No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
RAHIMI,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER, ET. AL. IN SUPPORT OF PETITIONER

SARAH DEER
UNIVERSITY OF KANSAS
1541 Lilac Lane
Lawrence KS 66045
(785) 864-9713
sarah.deer@ku.edu

MARY KATHRYN NAGLE
Counsel of Record
ATTORNEY AT LAW
P.O. Box 506
McLean, VA 22101
(202) 407-0591
mkn@mknaglelaw.onmicrosoft.com

SHONEY BLAKE
PIPESTEM LAW P.C.
401 S. Boston Ave
Suite 2200
Tulsa, OK 74103
(918) 936-4705
sblake@pipestemlaw.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

The National Indigenous Women's Resource Center ("NIWRC") is a national organization working to end domestic violence and sexual assault against Indian women and children. The NIWRC's work is directly implicated by the argument that 18 U.S.C. § 922(g)(8) violates the Second Amendment. Indeed, a decision from this Court striking down § 922(g)(8) would leave Native women and children even more vulnerable and susceptible to homicide than they are at present.

The NIWRC is a Native non-profit organization whose mission is to ensure the safety of Native women and children by protecting and preserving the inherent sovereign authority of Tribal Nations to respond to domestic violence and sexual assault. The NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience in tribal courts, tribal governmental processes, and programmatic and educational work to end violence against Native women and children, including domestic violence and sexual assault.

The NIWRC is also joined by Tribal Nations whose efforts to protect their citizens from domestic violence and homicide will be undermined should the Court declare § 922(g)(8) unconstitutional on its face. These Tribal Nations have worked hard to ensure that their laws and procedures allow for victims to receive protective orders in a safe and timely manner, while

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[1] Pursuant to Supreme Court Rule 37, the NIWRC states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from the NIWRC and its counsel, made any monetary contribution toward the preparation or submission of this brief.

also balancing the rights of defendants and the need for a fair and just process.

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") is a union of three Tribes—Cayuse, Umatilla, and Walla Walla—located on a 172,000-acre reservation in Oregon. The Umatilla Indian Reservation was subject to allotment and is heavily allotted, and as a result, contains a large percentage of non-Indian fee land. The CTUIR has more than 3,100 citizens, nearly half of whom live on the Reservation alongside approximately 1,500 non-Indians. The CTUIR was the first Tribe in the nation, and the first jurisdiction in the country, to implement the Adam Walsh Act in 2009. In March of 2011, the CTUIR implemented felony sentencing under the Tribal Law and Order Act of 2010 and has since prosecuted numerous felony cases. In July of 2013, the CTUIR implemented all necessary provisions of the 2013 Violence Against Women Act's ("VAWA") restored tribal criminal jurisdiction, and was approved by the United States for early exercise of that authority in February of 2014. The CTUIR implemented VAWA 2022's restored jurisdiction and began exercising that authority on October 1, 2022. Since implementing restored tribal criminal jurisdiction under VAWA, the CTUIR has prosecuted VAWA cases for acts of domestic violence committed by non-Indians against Indian women on the Umatilla Indian Reservation while affording those defendants the full panoply of protections called for under VAWA.

The Nottawaseppi Huron Band of the Potawatomi ("NHBP") is a federally-recognized Tribe with 1,673 enrolled citizens that is headquartered on the Pine Creek Reservation, operates administrative and health offices in Grand Rapids, and retains a tribal service

area of seven contiguous counties spanning 6,700 square miles throughout what is now called the State of Michigan. NHBP's Victim Services Department, with its tribal & non-tribal partners, and the support of federal grants & tribal allocations, serves NHBP tribal citizens, tribal citizens/descendants of other federally-recognized Indian Tribes, employees who are not tribal citizens and their dependents, and any individual who falls under the jurisdiction of the NHBP Tribal Police. NHBP has participated in the Intertribal Technical-Assistance Working Group on VAWA 2013 since its inception, exercising VAWA § 904's restored criminal jurisdiction through the NHBP Domestic Violence Code and NHBP Law and Order Code since 2016. NHBP is currently in the process of implementing the new and amended laws, policies, and services to exercise the criminal jurisdiction restored to Tribes in VAWA 2022.

The Yurok Tribe's work to protect their people from the MMIP crisis and domestic violence will be greatly undermined if the Court upholds the lower court's ruling. The Yurok Tribe is in Northern California in the remote areas of Humboldt and Del Norte Counties. There are a total of 6,285 enrolled Yurok tribal members making it the largest Tribe in the State of California with a Reservation land base of over 100 square miles and a service area encompassing over 5,282 square miles. California's Native American communities are dealing with an escalating crisis that is not being adequately addressed by local law enforcement nor the criminal justice systems. Being situated in a Public Law 280 State, they cannot rely on the federal government to ensure the safety of their people. Yurok has developed a robust Tribal Court system, complete with victim services, a prosecutor's office, and Tribal Police department. The Yurok Tribal Court diligently

ensures that the rights of victims and defendants are both respected. The Yurok Tribe often relies on civil protective orders issued by the Tribal Court to ensure the safety of people in the Tribe or under their jurisdiction. Removing guns from a tenuous situation is of the upmost importance to keep people in the community, especially women, safe.

The NIWRC is also joined by two national organizations that represent hundreds of Tribal Nations. The Coalition of Large Tribes ("COLT") represents the interests of the more than 40 Tribal Nations whose land base each exceeds 100,000 acres, encompassing more than 95% of tribal lands and approximately half the Native American population in the country. Since its creation in 2011, COLT has provided a unified advocacy base for Tribes that govern large trust land bases and provide full service in the governing of their members and reservations. Violence against women is a crisis of COLT member Tribes' reservations and tribal law enforcement is chronically under-resourced.

The National Congress of American Indians ("NCAI") was established in 1944, and is the nation's oldest and largest organization addressing American Indian interests. Since its founding, NCAI has worked with federal, tribal, and state governments to improve public safety in Indian country. NCAI's mission is to educate tribal, federal, and state government officials, along with the general public, about tribal self-governance, treaty rights, and legal and policy issues affecting Indian tribes. NCAI has a strong interest in preserving the time-honored principles of Indian law and in ensuring effective responses to crime and violence in Indian country and against Indigenous people throughout the United States.

The NIWRC is also joined by eighteen Native and victim advocacy organizations that share the NIWRC's commitment to end domestic violence, rape, sexual assault, and other forms of violence against Indian women and children in the United States (collectively, the "NIWRC *Amici*").[2] The depth of the NIWRC *Amici*'s experience in working to end domestic violence and sexual assault renders them uniquely positioned to offer their views on how declaring 18 U.S.C. § 922(g)(8) to be unconstitutional would significantly impede the ability of Tribal Nations to protect their women and children against domestic violence and homicide.

SUMMARY OF THE ARGUMENT

Native women are more likely to be victimized by domestic violence than any other population in the United States. Section 922(g)(8) provides Native victims of domestic violence with critical protections. Specifically, when a Native woman goes to her Tribal Court and secures a protective order, § 922(g)(8) makes it illegal for her abuser to access a firearm. This is a statute that saves lives.

The Fifth Circuit's conclusion that § 922(g)(8), on its face, violates the Second Amendment is erroneous. As Petitioner and other *Amici*'s arguments demonstrate, § 922(g)(8)'s firearm regulation falls well within the scope of historic regulations that prohibited dangerous individuals from accessing firearms. The NIWRC *Amici* write to further articulate how, in the context of Tribal Court protective orders, § 922(g)(8) serves to effectuate the United States' treaty trust duty and responsibility to safeguard the lives of Native women,

[2] The additional NIWRC *Amici* are identified and listed in the Appendix to this brief.

as well as United States federal Indian policy at the time of the Fourteenth Amendment's adoption.

The Second Amendment was created, in part, to federally endorse the right of Americans to access and use firearms to kill Indians. But the federal government's relationship with Tribal Nations and intent in this regard evolved over time. By the time the United States ratified the Fourteenth Amendment, the United States had shifted its policy away from encouraging individual American citizens to actively participate in the genocide against Indians, and was instead signing treaties with Tribal Nations guaranteeing these Nations, and their citizens, a right to be free from "bad men." Section 922(g)(8)'s firearm prohibition, therefore, sits well within the scope of the United States' treaty trust duty and responsibility to protect the lives of Native women.

Furthermore, the NIWRC *Amici*'s firsthand experience with the provision of protective orders in Tribal Courts demonstrates that these orders are not granted indiscriminately or without a court's careful consideration. If anything, protective orders are currently *too* difficult for victims to obtain—but that is a policy issue discussion for another day. At a minimum, the concurrence to the Fifth Circuit's decision makes assumptions and reaches conclusions that are not tethered to evidence of any actual practice. The NIWRC *Amici* explain below that § 922(g)(8) disarms individuals who abuse Native women—it does not disarm victims. When it comes to safeguarding the lives of Native victims, § 922(g)(8) is a critical tool that Tribal Nations cannot afford to lose.

The Tribal Nations and tribal organizations filing this brief do not take these issues lightly. In addition to signing numerous treaties that contain "bad man"

provisions, many Tribal Nations have signed treaties that protect and preserve the rights of tribal citizens to use firearms to hunt. Many of the tribal populations represented in the filing of this brief rely on subsistence hunting to feed their families. Hunting has always been, and always will be, a significant aspect of Native life and culture. But that is a consideration for Tribal Nations to face in creating the laws and policies that govern the provision of protective orders in Tribal Courts. For Tribal Nations, supporting the constitutional right of tribal citizens to practice their hunting rights does not require sacrificing the lives of Native victims to firearm homicide. There can be balance. And § 922(g)(8) sits well within that balance.

For the reasons articulated below, the NIWRC *Amici* urge this Court to uphold the constitutionality of § 922(g)(8).

ARGUMENT

I. The Elimination of § 922(g)(8)'s Protections Would Imperil the Lives of Native Women

For Native women, § 922(g)(8)'s firearm prohibition constitutes a critical safeguard that comes at a time when Native women are the most vulnerable—when they have received an order of protection. Survivors are most vulnerable when their abuser learns they are planning to or trying to leave the relationship, and receipt of a protective order is a clear signal the victim is on their way out.[3] "[A]ll too often," one Senator noted during the debate over § 922(g)(9), "the only difference

[3] *See generally* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Just. and Nat'l Ctr. for Injury Prevention and Control, *Extent, Nature, and Consequences of Intimate Partner Violence,* NCJ 181867 (2000), https://www.ojp.gov/pdffiles1/nij/181867.pdf.

between a battered woman and a dead woman is the presence of a gun." 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone).[4]

This reality hits hard in Indian Country where Native women face the highest rates of domestic violence and victimization in the United States. *See United States v. Bryant*, 579 U.S. 140, 144 (2016) ("'[C]ompared to all other groups in the United States,' Native American women 'experience the highest rates of domestic violence.'") (quoting 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain)). Congress has also repeatedly acknowledged this crisis in the legislative history of various iterations of VAWA.

In 2006, Congress took action to address the high rates of domestic violence committed against Native women. As part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Congress amended § 921(a)(33)(A)(i) to include offenders convicted under tribal law. *See* Violence Against Women and Dep't of Just. Reauthorization Act of 2005, Pub. L. No. 109–162, tit. IX § 908(a), 119 Stat. 2960, 3083 (2006). Today, § 921(a)(33)(A)(i) defines § 922(g)(9)'s "misdemeanor crime of domestic violence" to mean "a misdemeanor under Federal, State, or *Tribal law*." 18 U.S.C. § 921(a)(33)(A)(i) (emphasis added).

When Senator McCain introduced the Restoring Safety to Indian Women Act in the 2006 re-authorization of VAWA, he explained the congressional purpose behind the new tribal provisions as follows:

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[4] Although § 922(g)(9) is a separate provision from the one under consideration in the present case, both provisions serve to protect Native women from dangerous individuals.

> Since 1999, the Department of Justice has issued various studies which report that Indian women experience the highest rates of domestic violence compared to all other groups in the United States. These reports state that one out of every three Indian women are victims of sexual assault; that from 1979 to 1992, homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and that 75 percent of those deaths were committed by a family member or acquaintance. These are startling statistics that require our close examination and a better understanding of how to prevent and respond to domestic violence in Indian Country.

151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain).

Further, at the time of VAWA's 2013 reauthorization, the majority report for the Senate Committee on the Judiciary acknowledged the crisis, stating that:

> A[] significant focus of this reauthorization of VAWA is the crisis of violence against women in tribal communities. These women face rates of domestic violence and sexual assault far higher than the national average. A regional survey conducted by University of Oklahoma researchers showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners, and a nationwide survey found that one third of all American Indian women will be raped during their lifetimes. A study funded by the National Institute of Justice found that, on some reservations, Native

> American women are murdered at a rate more than ten times the national average.

S. Rep. No. 112-153, at 7-8 (2012); *see also* 159 Cong. Rec. S487 (daily ed. Feb. 7, 2013) (statement of Sen. Begich).[5] Senator Udall explained the urgency of the crisis as follows:

> Native American Women are 2 1⁄2 times more likely than other U.S. women to be victims of rape. One in three will be sexually assaulted in their lifetimes. And it is estimated that three out of every five Native women will experience domestic violence.

159 Cong. Rec. S488 (daily ed. Feb. 7, 2013).

The most recent reports from the National Institute of Justice include facts that are so stunning as to be almost incomprehensible. They conclude that more than 4 in 5 Native people have been victims of violence.[6] Over half (56.1%) of Native women report being victims of sexual violence.[7] Native women also experience an elevated risk of stalking, a crime often associated with domestic violence. A 2022 report from

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[5] The restoration of tribal criminal jurisdiction in VAWA 2013 was truly a bi-partisan effort. *See Violence Against Women Act Anniversary*, 160 Cong. Rec. S1374 (daily ed. Mar. 10, 2014) (statement of Sen. Patrick Leahy acknowledging his bipartisan collaboration with Senators Crapo and Murkowski, as well as Congressman Cole, to restore tribal jurisdiction over non-Indians who commit acts of domestic or dating violence).

[6] Andre B. Rosay, Nat'l Inst. of Just., *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey*, NCJ 249736, 43-44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[7] *Id.* at 43.

the Centers for Disease Control and Prevention ("CDC"), concluded that 42% of Native women have been victims of stalking at some point in their lives.[8] According to the same study, most female victims of stalking know their perpetrators, and current or former intimate partners constitute 43% of the perpetrators.[9]

On some reservations, Native women experience homicide at a rate 10 times the national average.[10] The crisis has garnered the attention of both Congress and the Executive Branch, including President Trump's creation in 2019 of a task force to address the crisis of Missing and Murdered Indigenous Women ("MMIW"). *See* Exec. Order No. 13,898, 84 Fed. Reg. 66059 (Dec. 2, 2019).[11]

A 2016 report based on data from the Indian Health Service showed that rates of homicide (per 100,000) were four times higher among American Indian and

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[8] Sharon Smith et al., Nat'l Ctr. for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking – Updated Release* 4 (2022), https://stacks.cdc.gov/view/cdc/124645

[9] *Id*. at 6.

[10] Office on Violence Against Women, U.S. Dep't of Just., *Native women experience homicide at a rate 10 times the national average* (Nov. 29, 2019), https://www.justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american.

[11] President Biden has taken similar action to address the crisis of MMIW and Missing and Murdered Indigenous Persons. *See* Exec. Order No. 14,053, 86 Fed. Reg. 64337 (Nov. 18, 2021), *also available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/15/executive-order-on-improving-public-safety-and-criminal-justice-for-native-americans-and-addressing-the-crisis-of-missing-or-murdered-indigenous-people/.

Alaska Natives (12.1) than white people (2.8).[12] A recent 2022 study demonstrates that statistics vary widely by State. In South Dakota, for example, the 2020 homicide rate of American Indians and Alaska Natives was 16 times that of non-Hispanic whites.[13] The National Vital Statistics Report for 2021 lists homicide as the third leading cause of death for Native females between ages 15-24 and the fourth leading cause of death for Native females between 25-34 years.[14]

The majority of these homicides are attributable to domestic violence that goes unaddressed, as Native women experience high rates of homicide at the hands of intimate partners. In 2021, the CDC issued a report on homicides of American Indian/Alaska Natives from 2003-2018. The CDC found that nearly half of Native women victims were killed in their own home, and nearly 40% of Native women victims were killed by a current or former intimate partner.[15]

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[12] Moses Herne et al., *Homicide Among American Indians/Alaska Natives, 1999-2009: Implications for Public Health Interventions*, 131 Pub. Health Reps. 597, 597 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4937122/pdf/phr131000597.pdf.

[13] Sydelle N. Harrison, *Homicide, Deaths of Undetermined Intent, and Legal Intervention: A Comparison of American and Alaska Native Violent Deaths by Multilevel Place of Death* 68 (Jun. 2, 2022) (Ph.D. dissertation, Oregon State University), https://ir.library.oregonstate.edu/concern/graduate_thesis_or_dissertations/44558p09m.

[14] Melonie Heron, Nat'l Ctr. for Health Stats., *Deaths: Leading Causes for 2019* 70 Nat'l Vital Stats. Reps. 57 (2021), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-09-508.pdf.

[15] Emiko Petrosky et al., Ctrs. for Disease Control and Prevention, *Homicides of American Indians/Alaska Natives – National Violence Death Reporting System, United States, 2003-2018,* 70 MMWR Surveillance Summ. 1, 5, 13 (2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7008a1.htm.

Furthermore, most Native homicide victims (55%) are killed by a firearm.[16] According to one study, "the [American Indian/Alaska Native] firearm homicide rate is 2.2 times higher than the gun homicide rate for non-Hispanic white people."[17] The same report discussed the regional differences in homicides committed by guns. In South Dakota, for example, the American Indian/Alaska Native firearm homicide rate is 8.5 times higher than the non-Hispanic white rate.[18] Recent empirical studies have established that a significant number of gun-related deaths of American Indian and Alaska Native women are connected to domestic violence. A 2023 analysis of the National Violent Death Reporting System found that American Indian/Alaska Native women experience the highest rate of intimate partner firearm homicide in the United States.[19] In 2017, a report from the CDC concluded that nearly 55% of homicide cases from 2003-2014 involving Native people were committed by an intimate partner and that nearly 38.8% of these homicides were accomplished with a firearm.[20]

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[16] Harrison, *supra* note 13, at 73.

[17] Alex Nguyen & Kelly Drane, Giffords Law Center, *Gun Violence in American Indian and Alaska Native Communities* (Oct. 7, 2022), https://giffords.org/lawcenter/memo/gun-violence-in-american-indian-and-alaska-native-communities/.

[18] *Id*.

[19] Everytown Research and Policy, *Guns and Violence Against Women* (Apr. 10, 2023) https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/.

[20] Emiko Petrosky et al., Ctrs. for Disease Control and Prevention, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MMWR Morbidity and Mortality Wkly.

As this Court has acknowledged, "'[w]hen a gun [i]s in the house, an abused woman [i]s 6 times more likely than other abused women to be killed.'" *United States v. Castleman*, 572 U.S. 157, 160 (2014) (quoting Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003)). "Not surprisingly, research has found that 'the presence of a gun in the home of a convicted domestic abuser is strongly and independently associated with an increased risk of homicide.'" *United States v. Booker*, 644 F.3d 12, 25-26 (1st Cir. 2011) (quoting Arthur L. Kellerman, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084, 1087 (1993)) (additional internal citation and quotation marks omitted).

Domestic violence and gun access present a uniquely deadly combination because of the crime's intimate dynamics. Over time, domestic violence typically escalates in both frequency and severity, since at its core, "domestic violence is about gaining control of another person."[21] An abuser's need to control his/her intimate partner drives a pattern of recurring, worsening behaviors. The first incident of abuse is usually not the last, and when less abusive acts fail to achieve sufficient control, a perpetrator moves on to more dangerous

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Rep. 741, 743 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm.

[21] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see also* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007) (articulating "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

acts.[22] Section 922(g)(8), therefore, constitutes a critical intervention to ensure that if and when a Native survivor obtains a protective order in Tribal Court, the survivor is protected from this increased threat of firearm homicide.

Because Native women face the highest rates of domestic violence and homicide—including firearm homicide—in the United States, Native women would be the group most impacted should this Court issue a decision declaring § 922(g)(8) unconstitutional. For Native women, § 922(g)(8) constitutes a critical safety valve allowing them to leave a dangerous, abusive relationship without an increased threat that their flight to safety will result in death. Without § 922(g)(8), the already high rates of homicide of Native women will only increase. This is a crisis the Court can avoid by adhering to a correct and true application of the Court's precedent in *Bruen*, as the NIWRC *Amici* advocate in greater detail below.

II. Section 922(g)(8)'s Firearm Regulation Is Consistent With Historical Firearm Regulation

The NIWRC *Amici* adopt and support Petitioner and other *Amici*'s argument that § 922(g)(8) is entirely consistent with historical firearm regulations. As this Court has previously instructed, firearm regulations that implicate the text of the Second Amendment must be "consistent with this Nation's historical tradition of

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[22] *See e.g.*, Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263, 291 (1987) ("The first instance of violence . . . is usually short and not terribly severe . . . . Later in the pattern of violence, however, the same victim faces a serious threat to life and health, and may be . . . too afraid to change the situation alone.").

firearm regulation" to survive a Second Amendment challenge. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). In other words, in considering whether a contemporary firearm regulation survives a challenge under the Second Amendment, the reviewing court must ask whether the regulation is "consistent with the Second Amendment's text and historical understanding." *Id.* at 2130. Because "individual self-defense is the central component of the Second Amendment right," "central considerations" in this inquiry are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense" and "whether that burden is comparably justified." *Id.* at 2118 (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010), *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)). In conducting its own inquiries, this Court has recognized that the Nation's historical tradition of firearm regulation includes regulations that burden a presumed right to carry after a complaint by "any person having reasonable cause to fear an injury, or breach of the peace," *Bruen*, 142 S.Ct. at 2148 (quoting 1795 Mass. Rev. Stat., ch. 134 § 16), and regulations that impose forfeiture as punishment, *Heller*, 554 U.S. at 634. The NIWRC *Amici* join Petitioner's and other *Amici*'s argument that § 922(g)(8), generally speaking, sits well-within the federal, state, and local governments' historical pattern and practice of removing firearms from individuals who pose a risk to the safety of others in the community and nation.[23]

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[23] As Petitioner notes, § 922(g)(8) is analogous to these historical regulations. Section 922(g)(8)(A) requires an individual to be "subject to a 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" before their Second

The NIWRC *Amici* write separately to provide additional, relevant context for the Court's consideration. In addition to being analogous to historical laws and regulations that protect the public at large from dangerous individuals, § 922(g)(8) serves an additional critical—and constitutional—purpose. Specifically, § 922(g)(8) fulfills the United States' treaty and trust duty to protect and safeguard the lives of Native women, a trust duty that this Court and Congress have repeatedly recognized as arising from the treaties the United States signed with Tribal Nations. *See, e.g., Haaland v. Brackeen*, 143 S. Ct. 1609, 1628 (2023) ("As we have explained, the Federal Government has charged itself with moral obligations of the highest responsibility and trust toward Indian tribes.") (citations and quotation marks omitted); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (recognizing "a general trust relationship between the United States and the Indian people"); *Seminole Nation v. United States,* 316 U.S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.").

This Court has reaffirmed that management of this trust relationship is assigned to Congress. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175

Amendment right can be burdened. Even then the order must contain either a finding that the individual poses a "credible threat" to the physical safety their intimate partner or intimate partner's child or a prohibition on use of physical force or threats of physical force against the individual's intimate partner or intimate partner's child. § 922(g)(8)(C). In other words, § 922(g)(8) imposes a "comparable burden on the right of armed self-defense" as historical regulations—the individual may not access firearms or ammunition, § 922(g)—that is "comparably justified"—*i.e.*, by a showing of recklessness or danger. *See Bruen*, 142 S.Ct. at 2148.

(2011) ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."); *see also Blackfeather v. United States,* 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize."). Accordingly, Congress has recognized that the United States' trust duty and responsibilities to Tribal Nations includes safeguarding the lives of Native women from domestic violence. *See* Violence Against Women and Dep't of Just. Reauthorization Act of 2005, Pub. L. No. 109-162, tit. IX § 901, 119 Stat. 2960, 3078 (2006), *codified at* 34 U.S.C. § 10452 note ("[T]he unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.").

Section 922(g)(8)'s specific commitment to safeguard the lives of Indian women is the type of "specific, applicable, trust-creating statute or regulation" that the United States Supreme Court has found creates an enforceable fiduciary obligation on the part of the United States. *See generally United States v. Mitchell*, 463 U.S. 206, 226 (1983); *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 473-476 (2003). This obligation provides the historical backdrop against which the question presented must be considered. At a minimum, the federal government's trust responsibility to Tribal Nations requires federal law to regulate the dangers and illegal conduct that currently render Indian women more likely to be murdered than any other population in the United States.

Moreover, beyond the consideration of the moral trust duty and obligation the United States maintains

to protect Native women from homicides caused by firearms possessed by individuals known to be dangerous, this Court should also consider the fact that the United States' trust duty to Tribal Nations is the direct result of the Second Amendment and historic firearms regulations in this country. At the time of the Second Amendment's drafting, the Framers were primarily concerned with locating authority over "treaties, taxation, and trade" in the federal government, and they achieved this by continuing to treat Native peoples as separate sovereigns.[24] This treatment also allowed the colonial idea of "'hostile' Indians . . . [to] play[] a major role in the construction of the new nation."[25]

So much so that Americans "favored a stronger Union not because they feared anarchy, but because they wanted protection from Indians."[26] Militias too were "originally . . . meant to protect white settler communities from Native Americans."[27] And it was Americans' experiences in militias that informed the drafting of the Second Amendment.[28] Indeed, in holding that the

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[24] Angela Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1695 (2012).

[25] *Id*.

[26] David Andrew Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* 94 (2008).

[27] Maxine Burkett, *Much Ado About . . . Something Else: D.C. v. Heller, the Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 J. Gender Race & Just. 57, 86 (2008); *see also* Roxanne Dunbar-Ortiz, *Loaded: A Disarming History of the Second Amendment* 53 (2018) ("the voluntary militias described in the Second Amendment entitled settlers, as individuals and families, to the right to combat Native Americans on their own.").

[28] Ann Tweedy, *"Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second*

Second Amendment protects the individual right to bear arms, this Court recounted Charles Sumner's statement that "[t]he rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the forest." *Heller*, 554 U.S. at 609 (quoting The Crime Against Kansas, May 19-20, 1856, in *American Speeches: Political Oratory from the Revolution to the Civil War* 553, 606-607 (T. Widmer ed. 2006)). Of course, much of the "hostilities" early Americans experienced were efforts by Native people to defend their own lives and homelands.[29]

This idea of "hostile" Indians held by Americans ultimately led to "[s]uccessive generations of Americans, both soldiers and civilians, ma[king] the killing of Indian men, women, and children a defining element of their first military tradition and thereby part of a shared American identity."[30] Such killings include the Sand Creek Massacre in 1864 when Col. John Chivington and his regiment of U.S. soldiers used firearms to kill over 150 Cheyenne women, children, and elders while their chiefs were engaged in peace talks with U.S. authorities,[31] and a state-sanctioned genocide in California

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Amendment and Supreme Court Precedent Target Tribal Self-Defense, 13 U. Pa. J. Const. L. 687, 699-700 (2011).

[29] *Id.* at 703-704 ("[I]t is difficult to imagine how a continent peopled by numerous nations that had inhabited it for thousands of years could be taken over, and the nations displaced, without the colonists experiencing violent repercussions.").

[30] John Grenier, *The First Way of War: American War Making on the Frontier*, 1607-1841 58-9 (2005).

[31] Tony Horwitz, "The Horrific Sand Creek Massacre will be Forgotten No More," Smithsonian Magazine (December 2014), https://www.smithsonianmag.com/history/horrific-sand-creek-massacre-will-be-forgotten-no-more-180953403/.

that began almost as soon as Mexico ceded control in 1846.[32]

With the conclusion of the Civil War, and the passage of the Civil War Amendments—including the Fourteenth—however, came a change in United States' policy regarding arming Americans to shoot and kill Indians. In 1865, Congress commissioned what became known as the Doolittle Report, which was "an inquiry into the condition of the Indian tribes and their treatment by the civil and military authorities of the United States."[33] The Doolittle Report's documentation of Native women "killed, mutilated, otherwise attacked and coerced into prostitution and other sexual relationships with United States soldiers," *Elk v. United States*, 87 Fed. Cl. 70, 80 (2009), ultimately resulted in an increase in the use of treaty provisions by which the United States promised to prosecute and punish "bad men among the whites" and reimburse injured tribal members.[34] At the same time, these treaties and those before them were a continuation of the recognition of the sovereignty of Tribal Nations and their inherent right to continue their traditional laws and practices that, since time immemorial, protected Native women from violence.[35]

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[32] Alexander Nazaryan, "California Slaughter: The State-Sanctioned Genocide of Native Americans," Newsweek (August 2016), https://www.newsweek.com/2016/08/26/california-native-americans-genocide-490824.html.

[33] Conditions of the Indian Tribes, S. Rep. No. 39-156, at 3 (1867).

[34] Ana Condes, *Man Camps and Bad Men: Litigating Violence Against American Indian Women*, 116 Nw. U. L. Rev. 515, 540-2 (2021).

[35] *See e.g.,* Cyndy Baskin, *Contemporary Indigenous Women's Roles: Traditional Teachings or Internalized Colonialism?* 26

Congress further responded to the armed conflict between American citizens and the citizens of Tribal Nations in 1867, when Congress authorized the creation of the Indian Peace Commission. An Act to establish Peace with certain Hostile Indian Tribes, ch. 32, 15 Stat. 17 (1867), *hereinafter* "An Act to establish Peace." The goal of the Commission was to end the wars with Indian Tribes on the Plains and in the southwestern United States, which had been raging for several years. *Id.* § 1. To accomplish this goal, the Commission was to meet with the leaders of these Tribal Nations to "ascertain the alleged reasons for their acts of hostility." *Id.* Then, the Commission was charged with negotiating treaties that would "remove all just causes of complaint on [the Indians'] part," while establishing "peace and safety for the whites," including "security for person and property along the lines of railroad now being constructed to the Pacific

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Violence Against Women 2083, 2086 (2020) ("any violence toward [women] resulted in harsh punishment such as banishment, humiliation, and removal or prior status and responsibility."); Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* 21-22 (2015) ("tribal systems provided a powerful system of social checks and balances that held offenders accountable for their behavior" when they abused Native women); Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 1 St. John's L. Rev. 69 (1995), http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1634&context=lawreview (noting that "[u]nder Navajo common law, violence toward women, or mistreatment of them in any way, is illegal" and that, historically, Lakota law did not tolerate violence against women in the community, and "[a] man who battered his wife was considered irrational and thus . . . [h]e could not be trusted to behave properly. . . . He was thought of as contrary to Lakota law and lost many privileges of life and many roles in Lakota society and the societies within the society.").

and other thoroughfares of travel to the western Territories." *Id.*

After much research, the Indian Peace Commission concluded that the U.S. military, often responding to false reports of Indian depredations on the property of non-Indian settlers, attacked and used firearms to kill Indian men, women, and children without cause. *See e.g.,* Report of the Indian Peace Commissioners, H. Exec. Doc. No. 40-97, at 6 (1868) *hereinafter* Peace Comm'n Rep't; Report of Gen. N.B. Buford to the Sec. of Interior, S. Exec. Doc. No. 40-13A, at 59 (1867) ("We have found the whole population who live on the routes of travel and transportation to the gold-producing territories spreading false reports and calling on the government to make war on the Indians"). Additionally, non-Indian settlers trespassed on Indian lands, killed their game, and committed violent criminal acts against Indians, without being punished. This led to retaliation by the affected Tribes, which ultimately escalated into war. In large part, the Indian Peace Commission echoed the findings from the earlier Doolittle Report.

The difference between the Indian Peace Commission and prior committees and investigations is that the Commission was tasked with negotiating treaties to end hostilities between the United States and Indian tribes in the west, while "remov[ing] all just causes of complaint on [the Indians'] part." Act to establish Peace, § 1. Nine new treaties with thirteen tribal signatories resulted from the Indian Peace Commission's activities and negotiations with Tribes.[36] In each of

[36] Treaty between the United States of America and the Kiowa and Comanche Indians, Oct. 21, 1867, 15 Stat. 581, 15 Stat. 589; Treaty between the United States of America and the Cheyenne and Arapaho Tribes of Indians, Oct. 28, 1867, 15 Stat. 593; Treaty

these treaties, the Tribes who were signatories thereto agreed to cease any and all wars against the United States. *E.g.*, Treaty with the Kiowas and Comanches, art. 1, Oct. 21, 1867, 15 Stat. 581 ("From this day forward all war between the parties to this agreement shall forever cease"). To prevent future wars, each of these treaties also contained nearly identical provisions to punish "bad men" who committed "wrongs" against the other nation's citizens. If non-Indians committed crimes against Indians, they were to be arrested and prosecuted by the United States, and the United States would provide monetary compensation to the injured Indian(s). If Indians committed crimes against non-Indians, they were to be turned over to the United States for prosecution, and if the Tribe refused to do so, money to compensate the injured party for the wrongs committed would be deducted from the Tribes' annuities.

These treaties, and the hundreds of other treaties signed by the United States with Tribal Nations, constitute the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. And without a doubt, § 922(g)(8)'s firearm prohibition falls well-within the United States' treaty

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between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Tampa, Grand River, and Uintah Bands of Indians, Mar. 2, 1868, 15 Stat. 619; Treaty between the United States of America and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635; Treaty between the United States of America and the Crow Tribe of Indians, May 7, 1868, 15 Stat. 649; Treaty between the United States of America and the Northern Cheyenne and Northern Arapaho Tribes of Indians, May 10, 1868, 15 Stat. 655; Treaty between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667; Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannock Tribe of Indians, July 3, 1868, 15 Stat. 673.

and trust duties that arise from the various "bad man" treaties the United States signed with Tribal Nations. *See generally Richard v. United States*, 677 F.3d 1141, 1152-53 (Fed. Cir. 2012) (supporting a broad, expansive read of the "bad man" treaties); *Tsosie v. United States*, 825 F.2d 393, 400 n.2 (Fed. Cir. 1987) (same).

In the 155 years since the Fourteenth Amendment was passed, not only have Native people become United States citizens protected by the U.S. Constitution and the treaties signed with their Tribal Nations, but the United States government has moved from a policy of assimilation/extermination to supporting self-determination. This includes supporting efforts by Tribal Nations to protect their women and children from domestic violence. As mentioned above, in 2006 as part of the Violence Against Women and Dep't of Just. Reauthorization Act of 2005, Congress amended the definition of "misdemeanor crime of domestic violence" in § 921(a)(33)(A)(i)) to include domestic violence offenders convicted under tribal law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, tit. IX, § 908(a), 119 Stat. 2960, 3083 (2006). At the time, Senator McCain noted that although "[d]omestic violence is a national problem and not one that is unique to Indian Country," the amendment was necessary to remove legal "obstacles" that Tribal governments face in working to protect Native women from domestic violence and homicide "due to the unique status of Indian tribes." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Congress therefore "intended to remove these" obstacles when it added the tribal provisions to the 2006 reauthorization of VAWA. *Id*.

A review of the evolution of United States' policy, as well as the treaty and trust duties and obligations the United States willingly incurred in order to end the armed conflict between American citizens and Indians, reveals that the United States, today, maintains a trust duty and responsibility to safeguard the lives of Native women. This duty includes ensuring individuals known to be dangerous do not have access to firearms to kill Native women. *See* S. Rep. No. 111-93, at 4 (2009) (observing that "along with the authority that the United States imposed over Indian [T]ribes, it incurred significant legal and moral obligations to provide for public safety on Indian lands"). Such a regulation is not incongruent with the history of firearm regulation in this country; instead, it is the direct result of the Second Amendment and this nation's history of firearm regulation. Section 922(g)(8), therefore, is not unconstitutional; it is the constitutional consequence of the Second Amendment and hundreds of treaties that, according to the Constitution, constitute the "supreme Law of the Land." U.S. Const. art. VI cl. 2. Declaring § 922(g)(8) unconstitutional would preclude Congress from fulfilling its trust duty and obligation to safeguard the lives of Indian women.

III. Section 922(g)(8) Disarms Individuals Who Abuse Native Women, Not Victims

Finally, the NIWRC *Amici* write to respond to the idea, proferred by the concurrence to the Fifth Circuit's decision, that protective orders are "often misused as a tactical device in divorce proceedings" Op. 32, or that they are simply given to "virtually all" who request them—without any regard to whether the alleged perpetrator threatens the life or safety of the victim. *Id.* at 34. The reality in Tribal Court is quite the opposite of the concurrence's mischaracterization.

First, Tribal Courts do not give out protective orders to anyone who walks in the door. Instead, the requirements to obtain a protective order in Tribal Court are quite extensive and more than sufficient to deter frivolous filings. For instance, in the Mississippi Choctaw Tribal Court, an individual requesting an order of protection must file a petition that includes "the facts and circumstances concerning the alleged abuse," as well as "the relationship between the petitioners and the individuals alleged to have committed abuse."[37] Then, "[w]ithin ten (10) days of filing a petition under provisions of this chapter, the Choctaw Tribal Court shall hold a hearing, at which time the petitioner must prove the allegation of abuse by a preponderance of the evidence."[38] The Tribal Court does not grant anyone's request for an order of protection, but instead, must find "[i]mmediate and present danger of abuse to the petitioner, any minor children, or any person alleged to be incompetent. . . ."[39]

Likewise, in Tulalip Tribal Court, the judge may only grant an *ex parte* emergency order of protection in circumstances where, based on "the specific facts stated in the affidavit, the Court has probable cause to believe that the petitioner or the person on whose behalf the petition has been filed is the victim of an act of domestic violence, family violence, dating violence, or stalking committed by the respondent, and issuance of the *ex parte* order is necessary to protect the victim

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[37] Law and Order Code of the Mississippi Band of Choctaw Indians, § 23-1-5(b)-(c), https://www.choctaw.org/government/tribal_code/Title%2023%20-%20Protection%20from%20Domestic%20Abuse.pdf.

[38] *Id.* at § 23-1-6(1).

[39] *Id.* at § 23-1-6(2).

from further abuse."[40] The Tulalip Tribal Court is then required to hold a hearing within fourteen days to determine whether the order should be made permanent, or lifted.[41] Notably, "[a]t the hearing, both parties may testify, and the Court will review the record and may consider other relevant evidence."[42]

In Standing Rock Tribal Court, the Court may only issue an order of protection "[u]pon a showing of actual or imminent domestic abuse . . . ."[43] And in Pascua Yaqui Tribal Court, the Court reviews the evidence before it to determine whether "there is reasonable cause to believe that the defendant may commit an act of domestic violence or that the defendant has committed an act of domestic violence."[44] Tribal Nations take great care to ensure that neither bias nor prejudice may enter into the Court's consideration. For instance, the Kickapoo Tribal Code states that the Kickapoo Tribal Court may "[n]ot grant nor deny relief to the petitioner based on the employment, age, economic, educational, social, political, and/or mental and physical status of the petitioner or respondent."[45]

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[40] Tulalip Tribal Codes, § 4.25.500(1), https://www.codepublishing.com/WA/Tulalip/#!/Tulalip04/Tulalip0425.html#4.25.500.

[41] *Id.* at § 4.25.500(4).

[42] *Id.* at § 4.25.500(4)(A).

[43] Standing Rock Tribal Code, § 25-108(d), https://www.standingrock.org/wp-content/uploads/mdocs/Title%20XXV%20-%20(25)%20Domestic%20Abuse.pdf.

[44] Pasqua Yaqui Tribal Code, 4 PYTC § 3-60, https://www.pascuayaqui-nsn.gov/tribal-code/ch-3-domestic-and-family-violence/.

[45] Kickapoo Tribe of Okla. Domestic Violence Protection Ordinance, ch. 3, § 312(A), https://static1.squarespace.com/stat

Tribal Courts take § 922(g)(8)(A)'s requirement that the defendant be given notice and an opportunity to be present at a hearing seriously. The Choctaw Nation requires that "the person seeking relief must file a complaint against the defendant with the proper law enforcement agency before filing a petition for a protective order with the district court."[46] The Kickapoo Tribal Code requires that:

> A copy of the petition, notice of hearing and a copy of any *ex parte* order issued by the Court shall be served, pursuant to the Kickapoo Tribe of Oklahoma Civil Procedure Ordinance, upon the respondent in the same manner as a summons. *Ex parte* orders shall be given priority for service by the Kickapoo Tribal Police Department and can be served twenty-four (24) hours a day.[47]

Furthermore, contrary to the aspersions cast in the concurrence below, tribal law does not favor the indiscriminate provision of protective orders against both respondent and petitioner.[48]

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ic/60537f312b9e3a557fca2b4f/t/605e524c8f0b711e8d10d6d3/1616794189414/Domestic+Violence+Protection+Ordinance.pdf.

[46] Code of Criminal Procedure of the Choctaw Nation of Okla., § 60.3(B) https://www.choctawnation.com/wp-content/uploads/2022/04/criminal-procedure-code.pdf.

[47] Kickapoo Tribe of Okla. Domestic Violence Protection Ordinance,, ch. 3, § 304(A), https://static1.squarespace.com/static/60537f312b9e3a557fca2b4f/t/605e524c8f0b711e8d10d6d3/1616794189414/Domestic+Violence+Protection+Ordinance.pdf

[48] *See, e.g.,* Kickapoo Tribe of Okla. Domestic Violence Protection Ordinance, ch. 3, § 313, https://static1.squarespace.com/static/60537f312b9e3a557fca2b4f/t/605e524c8f0b711e8d10d6d3/1616794189414/Domestic+Violence+Protection+Ordinance.pdf (providing that a protective order "against both the plaintiff

The concurrence's suggestion that § 922(g)(8) disarms *victims* is erroneous and not connected to specific judicial proceedings. The tribal laws currently in place ensure that protective orders issued in Tribal Courts protect and preserve Native lives, not harass individuals. As the NIWRC *Amici* can attest, protective orders are a critical means by which Tribal Nations are able to protect their most vulnerable citizens from domestic violence. Because perpetrators are most likely to try to kill a victim when the victim leaves their abuser, ensuring that individuals subject to a Tribal Court protective order cannot access a firearm constitutes a critical safeguard to preventing the loss of further Native lives. The NIWRC *Amici* respectfully request that this Court uphold the constitutionality of § 922(g)(8).

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and respondent shall not be enforceable against the plaintiff unless: (a) The respondent files a written pleading, such as a cross or counter complaint, seeking a protection order, and; (b) The Court makes specific findings of harassment, stalking, assault, or domestic or family violence against both the plaintiff and respondent and determines that each party is entitled to such an order.").

CONCLUSION

The Fifth Circuit Court of Appeals' decision should be reversed.

Respectfully submitted,

SARAH DEER
UNIVERSITY OF KANSAS
1541 Lilac Lane
Lawrence KS 66045
(785) 864-9713
sarah.deer@ku.edu

MARY KATHRYN NAGLE
Counsel of Record
ATTORNEY AT LAW
P.O. Box 506
McLean, VA 22101
(202) 407-0591
mkn@mknaglelaw.onmicrosoft.com

SHONEY BLAKE
PIPESTEM LAW P.C.
401 S. Boston Ave
Suite 2200
Tulsa, OK 74103
(918) 936-4705
sblake@pipestemlaw.com

Counsel for Amici Curiae

August 21, 2023

APPENDIX

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APPENDIX

LIST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *amici curiae* in support of Petitioner.

Alaska Native Women's Resource Center (aknwrc.com)

Albany County Crime Victim and Sexual Violence Center (www.albanycounty.com/cvsvc)

Breaking Generational Cycles (https://joyclynbreakinggenerationalcycles.org/)

Bridgercare (www.bridgercare.org)

The Heart of America Indian Center, Inc., d/b/a Kansas City Indian Center (https://kcindiancenter.org/)

Indian Law Resource Center (https://indianlaw.org/)

Minnesota Indian Women's Sexual Assault Coalition (https://www.miwsac.org/)

Mt. Carmel Veteran Service Center (https://www.veteranscenter.org/)

National Center on Domestic and Sexual Violence (www.NCDSV.org)

Native America Humane Society (www.nativeamericahumane.org)

Native Women's Society (nativewomenssociety.org)

Pouhana O Nā Wāhine (https://www.pouhanaonw.org/)

Seattle Indian Health Board (https://www.sihb.org/)

Sexual Violence Prevention Association (SVPA) (www.s-v-p-a.org)

StrongHearts Native Helpline (https://strongheartshelpline.org/)

Tribal Law and Policy Institute (https://www.home.tlpi.org/)

Wisconsin Judicare Inc. dba Judicare Legal Aid (judicare.org)

Women's Economic Self-Sufficiency Team, Corp dba WESST (www.wesst.org)

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