No. 22-915

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

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

BRIEF OF *AMICI CURIAE* PHYLLIS SCHLAFLY EAGLES AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae Phyllis Schlafly Eagles was founded in 2016 as an association to carry on the work of its namesake, who was outspoken against the frequent misuse of restraining orders against husbands and fathers. In her weekly column published 15 years ago, on August 8, 2008, Phyllis Schlafly wrote that:

> Family courts are notorious for issuing restraining orders based on one woman's unsupported request. The New Jersey Law Journal

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amici*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

> reported that an instructor taught judges to be merciless to husbands and fathers ….
>
> People have a better chance to prove their innocence in traffic court than when subjected to a restraining order. Too often, the order serves no legitimate purpose, but is just an easy way for one spouse to get revenge or the upper hand in a divorce or child custody dispute.[2]

Phyllis Schlafly Eagles continues her educational work, political advocacy, and weekly commentaries.

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, and for more than two decades has filed many appellate briefs in federal and state courts. Eagle Forum ELDF has long advocated against the removal of fathers from families based on unjustified restraining orders that are often issued on an ex parte basis. In 2009, Eagle Forum ELDF filed an amicus brief in the New Jersey Supreme Court to argue against the low standard for issuing restraining orders based on alleged domestic violence. *See Crespo v. Crespo*, 201 N.J. 207, 989 A.2d 827 (2010). As Eagle Forum ELDF has argued, these restraining orders are frequently both unjustified and a cause of continuing harm to innocent individuals.

Amici have strong interests in the issues implicated here, to argue against treating restraining orders as presumptively valid and automatic disqualifications of the Second Amendment right to bear arms. U.S. CONST. Amend. II.

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[2] https://www.phyllisschlafly.com/family/one-brave-judge-resists-feminist-agenda-718/ (viewed Oct. 2, 2023).

SUMMARY OF ARGUMENT

Restraining orders have no reliability for criminal law purposes. They are often obtained and used tactically to gain advantage in custody battles and divorces, as many commentators have observed. The notice requirement in 18 U.S.C. § 922(g)(8), without including a knowing waiver of Second Amendment rights, is plainly inadequate to justify waiver or forfeiture of such rights.

Petitioner and its amici rely on statistics that, upon scrutiny, do not support their arguments here. Few victims, if any, are genuinely protected by the federal statutory provision at issue here, and domestic violence charges are commonly over-prosecuted. This case is more political than legal, and the granting of certiorari was unjustified. The writ of certiorari should be dismissed as improvidently granted.

California has not reduced violent crime with its gun control, and the two briefs submitted by California Gov. Gavin Newsom rely on the fallacy that reducing violence by guns reduces overall violence. Guns are primarily used for self-defense and potential victims of violence have a Second Amendment right to acquire and possess guns. Violent crimes in California are increasing as it ratchets up gun control.

ARGUMENT

I. Restraining Orders Are Often Used Tactically to Gain Advantage in Custody Battles and Divorces, and Have No Reliability for Criminal Law Purposes.

It has long been common knowledge that restraining orders are used by lawyers for strategic

advantage, rather than for genuine safety concerns. "Restraining orders … are granted to virtually all who apply …. In many [divorce] cases, allegations of abuse are now used for tactical advantage." Elaine Epstein, "Speaking the Unspeakable," Mass. Bar Ass'n Newsl. at 1 (June-July 1993). Nothing remotely similar to the criminal burden of proof beyond reasonable doubt is required in order to obtain a restraining order.

David Letterman, the late-night television comedian, famously described how a stranger whom he had never met, and who lived thousands of miles away from him, obtained a restraining order against him from a state court. As reported by *CBS News*:

> A state judge granted a temporary restraining order to Colleen Nestler, who alleged in a request filed last Thursday that Letterman has forced her to go bankrupt and caused her "mental cruelty" and "sleep deprivation" since May 1994.
>
> Nestler requested that Letterman, who tapes his show in New York, stay at least 3 yards away and not "think of me, and release me from his mental harassment and hammering."

Associated Press, "Letterman Fights Restraining Order" (Dec. 21, 2005).[3] Letterman had the resources to hire an attorney to litigate and overturn that restraining order, but of course many do not.

A widely cited Illinois Bar Journal article explained that "not all parties to divorce are above using [restraining orders] not for their intended purpose but

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[3] https://www.cbsnews.com/news/letterman-fights-restraining-order/ (viewed Sept. 27, 2023).

solely to gain advantage in a dissolution." Scott A. Lerner, "Sword or Shield? Combating Orders-of-Protection Abuse in Divorce," Ill. State Bar J. (Nov. 2007). "Many divorce lawyers routinely recommend pursuit of civil protection orders for clients in divorce proceedings, either because they assume abused women are not candid about being abused or as a tactical leverage device." Jeannie Suk, "Criminal Law Comes Home," 116 Yale L.J. 2, 62 n.257 (2006) (citing Randy Frances Kandel, "Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation," 48 S.C. L. Rev. 441, 448 (1997)). As another commentator observed:

> protective orders are increasingly being used in family law cases to help one side jockey for an advantage …. While clearly these protective orders are necessary in egregious cases of abuse, it is troubling that they appear to be sought more and more frequently for retaliation and litigation purposes rather than from the true need to be protected from a genuine abusive batterer.

Lynette Berg Robe & Melvyn Jay Ross, "Extending the Impact of Domestic Violence Protective Orders," 27 Fam. L. News, No. 4, at 26-27 (2005).[4]

If a defendant to a restraining order is able to find transportation and time off work to attend a hearing about it – and often a defendant is not – then typically the judicial officer will ask the defendant if he has any

[4] http://www.cafcusa.org/docs/family-law-news_TRO_RO_Pages%2026thru30_Vol27-Number4_2005-1.pdf (viewed Sept. 27, 2023).

objection to voluntarily staying away from the person seeking the restraining order. *Id.* at 27. When he answers "no", the court then routinely enters the restraining order containing sweeping language as submitted by the adversary and for the maximum duration allowed. *Id.*

The federal statute at issue here, 18 U.S.C. § 922(g)(8), merely requires that the defendant to a restraining order "had an opportunity to participate" at a hearing, § 922(g)(8)(A), not that he had sufficient advance notice and actually participated with knowledge of the dire consequences of a waiver. For example, the notice period in New Jersey of "ten days is not enough time to prepare a defense against a charge of domestic violence." David N. Heleniak, "The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act," 57 Rutgers L. Rev. 1009, 1036 (2005).

When a defendant has no notice of an implicit waiver of Second Amendment rights and thus no motivation to contest a restraining order, then he is unlikely to incur the expense and effort to show up at a civil hearing merely to provide his consent. This federal statute does not require notice that consent to the restraining order will constitute a waiver of his Second Amendment rights, but ordinarily any waiver of constitutional rights must be with knowledge in order to be effective. "Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.'" *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (quoting *Brady* v. *United States,* 397 U.S. 742, 748 (1970)).

The notice requirement in Section 922(g)(8) fails to provide the necessary warning: that Second Amendment rights are at stake in a restraining order proceeding. The court below was correct in holding that Section 922(g)(8) is unconstitutional.

II. The Statistical Assertions on which Petitioner and its Amici Rely Are Fallacious and Do Not Support Their Sweeping Arguments about Domestic Violence.

Fallacies pervade the statistical assertions made by Petitioner and its amici, and it would be illogical to repeat and rely on them.

A central false statistical assertion cited by Petitioner's amici is that more than half of the murders of women are by intimate male partners, broadly defined to encompass any current or former male partner including someone that a woman may have merely once dated. California Governor Gavin Newsom, for example, baldly asserts that "[m]ore than half of all female homicide victims are killed by a current or former male intimate partner." (Newsom Pet. Br. 3, citing Ctrs. for Disease Control & Prevention, "Preventing Intimate Partner Violence" (Oct. 11, 2022); cited again twice by Newsom Merits Br. 9 n.4 & 16) But this statistical assertion is false, and the CDC is an agency that researches diseases, not violence. Moreover, the total actual number of such murders is very small compared with other causes of death, in contrast with the impression left by Petitioner's assertion that more than a million domestic violence acts occur each year. (Pet. at 6)

The federal authority on crime statistics is not the CDC but is the Bureau of Justice Statistics, and it

issued a report on this in December 2022. *See* Erica L. Smith (BJS Statistician), "Just the Stats: Female Murder Victims and Victim-Offender Relationship" (2021).[5] Far from the "more than half" claim, the actual percentage is 34%, the total number is relatively small, and this includes murders of women committed by same-sex partners, not only men murdering women:

> Of the estimated 4,970 female victims of murder and nonnegligent manslaughter in 2021, data reported by law enforcement agencies indicate that 34% were killed by an intimate partner.

Id. (illustrating figure omitted). Thus the total such murders by both men and women of a female intimate partner, former and current, is only 1,690 victims annually. That is out of more than 330 million Americans, and to put this in perspective it is less than 5% of the estimated 43,000 women who die annually from alcohol related deaths. *See* National Institute on Alcohol Abuse and Alcoholism, "Alcohol-Related Emergencies and Deaths in the United States" (2023).[6]

The total of 1,690 is actually far smaller for the purposes of the legal issue on appeal here. It is no secret that many murders today are drug-related, and under federal law it is already illegal for a drug user to possess a firearm. According to the federal authority, the Bureau of Justice Statistics, about 48% of men and 65% of women who are arrested and booked

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[5] https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021 (viewed Sept. 30, 2023).

[6] https://tinyurl.com/mrybv729 (viewed Oct. 1, 2023).

for homicide test positive for drugs.[7] It is also already illegal for a felon to possess a firearm, and many murders are committed by felons. How many? More than half of homicides are committed by someone with a prior felony conviction, again according to the Bureau of Justice Statistics.[8]

In addition, not all homicides are committed with a firearm as opposed to other physical means, or by a firearm owned by the perpetrator of the violence. Homicides using guns declined by 6.5% in 2022. *See* Jennifer Mascia, "Gun Deaths Dropped Slightly in 2022 — But Were Still High," The Trace (July 10, 2023).[9] More deaths from guns are suicides than homicides. Taking away a murderer's access to firearms does not prevent him or her from killing another by other means.

Finally, as conceded by Gov. Newsom, one-third to one-half of domestic violence convictions were by assailants who did not have a restraining order against them, so these cases are likewise not part of the relevant issue on appeal here. (Newsom Merits Br. 9 n.4, citing Matthew R. Durose, *et al.*, U.S. Dep't of Just., Bureau of Just. Stat., Family Violence Statistics 64 (2005)). A first-time or one-time domestic violence offender is not prevented from possessing a gun by the statutory provision on appeal here.

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[7] https://bjs.ojp.gov/content/pub/pdf/DRRC.PDF, p. 2, Table 2 (viewed Sept. 26, 2023).

[8] Brian A. Reaves, "Violent Felons in Large Urban Counties" Bureau of Justice Statistics (July 2006) https://bjs.ojp.gov/content/pub/ascii/vfluc.txt (viewed Sept. 26, 2023).

[9] https://tinyurl.com/4tst7be6 (viewed Oct. 1, 2023).

Petitioner misuses statistics by arguing that "[t]ens of millions of Americans will, in the course of their lifetimes, be the victims of intimate-partner abuse." (Pet. Br. 15, inner quotations omitted) That inflated number apparently includes alleged psychological abuse, which can be as trivial as complaining to a partner. Petitioner adds that "the presence of a gun in a house with a domestic abuser increases the risk of homicide sixfold," while citing *United States v. Castleman*, 572 U.S. 157, 160 (2014), but in that same paragraph the Supreme Court revealed that the total number of such homicides is only "hundreds of deaths from domestic violence, each year." *Id.* at 159.

Taking all of the above into consideration – which Petitioner and its amici fail to do – means that the total number of women whose lives might be saved by reversing the decision of the Fifth Circuit is quite small, less than 1% of the 43,000 women who die from alcohol-related deaths. It is far less than the roughly 3,700 people who die annually from unintentional drowning, many of whose lives could be saved if swimming pools were banned.

Despite the potential harm to only about 1 in a million Americans, Petitioner flamboyantly insists that "[a]ll too often, … the only difference between a battered woman and a dead woman is the presence of a gun." (Pet 7, quoting *Castleman*, 572 U.S. at 159-60). In fact, it is not often at all, and is instead exceedingly rare that the presence of a gun makes any significant statistical difference in these situations. Relying on the fallacious "more than half" statistical assertion, California Gov. Gavin Newsom argues that "[t]he Fifth Circuit's decision threatens the lives of countless Americans." (Newsom Pet. Br. at

3) This is political demagoguery, not legal or statistical analysis.

Like swimming pools, gun possession has benefits. Lives are saved by guns used in self-defense, which could be in self-defense by a woman who once had a domestic violence restraining order issued against her. A woman's current partner can properly use a gun to defend against an ex-partner. Gun possession can also provide a sense of security and greater productivity knowing that self-defense is readily available. An automatic ban on gun ownership by those who have been subjected to a restraining order inflicts harm by impeding the right to self-defense, which Petitioner and its amici overlook in their analysis and which the Second Amendment exists to prevent.

More than a million restraining orders are issued annually, which means that more than ten million Americans may have a restraining order on their record.[10] To deny them – and their intimate partners – the benefit of their ability to possess firearms for self-defense and recreation is not justified by the statistics or the inflammatory rhetoric.

III. Domestic Violence Is Over-Prosecuted Against the Wishes of Complainants.

In sharp contrast with common law crime, domestic violence is over-prosecuted, often against the wishes of the complainant. In an estimated 80% of domestic violence cases, the complainant who calls the police

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[10] "Restraining Orders Issued and in Effect in the U.S." https://www.acrosswalls.org/statistics/restraining-orders/ (viewed Oct 1, 2023).

either recants her (or his) allegations or refuses to cooperate with the prosecutor, and yet the prosecutor nevertheless insists on seeking a restraining order anyway. One study explained the reasons for this opposition by the complainant of domestic violence to any prosecution of it:

1. The claimant called the police to stabilize the situation, but did not want the abuser to be arrested.

2. The claimant wants to maintain a relationship with the abuser, believing the aggression was a one-time event and expecting the situation will improve.

3. The claimant was equally involved in or instigated the violence, and does not want this fact to come out in court. One survey of dating couples in the United States found that 70% of all physical abuse was mutual.

4. The allegation is non-meritorious.

Coalition to End Domestic Violence, "Without Restraint: The Use and Abuse of Domestic Restraining Orders," at 2 (2021).[11] *See also* Carolyn N. Ko, "Civil Restraining Orders for Domestic Violence: the Unresolved Question of 'Efficacy,'" 11 S. Cal. Interdis. L.J. 361, 387 (Spring 2002) ("most of the women did not return [to obtain permanent orders] because they were satisfied with the results from the TROs").

Restraining orders and domestic violence prosecutions break up homes that are typically safer than alternatives. Two-thirds of shelters do not allow

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[11] https://endtodv.org/wp-content/uploads/2021/11/Bias-In-The-Judiciary.pdf (viewed Sept. 30, 2023).

women to stay there longer than 60 days.[12] The breaking up of a home by restraining orders and domestic violence prosecutions does not provide a long-term solution. The castle doctrine embodies the legal recognition of the value in maintaining and defending the home. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 888 n.32 (2010) (Stevens, J., dissenting).

Substance abuse, mental illness, or habitual crime is typically the root cause of ongoing domestic violence, and none of these need Section 922(g)(8) to prohibit gun possession in those circumstances. The amicus brief filed here by the AMA *et al.*, for example, consists of one anecdote after another about the misuse of firearms in domestic circumstances, without indicating whether such firearm possession was illegal under the well-established exceptions to the Second Amendment right. The AMA Brief even generally admits that domestic violence is often perpetrated by someone while on drugs. (AMA Br. 10) This Court has recognized that the Second Amendment right does not extend to felons and the mentally ill, and by extrapolation, to habitual drug users:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill ….

District of Columbia v. Heller, 554 U.S. 570, 626 (2008). *See also United States v. Yancey*, 621 F.3d 681,

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[12] National Institute of Justice (Oct. 5, 2009) https://nij.ojp.gov/topics/articles/domestic-violence-shelters-meet-survivors-needs (viewed Oct. 1, 2023).

684 (7th Cir. 2010) ("Keeping guns away from habitual drug abusers is analogous to disarming felons."). Here, Petitioner declares in its first substantive sentence that Respondent Rahimi was a drug dealer. (Pet. at 2) Section 922(g)(8) is unnecessary and unjustified in adding to these exceptions to the Second Amendment right.

IV. There Is No Post-*Bruen* Circuit Split and No Showing of any Significant Benefit from Section 922(g)(8), and Thus This Case Should Be Dismissed Because Certiorari Was Improvidently Granted.

This case is entirely political in a presidential election year. There has not been any showing that the federal statute invalidated below had any significant practical benefits. No post-*Bruen* Circuit split was demonstrated in the government's petition for certiorari here. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). This dispute does not satisfy the ordinary requirements to justify review and resolution by this Court, and for considering a mostly hypothetical Second Amendment issue within a year of a recent major decision on the same amendment.

Section 922(g)(8) is largely superfluous as a practical matter because the government can still prosecute a gun buyer for making a false statement about the issue of domestic violence. "But even if section 922(g)(8) is unconstitutional, the United States contends that whether the defendant was prohibited from possessing a firearm is irrelevant to falsely concealing his status during the acquisition of a firearm under [section] 922(a)(6)." *United States v. Combs*, No. 5:22-136-DCR, 2023 U.S. Dist. LEXIS

17608, at *2 (E.D. Ky. Feb. 2, 2023) (inner quotations omitted). The district court agreed, and struck the count based on Section 922(g)(8) while upholding another count based on the false statement. *See id.* at *2 - *3 (sustaining "the charge contained in Count 2 because knowingly making a false statement to a firearms dealer is independent of, and may be prosecuted separately from, section 922(g)(8)'s constitutional infirmity").

Despite this, the government petitioned here in an expedited manner for certiorari by arguing that "[t]his Court has thus recently and repeatedly reviewed decisions invalidating federal statutes even in the absence of a circuit conflict." (Pet. at 13) Yet the only genuine urgency is political, not legal, and this Court should decline to prematurely decide this contentious issue in the absence of a stronger legal justification for this extraordinary review.

In arguing for a writ of certiorari, Petitioner stated that the decision below "has led to the suspension of criminal prosecutions under Section 922(g)(8) in the nine judicial districts within the Fifth Circuit" (Pet. at 15), but notably omits whether any of those prosecutions are based on only a violation of this particular provision. When no other crimes were committed, a rare federal prosecution of someone based solely on his peaceful possession of a firearm in violation of Section 922(g)(8) hardly seems worthy of demanding expedited attention by the Supreme Court amid many other unresolved issues of far greater significance.

The obvious political motivation for this highly publicized expedited petition should not be overlooked, as President Biden is campaigning for support by

claiming to protect women, while gun owners predominantly support his opponent. Many briefs filed here convert this case into a gender issue, which is a distortion. The Supreme Court should be getting the federal judiciary out of presidential politics rather than biting the bait dangled here by the Biden Administration to decide this wedge issue among voters. There has been no showing that any lives actually hang in the balance here, and at most an unspecified number of prosecutions in merely one judicial circuit have one fewer charge on which to proceed. That hardly justifies this Court issuing a premature decision based on speculation about consequences from the invalidation below of Section 922(g)(8).

Instead, Congress should be given an opportunity to hold hearings, gather facts, and consider whether it would like to revise Section 922(g)(8) to remove its constitutional defects. The briefs filed by Petitioner and its amici are filled with surmise and a misuse of statistics that would be better sorted out in congressional hearings than in an abbreviated oral argument without witnesses before this Court. This issue should also be allowed to percolate in the various Circuits so that this Court can benefit from additional post-*Bruen* decisions, containing far greater constitutional analysis, rather than patching together a divided decision now on the limited record here just in time for the upcoming presidential election.

This writ for certiorari should be dismissed for having been improvidently granted. *See, e.g.*, *Nike, Inc. v. Kasky*, 539 U.S. 654, 658 (2003) (Stevens and Ginsburg, JJ., concurring) ("[T]he reasons for avoiding

the premature adjudication of novel constitutional questions apply with special force to this case.").

V. California Remains High in Violent Crime Despite Its Gun Control.

Two amicus briefs submitted by California Gov. Gavin Newsom, first at the petition and then the merits stages, portray California as a state that has reduced gun violence with gun control. Gov. Newsom argues that:

> California's gun safety laws work. The State's gun-death rate is the 43rd lowest in the country and 39 percent lower than the national average. Californians are 25 percent less likely to die in a mass shooting compared to residents of other States. And since the early 1990s, when some of California's most significant gun safety laws took effect, California has cut its gun death rate by more than half.

(Newsom Merits Br. at 2, footnote omitted). But notably missing from the California Governor's briefs is any mention of its own official California report that violent crime is increasing there amid its gun control. "The 2022 report revealed that the state's violent crime rate increased by 6.1% since 2021, and property crime was up 6.2%." Dan Walters, "Annual crime report shows Californians' fear of increasing crime is justified" (July 9, 2023).[13] As to the crime decline since the early 1990s, that has occurred nationally and is attributed by experts to "various social, economic, and environmental factors, such as

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[13] https://calmatters.org/commentary/2023/07/crime-increase-california-fears-justified/ (viewed Sept. 28, 2023).

growth in income and an aging population." Oliver Roeder, *et al.*, "What Caused the Crime Decline?", National Institute of Corrections (2015).

Guns are possessed and used mostly in self-defense, so restricting guns is likely to increase violent crime and property crime overall, and it has in California. Indeed, California has the 16th highest rate of violent crime in the Nation. *See* Samuel Stebbins, "How the Violent Crime Rate in California Compares to Other States," 24/7 Wall St. (based on 2020 data).[14] California is often compared with Florida, and California's rate of violent crime is substantially higher than Florida's, despite how California is generally wealthier, better educated, and has a lower poverty rate. *See* Tori Gaines, "California vs. Florida: By the Numbers," KRON4 (June 21, 2023).[15]

Banning guns may indeed reduce violence by guns themselves, just as banning swimming pools would reduce drownings in swimming pools. But neither reduces overall harm, which is what matters. Assuming for the sake of argument that the purpose of domestic violence laws, including Section 922(g)(8), is to protect women in particular, many women have had restraining orders against them, and depriving them of their Second Amendment right of self-defense makes them more vulnerable to the high rate of violent crime in California and elsewhere.

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[14] https://247wallst.com/state/how-the-violent-crime-rate-in-california-compares-to-other-states/ (viewed Sept. 28, 2023).

[15] https://tinyurl.com/yfyxt85u (viewed Oct. 1, 2023).

CONCLUSION

The decision below should be affirmed, or the writ of certiorari should be dismissed for having been improvidently granted.

Respectfully submitted,

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