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* William English, Ph.D. and Citizens Committee for the Right to Keep and Bear Arms in Support of Respondent

Craig L. Uhrich
Counsel of Record
Serge Krimnus
Bochner PLLC
1040 Avenue of the Americas
15th Floor
New York, New York 10018
(646) 971-0685
craig@bochner.law

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. There is No Compelling Evidence That § 922(g)(8) Advances Public Safety When All of Its Effects are Considered 3

II. The Protective Order Process is Widely Used and Abused, Resulting in a Large Number of False Orders Wrongly Depriving the Accused of Their Second Amendment Rights 6

III. The Evidence that § 922(g)(8) is Effective in Lowering Domestic Violence Homicide is Weak 14

IV. Depriving a Class of Citizens of Rights Based on Group Characteristics that are Not a Product of Due Process is Legally Perilous 21

V. There Are Effective Alternatives for Protecting Public Safety that Are Constitutionally Permissible and Respect Second Amendment Rights and Due Process 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Caetano v. Massachusetts,
577 U.S. 411 (2016) 9

New York State Rifle & Pistol Association, Inc. v. Bruen,
142 S. Ct. 2111 (2022) 1, 2, 3, 5

United States v. Rahimi,
61 F.4th 443 (5th Cir. 2023) 3

STATUTES

18 U.S.C. § 922(g)(8) 3, 4, 5, 8, 10, 13, 14, 18, 19, 24, 25

OTHER AUTHORITIES

C. H. Achen, *Why Lagged Dependent Variables Can Suppress the Explanatory Power of Other Independent Variables* (2001) 18

Christine Agnew-Brune et al., *Domestic Violence Protective Orders : A Qualitative Examination of Judges' Decision-Making Process*, 32 J. Interpersonal Violence *32* (13), https://journals.sagepub.com/doi/full/10.1177/0886260515590126 . . . . . 12, 13

Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler, Ziming Xuan, Sandro Galea, et al. *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, ANNALS OF INTERNAL MEDICINE 167(8):536-43 (Oct. 17, 2017) 9, 10, 18, 19

John J. Donohue, *Some Perspective on Crime and Criminal Justice Policy*, *in* The Crime Conundrum: Essays on Criminal Justice (Lawrence M. Friedman & George Fisher, eds. 2019) 21

William English, 2021 NATIONAL FIREARMS SURVEY (July 14, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887145. . . . . 1, 4, 12

Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in US Homicide, 1976–2017,* VIOLENCE AND GENDER 6.1:27-36 (2019). 7

Denise Hines, *Expert Addresses Common Misconceptions About Men Who Experience Intimate Partner Violence* (Apr. 19, 2022) (available at https://www.gmu.edu/news/2022-04/expert-addresses-common-misconceptions-about-men-who-experience-intimate-partner) . 11

Denise A. Hines, Emily M. Douglas, and Joshua L. Berger, *A Self Report Measure of Legal and Administrative Aggression Within Intimate Relationships,* AGGRESSIVE BEHAVIOR 41, no. 4 (2015). 11

Randy F. 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 (1997) 10

Aaron J. Kivisto and Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, J. AM. ACAD. PSYCHIATRY L., 48.1:26-34 (2020) 7

Gary Kleck, *What Do CDC's Surveys Say About the Prevalence of Defensive Gun Use?*, AM. J. CRIMINAL JUSTICE, 46.3 (2021). 12

Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors*, and Judges, NIJ Special Report (June 2009) (available at https://www.ojp.gov/pdffiles1/nij/225722.pdf) 4, 5, 21

V. H. Lyons, A. Adhia, C. Moe, M. A. Kernic, A. Rowhani-Rahbar, F. P. Rivara, *Firearms & Protective Orders in Intimate Partner Homicides*, J. FAM. VIOL. 36 (2021) 7

Yoav Mazeh & Martin Widrig, *The Rate of False Allegations of Partner Violence*, JOURNAL OF FAMILY VIOLENCE 31, no. 8 (2016) 11

Protection from Abuse (PFA) Caseload, at https://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/protection-from-abuse 13

RAND, *Effects of Prohibitions Associated with Domestic Violence on Violent Crime* (Updated Jan. 10, 2023) (available at https://www.rand.org/research/gun-policy/analysis/domestic-violence-prohibitions/violent-crime.html 15

Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship*, (2021). 7

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 PEPPERDINE L. REV. 71 (2020) 8

Susan B. Sorenson & Haikang Shen, *Restraining Orders in California: A look at Statewide Data*, VIOLENCE AGAINST WOMEN 11.7:912-33 (2005) . . 6

Rebecca Stewart, *Survey: Over 20 Million Have Been Falsely Accused of Abuse*, CENTER FOR PROSECUTOR INTEGRITY (Dec. 17, 2020) (available at https://www.prosecutorintegrity.org/pr/survey-over-20-million-have-been-falsely-accused-of-abuse/) 12

Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey*, NCJ 181867 (July 2000) (available at https://www.ojp.gov/pdffiles1/nij/181867.pdf) 6

Elizabeth Richardson Vigdor and James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, EVALUATION REVIEW 30, no. 3 (2006) 9, 17, 18

Katherine A. Vittes & Susan B. Sorenson, *Restraining Orders Among Victims of Intimate Partner Homicide*, INJURY PREVENTION 14.3:191-95 (2008) 7

https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fmvvor21.pdf 8

https://academic.oup.com/aje/article/187/11/2491/5154820 *Retraction: Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and their Associations with Intimate Partner Homicide*, AM. J. EPIDEMIOLOGY, Vol. 187, Iss. 11 (Nov. 2018), https://doi.org/10.1093/aje/kwy169 16

https://bjs.ojp.gov/content/pub/pdf/ipv.pdf 8, 9

https://www.cdc.gov/drowning/facts/index.html . . . 10

https://www.ojp.gov/pdffiles/fs000191.pdf. 23

https://www.ojp.gov/pdffiles1/nij/225722.pdf 24

https://www.wusa9.com/article/news/verify/verify-homicide-suspects-prior-arrests/65-a66c3b04-a303-4b33-90b1-f94f698e1492 24

INTEREST OF *AMICI CURIAE*[1]

William English, Ph.D. ("English") is a political economist and Assistant Professor of Strategy, Economics, Ethics, and Public Policy at the McDonough School of Business, Georgetown University, where he has taught since 2016. He received his Ph.D. from Duke University and held teaching and research positions at Brown University and Harvard University before joining the faculty of Georgetown. In 2021, English conducted the largest-ever nationally representative survey of firearms owners, which estimated how frequently firearms are used for self-defense. *See* William English, 2021 NATIONAL FIREARMS SURVEY (July 14, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887145 (the "English Survey"). The National Firearms Survey was also the subject of an amicus brief submitted in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). As a scholar committed to data driven firearms policy research, English has an interest in ensuring the Court's accurate understanding of social science research concerning (a) the net costs and benefits of firearms prohibitions linked to allegations of domestic abuse, and (b) the risks arising from the denial of constitutional rights to those who have been wrongfully accused of domestic violence without due process.

---

[1] No counsel for any party authored this brief in whole or in part. Only *amici curiae* funded its preparation and submission.

Citizens Committee for the Right to Keep and Bear Arms ("CCRKBA") is a non-profit membership organization whose purpose is to educate Americans to help them understand the importance of the Second Amendment and its role in keeping Americans free. CCRKBA has a special interest in this case because many American firearms owners are subject to, or threatened with, civil restraining orders that deny them their fundamental constitutional right to keep and bear arms, in a manner that ignores basic facts about such civil restraining orders and that is not supported by "the Second Amendment's text, as informed by history," as required by this Court's jurisprudence. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

SUMMARY OF ARGUMENT

Domestic Violence Restraining Orders ("DVROs"), such as the one at issue in the case below, are a relatively recent addition to the American legal landscape. The standards for obtaining DVROs vary by jurisdiction, and multiple studies have shown that such orders are widely abused, often in an effort by a party to obtain a tactical advantage during divorce and child custody cases. Though DVROs are often part of the legal process in such cases, the empirical evidence that restrictions on firearms ownership accompanying such orders are effective at preventing domestic violence is weak.

This brief explores the statistical and sociological basis for rejecting the denial of fundamental constitutional rights to individuals who may be the subject of a DVRO. The restriction of firearms

ownership under § 922(g)(8) lacks a compelling empirical justification when all costs and benefits are taken into account.

ARGUMENT

I. There is No Compelling Evidence That § 922(g)(8) Advances Public Safety When All of Its Effects are Considered

The analysis of this case is relatively straight forward under this Court's jurisprudence. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). As the Fifth Circuit rightly concluded, "§ 922(g)(8)'s ban on possession of firearms is an 'outlier [] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023). As such, it is not "consistent with the Nation's historical tradition of firearm regulation" in the manner required by *Bruen*. That should be the end of the case, since under *Bruen* interest-balancing is not supposed to play a role in Second Amendment jurisprudence. Petitioner and its *amici* nevertheless invoke social science in defense of § 922(g)(8), but even if this were relevant (and it is not), social science does not demonstrate that the law entails net gains for public safety.

Here, a number of amicus briefs submitted on behalf of Petitioner advance arguments regarding the putative societal benefits of § 922(g)(8). Upon scrutiny, however, these arguments and the empirical evidence they cite are not compelling, and § 922(g)(8) is not sufficiently justified even from a basic public policy perspective.

The evidence that § 922(g)(8) is effective in substantially reducing domestic firearms violence in practice is weak. In contrast, there is strong evidence that the underlying civil protection orders, which trigger § 922(g)(8), are widely used and abused in relationship disputes, and the net effect of current practice is that millions of innocent, law-abiding citizens have been deprived of their Second Amendment rights without due process. The consequence to Americans who lose their right to keep and bear arms, even for a short period, is not inconsequential. This is especially true given that 31.1% of firearm owners have defended themselves or their property through the discharge, display, or mention of a firearm (excluding military service, police work, or work as a security guard). As documented in the National Firearms Survey, this averages out to approximately 1.67 million defensive gun use incidents per year; thus, the denial of Second Amendment rights comes with grave risks both to individuals and to public safety. *See* William English, 2021 NATIONAL FIREARMS SURVEY (July 14, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887145 at 1, 10). Put simply, guns save many lives each year, and gun owners falsely accused under § 922(g)(8) are themselves placed in danger when the law deprives them of the ability to defend themselves.

It is a statistical truism that we should expect to find more violent incidents among those issued protective orders as a class compared to the rest of the population, in part because over 80% of protective orders are issued against men, and men are more violent than women. *See* Andrew R. Klein, *Practical*

Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges, NIJ SPECIAL REPORT, at 15 (June 2009) (available at https://www.ojp.gov/pdffiles1/nij/225722.pdf). Such facts notwithstanding, blanket deprivation of constitutional rights for classes of people based on statistical properties of those classes as a whole would have repugnant legal implications, which courts have roundly rejected. Rather, for the vast majority of citizens, firearms are life saving devices and they should not be readily removed without the sorts of robust due process and other protections we see in involuntary civil commitments and imprisonment.

Finally, however, this does not mean that the government is powerless to stop those who threaten others with grave harm. It only means that government must use clearly defined law and due process to accomplish its objective. Laws can be structured in ways that allow targeted criminal prosecutions to be used against intimate partners who issue genuine threats of violence, or in ways that allow targeted involuntary civil commitments against those who are adjudicated to pose a physical threat to themselves or others due to mental illness, all with the accused having access to robust due process. Ultimately, if an aggressor is indeed too dangerous to be in society with a firearm, then he or she is too dangerous to be in society.

Not only is § 922(g)(8) unconstitutional based on the clear standards established by *Bruen*, it is also poor public policy, prone to gross abuse with meager evidence of efficacy, while alternative approaches could

address the underlying social concerns consistent with due process. For all these reasons, this Court should rule that the statute is unconstitutional.

II. The Protective Order Process is Widely Used and Abused, Resulting in a Large Number of False Orders Wrongly Depriving the Accused of Their Second Amendment Rights

According to the National Violence Against Women ("NVAW") Survey conducted by the National Institute of Justice and the Centers for Disease Control and Prevention, over 1.1 million protective or restraining orders are sought against intimate partners on an annual basis. *See* Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey*, NCJ 181867 at 54 (July 2000) (available at https://www.ojp.gov/pdffiles1/nij/181867.pdf). A separate study of the California system by Sorenson and Shen documented that the state maintained 882.2 restraining orders for every 100,000 adults in California and estimated that 84.2% to 92.4% were for domestic violence. *See* Susan B. Sorenson & Haikang Shen, *Restraining Orders in California: A look at Statewide Data*, VIOLENCE AGAINST WOMEN 11.7:912-33, at 919, 922 (2005). If national rates are on par with California's rates, this would imply over two million active protective orders for alleged domestic violence nationwide.

Compare these numbers to the actual incidents of domestic partner homicide. In the last decade these have fluctuated between approximately 1,800 and

2,800 annually. *See* Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in US Homicide, 1976–2017,* VIOLENCE AND GENDER 6.1:27-36 (2019); Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship*, (2021). Studies have consistently found, however, that for the vast majority (between 89-95%) of intimate partner homicides, no protective order had been issued. *See* Katherine A. Vittes & Susan B. Sorenson, *Restraining Orders Among Victims of Intimate Partner Homicide*, INJURY PREVENTION 14.3:191-95 (2008); V. H. Lyons, A. Adhia, C. Moe, M. A. Kernic, A. Rowhani-Rahbar, F. P. Rivara, *Firearms & Protective Orders in Intimate Partner Homicides*, J. FAM. VIOL. 36, 587–96 (2021). Furthermore, firearms are only used in approximately half of intimate partner homicides. *See* Aaron J. Kivisto and Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, J. AM. ACAD. PSYCHIATRY L., 48.1:26-34 (2020). Taken together this suggests that there are only approximately 150 (3,000 x 0.10 x 0.5) intimate partner homicides each year involving firearms for which a protective order was issued, in a country where approximately two million people are subject to protective orders related to domestic violence. Thus, while 0.0075% of those with protective orders go on to commit homicide with a firearm, 99.9925% do not.

At first glance, this might be taken as evidence for the resounding success of protective orders if one believes that they are holding millions of otherwise violent offenders at bay. But no one on any side of this debate seriously believes that—nor does it withstand empirical scrutiny. In 2021 approximately 1,690

females were killed by an intimate partner *See* https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fmvvor21.pdf. In the 17 years before § 922(g)(8) went into effect (1976-1993), this number was slightly lower, fluctuating between 1,300 and 1,600 deaths of females killed by an intimate partner annually for most years. *See* https://bjs.ojp.gov/content/pub/pdf/ipv.pdf.

Unfortunately, the restraining order process suffers from a logic explored by the pro-criminologist and enlightenment social thinker Cesare Beccaria, whose writings influenced the framers of the U.S. Constitution. As Beccaria wrote in his treatise On Crimes and Punishments:

> laws that forbid the carrying of arms . . . disarm those only who are neither inclined nor determined to commit crimes. 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 . . . . Such laws make things worse for the assaulted and better for the assailants.

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 PEPPERDINE L. REV. 71 at 83 (2020).

Put simply, restraining orders should be most effective in restraining the already-law abiding, but those are not the people who need to be restrained. Conversely, restraining orders offer little impediment to those who are intent on inflicting grave violence, which in itself is a gross violation of law. Indeed, the failure of restraining orders to restrain has been a feature of prior prominent cases before this Court. *See*, *e.g.*, *Caetano v. Massachusetts*, 577 U.S. 411, 412-13 (2016).

The shifts in intimate partner homicide in recent decades have taken place in the context of other social developments. First, there was a long-term secular decline in male victims of intimate partner homicides, which started in the early 1980s. *See* https://bjs.ojp.gov/content/pub/pdf/ipv.pdf. Second, intimate partner homicides followed other trends in crime over the last three decades, falling in the late 1990s and 2000s before ticking up in recent years. *See* Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler, Ziming Xuan, Sandro Galea, *et al.*, *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015,* ANNALS OF INTERNAL MEDICINE 167(8):536-43 (Oct. 17, 2017); Elizabeth Richardson Vigdor and James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, EVALUATION REVIEW 30, no. 3 at 313-46 (2006). The econometric question that most studies of the effects of these laws examine is whether homicide decreased marginally faster in states that mirrored federal law in local law.

From a macro perspective, intimate partner homicide appears largely to be a function of broader crime fighting efforts in society. Even the most optimistic study of the effects of laws like § 922(g)(8) estimates that, if indeed they had independent causal influence, their full-scale adoption and enforcement could prevent some 120 deaths a year. *See* Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler, Ziming Xuan, Sandro Galea, et al. *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, ANNALS OF INTERNAL MEDICINE, 167(8):536-43 (Oct. 17, 2017). Weaknesses in this literature are examined below, but the magnitude of even these highest estimates is low. Considering that, for example, 4,000 persons die of unintentional drownings each year (*see* https://www.cdc.gov/drowning/facts/index.html) and we still permit recreational swimming, we must evaluate the putative and likely benefits of these laws in the context of their costs for the millions of people subject to them who are not violent.

The problem is that protective orders can be obtained under false or trivial pretenses, and there are systematic pressures to do so for strategic purposes within romantic and marital disputes. This phenomenon has been described in detail in ethnographic research. See Randy F. 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 (1997). Although documenting its prevalence at scale is

methodologically challenging, a number of studies using different methods have found evidence that unsubstantiated protective orders are sought and obtained at high rates.

For example, Hines, Douglas, and Berger (2014) found that "threats to make false accusations are common in situations where women perpetrate violence against men. 73% of men who experienced female-perpetrated violence reported that their partner threatened to make false accusations." *See* Denise A. Hines, Emily M. Douglas, and Joshua L. Berger, *A Self Report Measure of Legal and Administrative Aggression Within Intimate Relationships,* AGGRESSIVE BEHAVIOR 41, no. 4 at 295-309 (2015); Denise Hines, *Expert Addresses Common Misconceptions About Men Who Experience Intimate Partner Violence* (Apr. 19, 2022) (available at https://www.gmu.edu/news/2022-04/expert-addresses-common-misconceptions-about-men-who-experience-intimate-partner).

Mazeh and Widrig note that "Shaffer and Bala (2003) examined the outcome of legal proceedings involving allegation of PV [Partner Violence]. Their findings were that 26% of the allegations were found to be either false or unsubstantiated." Yoav Mazeh & Martin Widrig, *The Rate of False Allegations of Partner Violence*, JOURNAL OF FAMILY VIOLENCE 31, no. 8 at 1035-37 (2016). In a more in-depth study of subjects referred from family courts in San Francisco Bay Area counties, 50% of the domestic violence accusations against mothers and 25% against fathers were found to be unsubstantiated. *Id.* at 1036.

A national survey conducted by the professional survey firm YouGov found that 8% of respondents representing 20.4 million adults "report being falsely accused of domestic violence, child abuse, sexual assault, or other forms of abuse." Moreover, 17% of respondents indicated that they have known someone falsely accused of domestic violence in particular. Rebecca Stewart, *Survey: Over 20 Million Have Been Falsely Accused of Abuse*, CENTER FOR PROSECUTOR INTEGRITY (Dec. 17, 2020) (available at https://www.prosecutorintegrity.org/pr/survey-over-20-million-have-been-falsely-accused-of-abuse/).

The scale of such false or trivial accusations is striking because it effectively means that millions of innocent accused can potentially be denied Second Amendment rights, which are rights that research has consistently shown are vital for self-defense. *See* Gary Kleck, *What Do CDC's Surveys Say About the Prevalence of Defensive Gun Use?*, AM. J. CRIMINAL JUSTICE, 46.3 at 401-21 (2021); English Survey, at 10.

This presents a genuine dilemma for judges who must make rulings based on sparse evidence that can have drastic ramifications for those who have protective orders issued against them. A study of North Carolina District Court judges who rule on domestic violence protective orders found that 75% "worried that the complaint may be false and in turn place an undue burden on the defendant or that issuing the order poses a serious threat to the livelihood of the defendant." Christine Agnew-Brune et al., *Domestic Violence Protective Orders : A Qualitative Examination of Judges' Decision-Making Process* , 32 J.

INTERPERSONAL VIOLENCE *32*(13), at 1933. https://journals.sagepub.com/doi/full/10.1177/0886260515590126.

Some states have more stringent standards for issuing protective orders and collect data in a manner that can be helpful for evaluating the quality of complaints. Pennsylvania, for example, issues "Protection from Abuse" orders (PFA's), which are a special type of restraining order available only to victims of alleged domestic violence. Of the 40,615 PFA cases processed in 2022, only 18% were ultimately granted, while 21% were withdrawn by the complainant and for another 26% of cases the complainant did not appear. *See* Protection from Abuse (PFA) Caseload, at https://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/protection-from-abuse.

Briefs for Petitioner argue that there are heightened standards for when § 922(g)(8) applies, noting that accusations must include "credible" determinations of threat, and that defendants must be provided a "notice and a hearing." On the other hand, if a large number of false or trivial complaints are filed, this places a considerable burden upon the innocent who then must defend themselves at great personal expense in terms of time and finances. Moreover, there are generally no consequences for complainants who file applications for orders under false or trivial pretenses.

If the main consequence of domestic violence protection orders is that the accused must avoid contact with the accuser, a large number of "false

positives" may be tolerable from a social cost benefit analysis. But when protective orders deprive the accused of fundamental Second Amendment rights and expropriate property without robust due process, a large number of false positives becomes a much graver concern.

In light of this concern, it is worth further considering how strong the evidence is that such protective orders have a substantive effect on public safety, what legal standards such blanket deprivations of rights for safety purposes would imply, and whether there are alternatives that can address the same concerns consistent with due process.

III. The Evidence that § 922(g)(8) is Effective in Lowering Domestic Violence Homicide is Weak

It is difficult to evaluate the impact of § 922(g)(8) econometrically because the law went into effect nationally in a manner that affected all jurisdictions simultaneously and at the same time a wide range of other crime fighting measures were implemented as part of the 1994 Crime Bill. Nearly all studies of the effects of restricting those with domestic violence restraining orders from possessing firearms examine later state laws that mirror the federal law with varying levels of enforcement. A serious methodological challenge with this approach is that the federal law was in effect in all states including those states that are supposed to function as "controls" to be contrasted with those states that had mirrored federal law in state law.

A recent RAND Report summarizes the literature concerning the "Effects of Prohibitions Associated with Domestic Violence on Violent Crime" as follows:

> Four studies estimated the relationship of state DVRO-related prohibitions with intimate partner homicide rates. Three of these studies found that state firearm prohibitions related to DVROs resulted in significantly lower rates of total and firearm-related intimate partner homicide (Zeoli et al., 2018; Zeoli and Webster, 2010; Vigdor and Mercy, 2006). One study, which stratified the DVRO policy by whether firearm relinquishment was required, found that these negative relationships were significant when relinquishment was required but were negative and suggestive without required relinquishment (Díez et al., 2017). These four studies drew on substantially similar data sets with largely overlapping time periods. Considering these results, we find *moderate evidence that state laws establishing firearm prohibitions for individuals subject to DVROs reduce total and firearm-related intimate partner homicides*.

RAND, *Effects of Prohibitions Associated with Domestic Violence on Violent Crime* (updated Jan. 10, 2023) (available at https://www.rand.org/research/gun-policy/analysis/domestic-violence-prohibitions/violent-crime.html.

This rating of only a "moderate" finding of evidence in favor of benefits from domestic violence restraining orders based on these four studies is itself

questionable, as these studies have weaknesses, and this literature is still in need of research that examines the effects of federal and state laws together.

First, it is important to note that one of the four studies that RAND's review relies on (Zeoli, *et al.*, 2018) has been retracted, as the authors later reported that they "learned that there were errors in the implementation dates of some of the laws we studied." In the retraction the authors assert that updated analysis still suggests that certain sorts of DVROs do have statistical associations with lower homicide rates, but the robustness of these findings and the particular coding changes that produced them are not clear from the brief paragraph announcing the retraction. It is also not clear what circumstances brought these errors in coding to the authors' attention, but the retraction speaks to the genuine challenges of doing this sort of research well, which involves many moving parts and assumptions, small changes of which can produce large shifts in results. *See* https://academic.oup.com/aje/article/187/11/2491/5154820 *Retraction: Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and their Associations with Intimate Partner Homicide*, AM. J. EPIDEMIOLOGY, Vol. 187, Iss. 11, at 2491 (Nov. 2018), https://doi.org/10.1093/aje/kwy169.

The RAND reviewers also found "significant methodological concerns" with the analysis of Zeoli and Webster (2010), as indicated by the unfilled circle reporting results in the RAND summary of "Incidence Rate Ratios Associated with the Effect of Domestic Violence–Related Prohibitions on Violent Crime."

The Vigdor and Mercy (2006) study only examined data until 2002 and excluded four states and DC because of data availability issues. Their models include a long list of control variables and employed log transformations of most continuous variables to improve the fit of the model. It would have been helpful for the authors to report the influence of these covariates and test the robustness of their findings with reference to changes in covariate inclusion. The study also tested multiple different hypotheses categorizing state laws in at least eight different ways, which can inflate the likelihood of finding a false positive association by chance. Finally, the authors noted a serious methodological challenge for their research and research like it, concerning potential confounding due to the effects of other domestic violence prevention measures that states passed at the same time they enhanced firearms restrictions:

> It also is possible that our measure of the restraining order laws is actually capturing the effect of other state legislation designed to reduce domestic violence. For example, Dugan, Nagin, and Rosenfeld (1999) found that the availability of hotlines and legal services had "a statistically stable and negative impact on the rate at which wives murder their husbands" in the 29 large cities they studied. If states are passing comprehensive domestic violence legislation that includes funding for these programs as well as restraining order laws, it would not be possible to distinguish between the effect of the firearm laws and the other social programs or legal changes.

Elizabeth Richardson Vigdor and James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, EVALUATION REVIEW, 30, no. 3 at 313-46, 340 (2006).

The most comprehensive study of the effect of DVRO-related firearms prohibitions is that by Díez, *et al.*, 2017. Restricting analysis to the period from 1991 to 2015, this study found no association between intimate partner homicide rates and laws prohibiting firearm possession by persons subject to IPV[2]-related restraining orders that did not also require offenders to surrender firearms. But it did find an effect with regard to the more specific subgroup of eleven states that included a requirement to surrender firearms — a requirement notably absent from Section 922(g)(8). Again, multiple hypotheses were tested (across at least six different types of state IPV-Related Firearms laws) which will inflate the probability of finding false positives. The authors also departed from earlier literature by using the lagged dependent variable as an independent predictor (the intimate partner homicide rate in the previous year). Although theoretical arguments can be made for this approach it also has the potential of dramatically decreasing the influence of other relevant covariates and the authors do not subject this modeling choice to robustness tests. *See* C. H. Achen, *Why Lagged Dependent Variables Can Suppress the Explanatory Power of Other Independent Variables* (2001). Additionally, the authors note that enforcement characteristics of these laws may vary

[2] Intimate Partner Violence.

across different jurisdictions, which is not something that their coding approach can take into account.

Finally, the authors concede that, "The chief potential threat to the validity of our findings is that states that have enacted laws requiring subjects of IPV-related restraining orders to surrender their firearms may differ from those that have not in ways that were not measured." Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler, Ziming Xuan, Sandro Galea, *et al.*, *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, ANNALS OF INTERNAL MEDICINE, 167(8):536-43 at 542 (Oct. 17, 2017). As alluded to above, this is particularly a concern if these 11 states enacted other domestic violence prevention efforts at the same time that they enhanced firearms surrender requirements. Assuming the most optimistic inference from their analysis is true and the effect is entirely causal, the authors estimate that comprehensive firearms relinquishment laws implemented across all states could prevent 120 homicides a year. Of course, this potential saving of lives *presumes* the existence of § 922(g)(8), so it cannot in any way be attributed to it as opposed to state-law restrictions, which are not at issue in this case. And, again, because § 922(g)(8) does not require relinquishment of firearms, this study would not support concluding that there is *any* statistically significant impact on intimate partner homicides from the law.

It would be useful to have studies that examine datasets over longer periods and include indicators for both federal and state laws, as well as measures of the duration characteristics of state laws. As things currently stand, the methodological challenges in studying the effects of these laws remain significant, and the literature has been divided, with the bulk of findings reported by the RAND review being null results (no effect). While the few studies that have found an association raise understandable concern, even their estimates of the net impact of these laws are modest.

One final concern with this literature—if it indeed is picking up on an actual signal concerning firearms relinquishment laws and not broader interventions to fight crime and prevent intimate partner violence through other channels—is that these modest effects at the margin may be an artifact of the simple statistical fact that the vast majority of domestic violence restraining orders arising from allegations of domestic abuse are issued against men, and men commit crime at higher rates than women. Mass disarmament of a group slightly more inclined towards violence compared to the general population can produce marginal improvements in crime rates. This logic, however, could lead to repugnant legal and social conclusions if not buttressed by the protections of due process.

IV. Depriving a Class of Citizens of Rights Based on Group Characteristics that are Not a Product of Due Process is Legally Perilous

One point of enumerating rights in a constitution is to protect those rights from erosion through appeals to the marginal utility of violating those rights. For example, many homicides could likely be prevented or solved by suspending Fourth Amendment protections against warrantless searches and seizures. Moreover, targeted suspension of such protections for particular groups, say poor communities plagued by crime, might produce disproportionate benefits. Some have even suggested focusing on racial categories to fight crime. *See, e.g.*, John J. Donohue, *Some Perspective on Crime and Criminal Justice Policy*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE (Lawrence M. Friedman & George Fisher, eds. 2019) ("efforts to curb the violent crime of black males might yield the greatest dividends"). But the American tradition of constitutionalism, and the logic of liberalism more generally, prohibits the suspension of fundamental rights and liberties for the marginal benefits they may bring to public safety.

As discussed above, over 80% of protective orders are issued against men, and men are more violent than women. *See* Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors*, and Judges, NIJ SPECIAL REPORT, at 15 (June 2009) (available at https://www.ojp.gov/pdffiles1/nij/225722.pdf). It could be argued that disarming men would bring benefits for

public safety, but this conclusion would be repugnant to civil rights, equality, and the presumption of innocence. Focusing on non-innate risk characteristics is not a promising path to pursue either. It may be the case that those who take testosterone, or those who like certain sorts of social media posts, or those who dress certain ways, or those who are going through a contentious divorce, and so on, as a group have higher propensities to violence. Targeting such groups for disarmament as a whole, however, is not a public policy approach countenanced by the Constitution.

This does not leave policy makers unable to take measures that can decrease crime by disarming individuals who have demonstrated individual behavior rendering them unfit to responsibly use firearms. The challenge is to do so in a manner consistent with the logic of rights and due process. But there are plenty of avenues for doing so.

V. There Are Effective Alternatives for Protecting Public Safety that Are Constitutionally Permissible and Respect Second Amendment Rights and Due Process

There are cases where someone does present a credible threat and the law can be used to constrain them in a manner that protects due process.

The first thing to note is that prohibiting those who have been convicted of violent felonies from owning firearms accomplishes a lot on this front. As National Institute of Justice documents have summarized:

> Among men named in the protection orders filed by participants, 65 percent had an arrest history. Researchers noted that many of these men appeared to be career criminals, with more than half having four or more arrests. Charges included violent crimes, drug- and alcohol-related crimes, and property, traffic, and miscellaneous offenses. Of the 129 abusers with any history of violent crime, 43 percent had 3 or more prior arrests for violent crimes other than domestic violence.

https://www.ojp.gov/pdffiles/fs000191.pdf.

Indeed, studies have consistently found that prior arrests and criminal records are highly predictive of intimate partner abuse. In particular:

> The length of prior record is predictive of reabuse as well as general recidivism. In looking at all restrained male abusers over two years, Massachusetts research documented that if the restrained abuser had just one prior arrest for any offense on his criminal record, his reabuse rate of the same victim rose from 15 to 25 percent; if he had five to six prior arrests, it rose to 50 percent. In the Rhode Island abuser probation study, abusers with one prior arrest for any crime were almost twice as likely to reabuse within one year, compared to those with no prior arrest (40 percent vs. 22.6 percent). If abusers had more than one prior arrest, reabuse increased to 73.3 percent.

https://www.ojp.gov/pdffiles1/nij/225722.pdf (internal citations omitted).

The Chief of the District of Columbia Metropolitan Police Department, Robert J. Contee III, recently stated that in DC the "average homicide suspect has been arrested 11 times prior to them committing a homicide"—a claim that local news fact checkers investigated and judged as true. https://www.wusa9.com/article/news/verify/verify-homicide-suspects-prior-arrests/65-a66c3b04-a303-4b33-90b1-f94f698e1492.

It is thus no surprise that broader crime fighting efforts had such a profound effect on intimate partner homicide in the later 1990s and 2000s across all states. In contrast, recent trends in some jurisdictions towards de-policing, decriminalization of petty crimes, and the elimination of bail portend potentially tragic and preventable outcomes.

Even if a domestic abuser has not run afoul of prior legal transgressions that would prohibit his or her ownership of firearms, it may be possible for states to erect laws that criminalize genuine abusive behavior and threats in a manner that can imprison and disarm an aggressor consistent with due process, akin to the standards required for involuntary civil commitment, including but not limited to heightened standards of proof and robust procedural protections.

CONCLUSION

The problem with § 922(g)(8) and laws like it is that their net effect is to deprive a large class of citizens, many who have been falsely accused, of their

fundamental constitutional right to keep and bear arms without due process, jeopardizing their own safety. Moreover, the benefits to public safety are estimated to be small in the best case and perhaps non-existent. Finally, while these laws may pursue a laudable public purpose of disarming genuinely dangerous aggressors, there are ways to effectively pursue this aim while protecting due process and Second Amendment rights.

For these reasons, this Court should rule that § 922(g)(8) is unconstitutional and affirm the decision below.

Respectfully submitted,

Craig L. Uhrich
Counsel of Record
Serge Krimnus
Bochner PLLC
1040 Avenue of the Americas
15th Floor
New York, New York 10018
(646) 971-0685
craig@bochner.law

Counsel for Amici Curiae