No. 22-915

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

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

BRIEF OF GUN VIOLENCE AND DOMESTIC VIOLENCE PREVENTION GROUPS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed in the Appendix, are nonprofit organizations dedicated to ending gun violence and domestic violence through education, research, and advocacy. This Court has recognized the devastating risks firearms pose when possessed by perpetrators of domestic violence. "[T]he presence of a firearm increases the likelihood that [domestic violence] will escalate to homicide." *United States v. Castleman*, 572 U.S. 157, 160 (2014). Recent research has also confirmed the substantial risk to the public and to victims from armed domestic abusers. *Amici* have a substantial interest in ensuring that the Constitution is construed to allow democratically elected officials to address the Nation's interconnected gun and domestic violence crises, and to safeguard the interest of everyone in America in living safe and secure lives in their homes and communities. The health and safety—indeed, the lives—of millions of people depend on keeping guns out of the hands of dangerous individuals, especially domestic abusers.

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

The United States has a deeply rooted tradition of disarming individuals who pose a danger to others or to the community at large. *Amici* thus agree with petitioner that history and tradition support the constitutionality of laws that disarm dangerous persons. U.S. Br. 7-8. *Amici* also agree that 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to qualifying domestic-violence restraining orders, fits comfortably within that tradition and thus is a permissible measure under this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

The Fifth Circuit, in holding that Section 922(g)(8) violates the Second Amendment on its face, seriously misapprehended *Bruen*'s inquiry into whether a challenged firearms regulation is sufficiently analogous to "historical regulations [that] impose[d] a comparable burden on the right of armed self-defense" that were also "comparably justified." *Bruen*, 142 S. Ct. at 2133. The Court should reverse that decision, which exposes wide swaths of the country to the dangers posed when persons under a domestic-violence restraining order retain access to firearms. Reversal is particularly warranted for two reasons:

I. *Bruen*'s historical-analogical test allows for modern regulations like Section 922(g)(8).

A. In *Bruen*, this Court articulated the Second Amendment framework for reviewing restrictions on the possession and carrying of firearms. Under

Bruen, the government may justify a modern restriction by showing that it is "relevantly similar" to historical regulations. "[A]nalogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Bruen*, 142 S. Ct. at 2133. In holding that Section 922(g)(8) violates the Second Amendment on its face, the Fifth Circuit violated that principle.

1. First, the Fifth Circuit applied an excessively restrictive approach to assessing whether Section 922(g)(8) is analogous to historical regulations. The court parsed each historical firearms regulation with an eye to distinguishing it, effectively requiring a "historical twin" to Section 922(g)(8). In rejecting each analogue based on immaterial differences from Section 922(g)(8), the Fifth Circuit missed the broader principle that emerges from multiple lines of historical firearms regulation: jurisdictions have historically—and can today—disarm dangerous people, including persons subject to qualifying domestic-violence restraining orders.

2. Second, the Fifth Circuit's efforts to distinguish the government's proffered analogues fail on their own terms. The court disqualified several historical analogues by identifying minute differences from Section 922(g)(8). But its critiques not only suffer from internal inconsistency, they reveal its unduly restrictive approach to identifying comparable justifications and comparable burdens in historical laws. Besides, the court also mischaracterized the nature of Section 922(g)(8)'s burden on firearms possession.

B. The Fifth Circuit made another critical methodological error: it failed to appreciate the significance of modern efforts to grapple with domestic violence. *Bruen* stated that regulations addressing "unprecedented societal concern[s]" require a "nuanced" analysis of historical firearms regulations. 142 S. Ct. at 2132. Only in the past 50 years have governments begun to adopt measures to address the distinctive and heightened risks of armed intimate-partner violence. This emerging recognition should play a role in evaluating historical analogies, and it makes the Fifth Circuit's approach all the more erroneous.

II. Reversal is also necessary to ensure that federal, state, and local governments can substantially reduce the threat of lethal violence by prohibiting domestic abusers from possessing firearms while subject to protection orders.

A. Armed domestic abusers pose an extraordinary threat to public safety. Seventy women are shot and killed each month in the United States by their intimate partner. In fact, the presence of a gun in an abusive relationship increases the likelihood of domestic homicide by 11 times. Even where guns are not used to kill, domestic-violence offenders often use them to assault, terrorize, threaten, and control their intimate partners. Children are not spared: up to 20% of violent deaths of intimate partners also involve deaths of children or other family members. And the risks of violence extend to the public and law enforcement officers. In most recent mass shootings, the perpetrator either had a history of domestic violence or killed at least one partner or family member during

the shooting. And, for law enforcement officers, responding to domestic-violence calls accounts for the highest number of service-related fatalities.

B. In enacting Section 922(g)(8), Congress recognized the grave threat posed by domestic abusers with access to firearms. States have likewise recognized the danger; at least thirty-one states have criminal prohibitions on firearm possession by persons subject to domestic-violence restraining orders. These regulations work. They are associated with a 13% reduction in domestic firearm homicides statewide, and an even greater 25% reduction in cities within these states.

Beyond that, invalidating Section 922(g)(8) would undermine the federal background check program. Since its inception in 1998, the National Instant Criminal Background Check System (NICS) successfully prevented 77,283 gun purchases by individuals subject to domestic-violence restraining orders. If Section 922(g)(8) were invalidated, qualifying restraining orders would no longer be uploaded into the NICS system, which would allow domestic abusers to legally purchase firearms.

Striking down Section 922(g)(8) would also threaten to topple an interlocking system of measures at all levels of government designed to keep firearms out of the hands of domestic abusers. Twenty-four states, for example, have extended their laws beyond Section 922(g)(8) to reach dating partners, which has proven even more effective than the baseline federal prohibition. Many states also require domestic abusers to relinquish their firearms in connection with

protection orders. Others rely on extreme-risk-protection-order ("red flag") laws to disarm persons determined to pose a danger of using firearms to harm others. The Fifth Circuit's decision not only invalidates Section 922(g)(8), but also raises unjustified constitutional questions about the array of measures that states have successfully used to reduce the threat of firearms-related domestic violence.

For all of these reasons, this Court should reverse the Fifth Circuit's erroneous decision.

ARGUMENT

I. THE FIFTH CIRCUIT TOOK AN EXCESSIVELY RESTRICTIVE APPROACH TO *BRUEN*'S HISTORICAL TEST

In *Bruen*, the Court announced a new historical-analogical test for reviewing restrictions on the possession and carrying of firearms. Under *Bruen*, a challenger must first establish that a restriction implicates conduct protected by the Second Amendment's plain text. 142 S. Ct. at 2129-30. The next question is whether the restriction is "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130.

Section 922(g)(8) disarms individuals subject to domestic-violence restraining orders. These are not the "law-abiding, responsible citizens" that the Second Amendment has been construed to protect. *Id.* at 2131 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)) (internal quotation marks omitted). Regulations that disarm dangerous groups of people, including "felons and the mentally ill," are "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n. 26. Similarly, individuals disarmed under Section

922(g)(8) are dangerous people who have demonstrated a disrespect for the safety and well-being of others and the rule of law. They are not "law-abiding, responsible" citizens: the statute applies only if, *inter alia*, the court conducts a hearing of which the person had "actual notice" and an "opportunity to participate" and then either (i) finds that the person poses a "credible threat to the physical safety" of an intimate partner or child or (ii) expressly prohibits the use, attempted use, or threatened use of physical force against the partner or child. 18 U.S.C. § 922(g)(8)(A), (C).

The class regulated by Section 922(g)(8) thus has an uphill battle to show eligibility for Second Amendment protection. But the Court need not decide that threshold issue. Section 922(g)(8) meets *Bruen*'s second step: the provision reflects a historical pattern of laws disarming persons who are judged dangerous. And that pattern explains why society is entitled to protect itself against the risk posed by persons like respondent.[2]

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[2] Historical judgments about what constitutes a threat have changed over time, and some laws in our history reflect outmoded, unjustified, or even invidious judgments. Nothing in *amici*'s reliance on those laws in Second Amendment analysis reflects endorsement of their factual premises. But *Bruen* does not require such endorsement. Rather, these historical examples remain relevant in assessing burdens on firearms rights accepted by earlier generations. *See United States v. Rowson*, 2023 WL 431037, at *22 (S.D.N.Y. Jan. 26, 2023) ("It goes without saying that, in our modern era, a law that would disarm a group based on race, nationality, or political point of view—or on the assumption that these characteristics bespoke heightened dangerousness—would be anathema, and clearly unconstitutional.

A. *Bruen*'s Historical Analogical Test Permits Regulation of Dangerous Persons' Access To Firearms

Under *Bruen*'s historical test, if a challenger can show that a modern regulation implicates conduct protected by the Second Amendment, the government must justify the regulation by demonstrating that it is "relevantly similar" to historical analogues. *Bruen*, 142 S. Ct. at 2129-33. The Court took care to emphasize that this test requires only a "well-established and representative . . . *analogue*, not a historical *twin*." *Id.* at 2133. That means that the challenged law must impose "a comparable burden on the right of armed self-defense" as the analogue and be "comparably justified." *Id.* *Bruen* was explicit that, under this framework, a modern regulation need not be "a dead ringer for historical precursors"—it need only be "analogous enough" to pass constitutional muster. *Id.*

1. The Fifth Circuit committed the exact analytical error that *Bruen* warned against. The court analyzed each of the government's proffered historical regulations individually with an eye to distinguishing them, then dismissed each analogue based on immaterial differences from Section 922(g)(8). In doing so, the court missed the broader point that Section 922(g)(8) is "relevantly similar" to the government's proffered analogues because those laws demonstrate a longstanding historical pattern of disarming dangerous people. For instance, the court rejected as insufficiently analogous colonial laws disarming groups of people considered to be dangerous because, according to the court, the purpose of those laws was "not the protection of an identified person from the threat

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But the Second Amendment's inquiry into historical analogues is not a normative one." (citation omitted)).

of 'domestic gun abuse.'" Pet. App. 20a (internal quotation marks omitted). This defies *Bruen*'s own explanation of how to apply its historical test. The court of appeals applied analogical reasoning like a "regulatory straightjacket," requiring an exact historical "twin" to Section 922(g)(8)—in direct contradiction of *Bruen*'s instruction. 142 S. Ct. at 2133.

And the Fifth Circuit continues to misapply *Bruen*. Most recently, in *United States v. Daniels*, No. 22-60596, 2023 WL 5091317 (5th Cir. Aug. 10, 2023), the court of appeals relied on the decision below to hold that Section 922(g)(3), which prohibits drug abusers from possessing firearms, is invalid as applied to the defendant even though he admitted to smoking marijuana multiple days per month, and had multiple marijuana cigarette butts in the ashtray of his car, as well as two loaded guns: a 9mm pistol and a semi-automatic rifle. *Id.* at *1-2. The government proffered several relevantly similar historical analogues to Section 922(g)(3): (1) statutes disarming intoxicated individuals, (2) statutes disarming the mentally ill or insane, and (3) statutes disarming otherwise dangerous individuals. *Id.* at *5-9. The Fifth Circuit conceded that these analogues share "an undeniable throughline" demonstrating that "Founding-era governments took guns away from persons perceived to be dangerous." *Id.* at *13. This conclusion alone satisfies *Bruen*'s requirement that a modern regulation be "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

Nevertheless, the Fifth Circuit, as it did in the decision below, dispensed with each analogue based on a variety of minute differences from Section 922(g)(3),

ultimately concluding that the "handful" of historical regulations in these areas "are sparse," and therefore not enough to form a tradition. *Daniels*, 2023 WL 5091317, at *5-9, *10. This atomized approach to *Bruen*'s requirements cannot be squared with this Court's caution that history ought not be applied to preclude all modern firearms regulations. 142 S. Ct. at 2133. Under the Fifth Circuit's reasoning, the government can proffer a series of relevant historical analogues to a modern regulation, with a clear "throughline" demonstrating a Founding-era tradition of similar firearms regulation—yet that regulation *still* may not be "analogous enough" to pass constitutional muster. *Id.*

The Fifth Circuit is not alone in misapprehending *Bruen*'s historical test. It is "increasingly apparent . . . that courts . . . are struggling at every stage of the *Bruen* inquiry" to answer difficult questions about what is required to demonstrate a "tradition" and what regulations constitute appropriate analogues. *Daniels*, 2023 WL 5091317, at *17 (Higginson, J., concurring). In trying to adhere to *Bruen*'s historical test, courts have taken excessively restrictive approaches that apply analogical reasoning like a "regulatory straightjacket." 142 S. Ct. at 2133.

For example, in *United States v. Perez-Gallan*, the Western District of Texas struck down Section 922(g)(8) because that court concluded that all of the government's proffered analogues slightly differed from the modern regulation disarming domestic abusers subject to restraining orders. *See* 2022 WL 16858516, at *8-12 (W.D. Tex. Nov. 10, 2022). It distinguished historical surety laws by noting that those

laws applied only to "public mischief" and not to "private vices (like spousal disputes)" and contained different "procedural safeguards" than Section 922(g)(8), *id*. at *9-10. The *Perez-Gallan* court also distinguished a variety of historical laws disarming "dangerous persons" as applying only to individuals who threatened state security rather than other private individuals. *Id.* at *10-11.

The Western District of Oklahoma took a similarly narrow approach as the Fifth Circuit in *Daniels*. The court held that Section 922(g)(3) was not sufficiently similar to historical laws restricting gun use or access by actively intoxicated individuals in part because the historical laws were aimed at preserving "the ability of the colonists to defend against Indian attacks," rather than mitigating general concerns about the dangers of intoxicated individuals using firearms. *United States v. Harrison*, 2023 WL 1771138, at *8 (W.D. Okla. Feb. 3, 2023), *appeal filed*, No. 23-6028 (10th Cir. Mar. 3, 2023). While those historical laws rest on invidious judgments that are unacceptable today, they nonetheless remain relevant under *Bruen* in assessing the Second Amendment's latitude for firearm's restrictions. *See supra* at [7 n.2].

To counter this trend, this Court should reaffirm that *Bruen* envisons the use of history as a guiding principle rather than a regulatory straightjacket. The alternative erroneous approach of some lower courts "will mean systemic . . . judicial dismantling of the laws that have served to protect our country for generations." *Daniels*, 2023 WL 5091317, at *20 (Higginson, J., concurring).

2. Beyond that, the Fifth Circuit's efforts to distinguish the government's proffered analogues also

fail when those laws are considered one by one. For example, the Fifth Circuit reasoned that various historical restrictions disarmed dangerous people in a categorical manner, while Section 922(g)(8) reflects a case-by-case approach. This proffered distinction does not support the Fifth Circuit's conclusion. Section 922(g)(8)'s individualized restrictions reflect a narrower and thus more focused approach than categorical restrictions. Categorical restrictions are surely valid, *see Heller*, 554 U.S. at 626-27 & n. 26, but this is a case where the nation's tradition of greater restrictions—*i.e.*, class-wide prohibitions of perceived dangerous people—plainly includes the lesser power to regulate those found dangerous on an individualized basis.

The Fifth Circuit also found wanting the government's reliance on laws under which a person found to pose a danger to another could bear arms only if he first posted a surety, on the ground that those laws worked only a "partial restriction" on the right to keep and bear arms unlike Section 922(g)(8)'s "absolute deprivation." Pet. App. 65a. Here again, the Fifth Circuit is wrong: Section 922(g)(8), too, is only a partial restriction, because it restricts possession of a firearm only for the time that a qualifying domestic-violence restraining order is in effect. More than that, the existence of surety laws reinforces the general principle that our traditions include imposing firearms restrictions on individuals found to be dangerous. Given that historical tradition, lawmakers are not limited to imposing restrictions on dangerous individuals' possession of firearms in the precise manner as did their forebears. The burdens need only be "comparable" and "comparably justified." *Bruen*, 142 S. Ct. at 2133. That test is readily met here.

B. Domestic Violence Regulations Address A Modern Societal Concern Which Requires A More Nuanced Historical Inquiry

The Fifth Circuit's analysis contains another methodological flaw that is particularly problematic in the context of Section 922(g)(8): the failure to recognize that domestic violence reflects an "unprecedented societal concern," such that modern regulations addressing that concern warrant a more "nuanced" historical analysis. *Bruen*, 142 S. Ct. at 2132. Founding-era governments did not recognize intimate-partner violence as a distinctive regulatory concern for the state to solve. Anglo-American common law treated domestic violence as a private matter restricted to the realm of domestic relations. A husband had a legal right to subject his wife to physical violence if she defied his authority; it was not the place of the state to intervene to prevent this violence. *See* 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 442-45 (1765) ("[T]he law thought it reasonable to entrust [the husband] with this power of restraining [the wife], by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children . . . and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.").

Societal views of marital and family relations have significantly changed in the intervening centuries. Society now recognizes that intimate-partner violence is a threat to both individual and public safety that implicates important state interests; it is not just a "private matter between husband and wife." Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L.

Rev. 1657, 1662 (2004). But it was not until the late twentieth century that the law came to truly reflect this social evolution and governments began to enact state and federal legislation aimed to protect victims and survivors of domestic violence and to hold abusers accountable. *See*, *e.g.*, The Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); *See* Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2170-71 (1996) (describing the shift in the government's approach to domestic violence in the late 1970s); Sack, *supra*, at 1662 ("This policy of [state] toleration of [domestic violence] continued up through the 1970s, and wife-beating was considered a private matter between husband and wife in which the state should not intrude.").

Beyond that, domestic violence committed with firearms has become increasingly prevalent and lethal in the modern era. At the time of the Founding, little evidence suggests that firearms were the weapon of choice in domestic violence. Today, unfortunately and often tragically, firearms violence in the domestic context is pervasive. *See Castleman*, 572 U.S. at 159-60 ("All too often, the only difference between a battered woman and a dead woman is the presence of a gun." (internal quotation marks omitted)).

Bruen recognizes that these kinds of shifts in the social and legal order have a direct bearing on the use of history. Unprecedented modern problems, *Bruen* explained, require a particularly "nuanced approach" that recognizes that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132.

The Fifth Circuit overlooked this principle. It rejected historical laws disarming dangerous people as not "relevantly similar" to Section 922(g)(8) because, it stated, the purpose of the historical laws "was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse.'" Pet. App. 20a (internal quotation marks omitted).

This mirror-image analysis of history misses the mark. The Fifth Circuit required that historical analogues serve the exact same purpose as a modern regulation. But where Congress enacted a law to address a problem that was "unimaginable" to the Founders, *Bruen* makes clear that this approach is untenable. Section 922(g)(8) departs from the Anglo-American common law tradition that treated women as property and reflects a new social understanding "in which women as well as men are entitled to equal protection of the civil and criminal law." Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere From Weapons Threats Under* Bruen, 98 N.Y.U. L. Rev. (forthcoming 2023) (manuscript at 26). The nuanced approach that *Bruen* requires takes account of this understanding and considers the tradition of firearm regulation in that light.

II. THE CRITICAL DANGERS POSED BY ARMED DOMESTIC ABUSERS MAKE REVERSAL ESPECIALLY URGENT

Armed domestic abusers pose a grave threat to public safety, as empirical evidence confirms and the experiences of survivors illustrate. Federal, state, and local governments have sought to reduce lethal violence in the domestic context through a range of measures, and the Fifth Circuit's decision threatens

not only state and local criminal prohibitions closely resembling Section 922(g)(8), but also a much broader set of interventions. This Court should reverse to ensure that governments at all levels retain the power to prevent domestic abusers from possessing firearms while subject to qualifying restraining orders.

A. Domestic Violence Offenders Pose An Extraordinary Public-Safety Threat, Which Is Heightened When Those Offenders Have Access To Firearms

Firearms are inextricably linked with deadly domestic violence. Every 16 hours in America, a woman is killed with a firearm by an intimate partner. *Beyond Bullet Wounds: Guns In the Hands of Domestic Abusers*, Brady United Against Gun Violence at 3 (2021), https://brady-static.s3.amazonaws.com/Guns-Domestic-Violence.pdf. And direct access to guns increases the likelihood of intimate-partner homicide of women by 11 times. Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21 Trauma, Violence & Abuse 1, 9 (2018). Between 1980 and 2012, most women killed by their intimate partners were killed with guns. April M. Zeoli & Amy Bonomi, *Pretty in Pink? Firearm Hazards for Domestic Violence Victims*, 25 Women's Health Issues 1, 3 (2015).

The statistics on the prevalence of intimate-partner violence with a gun in the United States are staggering. Every month in 2019, an average of 70 women in the United States were shot and killed by an intimate partner. *The Silent Epidemic of Femicide in the United States*, SANCTUARY FOR FAMILIES (Mar. 10,

2023), https://sanctuaryforfamilies.org/femicide-epidemic/. As of 2019, nearly one million women in the United States have reported being shot or shot at by intimate partners, and more than 4.5 million women have reported being threatened with a gun by an intimate partner. *Guns & Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem*, Everytown Rsch. & Pol'y (updated Apr. 10, 2023), https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/ (last visited Aug. 18, 2023).

Children are not spared from the risk of death at the hands of armed domestic abusers. In up to 20% of domestic homicides, the abuser also kills at least one other person, most commonly a child or other family member. April M. Zeoli & Jennifer K. Paruk, *Potential to Prevent Mass Shootings through Domestic Violence Firearm Restrictions*, 19 Criminology & Pub. Pol'y 129, 130 (2020) (citing sources). Nearly two-thirds of all child fatalities related to domestic violence involved guns. Avanti Adhia et al., *The Role of Intimate Partner Violence in Homicides of Children Aged 2–14 Years*, 56 Am. J. Preventive Med. 38 (2019). Between 2017 and 2022 alone, at least 866 children ages 17 and younger were shot in domestic violence incidents, and 621 died as a result. Jennifer Mascia, *Dangerous Homes: Guns and Domestic Violence Exact a Deadly Toll on Kids*, THE TRACE (Mar. 28, 2023), https://www.thetrace.org/2023/03/guns-domestic-violence-child-deaths/.

And even when guns are not used to kill, they are often used as tools to "establish[ ] coercive control —

a pattern of threats, violence, and humiliation used to undermine the autonomy of a partner or family member," and even sexually abuse their victims. *Beyond Bullet Wounds*, *supra*, at 7-8; *see also* Kellie R. Lynch & Dylan B. Jackson, *Firearm Exposure and the Health of High-Risk Intimate Partner Violence Victims*, 270 Soc. Sci. Med. 113644 (Feb. 2021); Nat'l Domestic Violence Hotline, *Hotline Focus Survey Provides Firsthand Look at Intersection of Firearms & Domestic Violence; Highlights Need for Stronger Laws and Equal Protection* (June 18, 2014), https://www.thehotline.org/news/hotline-focus-survey-provides-firsthand-look-at-intersection-of-firearms-highlights-need-for-stronger-laws-and-equal-protection/. In one case, the abuser forcefully penetrated his victim with a gun when she refused to be intimate with him. Nat'l Domestic Violence Hotline, *Hotline Focus Survey*, *supra*. In another, an abuser slept with his gun under his pillow every night. The victim would often wake to the sound of her abuser releasing the safety next to her head. *Id.* In yet another, the abuser pointed his firearm at himself and threatened suicide if the victim ever left him. *Id.*; Memorandum, Nat'l Domestic Violence Hotline, Firearm Impact on Domestic Violence Survivors: National Domestic Violence Hotline Story Logs, July 2020 – July 2023 (July 28, 2023).

As Rahimi himself demonstrates, armed domestic abusers pose a grave threat to not only their intimate partners and children, but also society more broadly. More than two-thirds (68.2%) of mass shootings are domestic-violence incidents or are perpetrated by shooters with a history of domestic violence. Lisa B.

Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 Injury Epidemiology 38 (2021). Mass shootings and domestic violence are closely linked: between 2014 and 2019, 60% of mass shooting events were either domestic violence attacks or perpetrated by those with a history of domestic violence. *Beyond Bullet Wounds*, *supra*, at 4. And in almost half of all mass shootings over the past decade, the perpetrator shot a current or former intimate partner or family member as part of the rampage. Everytown for Gun Safety Support Fund, *Mass Shootings in America*, 2009–2020 (2021), https://everytownresearch.org/maps/mass-shootings-in-america/.

Domestic abusers also heighten the risk to police officers responding to domestic violence calls. A five-year study found that responding to domestic abuse accounted for the highest number of service-related fatalities for police officers. Nick Breul & Mike Keith, *Deadly Calls and Fatal Encounters: Analysis of US Law Enforcement Line of Duty Deaths When Officers Responded to Dispatched Calls for Service and Conducted Enforcement (2010–2014)*, Nat'l Law Enforcement Officers Memorial Fund (2016). And 95% of law enforcement officer deaths when responding to domestic violence between 1996 and 2010 involved a firearm. Cassandra Kercher et al., *Homicides of Law Enforcement Officers Responding to Domestic Disturbance Calls*, 19 Injury Prevention 331 (2013). In one case, the intoxicated abuser barricaded himself in a room and shot at responding officers, ultimately requiring a SWAT Team response. Memorandum, Nat'l Domestic Violence Hotline, *supra*.

B. States Have Taken A Variety Of Measures To Address The Risks That Firearms Pose In The Domestic-Violence Context, And Reversal Is Necessary To Confirm Their Validity

For decades, governments at all levels have taken steps to protect against firearms possession by dangerous persons in the domestic violence context. Congress recognized the gravity of the threat detailed above more than 30 years ago in enacting Section 922(g)(8). State and local governments too have recognized the importance of similar laws. Prohibitions resembling Section 922(g)(8), however, represent only one strand in the web of approaches that states and the federal government have taken to combat gun-aggravated domestic violence. Many of those measures seek to prevent violence by intervening before escalation to state and federal criminal prosecutions. The Fifth Circuit's decision casts a constitutional cloud over this entire range of highly successful measures. This Court should dispel those doubts.

1. Jurisdictions have employed a range of measures to address the dangers of firearms in domestic abuse settings.

Background checks. The invalidation of Section 922(g)(8) will inevitably diminish the effectiveness of firearms background checks. Background checks are the first line of defense in preventing dangerous individuals, including domestic abusers, from obtaining firearms. The primary database used to conduct background checks is the Federal Bureau of Investigation's (FBI's) National Instant Criminal Background Check System (NICS), a "national system that enables Federal Firearms Licensees (FFL) to initiate

a background check through the FBI" or through state law enforcement agencies. Anne Gallegos & Becki Goggins, *State Progress in Record Reporting for Firearm-Related Background Checks: Misdemeanor Crimes of Domestic Violence*, SEARCH and the National Center for State Courts (Dec. 2016), https://www.ojp.gov/pdffiles1/bjs/grants/250392.pdf; *The Effects of Background Checks*, THE RAND CORPORATION (last updated Jan. 10, 2023), https://www.rand.org/research/gun-policy/analysis/background-checks.html. In 30 states, five territories, and Washington, D.C., all prospective gun purchasers are required to submit to a background check through the NICS.[3] *Firearm Background Checks: Explained*, USAFACTS.ORG (last revised May 14, 2023), https://usafacts.org/articles/firearm-background-checks-explained/. NICS staff perform a detailed background check to verify that the potential buyer is eligible to purchase a gun. *Id.* These federal background checks reveal, in relevant part, if an individual is the subject of a federally qualifying domestic-violence restraining order under Section 922(g)(8). *Id.* Although federal law does not require background checks for private gun sales, 20 states have expanded

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[3] Seven states handle background checks through the Federal Bureau of Investigation (FBI), while 13 states perform background checks through state law enforcement agencies that search NICS, as well as additional state and local records and databases. *Firearm Background Checks: Explained*, USAFacts.org (last revised May 14, 2023), https://usafacts.org/articles/firearm-background-checks-explained/; Chip Brownlee, *Which States Have Universal Gun Background Checks?*, THE TRACE (June 15, 2023), https://www.thetrace.org/2023/06/background-check-buy-a-gun-america-map/.

their laws to require background checks for private sales. Chip Brownlee, *Which States Have Universal Gun Background Checks?*, THE TRACE (June 15, 2023), https://www.thetrace.org/2023/06/background-check-buy-a-gun-america-map/.

Congress continues to strengthen the role of Section 922(g)(8) in background checks. In 2018, Congress passed the Fix NICS Act, in part to incentivize states to prioritize uploading records to NICS by establishing a funding preference for states that develop an implementation plan and use grant funds to upload domestic violence records to NICS. Fix NICS Act of 2017, H.R. 4477, 115th Cong. (2017); Press Release, U.S. Dep't of Just., Attorney General William P. Barr Releases First-Ever Semiannual Report on the Fix NICS Act (Nov. 14, 2019). And in 2022, Congress passed the Violence Against Women Act Reauthorization Act (VAWA Reauthorization Act) to "improve the enforcement" of Section 922(g)(8) and "cross-deputize[]" federal, state, and local law enforcement agencies to increase the investigation and prosecution of violations of Section 922(g)(8). 18 U.S.C. § 925D.

The VAWA Reauthorization Act law gives the Attorney General the power to appoint state and local law enforcement to serve as special assistant United States Attorneys to prosecute violations of Section 922(g)(8) and "deputize [s]tate . . . and local law enforcement officers" to "enhance[] the capacity of the agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives in responding to and investigating [such] violations." 18 U.S.C. § 925D. The law also re-

quires that the Attorney General report all NICS firearms denials under Section 922(g)(8) to state and local law enforcement entities. 18 U.S.C. § 925B.

Since its launch in 1998, NICS has prevented more than 2.2 million attempted gun transfers, and 77,283 of the denials were based on the fact that the potential purchaser was the subject of a domestic-violence restraining order. Fed. Bureau of Investigation, *Federal Denials, Reasons Why the NICS Section Denies November 30, 1998 – July 31, 2023* (July 31, 2023), https://www.fbi.gov/file-repository/federal_denials.pdf/view.

If Section 922(g)(8) is invalidated, federally qualifying restraining orders issued by states and local governments would no longer be entered into the NICS. This would allow domestic abusers who have been found by a court to pose a credible threat to the physical safety of their intimate partner to legally possess firearms—with predictably tragic outcomes.

Domestic-violence restraining orders. A wholesale invalidation of Section 922(g)(8) would also cast doubt over a large swath of other measures that states have taken to reduce firearms-related domestic violence. At least 31 states have criminal prohibitions on possession of a firearm by persons subject to qualifying domestic-violence restraining orders. These restraining orders reflect a judge's determinations of a realistic threat of violence.[4] States with these prohibitions

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[4] Contrary to the suggestion that civil restraining orders are often issued "without any actual threat of danger," Pet. App. 36a (Ho, J., concurring), victims must prove by a preponderance of the evidence that they are in physical danger in order for the

have seen a 13% reduction in intimate partner firearm homicide rates. April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 Am. J. Epidemiology 2365, 2367 (2018). The impact of these laws is even more striking in urban settings. Large cities in states that employ these procedures have experienced a 25% reduction in intimate partner firearm homicide rates. April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 Inj. Prevention 90, 92 (2010). And many states have adopted measures going beyond federal law to allow for domestic-violence restraining orders against abusive *dating partners*, and those that have done so have seen a 16% reduction in intimate partner firearm homicide rates. Zeoli et al., *Analysis*, *supra*, at 2369.

Twenty-two states not only prohibit domestic violence abusers from possessing firearms while subject to a qualifying restraining order, but also explicitly

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court to issue a civil restraining order. Alexa Bejinariu et al., *A Content Analysis of Civil Protection Order Statutes: What Makes Some State Statutes More Comprehensive Than Others?*, 48 AM. J. CRIM. JUST. 491 (April 2023). The issuance of a civil restraining order is "contingent on a range of legal factors relevant to the experiences of the victim." *Id*. at 492. Thus, the court must take into account "the type of abuse experienced (i.e., sexual, physical, verbal, emotional, and economic), the context surrounding the abuse (i.e., when and where the abuse took place) and other relevant information (i.e., whether a police report was filed . . . ; whether or not children were present during the incident)" before issuing a civil restraining order. *Id*.

require them to relinquish firearms. *Which States Require Prohibited Domestic Abusers to Turn In Any Guns While Under a Restraining Order?*, Everytown Rsch. & Pol'y (Jan. 12, 2023), https://everytownresearch.org/rankings/law/relinquishment-for-domestic-abusers-under-restraining-orders/. These relinquishment laws are associated with 15% lower firearm-related intimate-partner firearm homicide rates. Carolina Díez et al., *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 Annals of Internal Med. 536, 539 (2017).

Extreme risk protection orders. Twenty jurisdictions also rely on extreme risk protection order (sometimes called "red flag") laws to disarm those who have been determined to pose a danger of using firearms to, among other things, inflict "harm on innocent persons." *Caniglia v. Strom*, 141 S. Ct. 1596, 1601 (2021) (Alito, J., concurring); *see* Johns Hopkins Bloomberg Sch. of Pub. Health, *Extreme Risk Protection Order: A Tool to Save Lives*, https://americanhealth.jhu.edu/implementERPO (last visited Aug. 18, 2023).

Extreme risk protection orders allow a family member, household member, or in some states law enforcement to request an order to temporarily remove any firearms from the possession of a person who is deemed a high risk for gun violence. *The Effects of Extreme Risk Protection Orders*, THE RAND CORPORATION (last updated Jan. 10, 2023), https://www.rand.org/research/gun-policy/analysis/extreme-risk-protection-orders.html. These laws,

when used in domestic violence situations, can supplement the use of protection order prohibitions to temporarily prevent domestic abusers from purchasing new firearms, and by temporarily removing the firearms they already own from their possession. While these laws are not at issue in this case, they illustrate the dangers of endorsing the Fifth Circuit's approach, which assigned "importan[ce]" and "significan[ce]" to the fact that orders qualifying under Section 922(g)(8) are issued in civil proceedings. Pet. App. 56a n.6. Endorsing the Fifth Circuit's application of *Bruen* could threaten the validity of other civil orders, like extreme risk protection orders.

Apprehension. Section 922(g)(8) not only permits prosecution and incapacitation of violators, but also supports law enforcement intervention to prevent violent acts. A prime example is Section 922(g)(8)'s role in apprehending the Beltway Snipers, whose arrest ended their 23-day killing spree in the Washington, D.C. area—during which they planned to murder the primary shooter's former spouse. Neal Augenstein, *Ex-wife of Beltway sniper shares story of domestic abuse on Valentine's Day*, WTOP NEWS (Feb. 14, 2020), https://wtop.com/local/2020/02/ex-wife-of-beltway-sniper-shares-story-of-domestic-abuse-on-valentines-day/. Section 922(g)(8) was pivotal: after getting a lead to one of the shooters, federal agents discovered that the other shooter possessed a gun despite being subject to a qualifying domestic-violence restraining order. This "enabled [them] to charge him with federal weapons violations" and secure an arrest warrant under Section 922(g)(8). Fed. Bureau of In-

vestigation, *Beltway Snipers*, https://www.fbi.gov/history/famous-cases/beltway-snipers; *see* Crim. Compl., Braga Aff. ¶ 17, *United States v. Muhammad*, No. 02-3187 (D. Md. Oct. 29, 2002), https://vault.fbi.gov/SNIPEMUR. The arrest in the federal system ensured that the resources of the United States were available to detain and prosecute the defendants.

2. The array of civil and criminal measures to remove firearms from the hands of domestic abusers also provides an avenue to safety for many victims who may be reluctant to cooperate in criminal prosecutions. Nat'l District Attorneys Ass'n, *National Domestic Violence Prosecution Best Practices Guide* (last revised June 23, 2020), https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-June-23-2020-1.pdf. Because of the uniquely complicated dynamics of domestic violence, victims often do not pursue criminal charges out of fear of retaliation or manipulation by their abuser. *Id.* at 7-8. As a result, 80 percent of victims in domestic-violence cases "minimiz[e] the incident, deny[] it happened, fault[] . . . [themselves], or refus[e] to participate in prosecution," making it particularly difficult to prosecute and ultimately convict domestic abusers. *Id.*

This range of remedies underscores the significance of this case. A ruling adopting the Fifth Circuit's Second Amendment reasoning would not be easily limited to Section 922(g)(8). To the contrary, it would "constrain the ability of our state and federal political branches to address gun violence across the country" and threaten the entire network of measures, including those described above, used to

disarm dangerous persons and prevent gun violence in the domestic violence context. *See Daniels*, 2023 WL 5091317 at *20 (Higginson, J., concurring).

3. The issues here are not abstract; this Court's resolution will have a profound impact on life and safety nationwide. A single survivor's experience illustrates this basic point. *See* Ruth M. Glenn, *Everything I Never Dreamed: My Life Surviving and Standing Up to Domestic Violence* (Altria Books ed., 2022). Ms. Glenn's husband abused her for years and had a civil order of protection issued against him on her behalf. Because Section 922(g)(8) was not yet enacted, Ms. Glenn's abuser was able to legally purchase firearms. And guns made his violence even more horrific. He used a gun to threaten Ms. Glenn and their son. When his son's school reported that he was struggling academically, Ms. Glenn's husband "aimed the gun at [her], looked at [their] son, and said, 'If you bring one more F into this house, I'll kill your mother.'" *Id.* at 41. After Ms. Glenn escaped with their son, her husband found her "in the parking garage of [her] apartment complex and abducted [her] at gunpoint," *id.* at 44, holding her hostage for four terrifying hours. Ms. Glenn escaped, but a few months later, her husband found her again, shot her in the head, and left her for dead. *Id.* at 56. Miraculously, Ms. Glenn drove 200 yards for help and survived the attack, *id.* at 58-59—but her abuser fled and escaped police, and Ms. Glenn continued to live in fear for months more until her abuser turned his gun on himself and died by suicide, *id.* at 63.

Section 922(g)(8)—and laws that reinforce its prohibitions—can prevent repetition of these horrific

events. While Ms. Glenn survived her domestic abuser's firearm violence, many others do not. The societal response to this avalanche of violence has been to seek to take firearms out of the hands of abusers before those tragedies occur. Section 922(g)(8) is a critical tool to that end.

This Court should reverse the Fifth Circuit's decision to confirm that society is not powerless to protect itself against senseless violence—and to make clear that "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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