issuance of a protective order. Perpetrators may seek revenge on their victims for daring to seek a DVPO.²¹ It is common for perpetrators to ramp up the abuse when their victim is in the process of ending, or has ended, physical contact.²² In fact, this is the most dangerous time for victims, when most domestic violence homicides occur. Tom Lininger, *Prosecuting*

¹⁹ See Christopher T. Benitez, et al., *Do Protection Orders Protect?*, 38 J. Am. Acad. Psychiatry L. 376 (2010), <https://perma.cc/B8EE-M5VE>.

²⁰ Andrew Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don’t Work?*, in *Do Arrests and Restraining Orders Work?* 192–213 (Eve Buzawa & Carl Buzawa eds., 1996).

²¹ Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women’s Experience with Male Violence and Legal Process*, in *Domestic Violence: The Changing Criminal Justice Response* 227–52 (Eve Buzawa & Carl Buzawa eds., 1992), <https://www.researchgate.net/publication/313474280>.

²² Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 Clearinghouse Rev. 1113, 1115 (1996) (discussing study showing that divorced and separated women are physically abused fourteen times as often as women living with their abusers and account for seventy-five percent of all female victims killed by their abusers).

Batterers After Crawford, 91 Va. L. Rev. 747, 769 (2005).

Because of the high risk of escalating violence when victims come forward, it is crucial to have a mechanism that will quickly restrict perpetrators' access to firearms. Section 922(g)(8), with its focus on civil DVPOs, which are ordinarily issued promptly, is an important tool in this regard. Once a DVPO is in place, the prospect of a federal criminal charge may deter the perpetrator from acquiring or possessing a firearm that could be used to commit additional violence. Thus, unlike other subparts of 18 U.S.C. § 922, which prohibit perpetrators from possessing firearms after a conviction, *id.* at § 922(g)(9), or upon indictment, *id.* at § 922(n), Section 922(g)(8) provides immediate protection during the most dangerous time for victims.

State analogs to Section 922(g)(8) that also focus on DVPOs often provide even more effective and immediate relief for victims. Indeed, many states not only ban firearm possession by individuals subject to a DVPO, they also effectuate the timely surrender of those weapons. For example, New Jersey authorizes a judge issuing a DVPO to order law enforcement officers to search for and seize any firearm in the perpetrator's possession. *See* N.J. Stat. Ann. § 2C:25-29b(16). Similarly, in Massachusetts a law enforcement officer who serves a DVPO "shall immediately take possession of all firearms . . . in the control, ownership, or possession" of the perpetrator. *See* Mass. Gen. Laws ch. 209A, § 3B. These laws effectively remove firearms from domestic violence perpetrators at the most dangerous time for victims.

Should the Court affirm the decision below, it would call into question these important tools for reducing the danger to victims and maintaining public safety in local communities.

Studies show that restricting perpetrators' access to firearms after a DVPO has been issued is an effective tool to reduce the risk of deadly violence. One study found that female intimate partner homicide rates decline by seven percent after a state passes such a law.²³ Another study found that such laws are associated with a ten percent reduction in intimate partner homicide.²⁴

The impact of these laws is even more striking in urban settings: prior to the enactment of Section 922(g)(8), cities in states with laws that reduced access to firearms for those subject to DVPOs experienced a twenty-five percent reduction in intimate partner firearm homicide rates. *See* Zeoli & Webster, 16 Inj. Prevention at 92.

B. Civil Protective Orders Provide an Appropriate Basis for Restricting a Perpetrator's Access to Firearms.

In the view of *amici* and their members, it is eminently reasonable to restrict domestic violence

²³ *See* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Sage J. 3 (June 2006).

²⁴ *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. Epidemiol. 2365, 2365–71 (2017).

perpetrators' access to firearms based on a court's issuance of a civil protective order. As discussed above, domestic violence perpetrators are likely to engage in future violence. Issuance of a DVPO is a good indication that a perpetrator presents a substantial risk of such violence.

The Section 922(g)(8) process is rigorous. A protective order must satisfy three statutory requirements before prosecutors may bring charges against an individual under that provision. First, the individual must have received actual notice of the hearing that led to issuance of the order and been given the opportunity to participate at that hearing. 18 U.S.C. § 922(g)(8)(A). Second, the order must forbid the individual from harassing, stalking, or threatening an intimate partner, the intimate partner's child, or the individual's child. *Id.* § 922(g)(8)(B). Third, the order must either (a) include a finding by the court that the individual represents a credible threat to the intimate partner or child, or (b) expressly prohibit the individual from using, attempting to use, or threatening to use force against the partner or child. *Id.* § 922(g)(8)(C). The second and third criteria provide assurances that there is a real risk that the perpetrator will engage in future violence, while the first criterion ensures that the perpetrator received due process when the order was issued.

Some state analogs to Section 922(g)(8) contain even more rigorous requirements. For example, Nevada law requires that before approving dispossession of firearms, the court consider any documented history of abuse, threatened or actual use

of a firearm in abuse, and whether the respondent has used a firearm in a crime. Nev. Rev. Stat. Ann. § 33.031. Similarly, North Carolina law requires that a court consider whether the abuse involved use of or threat with a deadly weapon, a threat to seriously injure or kill the petitioner or a minor, a suicide threat, or serious injury to the petitioner or a minor. N.C. Gen. Stat. § 50B-3.1.

Furthermore, DVPOs have a limited duration. In the experience of *amici* and their members, such orders ordinarily last around two years. *See, e.g.*, Tex. Fam. Code § 85.025(a); N.Y. Fam. Ct. Act § 842. Section 922(g)(8) applies only to a person who “is” subject to a protective order. Thus, the period of a firearms restriction based on a DVPO would be limited, never indefinite.

In the experience of *amici* and their members, courts exercise considerable care when issuing DVPOs and imposing firearms restrictions. The determination of whether an individual represents a credible threat to an intimate partner or child, or whether to include a prohibition on use of physical violence against the partner or child (two of the criteria for DVPOs under Section 922(g)(8)), is based on the court’s careful judgment. Courts consider not only the incident at hand, but also a holistic view of the perpetrator’s background and disposition. And courts do not grant DVPOs simply as a matter of course. As just one example, in June 2023, 380 protective orders were requested in Davidson County, Tennessee (home to Nashville), but courts granted only 123, less than a third. Metro. Gov’t of Nashville

& Davidson Cnty., *Domestic Violence Summary 2023 Through June*, at 1, 17 (July 18, 2023).

In addition, in the experience of *amici* and their members, reciprocal (mutual) protective orders are rare and are certainly not granted as a matter of “common practice” (*contra* Pet. App. 39a (Ho, J., concurring)). In California, which has one of the highest volumes of domestic violence cases in the nation, a court that wishes to grant a reciprocal DVPO must adhere to rigorous statutory criteria. Among other things, the court must make “detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” Cal. Fam. Code § 6305.

C. Barring Use of Protective Orders to Restrict Firearms Access Would Undermine the Life-Saving National Instant Background Check System.

Background checks for those seeking to purchase firearms are an essential public safety tool. The Court should consider the impact of its decision in this case on the federal background check system, which helps keep firearms out of the hands of thousands of domestic violence perpetrators each year.

The Brady Handgun Violence Prevention Act of 1993 (Brady Act), requires Federal Firearms Licensees (FFLs) to request background checks on prospective firearm purchasers to determine at the point of sale whether those purchasers are barred from possessing a firearm under 18 U.S.C. § 922(g) or (n) or state law. *See* 18 U.S.C. § 922(t); *id.* § 922(b) (prohibiting, in part, transfer of firearms where the

transfer would violate applicable state laws). Pursuant to the Brady Act, the FBI in 1998 established the National Instant Background Check System (NICS) to process these background checks. This national system queries available records in three national databases.²⁵

The NICS background check system has proven remarkably effective at keeping firearms out of the hands of dangerous individuals. Over the last twenty-five years, NICS has processed more than 411 million background checks. FBI, *NICS Operations Report 2020-2021*, at 13 (2021). Those checks have resulted in more than 2.2 million denials of firearm purchases. FBI, *Federal Denials 1* (updated July 31, 2023). In 2021 alone, 88,479 individuals who could not legally possess firearms were denied firearm purchases at the point of sale based on NICS background checks. FBI, *NICS Operations Report 2020-2021*, at 13 (2021).

Of particular relevance here, NICS background checks have kept firearms out of the hands of tens of thousands of domestic violence perpetrators. As of July 31, 2023, more than 74,000 individuals were included in the NICS indices because they were subject to a DVPO. FBI, *Active Records in the NICS*

²⁵ These databases are: (1) the National Crime Information Center (NCIC), which contains information on wanted persons, persons subject to protection orders, and other relevant persons; (2) the Interstate Identification Index (III), which accesses criminal history records; and (3) the NICS Indices, which include individuals who are prohibited from possessing or receiving a firearm under federal or state law when disqualifying information may not be available through the NCIC or III databases. See NICS, *Statement of Record Before Senate Judiciary Committee* (Dec. 6, 2017).

Indices (updated July 31, 2023). If these individuals attempted to purchase a firearm from a FFL, they would be denied. And NICS reports show that individuals subject to DVPOs regularly attempt to purchase firearms. Between the inception of the NICS system in 1998 and July 31, 2023, at least 77,283 firearm purchases were denied because the prospective purchaser was subject to a DVPO. See FBI, *Federal Denials* 1 (updated July 31, 2023). In 2021 alone, nearly 4,000 individuals subject to a DVPO sought and were denied a firearm based on NICS checks. FBI, *NICS Operations Report 2020-2021*, at 13 (2021).

Homicide statistics confirm the impact of background checks. According to an analysis of FBI data, thirty-eight percent fewer women are shot to death by intimate partners in states that require a background check for every handgun sale.²⁶ In light of the overwhelming evidence that removing firearms from domestic violence situations saves lives (see Section II, *supra*), each of the 77,283 times over the last twenty-five years that an individual subject to a DVPO was denied the purchase of a firearm represents a potential life or lives saved.

In deciding this case, the Court should consider the sheer volume of individuals subject to DVPOs who seek and are denied purchase of firearms. If the Court were to affirm the decision below and strike down Section 922(g)(8), that decision would end not only the

²⁶ Educational Fund to Stop Gun Violence, *Domestic Violence and Guns in the United States: A Lethal Combination* (Oct. 2016), <https://perma.cc/ZP76-GR8F> (analyzing FBI homicide reports).

federal prohibition on firearm possession for individuals subject to DVPOs, it would presumably end the Brady Act point-of-sale restrictions for these individuals. The thousands of individuals who seek to purchase firearms while subject to DVPOs would no longer be denied when NICS background checks are run. In short, affirming the decision below would eliminate a safeguard that, for the last twenty-five years, has kept tens of thousands of firearms from flowing into the hands of domestic violence perpetrators, thereby saving countless lives.

III. Civil Protective Orders Are an Essential Complement to Criminal Prosecution of Domestic Violence.

The court below appropriately recognized that its decision does not affect firearm restrictions that are imposed during a criminal prosecution or after a conviction. *See* Pet. App. 10a & n.6; *id.* at 16a & n.7. But the court failed to appreciate that prosecutors also rely on civil protective orders to reduce the substantial risk of harm that victims face until their abusers can be brought to justice using criminal prosecution. In the extensive experience of *amici* and their members, reliance on the criminal justice system alone is simply not sufficient. Domestic violence perpetrators ordinarily cannot be “detained, prosecuted, convicted, and incarcerated,” *id.* at 34a (Ho, J., concurring), before further abuse occurs.

A. Prosecutors Rely on Civil Protective Orders to Provide Timely Protection for Domestic Violence Victims.

Prosecutors regularly rely on civil protective orders to promptly prevent dangerous individuals from obtaining firearms. Section 922(g)(8) and its state analogs are often the only legal mechanism available to disarm domestic violence perpetrators during the most dangerous time for victims (*see* Section II.A., *supra*). Prosecutors regularly enforce these protective orders, bringing criminal contempt charges against individuals who violate such orders, including by unlawfully using or possessing firearms.

For example, in New York an individual can be convicted of first-degree criminal contempt if he threatens a person protected by a civil order of protection by displaying a firearm, or second-degree criminal contempt if he violates any provision of an order of protection, including a firearm suspension or surrender provision. *See* N.Y. Penal Law § 215.51(b)(i), (c); N.Y. Fam. Ct. Act § 842-a. Among other things, criminal contempt prosecutions provide an essential, prompt remedy for threatening conduct that might not, on its own, rise to the level of a criminal offense. Civil protective orders therefore allow prosecutors to quickly reduce the risk for victims by arresting the perpetrator and prosecuting violations of those orders promptly, without the need

for victim participation and extended evidentiary proceedings.²⁷

Moreover, Section 922(g)(8) plays an important gap-filling role in the federal criminal code. Although Section 922(n) bars firearm possession for individuals subject to felony indictment, many domestic violence crimes are misdemeanors. *See* 18 U.S.C. § 921(a)(33) (defining “misdemeanor crime of domestic violence”). An indictment for misdemeanor domestic violence does not trigger Section 922(n), but Section 922(g)(8) can be used to restrict the perpetrator’s access to firearms, thereby helping to avert future violence.

B. Civil Protective Orders Can Help Prosecutors Persuade Victims to Engage with the Criminal Process.

The availability of a civil remedy for domestic violence that provides immediate protection from future violence also encourages victims to come forward and engage with the criminal process. As prosecutors are well aware, survivors of intimate partner violence are often reluctant to pursue criminal charges for a number of reasons. As some examples, they may depend on their intimate partner for income, housing, childcare, or health insurance; fear retaliation by the perpetrator; or fear the potential immigration consequences of engaging with the criminal process. Without civil remedies to

²⁷ Criminal contempt laws (as well as Section 922(g)(8) itself) provide the basis for independent criminal charges that ordinarily do not require victim testimony, thereby avoiding the risks of victim intimidation and witness tampering. *See* Section III.C., *infra*.

address dangerous situations short of a criminal conviction or incarceration, survivors may never reach out to law enforcement at all. By contrast, survivors who understand that criminal prosecution is only one option in a spectrum of possible responses may be more willing to report domestic violence to law enforcement. They may also be more likely to engage with prosecutors to determine whether a criminal disposition is the best solution for their circumstances, as well as to reach out to law enforcement if abuse reoccurs or escalates.

Prosecutors have responded to this practical reality by working closely with advocates for domestic violence victims to ensure that both criminal and civil remedies are available when survivors reach out for help. For example, in New York City, staff from each of the five District Attorney Offices are co-located within Family Justice Centers with civil legal service providers, community groups, and government agencies that assist victims of domestic and gender-based violence. These settings facilitate communications between providers and prosecutors.

To be sure, survivors may ultimately decline to participate in a criminal prosecution. But regardless of whether a referral leads to prosecution, that initial contact with prosecutors can establish a relationship of trust that encourages survivors to re-engage if their situations escalate. The availability of civil orders, accompanied by enforceable protective measures such as firearms restrictions, thus opens the door for a cooperative ongoing relationship with the criminal process.

Prosecutors also rely on DVPOs when a criminal disposition appears impossible or unwise. Criminal prosecutions in cases involving domestic violence can founder for any number of reasons, including victim hesitation or recantation due to intimidation by the perpetrator. Nevertheless, the danger of future violence (including the potential that an armed perpetrator will kill the intimate partner or third parties) remains.

C. Protective Orders That Provide the Basis for Restricting a Perpetrator’s Access to Firearms Reduce the Likelihood of Witness Intimidation in Criminal Prosecutions of Domestic Violence.

Restricting a perpetrator’s access to firearms is essential to prosecutors’ efforts to hold perpetrators accountable through criminal prosecution. Victim testimony is often the linchpin of such cases.²⁸ That is particularly so given this Court’s Confrontation Clause jurisprudence. *See Crawford v. Washington*, 541 U.S. 36 (2004) (holding that prosecutors could not introduce “reliable” out of court statements in prosecuting a domestic violence case where the victim did not testify). Yet, as the Court highlighted in *Davis v. Washington*, domestic violence cases are

²⁸ See Mary Kernic et al., *Victim Recantation and Disengagement from Prosecution in Intimate Partner Violence Criminally Prosecuted Crimes in King County, Washington: Predictors of Victim Recantation and Disengagement and Prosecutorial Outcomes Final Report* 24 (2017) (finding that domestic violence cases in which the victim disengaged from the prosecution were half as likely to end in conviction as cases in which the victim was actively engaged with the prosecution).

“notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” 547 U.S. 813, 832–33 (2006). *See also, Giles v. California*, 554 U.S. 353, 405 (2008) (Breyer, J., dissenting) (“[D]omestic violence . . . typically involves a history of repeated violence; and *it is difficult to prove in court because the victim is generally reluctant or unable to testify.*”) (emphasis added).

Indeed, in the experience of *amici* and their members, who have collectively prosecuted millions of domestic violence cases, victim intimidation and witness tampering are nearly universal in domestic violence cases.²⁹ Studies show that perpetrators threaten retaliatory violence in as many as half of all domestic violence cases. Lininger, 91 Va. L. Rev. at 769. And many perpetrators go far beyond threats: thirty percent of abusers assault their victims again before the domestic violence criminal case concludes. *Id.*

In light of this pervasive violence and intimidation, it is no wonder that eighty to ninety percent of domestic violence victims recant or otherwise refuse to cooperate with prosecutors.³⁰ Although victims may choose not to cooperate with prosecutors for myriad reasons, among the most cited is a well-

²⁹ See Kerry Murphy Healy, Nat’l Inst. of Justice, *Victim and Witness Intimidation: New Developments and Emerging Responses* 1–2 (Oct. 1995), <https://perma.cc/55ZF-32UY> (describing the “near universality” of intimidation in domestic violence cases).

³⁰ See Joan Meier, Davis/Hammon, *Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 Mich. L. Rev. First Impressions 22, 25 (2015).

founded fear that their abusers will retaliate. *See* James Ptacek, *Battered Women in the Courtroom* 145–49 (1999).

Because victim testimony is so critical to the prosecution of domestic violence perpetrators, when victims recant or otherwise refuse to participate, domestic violence prosecutions are exceedingly difficult to pursue. One survey of prosecutors' offices in sixty locations across California, Washington, and Oregon found that seventy-six percent of prosecutors said their offices were more likely to drop domestic violence charges when the victim recants or refuses to cooperate. Lininger, 91 Va. L. Rev. at 769. In cases where the government continues to pursue charges after a victim recants or disengages, defendants are far more likely to be acquitted. For example, a study in King County, Washington showed that domestic violence cases in which the victim disengages from the prosecution are half as likely to result in conviction compared with cases in which the victim is actively involved in the government's case. *See* Kernic et al., *supra*, at 24.

Studies show that victims who obtain DVPOs are less likely to recant or otherwise disengage from prosecution. *See id.* DVPOs are critical in providing victims the peace of mind and physical space that is often necessary for them to participate in the prosecution of their abusers without fear of deadly retaliation. And laws that restrict perpetrators' access to firearms, including Section 922(g)(8), state law analogs, and the Brady Act provision for federal background checks, are especially effective in encouraging victims to come forward. By prohibiting

the purchase and possession of firearms by persons subject to a DVPO, this constellation of laws deters witness intimidation and interrupts the cycle of abuse.

Invalidating Section 922(g)(8) and similar state law provisions would hinder prosecutors' ability to charge and convict domestic violence perpetrators. If perpetrators can legally possess and purchase firearms prior to the commencement of criminal proceedings, victims and third parties will be far less likely to come forward and cooperate with a prosecution. And if witnesses are too afraid to testify because they know the accused is armed, prosecutors will be unable to obtain convictions in far too many cases.

CONCLUSION

The decision below imperils victims of domestic violence, their families, and the public at large, especially law enforcement officers responding to domestic disturbance calls. It also threatens to make domestic violence prosecutions even more difficult for prosecutors. It is inconceivable that those who framed and ratified the Second Amendment would have intended such a result. Because Congress acted lawfully by restricting access to firearms for persons subject to DVPOs, the Court should reverse.

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