No. 22-915

In the Supreme Court of the United States

United States of America,

Petitioner,

v.

Zackey Rahimi,

Respondent.

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

BRIEF OF AMICI CURIAE LAW ENFORCEMENT GROUPS AND FIREARMS RIGHTS GROUPS IN SUPPORT OF RESPONDENT (AMICI LISTED ON INSIDE COVER)

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The following law enforcement groups and firearms rights groups are amici curiae in this case:

Bridgeville Rifle & Pistol Club
Connecticut Citizens Defense League
Delaware State Sportsmen's Association
Gun Owners Action League (Massachusetts)
Law Enforcement Legal Defense Fund
Maryland State Rifle & Pistol Association
Vermont Federation of Sportsmen's Clubs
Vermont State Rifle & Pistol Association
Virginia Shooting Sports Association
Western States Sheriffs' Association
Women for Gun Rights

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INTEREST OF AMICI CURIAE[1]

The following are state and local groups that promote the shooting sports, provide firearms safety training, educate the public about firearms, and defend Second Amendment rights, including the right of ordinary citizens to lawfully possess firearms for legitimate purposes such as self-defense: Bridgeville Rifle & Pistol Club, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Maryland State Rifle & Pistol Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, Virginia Shooting Sports Association, and Women for Gun Rights.

Western States Sheriffs' Association and Law Enforcement Legal Defense Fund are groups composed of law enforcement officers or that support law enforcement.

All of these groups support the right to keep and bear arms.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is unnecessary to revisit *Bruen* in this case, or to determine whether the Fifth Circuit was correct in holding 18 U.S.C. § 922(g)(8) to be unconstitutional on its face due to the lack of historical analogues for that statute. There is a

[1]No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than amici, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief.

much simpler reason that § 922(g)(8) is unconstitutional. On its face, it deprives individuals who are subject to domestic violence restraining orders of their Second Amendment rights to possess a firearm without due process of law. Part I of this brief focuses on the due process issues. Part II places § 922(g)(8) in perspective, discusses some problems with its practical application, and dispels some misperceptions of how central or important that statute may (or may not) be in the landscape of measures designed to protect vulnerable persons against domestic violence. Although some factual matters are discussed, it is not an attempt to engage in interest balancing, but rather is designed to show that some of the claims made in support of § 922(g)(8)'s importance are misplaced or exaggerated.

Critically, this brief only addresses the federal statute, § 922(g)(8). Everyone agrees that violence within families or by intimate partners is horrific. That doesn't mean, however, that a particular penalty which a federal statute has piggy-backed on top of state domestic violence laws meets the requirements of due process, or is as crucial to protecting family members as its proponents contend.

This brief does not challenge the constitutionality of state DVRO statutes. If the arguments in this brief were to be accepted, it would not eliminate the ability of states to adopt or maintain DVRO laws. In the briefing before this Court, some defenders of § 922(g)(8) contend that the Fifth Circuit's reasoning in this case would result in all state DVRO statutes being found to be unconstitutional. Regardless of whether that contention has any foundation, this

brief addresses only the specific provisions, structure, and language of § 922(g)(8) itself, and thus presents no such risk.

Section 922(g)(8) unquestionably deprives individuals subject to DVROs of their constitutional right and liberty to keep and bear arms. That right is recognized by the operative clause of the Second Amendment. Because the plain text of that amendment covers possession of firearms, the right is presumptively protected by the Second Amendment.

The methodology of *Bruen* does not change the fact that a fundamental constitutional right cannot be abrogated without due process of law. *Bruen* does not address the means used to eliminate or curtail the right of individuals to possess firearms. The due process and Second Amendment inquiries are distinct, and it is possible that a law that does not violate the Second Amendment nevertheless fails to provide due process.

The felon-in-possession statute, § 922(g)(1), likely is not vulnerable to a due process challenge because it is predicated on a prior proceeding that resulted in a criminal conviction, which involves a high level of due process protections. The same cannot be said of § 922(g)(8), which makes only a rudimentary nod toward requiring due process in the proceeding resulting in the issuance of the DVRO.

Besides deprivation of a constitutional right and liberty, § 922(g)(8) also may deprive an individual of property, and even life itself due to an inability to defend one's self against criminal attack. The ordinary person's need for self-defense is not

speculative, but is well-supported by evidence.

Under the three-part *Mathews* framework, this Court balances the individual's interest against the government's interest, and evaluates what procedural protections are necessary or advisable to avoid erroneous deprivations. The government's interest, grounded in the history of firearms regulation, is to prevent a clear threat to public safety or to guard against actual risk or occurrence of physical violence to specific individuals. Section 922(g)(8)(C)(i) requires a finding that the individual who is subject to a DVRO must be a "credible threat to the physical safety of an intimate partner or child." But 922(g)(8)(C)(ii) does not require a finding that the person subject to the DVRO has engaged in physical violence or has threatened to do so. It only requires that the person has been ordered not to break the criminal law. Accordingly, the government's interest will often be completely lacking. The statute is unconstitutional on its face because it requires that individuals be disarmed without any finding that they are dangerous.

The individual's interest is very strong: not being deprived of a fundamental constitutional right. Due process procedural protections are also necessary to guard against erroneous deprivations.

Section 922(g)(8) does not specify the particular procedures that the state must require in issuing a DVRO. Notable among the safeguards that should be required are a high standard of proof, such as the "clear and convincing evidence" standard; the right to counsel; and the right to a live hearing, at which evidence can be proffered, witnesses can be cross-

examined, and other elements necessary to fundamental fairness can be followed.

Contrary to claims that exaggerate its importance, § 922(g)(8) provides little in the way of extra protection against domestic violence. When it was enacted, all 50 states already had DVRO statutes. Section 922(g)(8) increased penalties for violating those statutes, and added the disarmament provision. But state laws do the bulk of the work aimed at preventing domestic violence. The claim that 77,000 NICS denials for DVROs over a period of 25 years is unconvincing in trying to show the value of § 922(g)(8). Many of the people subject to DVROs have never been shown to be violent. NICS is known to have a high rate of "false positives." Most important, if a state law makes it illegal to possess a firearm while a DVRO is in effect, that prohibition can and should be reflected in NICS, which contains disqualifiers based on state law as well as federal law.

As shown in the *Caetano* case, truly violent people will often simply ignore DVROs.

Judge Ho, in his concurrence below, demonstrated that the use of DVROs as tactical devices in divorce and custody cases often results in non-violent individuals having their Second Amendment rights taken away by § 922(g)(8). When mutual restraining orders are used in such cases, a highly perverse result may occur: an innocent, non-violent person may abide by the order and therefore be disarmed, leaving a violent person who disregards the order free to prey on her.

ARGUMENT

I. SECTION 922(g)(8) VIOLATES PROCEDURAL DUE PROCESS.

A. Section 922(g)(8) deprives individuals of liberty and property, and possibly life, without due process of law.

The Fifth Amendment provides that "no person shall be … deprived of life, liberty, or property, without due process of law." There is no question that § 922(g)(8), by making it unlawful for an individual subject to a DVRO to possess any firearms, deprives that person of the constitutionally protected liberty to keep and bear arms. As *Bruen* observed, the "'textual elements' of the Second Amendment's operative clause—'the right of the people to keep and bear Arms, shall not be infringed'—'guarantee the individual right to *possess* and carry weapons in case of confrontation.'" *Bruen*, 142 S.Ct. at 2134 (quoting *Heller*, 554 U.S. at 592). Because the "Second Amendment's plain text covers" the possession of arms, "the Constitution presumptively protects that conduct." *Bruen*, 142 S.Ct. at 2126.

The methodology set forth in *Bruen* does not change the fact that a fundamental constitutional right of an individual cannot be abrogated without due process of law. It could be argued, albeit erroneously, that if under the *Bruen* methodology there were historical analogues that were sufficiently "well-established and representative," *id.* at 2133, to show that disarming persons subject to DVROs is "consistent with the Nation's historical tradition of firearm regulation," *id.* at 2130, then

people subject to DVROs have no Second Amendment rights to possess firearms while the order is in effect, so they are not being deprived of a constitutional right, and no process is due.

Any such argument is fallacious. People start out with a Second Amendment right to possess firearms. The members of "the people" presumptively have that right under the plain text of the Second Amendment. If under a *Bruen* analysis that right may be taken away because there are sufficient historical analogues to establish a tradition of such actions, that is a deprivation of a right that most other Americans continue to enjoy. So the means by which the Second Amendment right is taken away must comport with due process. The *Bruen* methodology tells one only if there is enough historical support to *potentially* justify curtailment of Second Amendment rights. It doesn't determine who possesses the right in the first instance (that is addressed by the plain text), or whether the *means* by which the right is eliminated or curtailed comports with due process. That is because the due process inquiry is distinct from the Second Amendment inquiry, such that it is possible that a law that does not violate the Second Amendment nevertheless fails to provide due process.

An analogy with § 922(g)(1), the felon-in-possession section, is instructive. That federal statute takes away an individual's Second Amendment right to possess a firearm because of a federal or state felony conviction.[2] For both (g)(1)

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[2] The convictions on which a felon-in-possession disqualifier may be based are somewhat different from all felonies

and (g)(8), the deprivation of Second Amendment rights is based on a prior proceeding to which the federal law simply adds a disarmament provision and additional penalties in case of violation. But the law taking away the fundamental right to possess a firearm must ensure that due process was provided in the prior proceeding. For § 922(g)(1), such protections are presumably in place, because a felony criminal prosecution represents the height of due process protections.[3] That cannot be said of § 922(g)(8), which makes only a passing reference, without more, to the DVRO being issued "after a hearing of which such person received actual notice, and at which such person had an opportunity to participate."

That language does makes clear, however, that when Congress passed § 922(g)(8) it believed that due process rights were implicated. See also 18 U.S.C. § 922(g)(9) (prescribing certain due process procedures that must be followed for loss of firearms rights after conviction of a misdemeanor crime of domestic violence).

Besides depriving persons subject to DVROs of their fundamental liberties, section § 922(g)(8) on its face also deprives individuals subject to DVROs of

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generally, and may include some non-felonies; *i.e.*, some state misdemeanors.

[3] This brief does not concede that § 922(g)(1) is constitutional under the Second Amendment as to all of its applications. But for whatever constitutional applications it has, it does not present the same due process issues as § 922(g)(8) because of the greater due process protections inherent in criminal proceedings.

their property in firearms. Because of the statute's complete ban on possession during the pendency of the order, the individual must immediately upon entry of the order divest himself or herself of any firearms already possessed, or be subject to fifteen years' imprisonment and massive fines.

The effect of § 922(g)(8) may even be to deprive the person subject to the DVRO of life itself. *Heller* and *Bruen* both recognized that the Second Amendment protects the "individual right to possess and carry weapons in case of confrontation." *Bruen*, 142 S.Ct. at 2134. Whether inside or outside the home, individuals have the right to possess and carry arms for the purpose "of being armed and ready for offensive or defensive action in a case of conflict with another person." *Bruen*, 142 S.Ct. at 2134 (quoting *Heller*, 554 U.S. at 584). Indeed, self-defense is "the central component of the [Second Amendment] right itself." *Bruen*, 142 S.Ct. at 2135 (quoting *Heller*, 554 U.S. at 599); see also *McDonald v. City of Chicago*, 561 U.S. 742, 767-78 (2010) (demonstrating that the right to keep and bear arms has been considered fundamental throughout our history).

The widespread need by ordinary citizens for armed self-defense to protect their lives is not speculative. The two largest and best designed studies of defensive gun uses (DGUs) have shown that firearms are used for self-defense between 1.7 and 2.5 million times per year.

Criminologists Gary Kleck and Marc Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents

who might misdescribe or misdate a DGU event.[4] Their results indicated between 2.2 and 2.5 million DGUs annually. Kleck & Gertz at 164. The Kleck/Gertz survey found that a large majority of defensive uses (76%) did not involve firing the weapon, but merely displaying it to deter an attacker. Kleck & Gertz at 175.

In 2021, Professor William English of Georgetown University conducted the largest, most sophisticated survey to date.[5] It revealed results of a similar magnitude—an estimated 1.67 million DGUs annually.[6] His findings that in the vast majority of incidents (81.9%) no shot was fired are consistent with Kleck's findings.[7]

Justices Thomas, Alito, and Gorsuch have emphasized the need for armed self-defense by ordinary people who sometimes cannot avoid dangerous circumstances as part of their daily lives. It can literally make the difference between saving lives and losing them. *Peruta v. California*, 137 S.Ct. 1995, 1999-2000 (2017) (Justice Thomas, joined by Justice Gorsuch, dissenting from denial of certiorari) (the Framers "reserved to all Americans the right to

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[4] Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. of Crim. Law and Criminology 150, 185 (Fall 1995).

[5] Justice Alito's concurrence in *Bruen* relied on Professor English's scholarship. See note 1 to his concurrence.

[6] William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 9 (Expanded Report Updated May 13, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494

[7] *Id.*

bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it."); Transcript of Oral Argument, *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843, 66-70 (Nov. 3, 2021) (questions and remarks by Justice Alito).

As discussed below, the common practice by courts of issuing "mutual" restraining orders in divorce cases may cause both an aggressor and an innocent person to be disarmed. That also can lead to deprivation of life, especially given the fact that the innocent party is more likely to obey the order, and the aggressor more likely to ignore it. And, as also shown below, § 922(g)(8) disarms individuals who have not committed or threatened violence.

It is impossible to know how many innocent lives are saved each year by the defensive use of firearms, but given that DGUs extend into the millions, the number is undoubtedly very large. The mandatory disarming of individuals by § 922(g)(8) may literally lead to the ultimate deprivation for which due process is needed, the loss of life.

B. Section 922(g)(8) deprives individuals of the right to keep and bear arms without any finding that he or she poses a danger of physical violence to others.

This Court has noted that:

> [W]e generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework, established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), requires consideration of three distinct factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

Wilkinson v. Austin, 545 U.S. 209 (2005).

In determining the procedural due process protections that are required, then, a court looks at three factors: 1) the plaintiff's interest; 2) the risk of erroneous deprivation because of a lack of procedural safeguards; and 3) the government's interest. All three of these factors demonstrate that the due

process protections afforded by § 922(g)(8) in depriving individuals of their Second Amendment rights are absent or grossly insufficient. The government's interest is discussed first, because it shows the inherent fatal flaws in the statute.

1. Government interest.

The government may not deprive citizens of Second Amendment rights except to vindicate some extremely important interest, grounded in the history of firearms regulation, such as a clear threat to public safety, or an imminent, actual risk or occurrence of physical violence to specific individuals. Even then such a deprivation can only occur if it is consistent with the methodology set forth in *Bruen*, and the means must comport with due process. Amici do not attempt a general formulation of the kinds of threats of violence or violent conduct that might support disarmament, although Justice Barrett's pre-*Bruen* statement in dissent in *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) is probably a good starting place ("the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety"). For the sake of brevity, this concept will be called "dangerousness," although it should be said that only an imminent, concrete, actual threat of physical violence or engaging in physically violent conduct would suffice.

The key fact is that § 922(g)(8) requires disarming individuals who have not been found to be dangerous. Thus, the government interest is not just

attenuated, but in many instances completely absent.

Section (g)(8) prohibits possession of firearms if the restraining order **either** "(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child;" **or** "(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." Only one of these conditions need be met to deprive an individual of his or her Second Amendment rights.

Section 922(g)(8)(C)(i) thus requires a finding of "dangerousness"; namely, that the individual poses a "credible threat to the physical safety of such intimate partner or child."

But (C)(ii) takes away an individual's firearms rights merely because he or she is *restrained* by the DVRO from the "use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." The language of (C)(ii) does not require a finding that the restrained individual has committed any of the enumerated acts, has threatened to commit them, or is likely to commit them. It contains no requirement of dangerousness at all. It allows, and indeed requires, the individual to be disarmed simply because the individual has been restrained from using physical force. The use, attempted use, or threatened use of physical force that would be expected to cause bodily injury, against an intimate partner or child, or against any non-aggressor for that matter, would almost

certainly be a crime under state law. Under (C)(ii) the individual has been ordered only not to violate state criminal law. That does not constitute a finding that the individual restrained is, in fact, dangerous. Thus, § 922(g)(8)(C) is constitutionally defective on its face because it allows—indeed requires if the terms of (C)(ii) are solely relied upon—individuals to be deprived of a fundamental right without a finding that the person poses any danger whatsoever to anyone.

Accordingly, the government interest in disarming those who threaten or commit violence cannot be presumed to be present at all when the express language of the statute is consulted. Section 922(g)(8) does not require that interest to exist in fact.

2. Private interest.

Section 922(g)(8) disarms people who are subject to certain DVROs, and outlaws possession not just outside but also inside the home, "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 629. It causes a direct infringement of the fundamental constitutional right to keep and bear arms. It involves the total loss of that liberty interest, and causes the loss of property if the individual already possesses firearms. It may result in severe bodily injury or even loss of life. Very few private interests are as strong as the need and constitutional right to armed self-defense.

3. Risk of erroneous deprivation.

Section 922(g)(8) presents a high risk of erroneous deprivation of Second Amendment rights unless there are strong due process protections. If §

922(g)(8)(C)(ii) is solely relied on, it will automatically create an erroneous deprivation, by depriving an individual of his or her right to armed self-defense without any supporting governmental interest in preventing highly dangerous people from having firearms. As explained below, even with respect to § 922(g)(8)(C)(i), which does require a finding of dangerousness, the risk of erroneous deprivation is high due to lack of fundamental due process protections.

C. Section 922(g)(8) does not specify the level or elements of due process that must be provided by the state in order for a person subject to a DVRO to lose his or her firearms rights under federal law.

Although § 922(g)(8)(A) requires that the order must have been "issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate," it does not specify any particular due process protections that must be observed for the individual to lose the fundamental right to keep and bear arms. Any kind of hearing seems to suffice. The statute says nothing about the standard of proof that must be satisfied at the hearing. It does not require that counsel must be allowed to represent the person against whom the order is sought, or that counsel must be provided for indigent persons. It does not state that there must be live testimony under oath, or provide for confrontation or the cross-examination of witnesses.

There is nothing in § 922(g)(8) about compulsory process to require witnesses to appear, or to obtain

relevant evidence. So long as there is some kind of "actual notice," it does not even require that the individual be informed in the notice that Second Amendment rights might be lost. Without such protections, individuals can be deprived of a basic constitutional right without elementary protections necessary to ensure fundamental fairness.

1. Standard of proof.

For example, what is the standard of proof that the state must require for the order to issue? Beyond a reasonable doubt? Clear and convincing evidence? A preponderance of the evidence? Good cause? The statute does not say.

State DVRO statutes vary on this point. For example, in California, a protective order shall issue if the judge finds there is "clear and convincing evidence that unlawful harassment exists." Cal. Code of Civ. P § 527.6.[8] In Iowa, the standard of proof is "preponderance of the evidence." Iowa Code § 236.4.1.

In *Addington v. Texas*, 441 U.S. 418 (1979), this Court held that a "clear and convincing evidence" standard, at minimum, must be applied to civil mental health commitments, where the test is whether "the individual is mentally ill and dangerous to either himself or others and in need of confined therapy." *Id.* at 429.

The opinion rejected the "beyond a reasonable doubt" standard, but given the importance of the

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[8] Harassment is broadly defined in California to include, among other things, "unlawful violence" or "a credible threat of violence."

interest in physical freedom, *Addington* held that "clear and convincing evidence" was required. With regard to § 922(g)(8), the deprivation of a fundamental constitutional right requires similar protection, especially when, as in *Addington*, the issue turns on whether an individual is "likely to be dangerous"—a highly subjective and uncertain determination. As noted, § 922(g)(8) does not even require a "dangerousness" determination—a fatal flaw—if the disarmament is imposed because of (C)(ii). But assuming that dangerousness is required, as under (C)(i), the standard of proof should be a high one, and § 922(g)(8) does not require that.

In *United States v. Salerno*, 481 U.S. 739 (1987), this Court upheld a federal statute allowing pre-trial detention without bail provided certain procedural safeguards were met. Again, the test was whether the arrestee, if released, would endanger the "safety of other persons and the community." The judicial officer had to state his findings of fact in writing, and support his conclusion with "clear and convincing evidence." *Id.* at 742.

The need for a "clear and convincing evidence" standard of proof extends outside the context of deprivation of physical liberty, and even to rights that are not expressly enumerated in the Constitution. See, e.g., *Santosky v. Kramer,* 455 U.S. 745 (1982) (termination of parental rights); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (there must be "clear, unequivocal, and convincing" proof in order to deport a person). Surely the abrogation of fundamental Second Amendment rights should require a similar standard of proof, but § 922(g)(8) does not specify any standard at all.

2. Right to counsel.

The right to be represented by counsel at the hearing is necessary for fundamental fairness when an important constitutional liberty is at stake. In some jurisdictions, applications for DVROs are often filed by attorneys from the prosecutor's office, who may appear in court to represent the applicant in court. See Tarrant County Protective Order Questionnaire, https://protectiveorder.tarrantcounty.com/Introduction.aspx. The ordinary lay person is likely to be no match in court for a prosecutor specializing in such matters.

Compare § 922(g)(8) to § 922(g)(9), which outlaws possession by persons convicted of misdemeanor crimes of domestic violence. The definition section of the Gun Control Act provides that a person shall not be considered to have been convicted of a misdemeanor crime of domestic violence unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case." 18 U.S.C. § 921(33)(B)(I)(i). To be disarmed for a misdemeanor crime of domestic violence there must be an actual conviction, with a right to counsel. To be disarmed because of a DVRO, the individual need not be convicted of anything, and § 922(g)(8) does not require that the person have the right to representation by counsel.

Neither does 922(g)(8) require counsel to be appointed when there is, in practice, no ability on the part of the respondent to pay for a private attorney. When the Federal Reserve asked a sample of Americans what was the largest expense they

could cover using only savings, "18 percent said the largest expense they could cover with savings was under $100 and an additional 14 percent said the largest expense they could cover was between $100 and $499." Board of Governors of the Federal Reserve System, Economic Well-Being of U.S. Households in 2022: Fact Sheet, https://www.federalreserve.gov/newsevents/pressreleases/files/other20230522a1.pdf

Again, the right to counsel has been held to apply in contexts other than criminal proceedings. See *Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994) (individuals subject to deportation have right to counsel at hearing).

3. Live hearing.

There is no requirement in § 922(g)(8) that the hearing be an in-person proceeding with the right to confront witnesses, cross-examine them, call witnesses, and introduce evidence into the record. There is also no requirement in the statute that a record be kept, or that an appeal be available.

All of these requirements concern minimizing the risk of erroneous deprivations of Second Amendment rights. In many cases, there may be conflicting stories, and judging the credibility of witnesses may be crucial. A record should be required, findings of fact should be made, and an appeal should be available to correct erroneous decisions or findings.

In the *Salerno* case cited above, pre-trial detention without bail could sometimes be allowed. But here are the due process protections required at the live hearing, as set forth in the federal statute itself:

> [T]he arrestee may request the presence of *counsel* at the detention hearing, he may *testify* and *present witnesses* in his behalf, as well as *proffer evidence*, and he may *cross-examine* other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing . . . and support his conclusion with "*clear and convincing evidence*." . . .
>
> Should a judicial officer order detention, the detainee is entitled to *expedited appellate review* of the detention order.

Salerno, 481 U.S. at 742-43 (emphasis added).

Section 922(g)(8) could have included some real due process protections against taking away Second Amendment rights without any government interest, and with safeguards against erroneous deprivations. But it didn't.

II. SECTION 922(G)(8) ACCOMPLISHES LITTLE AND SUFFERS FROM NUMEROUS PROBLEMS.

A. Petitioner and its amici make exaggerated claims about the effectiveness, centrality, and importance of § 922(g)(8).

Post-*Bruen*, courts are not to engage in "interest balancing," but must instead determine whether a

challenged present-day law is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2130. Many amici supporting Petitioner in this case continue to make arguments regarding the supposed effectiveness of § 922(g)(8), the central role it allegedly plays in protecting victims of domestic violence, and similar public policy balancing test arguments. While this brief does not urge the Court to abandon or modify *Bruen* by engaging in interest balancing, it may be helpful to place § 922(g)(8) in its proper context to see if these often-exaggerated claims are true.

It is important first to note that all 50 states and most territories have DVRO statutes or the equivalent.[9] "Protection order legislation was first implemented in the 1970s, and by 1989 all 50 states and the District of Columbia had enacted statutes providing civil remedies for battered women via protection orders." C. Benitez et al., *Do Protection Orders Protect?,* 38 J. Am. Acad. Psychiatry Law 376 (2010). But few of them make possession of a firearm by an individual subject to a restraining order a criminal offense, as § 922(g)(8) does.[10] It is also

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[9] See Addendum to Br. Of Illinois et al. as Amici Curiae (listing 44 states that "require[] or permit[] courts to impose limits on the ability of individuals subject to a domestic-violence restraining order to purchase, possess, or transport firearms.) The six states not listed in the Addendum are Georgia, Mississippi, Missouri, Nebraska, Oklahoma, and Wyoming.

[10] According to the Tarrant County prosecutor, "36 states, including Texas, and the District of Columbia prohibit the possession of firearms outright or where specific findings are made. And at least nine states criminalize the possession of firearms if an individual is subject to a protective order." Brief of the Tarrant County Criminal District Attorney et al. as

doubtful that very many states allow imposition of a prison sentence of up to 15 years for possession of a firearm while under a DVRO. All that § 922(g)(8) does is piggy-back on existing DVRO laws to increase the penalties for possession above those already imposed by the states, and require persons subject to DVROs to be disarmed, even when there is no finding of dangerousness. Some amici also tout the contention that the statute allows individuals under DVROs to be entered in the NICS database and thereby be prevented from purchasing a gun from a dealer.

But the basics of the DVRO system—the provisions for notice, hearing, protective orders, and the like—are already in place under state law. Far from being an essential and central part of the protections against domestic abuse, § 922(g)(8) is a late and largely superfluous add-on, that does very little by itself to protect intimate partners and family members.

Indeed, § 922(g)(8) has no operation at all unless the individual is *already* subject to a state-issued DVRO. The prohibitions and penalties under § 922(g)(8) are of the same duration as the state DVROs. They may often be shorter because § 922(g)(8) is only triggered by an order issued after a hearing, so *ex parte* state DVROs may add to the time the state prohibitions are in effect.

In addition to state DVRO regimes, there are many other remedies that may be invoked to punish and deter domestic violence. There have always been

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Amici Curiae 16, nn. 19, 20.

general criminal statutes against assault, malicious wounding, homicide, and other violent crimes against the person. Many states have criminal statutes specifically aimed at family or intimate partner violence, including stalking. Some jurisdictions have special units to investigate and prosecute domestic or intrafamily violence. For example, the Brooklyn District Attorney's Office has a Domestic Violence Bureau that "investigates and prosecutes over 10,000 cases of intimate partner violence each year, with criminal charges ranging from misdemeanor assault to homicide." http://www.brooklynda.org/domestic-violence/. That Bureau provides many other support services to individuals who have been or may be the victims of domestic violence. *Id.*

The federal statute thus adds little to the landscape of remedies available to help prevent and prosecute domestic violence, besides overriding state laws that are at the heart of the states' police powers.

One of the amicus briefs supporting the government asserts that 77,283 firearms purchases were denied to persons subject to DVROs between 1998 and July 31, 2023. Brief of Amici Curiae Prosecutor and Law Enforcement Associations and Office 21. That amicus brief contends that "each of the 77,283 times over the last twenty-five years that an individual subject to a DVPO was denied the purchase of a firearm represents a potential life or lives saved." *Id.* But because of (C)(ii), this figure includes persons who have never committed domestic violence, and have never presented a "credible threat" of violence under (C)(i). Oftentimes,

DVROs are issued in connection with divorce or custody proceedings, as described in Part II.B., below, and involve no violence or threat of violence.

Furthermore, NICS denials are known for generating "false positives." Of NICS denials, only about 20% are appealed. John Velleco, FBI Admits It Is Often Wrong On Gun Related Background Check Denials, Ammoland (Nov. 12, 2021) https://www.ammoland.com/2021/11/fbi-admits-wrong-gun-background-check-denials/#ixzz8EI5lI0sj Of these, the FBI admits that "27.7 percent of [NICS] appeals received during the requested time period were overturned and the firearm purchase/transfer transactions" were allowed to proceed. *Id.* If the 27.7 error rate is representative of all denials, including for DVROs, then of those 77,283 denials there were 21,407 "false positives."

Perhaps most important, if a state law makes it illegal to possess a firearm while subject to a DVRO, that prohibition can and should be contained in NICS. NICS allows the transfer from a licensed dealer to take place if the system "has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section, *or State, local, or Tribal law.*" 18 U.S.C. § 922(t). See also the NICS regulations, containing five references to whether transfer of a firearm would violate "federal or state law." 28 C.F.R. § 25.2.

In most states, NICS checks apply only to transfers by licensed dealers, so they don't really prevent a determined abuser from buying a gun even though subject to a DVRO.

Attempts to disarm truly dangerous people by

legal restrictions will often fail, because such persons frequently will simply ignore the restriction. The great 18th century criminologist Cesare Beccaria classed disarmament laws as embodying a "false idea of utility." He disparaged "laws that forbid the carrying of arms" because they "disarm those only who are neither inclined nor determined to commit crimes" such as innocent spouses disarmed by mutual restraining orders. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1764) (quoted in Mark W. Smith, *Enlightenment Thinker Cesare Beccaria and His Influence on the Founders: Understanding the Meaning and Purpose of the Second Amendment's Right to Keep and Bear Arms*, 2020 Pepp. L. Rev. 71, 83 (2020)). As to the actual aggressors, he asked "Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary [laws], which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty….?"[11]

The unwisdom of a law criminalizing the possession of a stun gun by a female victim who had obtained multiple protective orders against a violent ex-boyfriend was demonstrated by the facts in *Caetano v. Massachusetts*, 577 U.S. 411 (2016). The ex-boyfriend ignored the protective orders, but as he

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[11] Beccaria's work on crime and punishment was well-known to the Founders, and influential on their thought. "Thomas Jefferson and John Adams were so taken by On Crimes and Punishments that they each copied passages longhand into their own commonplace books or diaries." Smith, Enlightenment Thinker Cesare Beccaria, *supra*, at 75.

was threatening her outside her workplace, Jaime Caetano drove him away by displaying the stun gun and warning she would use it on him. Some women under mutual restraining orders adhere to the terms of those orders, and are not so lucky.

Although protection order violation rates vary considerably across studies, some report violation rates as high as 81.3 percent. Benitez, *Do Protection Orders Protect?* at 381. As Judge Ho observed in his Fifth Circuit concurrence, "After all, anyone who's willing to break the law when it comes to domestic violence is presumably willing to break the law when it comes to guns as well."

Thus, § 922(g)(8) is of highly questionable value in preventing domestic violence. It does, however, have its undoubted downsides.

B. The use of DVROs as tactical weapons in divorce and child custody matters exacerbates the problem of individuals who are not dangerous being denied their Second Amendment rights through § 922(g)(8).

Judge Ho's concurrence below demonstrates concretely how individuals can lose their right to keep and bear arms by the loose drafting of § 922(g)(8).

He notes that DVROs are "too often misused as a tactical device in divorce proceedings—and issued without any actual threat of danger. That makes it difficult to justify § 922(g)(8) as a measure to disarm dangerous individuals." Pet. App. 36a. As described above, § 922(g)(8)(C)(ii) does not require any showing of dangerousness or threats of violence, but deprives individuals subject to DVROs of their Second

Amendment rights anyway.

Such orders, he notes, can help a party in a divorce proceeding to "secure [favorable] rulings on critical issues such as [marital and child] support, exclusion from marital residence and property disposition." (quoting *Murray v. Murray,* 267 N.J.Super. 406, 631 A.2d 984, 986 (1993)). Protective orders can also be "a powerful strategic tool in custody disputes." [citation omitted]. Pet. App. 37a.

Judge Ho points out that "Family court judges may face enormous pressure to grant civil protective orders—and no incentive to deny them." He quotes one judge as stating that "If there is any doubt in your mind about what to do, you should issue the restraining order." As a result, "[r]estraining orders ... are granted to virtually all who apply." (quoting *City of Seattle v. May,* 171 Wash.2d 847, 256 P.3d 1161, 1166 n.1 (2011) (Sanders, J., dissenting)). Pet. App. 38a-39a.

"The consequences of disarming citizens under § 922(g)(8) may be especially perverse considering the common practice of 'mutual' protective orders," he observes. "In any domestic violence dispute, a judge may see no downside in forbidding both parties from harming one another," which is the precise situation that draws a DVRO into § 922(g)(8)(C)(ii)'s dragnet. Pet. App. 39a.

The result, Judge Ho argues, "is profoundly perverse, because it means that § 922(g)(8) effectively disarms victims of domestic violence. What's worse, victims of domestic violence may even be put in greater danger than before. Abusers may know or assume that their victims are law-abiding

citizens who will comply with their legal obligation not to arm themselves in self-defense due to § 922(g)(8). . . . Meanwhile, the abusers are criminals who have already demonstrated that they have zero propensity to obey the dictates of criminal statutes. As a result, § 922(g)(8) effectively empowers and enables abusers by guaranteeing that their victims will be unable to fight back." Pet. App. 40a-41a.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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