No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

—v.—

ZACKEY RAHIMI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court as direct counsel and as *amicus curiae*, including in cases involving gender-based violence, the Second Amendment, and criminal law.

The ACLU is committed to fighting mass incarceration and overbroad gun possession laws that fuel that phenomenon. It is committed to equal protection of the law and opposes the use of gun possession laws to unfairly target people of color. And the ACLU is committed to due process and fundamental fairness for all, and therefore condemns procedures to restrict constitutional liberties arbitrarily, without due process, or that impose unnecessarily excessive restrictions.

The ACLU is equally committed to the rights and protection of people who experience domestic violence and supports the long-delayed recognition by American legislatures and executive officials that domestic violence is a pervasive and grave problem

[1] No party has authored this brief in whole or in part, and no one other than *amicus*, its members, and its counsel have paid for the preparation or submission of this brief.

that has systematically deprived women of the ability to live with dignity and security.

The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

SUMMARY OF ARGUMENT

The United States seeks reversal by asserting sweeping government power to restrict the Second Amendment rights of anyone who is not a law-abiding, responsible, citizen. But the Court can and should reverse on a much narrower ground, without granting the government the broad authority it claims: namely, that there is ample historical support for restricting gun rights of persons *individually determined to pose a specific threat to others*. The limitation on gun possession at issue in this case does not sweep categorically, but applies only to individuals who are subject to specific domestic violence protective orders, and lasts only so long as those orders are in place. Because there is historical support for limiting gun possession by individuals adjudged to pose a specific threat to the safety of others, the Court need not—and should not—adopt the United States' overbroad theory in order to reverse the decision below. Accordingly, the ACLU files in support of reversal, but offers a significantly narrower basis for that result.

Restrictions on gun possession raise a number of policy and constitutional concerns. But this case does not ask this Court to weigh in on the full range of possible objections to felony gun restrictions. It asks only whether the Second Amendment prohibits every possible application of 18 U.S.C Section 922(g)(8)'s bar on firearms possession by persons subject to domestic violence restraining orders. The panel below held that it does, namely, that someone found by a court to pose a specific threat of physical violence to his intimate

partner retains a constitutional right to carry a gun—at least unless and until he is prosecuted for a felony.

Affirming that decision would have adverse consequences far beyond the federal criminal provision at issue here. Under the Fifth Circuit's reasoning, the Second Amendment denies all governments—federal, state, and local—the authority to disarm persons because they are subject to domestic violence protective orders for any period of time, regardless of the fairness of the procedures employed, the time limit of the restriction, or evidence that gun possession by such individuals poses a risk of severe harm or death to those the state seeks to protect. Importantly, the Fifth Circuit's rationale would deny governments the ability to prohibit gun possession through *any* regulatory devices predicated on restraining orders—including civil measures like pre-acquisition background checks, which since Section 922(g)(8)'s inception have stopped more than 77,000 purchases of weapons by individuals subject to domestic violence orders.

Bruen disclaimed precisely the sort of regulatory straitjacket that led the Fifth Circuit to issue such a far-reaching holding. As Justice John Marshall long ago warned, "we must never forget that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819). *Bruen* thus explicitly recognized congressional latitude to respond to modern societal challenges by imposing firearms restrictions, making clear that the historical inquiry looks for analogues, not twins.

All the Court needs to do—and all that it should do—to reverse the decision below is to recognize that the founding generation, like their common law forebearers and Reconstruction-era officials after them, routinely restricted access to guns by individuals adjudged to pose a specific threat of violence. Court-imposed, time-limited restrictions on firearms possession following an individualized finding of danger to an intimate partner or family member—as is at least the case where Section 922(g)(8) is satisfied through subsection 922(g)(8)(C)(i)—fit comfortably within this historical practice. Section 922(g)(8) thus is not unconstitutional in all applications, and does not conflict on its face with the Second Amendment.

The primary arguments advanced to the contrary lack merit. Historically, lawmakers took practically *no* steps to protect women from domestic violence. Therefore, because *Bruen* recognized that firearms regulations could be a valid response to modern-day policy challenges, the absence of a historical twin here is not dispositive. Nor is it enough to suggest that lawmakers could achieve substantially similar goals by imposing firearms restrictions only on those prosecuted for a felony. The framework articulated in *Bruen* does not support such a distinction. History and tradition counsel that legislative judgments about public safety—not the initiation of formal criminal proceedings—are the proper touchstone for firearms restrictions. And legislatures have long denied guns to persons individually adjudged to pose a danger to others.

In any event, a regime effectively permitting the government to disarm only those it prosecutes for felonies would be a poor substitute for the status quo. Restricting people who inflict domestic violence from possessing firearms via restraining orders offers a much more expeditious response to often-urgent threats, empowers individuals who have experienced domestic violence and fear more, and gives courts a more flexible, time-limited mechanism to offer protection. Affirmance here would thus imperil state and federal efforts to tackle the widespread and severe problem of domestic violence—a threat to basic personal security that accounts for more than half of homicides committed against women annually.

ARGUMENT

I. Firearms Restrictions Can Implicate a Variety of Policy and Constitutional Concerns Distinct from the Facial Second Amendment Challenge Respondent Has Pursued Here

Amicus is by no means a reflexive supporter of firearms restrictions. Even putting aside the Second Amendment, such laws raise multiple concerns. Laws that impose severe penalties on individuals for merely possessing a gun contribute to unjust and unnecessary punishment, and help fuel mass incarceration. *See, e.g.*, Mugambi Jouet, *Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization*, 55 Ariz. St. L.J. 239, 241 (2023). Criminal enforcement of gun laws has contributed to the racially disproportionate character of the incarcerated population, undermining promise of

equal justice under law. Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537, 544-45 (2022). Where such laws are enforced selectively on the basis of race, their application violates the constitutional guarantee of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). Additionally, because they limit a constitutional liberty, individualized gun deprivations must be predicated on procedures that satisfy due process. *See Mathews v. Eldridge*, 424 U.S. 319, 332-348 (1976). The Eighth Amendment, meanwhile, prohibits cruel and unusual sentencing for gun law violations. Moreover, while civil licensing regimes that prohibit selling guns to persons found to pose a threat of domestic violence and subject to restraining orders are a sensible tool to prevent further violence, sweeping after-the-fact criminal sanctions imposed categorically on wide swaths of persons are another matter.[2]

But this case does not present such policy or constitutional questions. It asks only whether one particular gun regulation, which prohibits firearms possession by persons subject to certain domestic violence restraining orders, on its face violates the Second Amendment. It does not.

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[2] There is not strong evidence to support the across-the-board deterrent effect of such laws. *See, e.g.*, Thomas B. Marvell & Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 Criminology 247, 274-75 (May 1995) (finding little evidence about the effect firearm sentence enhancements have on crime rates or firearm use).

II. The *Bruen* Framework Authorizes Disarming Individuals Judicially Determined to Pose a Specific Threat of Domestic Violence

The United States urges the Court to hold, based on atextual dicta, that Second Amendment rights are limited to "law-abiding, responsible citizens," Br. of the United States as Amicus Curiae at 10-27 ("U.S. Br."). But such a broad and vague standard for denying rights is unnecessary to resolve this case. Instead, the Court need only hold that some applications of Section 922(g)(8)—at least where enforced via subsection 922(g)(8)(C)(i), which requires individualized findings of threat—fit within the substantially narrower historical practice of restricting firearms possession by persons individually adjudged to pose a credible threat to others' safety.

A. The Prohibition Here Falls Within a Historical Tradition of Disarming People Individually Adjudged to Pose a Specific Threat of Violence

This Court has repeatedly stated that a facial challenge to a statute is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). *Salerno* provides that facial invalidation requires concluding that "no set of circumstances" exists by which a given legislative enactment would satisfy the Constitution. *Id.* at 745; *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702,

739-740 (1997)) (facial challenge requires showing a law is "unconstitutional in all its applications"). The parties contested below how that standard should apply in the Second Amendment context. *See* Pet. App. at 12a. But Respondent has never argued that Section 922(g)(8) falters specifically because of his own particular circumstances. *See* Br. in Opposition at 8 ("BIO"). Instead, he has maintained that every possible application the statute fails constitutional muster. *Id.* Accordingly, so long as some applications of Section 922(g)(8) are valid, his facial challenge fails.

Bruen instructs that the validity of modern-day firearms regulations under the Second Amendment turns on whether they find analogous support in our nation's "history and tradition." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2128 (2022). That inquiry may take different forms, depending on the representative branches' regulatory objectives. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century," the "lack of a distinctly similar historical regulation addressing that problem" through firearms restrictions may make the constitutional answer "fairly straightforward." *Id.* at 2131. Where regulations "implicat[e] unprecedented societal concerns," however, *Bruen* demands a "more nuanced approach" to constitutional exposition. *Id.* at 2132. Courts must reason by analogy, looking to the historical record to identify parallels along dimensions such as "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* Ultimately, because "the Constitution can, and must,

apply to circumstances beyond those the Founders specifically anticipated," *id.* at 2132, the crux is whether some "historical *analogue*" exists for a contemporary regulatory scheme, "not a historical *twin*." *Id.* at 2133 (emphasis in original); *see also id.* at 2132 (quoting *McCulloch*, 4 Wheat. at 415.

Domestic violence is precisely the sort of contemporary social problem the Framers would not have specifically considered in drafting the Second Amendment. While domestic violence certainly existed at the nation's founding, it was not viewed as an issue worthy of significant governmental response until much later. But because it is "a *constitution* we are expounding," *McCulloch*, 4 Wheat. at 407, *Bruen* recognizes that the Second Amendment inquiry does not require identification of the precise law at issue as of the founding. Rather, so long as the historical record features gun regulations that are analogous to Section 922(g)(8)'s effort to tackle the "unprecedented societal concern[]" of domestic violence, *Bruen*, 142 S. Ct. 2111, 2132, the statute survives a facial Second Amendment challenge.

The historical record is replete with relevant analogues, from 17th century England to the colonial era to Reconstruction, in which governments restricted gun possession by persons individually adjudged to pose a risk to others. The United States' brief lays out multiple examples of disarming such individuals predicated on specific findings of specific threats, U.S. Br. at 22-27, even as it urges the Court to adopt a far more expansive principle than necessary here. While some historical restrictions on gun rights

were overbroad, lacking in due process, or rested on racist assumptions, the record nevertheless provides clear support—as then-Judge Barrett recognized—for the narrower principle that the government can deny access to guns to people who pose a specific threat of violence to others. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *overruled by Bruen*, 142 S.Ct. at 2127.[3]

Take common law surety regimes. Where an individual could demonstrate "just cause to fear" injury, he could "demand surety of the peace against such person." 4 William Blackstone, Commentaries on the Laws of England 252 (1769). Like Section 922(g)(8), such measures were preventative, turning on "probable suspicion" of a future threat of violence. *Id.* at 249. The court below rejected the surety laws as analogues because they did not impose an absolute ban on weapons possession, but rather a conditional restriction. That sort of reasoning, however, effectively requires what this Court expressly rejected: a historical twin, *Bruen*, 142 S. Ct. at 2133. It is sufficient that the surety laws provide historical support for disarming persons based on individualized assessments that they posed a specific threat to others.

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[3] This Court has not yet clarified whether the framework promulgated in *Bruen* should be conducted by reference to founding-era or Reconstruction-era regulations. But both periods include a range of laws designed to deny firearms to persons who pose a specific threat of violence.

Surety laws were not historical outliers. At common law, for example, the Crown disarmed individuals who had "disturbed the public Peace." Privy Council Lord Newport (Jan. 8, 1661), in *Transactions of the Shropshire Archaeological and Natural History Society*, pt. 2, 3d ser., vol. 4, at 156 (1904). And an early Massachusetts law temporarily disarmed individuals who had participated in Shays' Rebellion as a precondition to pardon, with reinstatement subject to an individualized showing of good behavior over a multi-year period. Act of Feb. 16, 1787, §§ 1-3, 1 *Private and Special Statutes of the Commonwealth of Massachusetts* 145-147 (1805).[4]

These examples are merely illustrative; the United States' brief cites many more. But as a whole, the record provides ample support to conclude that at least some applications of Section 922(g)(8)'s time-limited denial of guns to people who have been individually adjudicated to pose a specific threat of violence to a specific victim fall comfortably within the

[4] Our history also includes more categorical gun regulations that were explicitly racist. For example, from the founding through Reconstruction, American laws routinely denied Black persons the right to possess firearms. *See* Winkler, *supra*, at 537. Such laws would plainly violate the guarantee of equal protection as we understand it today. There is no need to rely on such laws to uphold the individualized disbarment imposed by Section 922(g)(8). *Cf. United States v. Daniels*, No. 22-60596, 2023 WL 5091317, at *11 n.33 (5th Cir. Aug. 9, 2023) ("Although those laws are also examples of danger-based disarmament, we need not build our history and tradition on repugnant laws that today would be struck down as unconstitutional. There are plenty of examples at the Founding of states' disarming citizens who were considered a violent threat to society.").

government's historically recognized authority. That is sufficient to uphold the provision on its face and reverse the decision below.[5]

The Court need go no further and adopt the United States' sweeping assertion of power to deny Second Amendment rights to anyone not deemed a "law-abiding, responsible citizen." *Id.* at 7. Constitutional rights generally extend to all persons within the United States, citizen and non-citizen alike. And it would be alarming if an individual's entitlement to a constitutional right turned on the Government's vague determination of whether they were "responsible." Nothing about the historical record or this case requires embarking on that path in order to reverse.

B. The Arguments Advanced by Respondent and the Court Below Are Unpersuasive

Respondent and the court below advance two primary theories for maintaining that Section

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[5] Critically, only a subset of restraining orders issued nationally satisfy Section 922(g)(8)'s requirements. *See, e.g.*, *United States v. Sanchez*, 639 F.3d 1201 (9th Cir. 2011). Moreover, federal law requires that States, to receive federal funds, implement policies to notify persons subject to domestic violence restraining orders of the prohibition in Section 922(g)(8). *See* 34 U.S.C. § 10449(e)(1).

Despite these important limitations, it remains possible that some applications of Section 922(g)(8), including where the statute is satisfied under 922(g)(8)(C)(i), might violate the Second Amendment. Because this is a facial challenge, however, the Court need not address those possibilities here.

922(g)(8) on its face violates the Second Amendment. First, Mr. Rahimi contends in his Brief in Opposition to Certiorari that Section 922(g)(8) conflicts with the Second Amendment because the social problem it addresses was not historically remediated through firearms restrictions, and therefore may not be addressed in that manner today. The court below, by contrast, presupposed *some* legislative authority to combat domestic violence through firearms restrictions, but maintained that the Constitution prohibits doing so through the mechanism Congress chose here—namely, on the basis of domestic violence restraining orders. Neither argument is persuasive.

i. The Second Amendment Does Not Deny Policymakers All Power to Address Domestic Violence Through Firearms Restrictions

Respondent's certiorari-stage briefings argued that Section 922(g)(8) impermissibly interposes gun restrictions as a modern-day policy solution to a longstanding societal concern. BIO at 28; *see also Bruen*, 142 S. Ct. at 2131. Because the founding generation addressed domestic violence without disarming individuals, Mr. Rahimi says, firearms regulations are now constitutionally unavailable to tackle what he characterizes as a centuries-old problem. BIO at 28.

The truth is that lawmakers did not perceive domestic violence as a problem until well into the 20th century. Instead, American "common law originally provided that a husband, as master of his household,

could subject his wife to corporal punishment . . . so long as he did not inflict permanent injury upon her." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2118 (1996).

State tolerance of domestic violence persisted well past the founding. For example, the year the Fourteenth Amendment was adopted, the North Carolina Supreme Court opined in the case of a man who beat his wife with a switch that "[w]e will not inflict upon society the greater evil of raising the curtain upon domestic privacy" in order to "punish the lesser evil of trifling violence." *State v. Rhodes*, 61 N.C. 453, 459 (1868) (per curiam); *see also* Jeffrey R. Baker, *The Failure and Promise of Common Law Equity in Domestic Abuse Cases*, 58 Loyola L. Rev. 559, 566 (2012). As recently as 1904, this Court recognized "the husband has, so to speak, a property in the body . . . of his wife." *Tinker v. Colwell*, 193 U.S. 473, 483 (1904). Indeed, until the 1960s, "most judges" would have "lacked the vocabulary and cultural competence to recognize or understand domestic abuse" save for in "the most egregious cases." *Baker*, *supra*, at 561.

In other words, domestic violence was not seen as a problem the state should address, except in perhaps the most extreme cases. That has changed today, as illustrated by the amicus briefs filed by various states and the myriad modern-day laws they argue would be called into question by the decision below. But because *Bruen* recognizes that lawmakers can validly impose gun restrictions to address

concerns not recognized at the time of the founding, 142 S. Ct. at 2132, and policymakers' efforts to reduce domestic violence and provide remedies for victims are a modern-day phenomenon, the historical absence of firearms restrictions specifically targeting domestic violence does not render such restrictions categorically unavailable to contemporary lawmakers. States can regulate guns in connection with this problem so long as historical *analogues* support doing so, even if there were no identical laws at the founding. *Id.*

ii. Felony Prosecutions for Domestic Violence Are Not the Sole Constitutional Means of Disarming Individuals Who Pose a Specific Threat to Specific People

The court below embraced a different argument. It concluded that even if the political branches have *some* authority to bar firearms possession as a means of targeting the "unprecedented societal concern[]" of domestic violence, *Bruen*, 142 S. Ct. at 2131, hitching such restrictions to civil protective orders is a constitutionally impermissible means of doing so. Instead, as Judge Ho's concurrence crystallizes, the only valid means of disarming individuals who have committed domestic violence would be via a felony prosecution. *See* Pet. App. at 34a (Ho, J., concurring) ("Those who commit violence, including domestic violence, shouldn't just be disarmed—they should be detained, prosecuted, convicted, and incarcerated."). On this view, the state cannot disarm someone who poses a specific threat to a specific person unless the individual commits felony-

level domestic violence and a prosecutor pursues charges.

That argument likewise cannot be squared with a proper understanding of the historical record. Both the English and American traditions recounted above include many laws that denied guns to individuals adjudged to pose a threat to others without requiring an antecedent felony prosecution. *See supra* at 8-13. As Justice Barrett has previously observed, "[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). Instead, historical firearms regulations focused on disarming people in response to a specific threat they posed, distinct from the individual's formal status in the criminal legal system. Thus, "[i]n 1791—and for well more than a century afterward," legislators prohibited individuals from possessing firearms "only when they judged that doing so was necessary to protect the public safety"—and not only after they had been indicted or convicted of a felony. *Id.*

C. Other Subsections of Section 922(g), and Some Applications of Section 922(g)(8), Raise Distinct Questions Not Presented Here

The conclusion that Section 922(g)(8) does not violate the Second Amendment in *all* its applications does not preclude as-applied challenges to Section 922(g)(8), or facial or as-applied challenges to other provisions within Section 922(g).

Other subsections of Section 922(g) apply in perpetuity to broad categories of persons based on status alone, and are therefore more difficult to fit under historical precedents of disarming individuals found to pose a specific threat to others. They impose sweeping restrictions on all persons with a prior felony conviction, 18 U.S.C. § 922(g)(1), on persons who use drugs, § 922(g)(3), on persons deemed mental unfit, § 922(g)(4), and on "aliens," § 922(g)(5), among others, without supplying such persons any opportunity to regain their Second Amendment rights. Those provisions require a different, and more searching, historical inquiry to determine whether they comport with the Second Amendment—an inquiry they may well fail to satisfy.

Moreover, Section 922(g)(8)(C)(ii) itself bars gun possession by individuals subject to restraining orders that do *not* include specific findings that the individual poses a danger to an intimate partner or family member. It is a distinct question whether the historical analogues discussed above provide sufficient support for restrictions imposed on this lesser showing of need.

But the facial challenge to Section 922(g)(8) that Respondent has brought arises out of a protective order that satisfies the plain language of subsection (C)(i) by finding him a credible threat to the physical safety of his family members. *See* Joint Appendix at 2. It does not turn on the constitutionality of Section 922(g)(8)(C)(ii)—nor, as a facial challenge, on the validity of any particular fact-bound application of 922(g)(8) as a whole. And its companion provisions,

which prohibit firearm possession by other categories of persons, are another matter entirely.

These questions are thus for another day. The lone question presented here is whether the Second Amendment precludes the government from disarming persons found to pose a specific threat of violence to a specific person, and subject to domestic violence protective orders, even where all other constitutional constraints are satisfied. History and tradition counsel that it does not.

III. Imposing Firearms Restrictions Based on Civil Restraining Orders is a Key Tool for Combatting Domestic Violence

The Fifth Circuit's decision does more than overlook this Court's guidance in *Bruen* and the historical record. It disempowers authorities from imposing any restrictions on gun possession by individuals found to pose a specific threat of domestic violence to their intimate partners or family members. Such restrictions are a widespread, important tool governments have adopted to address the threat of domestic violence, and the benefits they provide to survivors of abuse would not be replicated by imposing similar restrictions on the basis of felony proceedings.

A. Firearms Restrictions Tied to Domestic Violence Restraining Orders Directly Respond to a Grave Problem

Just as legislatures and executive officials from the relevant historical periods tailored firearms restrictions to particular safety risks, restrictions on

firearm possession by persons subject to domestic violence restraining orders are tailored to the precise risk they address. Unlike many categorical gun restrictions, they apply only to persons individually adjudged to pose a specific threat of violence to others. And unlike many permanent bans on gun possession, they endure only so long as the domestic violence protective order lasts.

Moreover, like many of its historical analogues, Section 922(g)(8) responds to grave threats to life and limb. In the United States, domestic violence is both common and devastating. Although precise figures are impossible to know, one recent study estimates that one in four women in North America will report experiencing abuse from an intimate partner in their lifetimes. Lynnmarie Sardinha, et al., *Global, Regional, and National Prevalence Estimates of Physical or Sexual, or Both, Intimate Partner Violence Against Women in 2018*, 399 Lancet 803, 808 (2022). The Centers for Disease Control estimates that 40% of women in the United States will report physical abuse, sexual abuse, or stalking by an intimate partner. *Violence Prevention: Fast Facts*, Ctrs. for Disease Control & Prevention (Oct. 11, 2022), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html. One in five homicide victims are killed by an intimate partner; and over half of female homicide victims are killed by a current or former male intimate partner. *Id.*

In the modern era, federal, state, and local governments have increasingly recognized this problem, and have sought to address it by adopting

laws and policies aimed at providing protections and support for victims and their families. These measures range from increased social services and shelter, to reducing discriminatory treatment in the legal system. *See generally* The White House, *U.S. National Plan to End Gender-Based Violence: Strategies for Action* (May 2023), https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Plan-to-End-GBV.pdf.

One key legal mechanism all states now offer to persons who have suffered domestic violence is the option of a civil restraining or protective order. *See* Am. Bar Ass'n, *Domestic Violence Civil Protection Orders* (updated June 2020), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf. Since the 1970s, states have authorized those who experience domestic violence to seek such orders on behalf of themselves and their children. The civil restraining order process is usually separate from the criminal system and provides an alternate pathway for the state to recognize that an individual has experienced violence and abuse and to provide her with affirmative legal protection. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 Cardozo L. Rev. 1487, 1506 (2008). Studies show these restraining orders are effective. *See, e.g.*, Christopher T. Benitez, et al., *Do Protection Orders Protect?*, 38 J. Am. Acad. Psych. Law 376, 385 (Sept. 2010).

A restraining order by itself, however, does not guarantee safety for victims of domestic violence and their children. Some victims face particular danger when they attempt to leave their partners, including in retaliation for seeking and obtaining a protective order. One study found that approximately one-third of domestic violence homicides occur within one month of a restraining order being issued, and just under one-fifth occur within two days. K.A. Vittes & S.B. Sorenson, *Restraining Orders Among Victims of Intimate Partner Homicide*, 14 Inj. Prevention 191, 193 (2008).

Temporarily disarming those who pose a specific threat of domestic violence reduces the use of firearms in such incidents, and in particular reduces homicides. For example, after Congress restricted gun possession by individuals convicted of misdemeanor domestic violence, the policy was associated with a 17% reduction in deaths of women at the hands of their intimate partners. Philip J. Cook & John Donohue, *Saving Lives by Regulating Guns: Evidence for Policy*, 358 Sci. 1259, 1261 (2017). Other studies point to similar results. *See, e.g.*, Carolina Diez, et al., *State Intimate Partner Violence-Related Firearms Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 Annals Internal Med. 536, 541 (2017) (intimate partner homicide rates 14% lower in states with such laws). The heightened risks that guns pose in domestic violence situations, and the increased risk of violence when a victim seeks a restraining order, thus provide sound policy bases for temporarily disarming those

against whom a domestic violence order has been issued.

Critically, these legislative restrictions on firearms possession do not operate only, or even principally, as after-the-fact criminal sanctions. That is the case even for the felony statute at issue in this case. Piggybacking off the substantive prohibition embodied in Section 922(g)(8), Congress has directed the federal government to take steps to ensure that domestic violence restraining orders are promptly incorporated into the background check system and has provided funding to allow States to include such orders in the databases used for background checks. *See* 34 U.S.C. §§ 40903(1), 40911(b)(3)(c)(i), 40913(b)(5), 40941(a). This federal background-check restriction has resulted in more than 77,000 denials of gun purchases since its creation in 1998, including over 3,800 such denials in 2021 alone; U.S. Dep't of Justice, Fed. Bureau of Investigation, Crim. Justice Info. Servs. Div., *Federal Denials*, at 1 (2023), https://www.fbi.gov/file-repository/federal_denials .pdf/view; U.S. Dep't of Justice, Fed. Bureau of Investigation, Crim. Justice Info. Servs. Div., *National Instant Criminal Background Check System Operational Report 2020-2021*, at 19 (Apr. 2022), https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view. Some states have enacted their own, similar laws prohibiting acquisition or possession of firearms—and requiring their relinquishment—when an order is issued. *See Who Can Have a Gun: Domestic Violence & Firearms*, Giffords L. Ctr., https://giffords.org/lawcenter/gun-

laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/. Under the reasoning of the Court of Appeals, all of these restrictions would fall.

B. Regulating Gun Possession Exclusively Through After-the-Fact Domestic Violence Felony Prosecutions Is No Substitute

Firearms restrictions imposed on the basis of civil restraining orders offer victims of domestic abuse substantial benefits over restrictions imposed on the basis of a felony criminal prosecution. Chief among these, the civil restraining order system gives victims agency: It allows them to decide when and how to file for an order, securing protection without waiting for the possibility of action by a local prosecutor (who typically maintains considerable charging discretion). By the same token, felony proceedings typically take longer to initiate, leaving at-risk individuals without immediate redress from often-urgent threats. And, because women have more control over the civil process, they can choose to discontinue cases if that best serves their needs.

Moreover, a significant percentage of women who experience domestic violence refrain from pursuing criminal charges altogether. *See generally* Leigh Goodmark, Nt'l Domestic Violence Hotline, *Law Enforcement Experience Report: Domestic Violence Survivors' Survey Regarding Interaction with Law Enforcement* (2022), https://www.thehotline.org/wp-content/uploads/media/2022/09/2209-Hotline-LES_FINAL.pdf. Individuals who allege domestic violence often encounter hostility and bias from law

enforcement, including in the form of officials who minimize or dismiss the gravity of the abuse they have suffered. Others even face abuse and neglect charges themselves when they file reports. Alaina Richert, Note, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 Mich. L. Rev. 315, 322-23 (2021). Some may worry that pursuing felony prosecution will only magnify the harms they are already experiencing by jeopardizing their family's economic security, severing a parent-child relationship, or inflicting further violence through incarceration. In short, imposing firearms restrictions against those who commit domestic violence solely on the basis of felony prosecutions would not provide nearly the level of protection that civil restraining orders offer.

* * *

The court below ruled that lawmakers cannot disarm individuals who the court has found pose a specific threat of domestic violence to a family member. Its reasoning would short-circuit important federal and state measures to reduce the incidence and severity of domestic violence, leaving no adequate alternative in their stead.

The Second Amendment does not require that remarkable result. This Court instructed in *Bruen* that firearms restrictions can be a valid public policy response to societal problems that historically lacked legislative urgency, as is precisely the case with domestic violence. Because history supplies numerous analogous examples of laws denying guns

based similarly on individualized findings of threat to others, the Court can and should reverse—without relying on the sweeping assertion of authority the United States has advanced here.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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