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 FOR AMICUS CURIAE CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., AND GUN OWNERS OF CALIFORNIA IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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## AMICUS CURIAE STATEMENT OF INTEREST

Founded in 1875, the California Rifle and Pistol Association, Incorporated, ("CRPA") is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearms-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public. [1]

Gun Owners of California, Inc. ("GOC") was incorporated in California in 1982 and is one of the oldest pro-gun political action committees in the United States. GOC is a nonprofit organization, exempt from federal taxation under §§ 501(c)(3) or 501(c)(4) of the Internal Revenue Code, and is dedicated to the correct interpretation and application of the constitutional guarantees related to firearm ownership and use. Affiliated with Gun Owners of America, GOC lobbies on firearms legislation in Sacramento and was active in the successful legal

[1] No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

battle to overturn the San Francisco handgun ban referendum. GOC has filed amicus briefs in other federal litigation involving such issues, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

## SUMMARY OF ARGUMENT

> *It's our duty as judges to interpret the Constitution based on the text and original understanding of the relevant provision—not on public policy considerations, or worse, fear of public opprobrium or criticism from the political branches.*[2]

Passed with good intentions to alleviate perceived and actual threats of violence against women, 18 U.S.C. § 922(g)(8) bars "individuals subject to certain domestic violence protective orders from possessing firearms or ammunition for any purpose." *United States v. McGinnis*, 956 F.3d 747, 751, 758 (5th Cir. 2020), *abrogation recognized by Rahimi*, 59 F.4th at 450 (stating that § 922(g)(8)'s purpose is to reduce "domestic gun abuse"). But good intentions are not enough to confer constitutionality or the authority of Congress to meddle in affairs belonging to the states. Nor are arguments about the effectiveness of novel

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[2] *United States v. Rahimi*, 59 F.4th 163, 462 (5th Cir. 2023) (Ho, J., concurring) (quoted in *Duncan v. Bonta*, No. 17-cv-1017, 2023 WL 6180472 (S.D. Cal. Sept. 22, 2023) (Sept. 22, 2023) (declaring California's ban on magazines over 10 rounds unconstitutional)).

approaches to long-simmering social problems, like spousal abuse.

Rather, under this Court's precedents in *Bruen* and *Heller*, the government must prove that 922(g)(8) is "consistent with the Nation's historical tradition of firearm regulation." *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, -- U.S. --, 142 S. Ct. 2111, 2129-30 (2022). Put to this test, § 922(g)(8) clearly violates the Second Amendment on its face.

The indisputable seriousness of the crime of domestic violence and its impact on those it touches, however, have created a unique demand to endorse creative, modern solutions to this age-old problem. This case, perhaps more than many others, thus asks this Court to heed the call of Judge Ho's concurrence quoted above: To scrutinize § 922(g)(8) under "the text and original understanding of the" Second Amendment, and not whether it is good public policy. *Rahimi*, 59 F.4th at 462 (Ho, J., concurring).

This brief provides a historical look at the evolution of legal remedies for domestic violence in America. And it reveals that neither intimate partner violence nor civil and criminal legal responses to it are particularly modern. This brief also analyzes civil protection order ("CPO") regimes throughout the United States, rebutting claims that the procedures for obtaining a CPO that triggers § 922(g)(8) disarmament are sufficiently sound. Finally, amici build on Judge Ho's perceptive comments that CPOs are ripe for abuse, which in turn exposes innocent Americans and even domestic violence victims

themselves to the risk of losing their Second Amendment freedoms.

## ARGUMENT

### I. A Brief History of Domestic Violence Law and the Adoption of Domestic Violence CPOs in America

#### A. Legal Remedies for Spousal Abuse from 17th-Century England to 19th-Century America

Violence within the family is not a new phenomenon; it has existed since Cain killed his brother Abel. Genesis 4:1-16. Physical assault, regardless of the parties' relationship, has also been recognized as a crime since long before the Founding. More to the point, the criminalization of spousal abuse was not foreign to early Americans. On the contrary, in 17th- and 18th-century America, "the dominant trajectory of legal opinion … ran against the right of husbands" to beat their wives—regardless of the private attitudes of some men of the era that such was their prerogative. Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 Early Am. Studies 221, 231 (2007).

Still, as is evident in the briefs of the government and its amici, modern views on historical attitudes about domestic violence in America largely coalesce around a narrative that, until only recently, intimate partner violence was tolerated and enshrined in law. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117 (1996); Elizabeth Pleck, *Domestic*

*Tyranny: The Making of American Social Policy Against Family Violence from Colonial Times to the Present* (Oxford Univ. Press 1987).[3] To support their claims, modern scholars regularly cite the historical doctrine of chastisement, which acknowledged that it was the husband's prerogative to "give his wife moderate correction" through corporal punishment or "chastisement." *Id.* at 2123. But this is a weak foundation on which to build an argument that Anglo-American criminal law was blind to the social ill of spousal battery.

First, as Blackstone wrote, to the extent the doctrine was accepted at all, it permitted at most only "moderate correction" "within reasonable bounds." 3 William Blackstone, Commentaries 432 (1st ed. Clarendon Press, 1765-1769). As such, a wife could petition for a *writ of supplicavit* if her husband threatened "to beat or kill her." Kelly, *supra*, at 353. "Under terms of the writ, the husband [would be] summoned and required to guarantee … that he will not do, or cause to be done, any harm or evil to her body, other than licitly and reasonably pertains to a husband for ruling and chastising his wife." *Id.*[4]

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[3] That conventional wisdom has faced some pushback, however, as historians have revisited primary sources that challenge the assumption that spousal battery was condoned by English and American common law. *See, e.g.*, Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 Wm. & Mary J. Women & L. 379 (2015); Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. Legal Educ. 341 (1994).

[4] Kelly's article provides a fascinating deep dive into the historical texts for evidence that "wife-beating" was legal at

More important, however, precedential authorities from 17th-century England began to cast doubt on the tradition at least as early as the 1650s. *See* 3 Blackstone, Commentaries 333 ("But, with us, in the politer reign of Charles the Second, this power of correction began to be doubted."). For example, the court in *Manby v. Scott*, 1 Siderfin 109, 82 Eng. Rep. 1000 (1659), observed that "although our law makes the wife subject to her husband, still the husband cannot kill her, for that would be murder, nor can he beat her, for the wife can seek the peace (1 Edward IV, 1a), and for a similar reason he cannot starve her." (cited and translated in Kelly, *supra*, at 354).

In America, too, the legal writings of the 17th and 18th centuries evidence an ambiguous history, at best. Colonial American writings, for instance, reveal that men facing charges of assault might be excused for the reasonable discipline of children or servants. But that defense did not extend to violence against their wives. Bloch, *supra*, at 230 ("Two justice of the peace manuals published in the eighteenth century list the chastisement of children, servants, scholars, and prisoners—but not wives—as a valid defense against a charge of assault.") (citing George Webb,

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common law. He ultimately concludes that "[i]n most of the texts we have reviewed, at least from Blackstone through the American judges of the last century to the modern writers on wife-beating, *we see a tendency to believe that customs were worse in earlier eras and other lands than in the writer's own more enlightened time and place*…. [W]e must all guard against unfairly accusing others of harboring beliefs or engaging in practices for which there is no evidence…." Kelly, *supra*, at 365 (emphasis added).

*Virginian Manual for Justices of the Peace: The Office and Authority of a Justice of Peace* (William Parks, 1736); James Davis, *The Office and Authority of a Justice of the Peace* (1774)).

Further, "[m]ost American colonies assumed the continuity of the English common law and passed statutes only when addressing novel conditions of American life not covered by English law." *Id.* at 232-33. So, "the absence of specific legislation on wife beating therefore suggests that colonists outside New England … simply perpetuated English common law," which permitted women to report their husbands' cruelty as a breach of the peace and secure a surety to prevent further abuse. *Id.* Founding-era legal texts confirm that 18th-century American women had this remedy available as well. *Id.* at 233 (citing Webb, *supra*, at 56; Davis, *supra*, at 65; Richard Burn, *An Abridgement of Burn's Justice of the Peace* 343 (Greenleaf, 1773); Richard Starke, *The Office and Authority of a Justice of Peace Explained and Digested* 333 (Alexander Purdie & John Dixon, 1774); James Parker, *Conductor Generalis: or, The Office Duty and Authority of Justices of the Peace* 397 (John Patterson, 1788)).

Following the Revolution and into the mid-1800s, the liberalization of divorce laws allowed women to petition for divorce on the grounds of cruelty. *Id.* at 238. "[C]harges of wife beating that were made outside … of suits for separation or divorce were increasingly categorized as ordinary assault and battery," and tried in the criminal courts. *Id.* Both developments steered cases of spousal battery away from justices of the peace who could issue civil

remedies, like sureties, without a trial. *Id.* While this new order offered women a broader menu of remedies, 19th-century American courts were admittedly more likely to look the other way than their predecessors unless the alleged acts of violence were severe. *Id.* at 238-39.

In fact, "the first [known] precedent-setting case in either England or America to declare wife beating a positive right under the common law" was not handed down until 1825—more than three decades after the Founding era. *Id.* at 245 (discussing *Bradley v. State*, 1 Miss. 156 (1824)). In that case, the court affirmed a man's conviction for assaulting his wife and rejected his claim that husbands have "unlimited license" to beat their wives. *Bradley*, 1 Miss. at 157-58. The opinion did, however, acknowledge that, according to the "old law," husbands may resort to "moderate chastisement, in cases of great emergency." *Id.* at 158. *See* Bloch, *supra*, at pp. 245-46 (for a discussion of how the *Bradley* court misinterpreted English precedents and the mythic "rule of thumb" to justify chastisement). "No known English and by no means all American legal authorities, especially those in the North, agreed" with *Bradley*'s holding. Bloch, *supra*, at 246.

A turning point came in 1871 when two state courts forcefully repudiated chastisement, sparking another change in how domestic violence was viewed in America—at least by law, if not always in practice. Siegel, *supra*, at 2129-30 (discussing the formal repudiation of chastisement in America by the end of the Civil War); *id.* at 2134-42 (analyzing race and class bias in the prosecution of batterers).

In *Fulgham v. State*, 46 Ala. 143 (1871), Alabama charged a formerly enslaved man with the assault and battery of his wife. Holding that "a married woman is as much under the defense of the law as any other member of the community, the court allowed the charges to proceed. *Id.* at 147. It also held that the idea that a man had the right to "correct" his wife through corporal punishment was merely "a relic of barbarism." *Id.*

In *Commonwealth v. McAfee*, 108 Mass. 458 (1871), Massachusetts indicted a man for manslaughter after he beat his wife, causing her death. With seemingly little hesitation, the court decreed that "[b]eating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent. The blows being illegal, the defendant was at least guilty of manslaughter." *Id.* at 461 (citing *Commonwealth v. Fox*, 7 Gray 585 (1856)).

By the end of the decade, "no judge or treatise writer in the United States … recognized a husband's prerogative to chastise his wife. Thus, when a wife beater was charged with assault and battery, judges refused to entertain his claim that a husband had a legal right to strike his wife." Siegel, *supra*, at 2129-30 (citing *Fulgham*, 46 Ala. at 147; *Richardson v. Lawhon*, 4 Ky. L. Rptr. 998, 999 (1883) (abstract) (action for unlawful arrest); *McAfee*, 108 Mass. at 461 (1871); *Harris v. State*, 14 So. 266 (Miss. 1894); *Gorman v. State*, 42 Tex. 221, 223 (1875)).

Around the same time, state legislatures also began explicitly criminalizing spousal abuse. "[T]hree

states even revived corporal punishment for the crime, providing that wife beaters could be sentenced to the whipping post." Siegel, *supra*, at 2130 (citing Elizabeth Pleck, *The Whipping Post for Wife Beaters, 1876-1906*, in *Essays on the Family and Historical Change* 127 (David Levine et al. eds., 1983). By the 1920s, spousal abuse was illegal in every state. Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 12 (2006).

### B. The Return and Rise of Civil Remedies for Intimate Partner Violence in 20th-Century America

Congress passed the first CPO statute in the nation, the District of Columbia Intrafamily Offenses Act, on July 29, 1970. Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA Women's L.J. 39, 47 n.26 (2007). The D.C. law prompted a wave of similar legislation, including Pennsylvania's Protection from Abuse Act of 1976. The Act allowed "[f]amily or household members who resided together … [to] obtain a court order that would direct the defendant to refrain from abusing the plaintiff or minor children, evict the defendant from the residence, and award temporary custody of minor children to the plaintiff." *See* Margaret Klaw & Mary Scherf, *Feminist Advocacy: The Evolution of Pennsylvania's Protection from Abuse Act*, 1 U. Pa. J. L. & Soc. Change 21, 22 (1993) (citing 35 Pa. Stat. § 10181 (repealed 1990)).

"[A]lthough not technically the first restraining order law," Pennsylvania's law "rapidly became the

model for domestic violence restraining order laws through the country...." Susan Kelly-Dreiss, *A Retrospective: The Nation's Landmark Restraining Order Law and First State Domestic Violence Coalition*, 7 Fam. & Intimate Partner Violence Q. 275, 279 (2015). Indeed, in the years following its adoption, 31 other states adopted strikingly similar legislation. Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in *Criminal Justice Politics and Women* 13, 14 (Claudine Schweber & Clarice Feinman eds., 1985). In less than 20 years, all 50 states had enacted laws providing civil remedies for victims of domestic violence through orders of protection. Julia Henderson Gist, *Reducing Intimate Partner Violence Against Women: Evaluating the Effectiveness of Protection Orders* 12 (Ph.D. dissertation, Texas Woman's University May 2000), https://twu-ir.tdl.org/bitstream/handle/11274/12229/2000GistOCR.pdf?sequence=1&isAllowed=y.

In 1994, as part of the Violent Crime Control and Law Enforcement Act, Pub. L. Nos. 103-322, 108 Stat. 1796, Congress adopted the Violence Against Women Act ("VAWA"), a federal law acknowledging domestic violence as a crime and providing funding for anti-violence resources. Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40001, 108 Stat. 1902. Alongside VAWA, Congress enacted 18 U.S.C. § 922(g)(8), the first federal law to disarm any person subject to a domestic violence protection order issued after notice and an opportunity to be heard. Pub. L. 103-322, § 110401(b)(3).

But long before domestic violence legislation of the late 20th century gave courts the explicit authority to issue CPOs to combat spousal abuse, courts "had the power to issue injunctive decrees." Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 187 (James A. Inciardi ed., 2d ed. 1996). But historically, "their use was infrequent in the context of domestic assault." *Id.* Courts "required high standards of proof, often to the degree of a criminal law standard." *Id.* For good reason—such orders "were considered an *exceptional* imposition on citizenry rights." *Id.* (emphasis added).

They remain an "exceptional imposition" on the rights of Americans today. What does not remain is a system that applies appropriately high standards of evidence or procedure to ensure that such an imposition is warranted.

## II. Review of the Procedures and Realities of State CPO Regimes

All states authorize courts to attach firearm restrictions to domestic violence CPOs. In nearly a dozen states, the authority to issue such orders is permissive, allowing courts to decide case-by-case whether a gun prohibition is warranted.[5] A handful of

[5] *See* Alaska Stat. §§ 18.66.100(c)(6), (7), 18.66.990(3), (5) (if respondent possessed or used a firearm); Ariz. Rev. Stat. Ann. §§ 13-3601, 13-3602(G), 13-3624(D) (if respondent is a credible threat); Ind. Code Ann. §§ 31-9-2-42, 31-9-2-44.5, 34-26-5-2, 34-26-5-9(c)(4), (f); Mont. Code Ann. §§ 40-15-102(2)(a), 40-15-103(1)(6), 40-15-201(f); Nev. Rev. Stat. §§ 33.018, 33.020, 33.030, 33.031, 33.033; N.C. Gen. Stat. §§ 14-269.8, 50B-1, 50B-3(a)(11), 50B-3.1; N.D. Cent. Code §§ 14-07.1-01, 14-07.1-02, 14-07.1-03; Ohio Rev. Code § 3113.31(E)(1)(h) (if the court finds the

states require firearm restrictions when certain conditions are met. N.M. Stat. Ann. § 40-13-5(A)(2); N.Y. Crim. Proc. Law §§ 530.11, 530.12, 530.14; N.Y. Fam. Ct. Act §§ 812, 822, 828(3), 842-a; N.Y. Penal Code § 400.00; Utah Code Ann. § 76-10-503(b)(x). The rest prohibit anyone subject to a CPO from acquiring or possessing firearms—even if there is no articulable reason "to believe that the defendant would violate the restraining order and use the weapon against the plaintiff." Slocum, *supra*, at 647. Regardless of any variations in state law, however, § 922(g)(8) wrestles the power away from the states to decide for themselves whether those restrained by a CPO should be subject to disarmament.

For that reason, how CPOs are obtained is pivotal. But, as discussed below, CPO regimes throughout the country, in both law and practice, provide few procedural safeguards for the accused. While we consider domestic violence a crime, the restraining order system does not treat it as a criminal matter. It applies civil standards of evidence and denies the accused the protections available to criminal defendants. *See, e.g.*, *Cesare v. Cesare*, 694 A.2d 603, 608 (N.J. Super. Ct. App. Div. 1997), *rev'd on other grounds*, 713 A.2d 390 (N.J. 1998) (observing that "the law circumvents the protections normally accorded an accused in a criminal case" and "effectively requires what might otherwise be criminal

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restriction would be "equitable and fair"); S.C. Code Ann. § 16-25-30(A)(4); S.D. Codified Laws § 25-10-24; *Benson v. Muscari*, 172 Vt. 1, 769 A.2d 1291 (Vt. 2001) (interpreting Vt. Stat. Ann. tit. 15, § 1103(c)).

acts to be then treated as if born of a civil cause of action and under the burden of proof standard for civil cases"). While the informal process afforded to CPO respondents might be enough to justify a "stay-away" or "do no harm" order to protect the safety of the complaining victim, stripping one's fundamental right to bear arms requires much more.

In most jurisdictions, the CPO process begins when the alleged victim files a petition—which is often heard ex parte on the day of filing—and a temporary emergency order is routinely granted. Slocum, *supra*, at 644. A short notice period usually follows before the court will hold a hearing for the final order of protection. The amount of notice required varies by state. But there is rarely enough time in any state for the respondent to fully prepare for a critically important hearing that can result in the loss of significant freedoms. Indeed, the average notice period is just about two weeks. *Id.* (citing, e.g., Ala. Code § 30-5-6(a); Idaho Code Ann. § 39-6308(5)). In Maryland, the final hearing must be held just *one or two days after* the emergency order is issued. Md. Code Ann., Fam. Law. § 4-504.1(e)(1)(ii).

Further, respondents are not entitled to discovery, a jury, or free counsel in any jurisdiction amici are aware of. While petitioners bear the burden of proof at the evidentiary hearing, they generally need only show, by a preponderance of the evidence, that the respondent has committed or might commit an act of domestic violence. *See, e.g.*, Ga. Code Ann. § 19-13-3(c); 750 Ill. Comp. Stat. 60/205(a); Iowa Code

Ann. § 236.3; Me. Rev. Stat. Ann. tit. 19-A, § 4006(1); Miss. Code Ann. § 93-21-11(1); N.J. Stat. Ann. § 2C:25-29(a); S.D. Codified Laws § 25-10-5; Vt. Stat. Ann. tit. 15, § 1103(b).

At least one state turns even that limited procedural safeguard on its head. In Arizona, the court may issue a "temporary" CPO good for two years from service on the restrained party if there is even "reasonable cause to believe" the respondent has committed or may commit an act of domestic violence. Ariz. Rev. Stat. Ann. § 13-3602(E)(1)-(2), (N). "If the defendant wants the opportunity to be heard, the *defendant must petition the court to obtain a hearing*." Slocum, *supra* at 646 (emphasis added) (citing Ariz. Rev. Stat. Ann. § 13-3602(L) ("[A] party who is under an order of protection or who is restrained from contacting the other party is entitled to one hearing on written request.")).

Moreover, regardless of the applicable legal standards, judges may be overly cautious in denying CPO requests. They are human, after all, and no one wants to be tomorrow's headline should tragedy strike. Slocum, *supra*, at 667.[6]

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[6] Citing Russ Bleemer, N.*J. Judges Told to Ignore Rights in Abuse TROs*, 140 N.J. L.J. 281, 295 (1995) (quoting a judge: "A newspaper headline can be death to a municipal court judge's career ... and the prospect of an unfavorable newspaper headline is a frightening one."). *See also id.* (reporting on advice given to New Jersey judges at a 1995 judicial training on domestic violence: "If there is any doubt in your mind about what to do, you should issue the restraining order.").

The case of *Peterson v. Peterson*, 863 A.2d 1059 (N.J. Super. Ct. App. Div. 2005) illustrates well the mindset of at least some members of the bench. There, the trial court issued a final order of protection, having only heard the unrepresented parties' conflicting accounts of the alleged abuse. *Id.* at 1059-63. The respondent had no chance to call his witnesses (even though they were present) or cross-examine his wife or her witness. *Id.* at 1064-65. In granting the order, the presiding judge remarked:

> [I]f I have to make a mistake, I have to make a mistake in favor of safety. Do you understand that? Because let me tell you something right now. Aside from the fact that I'm a judge, I'm a human being. And if I make a mistake that's going to hurt somebody, I'll never forgive myself.
>
> ….
>
> [A]though I don't think you intentionally did anything to harm anybody... I have no problem entering the order ... not because you are a bad guy, because it's the right thing to do.

*Id.* at 122.

Though mindful of the gravity of the domestic violence problem and the heavy burden on family law judges, the Appellate Division expressed dismay over "the informality of the proceedings and the failure to afford defendant essential procedural safeguards." *Id.* at 124. This noted failure to provide due process in CPO hearings is not unique to the superior court that

heard *Peterson*—or even New Jersey. It is common to the enforcement of the domestic violence laws of every state that relies on a civil process to impose quasi-criminal penalties.

Compound all this with the fact that most states employ exceptionally broad legal definitions of "domestic violence."[7] In California, the standardized form for obtaining a CPO offers examples of what constitutes "abuse" under state law. The non-exhaustive list includes "repeated unwanted contact," "threats based on actual or suspected immigration" status, interference with access to health information, and "harassment." Jud. Council of Cal., *DV-100: Request for Domestic Violence Restraining Order* (Jan. 1, 2023), https://www.courts.ca.gov/documents/dv100.pdf. Several other states also define domestic violence to include "harassment," which usually covers a broad spectrum of non-violent conduct. In New Hampshire, for instance, "harassment" includes telephone calls "with no legitimate purpose" meant "to annoy, abuse, threaten, or alarm another" or "repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy

[7] The American Bar Association publishes a table of the domestic violence CPO laws of all 50 states, D.C., and the territories of the United States. Am. Bar Ass'n Comm'n on Domestic & Sexual Violence, *Domestic Violence Civil Protection Orders (CPOs)* (June 2020), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf (updates by Nat'l Network to End Domestic Violence and WomensLaw.org).

or alarm another." N.H. Rev. Stat. Ann. §§ 173-B:1(I)(g), 644.4(I)(a)-(b).

Such broad definitions for "domestic violence" allow courts to grant CPOs without a single allegation of physical violence. This shallow threshold for revoking Second Amendment rights without any showing of past acts of physical violence or future likelihood to commit such acts puts § 922(g)(8) out of step with any historical tradition of disarming felons and other violent people.

As the district court in *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd & remanded*, 46 F.3d 203 (5th Cir. 2001), (correctly) held years before *Heller* was even decided, "§ 922(g)(8) is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights." *Id.* at 610. The court further lamented that the law threatens citizens with the loss of a fundamental right "not because [they have] committed some wrong in the past, or because a judge finds [they] may commit some crime in the future, but merely because [they are] in a divorce proceeding." *Id.*

This is not how rights are treated in any other context. And the potential for systemic abuse of domestic violence CPOs highlighted by Judge Ho's concurrence and discussed below help illustrate the constitutional infirmity of doing so.

## III. Misuse of the CPO System Disarms Innocent Citizens and Puts Victims at Risk

Although the vast majority of protection orders are requested for good cause, a percentage of petitions are filed for improper reasons. Unfortunately, there is limited empirical research on how many false petitions are filed annually, and it is not logical to simply label as "false" all allegations that are recanted or dismissed as "unfounded." So it can be difficult to pinpoint just how widespread the problem is.

Even still, the Center for Prosecutor Integrity calls the unfortunate problem of false abuse allegations an "epidemic." Press Release, Ctr. for Prosecutor Integrity, *Survey: Over 20 Million Have Been Falsely Accused of Abuse* (Dec. 17, 2020), https://www.prosecutorintegrity.org/pr/survey-over-20-million-have-been-falsely-accused-of-abuse/. In 2020, the Center reported on survey findings that "8% of Americans report being falsely accused of domestic violence, child abuse, sexual assault, or other forms of abuse…. Th[at] 8% figure represents 20.4 million adults." *Id.* Claims of domestic violence made up 17% of those false reports. *Id.*

A 2011 study of the beliefs of professionals involved in child custody disputes, including judges, private attorneys, child custody evaluators, domestic violence workers, and legal aid attorneys, found that "[f]or all groups combined, the estimate for false DV allegations by the mother was 18% on average and by the father was 35% on average." Daniel G. Saunders, Ph.D. et al., *Child Custody Evaluators' Beliefs About*

*Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody Visitation Recommendations*, Final Report to Nat'l Inst. of J., U.S. Dep't of J., at 55 (Oct. 31, 2011), https://www.ojp.gov/pdffiles1/nij/grants/238891.pdf. Domestic violence workers and legal aid attorneys reported higher estimates of false reporting by fathers, while judges, private attorneys, and custody evaluators gave the highest estimates of false reporting by mothers. *Id.* But all groups acknowledged some level of false reporting from both parents. *Id.*

No matter how pervasive the problem is, however, the abuse of CPOs delegitimizes and clogs the legal system, trivializes the experience of domestic violence survivors, and subjects innocent people to unwarranted deprivations of their civil liberties—including their fundamental right to possess firearms for lawful purposes.

### A. The Use of CPOs for Advantages in Divorce Proceedings

Because CPOs can influence child support, custody, and visitation decisions, some use protection orders to gain a tactical advantage in family court proceedings.[8] As Judge Ho observed, "'[m]any divorce

[8] This is not to say that false allegations exceed legitimate ones or that the use of bad faith claims in divorce is disproportionate to their use generally. To be sure, the underreporting of legitimate domestic violence claims remains a significant concern. Still, "[i]t is a well-known fact within the matrimonial legal community that many lawyers and their

lawyers routinely recommend pursuit of [CPOs] for clients in divorce proceedings ... as a tactical leverage device.'" *Rahimi*, 61 F.4th at 465 (Ho, J., concurring) (quoting Suk, *supra*, at 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)).[9]

In 2005, *Family Law News*, an official California State Bar publication, reported that the State Bar's Family Law section officially opposed legislation "extending DVPOs to five years, arguing that it would harm families and put unnecessary burdens on the restrained party." Lynette Berg Robe & Melvyn Jay Ross, *Extending the Impact of Domestic Violence Protective Orders*, Fam. L. News, Vol. 27, No. 4, 2005, at 26, http://www.cafcusa.org/docs/family-law-news_TRO_RO_Pages%2026thru30_Vol27-

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clients use these orders of protection to gain a strategic advantage over their spouse from which it is difficult to recover." Liz Mandarano, *The Worst Thing A Woman Can Do In Divorce Proceedings - The Abuse Of Orders of Protection*, Huffington Post (April 13, 2011), https://www.huffpost.com/entry/the-worst-thing-a-woman-c_b_ 837636.

[9] Judge Ho was, of course, not the first judge to speak this uncomfortable truth. In *City of Seattle v. May*, 171 Wash. 2d 847 (2011), for example, Washington Supreme Court Justice Pro Tempore Richard Sanders noted the "growing trend to use protection orders as tactical weapons in divorce cases." *Id.* at 859, n.8 (Sanders, J., dissenting) (collecting authorities).

Number4_2005-1.pdf (last visited Sept. 25, 2023). Of particular concern to the Bar was that:

> [P]rotective 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.

*Id.*

The reason for this misuse of the system is apparent. As Judge Ho noted, "civil protective orders 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.'" *Id.* at 465 (quoting *Murray v. Murray*, 631 A.2d 984, 986 (N.J. Super. Ct. App. Div. 1993)). Indeed, nearly all states now require courts to consider claims of domestic violence when ruling on child custody and visitation. Res. Ctr. on Domestic Violence: Child Prot. & Custody, *State Custody Statutes Relevant to Domestic Violence* (Oct. 31, 2018), https://www.ncjfcj.org/wp-content/uploads/2022/07/Compiled-Custody-Law-Chart.FINAL_.pdf.

For instance, "[i]n Washington State, if the court concludes that a parent has engaged in child abuse or domestic violence, it is precluded from

awarding joint legal custody and it [shall] limit unsupervised residential time of the offending parent with the child." *Id.*; Wash. Rev. Code § 26-09-191. In California, "there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child…." Cal. Fam. Code § 3044.

Similar presumptions are found in about half the states and the District of Columbia.[10] In 13 other states, a history of domestic violence may not *expressly* create a presumption against granting custody or visitation to the accused parent. Still, courts must give domestic violence claims "extra weight" when making those determinations.[11]

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[10] Ala. Code §§ 30-3-131, 30-3-133; Alaska Stat. § 25.24.150(g); Ariz. Rev. Stat. Ann. § 25-403.03(D); Ark. Code Ann. §§ 9-13-101, 9-13-215; Cal. Fam. Code § 3044; Del. Code Ann. tit. 13, § 705A; D.C. Code § 16-914(2)(c)(2); Haw. Rev. Stat. § 571-46; Idaho Code § 32-717B (presumption attaches to "habitual perpetrators"); Iowa Code § 598.41(1)(b); La. Stat. Ann. § 9:364(A); Mass. Gen. Laws ch. 208, § 31A, ch. 209, § 38, ch. 209, § 10; Minn. Stat. § 518.17(1)(b)(9); Miss. Code Ann. § 93-5-24(9)(a)(1); Neb. Rev. Stat. § 43-2932; Nev. Rev. Stat. §§ 125C.0035, 125C.230; N.D. Cent. Code § 14-09-06.2; Okla. Stat. tit. 43, §§ 109 (I), 109.3; S.D. Codified Laws §§ 25-4-45.5, 24-4A-22; Tenn. Code Ann. § 36-6-406; Tex. Fam. Code Ann. § 153.004; Wash. Rev. Code § 26-09-191; W. Va. Code § 48-9-209; Wis. Stat. § 767.41. *See also* Res. Ctr. on Domestic Violence, *supra*, at 1-4.

[11] Colo. Rev. Stat. § 14-10-124(1.5)(a); Fla. Stat. § 61.13(c)(2)(a); Ga. Code Ann. § 19-9-3(a)(4); Me. Stat. tit. 19A, § 1653; Md. Code Ann., Fam. Law § 9-101.1(b); Mont. Code Ann. § 40-4-212(1)(l); N.Y. Dom. Rel. Law § 240(1)(a); N.C. Gen. Stat.

In short, because courts in all states must consider domestic violence claims in marriage dissolution proceedings and because, for the reasons explained above, "'[r]estraining orders ... are granted to virtually all who apply," Elaine Epstein, *Speaking the Unspeakable,* Mass. Bar Ass'n Newsl., June-July 1993, at 1, the system is particularly ripe for abuse.

The experience of practitioners in Illinois illustrates well how this misuse of the system plays out.

In 2007, the Illinois Bar Journal reported on the use of CPOs to circumvent the Illinois Marriage & Dissolution of Marriage Act ("IMDMA") to obtain orders for child custody, visitation, and possession of the family home. Scott A. Lerner, *Combatting Orders-of-Protection Abuse in Divorce*, 95 Ill. Bar J. 590, 591 (2007). The article explains why standards and presumptions that attach to petitions for protective orders—but not proceedings under the IMDMA—can entice parties to abuse the system. *Id.* at 591-93.

For instance, under the Illinois Domestic Violence Act ("DVA"), "[i]f a court finds, after a hearing, that respondent has committed abuse … of a minor child, there shall be a rebuttable presumption that awarding physical care to respondent would not be in the minor child's best interest." 750 Ill. Comp.

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§ 50-13.2(a)-(b); Or. Rev. Stat. § 107.137(1)(d); Pa. Cons. Stat. § 23-5328(a)(2); 15 R.I. Gen Laws § 15-5-6(g)(1); S.C. Code Ann. § 63-15-40(a)-(b); Vt. Stat. Ann. tit. 15, § 665a(a); Wyo. Stat. Ann. § 20-2-201(c). *See also* Res. Ctr. on Domestic Violence, *supra*, at 1-4.

Stat. 60/214(b)(5). Under the IDMA, however, no such presumption attaches. Evidence of family abuse is simply a relevant factor in considering the "best interests of the child" before granting custody. 750 Ill. Comp. Stat. 5/602.5, 5/602.7.

Similarly, "[i]t is far easier to restrict visitation via an order of protection [under the DVA] then [sic] by seeking the same relief under the IMDMA." *Id.* at 592-93. Under the IMDMA, courts may only restrict visitation rights upon a showing that "visitation would endanger seriously the child's physical, mental, moral or emotional health." 750 Ill. Comp. Stat. 5/602.7(b). The "serious endangerment" standard is "onerous, stringent, and rigorous." *Heldebrandt v. Heldebrandt*, 251 Ill. App. 3d 950, 957 (4th Dist.1993) (quoting *In re Marriage of Diehl*, 212 Ill. App. 3d 410, 429 (2d Dist. 1991)). In contrast, under the DVA, courts have broad discretion to restrict visitation rights as a condition of an order of civil protection. There is no requirement that the petitioner show, by a preponderance of the evidence, that visitation would "endanger seriously" the minor child's well-being. Lerner, *supra*, at 593 (discussing *In re Marriage of McCoy*, 253 Ill. App. 3d 958, 963 (4th Dist. 1993)).

For these reasons, and others, divorcing parties in Illinois can be (and have been)[12] persuaded to use

[12] *See, e.g.*, *Radke v. Radke*, 349 Ill. App. 3d 264, 269 (3d Dist. 2004) (holding that no abuse had occurred and the mother "misused the [DVA] for the purpose of attempting to alter [the father's visitation with [the child]"); *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 648 (1st Dist. 1992) (holding that the father

CPOs to circumvent the IMDMA and gain advantages in divorce proceedings. The experience is similar in courtrooms across the country. In short, Judge Ho's warning that "civil protective orders [are] a tempting target for abuse," *Rahimi*, 61 F.4th at 465 (Ho, J., concurring), was not unfounded. And the serious but (hopefully) unintended consequence of such abuse is that untold numbers of innocent Americans are being stripped of fundamental civil liberties—including, as a result of § 922(g)(8), their Second Amendment rights.

### B. Abusers Manipulating the System to Exert Abusive Control Over Their Intimate Partners

Abusers are exceptionally skilled at minimizing their role in any violence, gaslighting their victims, and, in cases of extreme intimate partner violence, manipulating the very system set up to protect victims of domestic abuse. They may retaliate against a partner for seeking a CPO by requesting their own order. Or they may try to exert control over their victim after separation by filing for their own order first, making false allegations of abuse against their victim.[13]

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had misused the DVA as a "subterfuge to circumvent the requirements of the [IMDMA]").

[13] According to one Massachusetts legal aid organization, "[t]he abusive person may lie about [their victim] or make up things [they] did so they can get a criminal case" or protective order filed against them. Mass. L. Reform Inst., *What If the Person Who Abused Me Files a Protective Order or Criminal Case*

Domestic violence advocates, legal aid organizations, and judges are familiar with this form of abuse. Leigh Goodmark, author of *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (2018), told the New York Times that "sometimes the complainant turns out to be the real abuser. 'There's literature on it—it's called systems abuse.'" Andy Newman, *Barred From Her Own Home: How a Tool for Fighting Domestic Abuse Fails*, N.Y. Times (June 17, 2021), https://www.nytimes.com/ 2021/06/17/nyregion/order-of-protection-domestic-violence-abuse.html. Also called "legal abuse," systems abuse is the:

> [M]anipulation of the legal system by perpetrators of family violence, done so in order to exert control over, threaten, and harass a partner (current or former). Systems abuse most often takes place post-separation and includes such acts as; attempting to have a partner arrested; taking legal action against a partner; making false reports of neglect or abuse to children protection agencies; and applying for intervention orders against a partner.

Ellen Reeves, *Research Brief: Systems Abuse* 1 (Monash Univ. 2018), https://arts.monash.edu/__data/assets/pdf_file/0005/1529852/rb-systems-abuse.pdf (citing Susan L. Miller & Nicole L. Smolter, "*Paper*

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*Against Me?* (April 2021), https://masslegalhelp.org/ domestic-violence/abuser-takes-me-to-court.

*Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (2011)).

A 2007 study of callers to the Domestic Abuse Helpline for Men found that 49% of male callers identified controlling behavior from their abusive partners. Denise Hines et al., *Characteristics of Callers to the Domestic Abuse Helpline for Men*, 22(2) J. Fam. Violence 63, 67 (Sept. 2007). Such conduct included "manipulating the system such that the abusers used the court system to do such things as gain sole custody of the children or falsely obtain a restraining order against the victim." *Id.*

The effects of vexatious CPOs are severe and far-reaching. Not only do they clog the system and divert precious resources from legitimate claims, but they also undermine the integrity of our legal system. As for victims who are incorrectly labeled perpetrators by the system, research shows that they can "experience [CPOs] as tools in the abuser's arsenal calculated to wear them down, whittle away their self-esteem, and create hardships as they work to negotiate their lives absent of men's violence, power, and control." Miller & Smolter, *supra*, at 640. In short, they "have their experiences of victimization de-legitimized and are denied protection from an abuser." Reeves, *supra*, at 2.

Worse yet, having been disarmed by § 922(g)(8), they are denied the right to protect themselves from their abusers. Research shows that victims of domestic violence are at the highest risk of murder by their abusive partners when preparing to exit the violent environment and end the relationship.

Carolyn Rebecca Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, 250 Nat'l Inst. Just. J. 6 (2003). So this is a particularly dangerous time for victim disarmament.[14]

### C. Resort to Mutual Protection Orders As an "Out" for the Court

Even if a judge can detect that it is the abuser and not the victim seeking relief, they may still issue a mutual protective order—sometimes even without a request from the respondent. As the name implies, a mutual protective order restrains "*both* parties from further acts of violence, contact, or harassment." Jud. Council of Cal., *Achieving Equal Justice for Women and Men in the California Courts: Final Report* 230 (Gay Danforth ed., July 1996), https://www.courts.ca.gov/documents/f-report.pdf.

Resort to mutual protection orders can be tempting for courts, attorneys, and even victims themselves. Overworked lawyers find them appealing because they avoid the time and expense of evidentiary hearings. Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-sex Domestic Violence Victims*, Note, 180 Cal.

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[14] *See also* Inge A. Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. Ill. L. Rev. 467, 494 (1996) (concluding that that firearm possession by women "not only equalize[s] the differences between men [and women], but also eliminates the disparity in physical power between the sexes" and that "the available information on civilian restriction of gun ownership indicates that one of the groups most harmed by restrictions on private gun ownership will be women").

L. Rev. 1047, 1054-55 (2020). Judges may feel they "save[] time because they do not have to hear testimony and make a finding regarding which party is a primary aggressor or even that one party has committed domestic violence." *Id.* (citing Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 Ind. L.J. 1039, 1056 (1992)). And victims might reluctantly agree to be bound by a mutual order to expedite the process, believing it is better than no protection order at all or because it is easier than a protracted proceeding where she must face her abuser.

But mutual protective orders are notoriously difficult to enforce. When they *are* enforced, victims themselves may be arrested. Indeed, the Minnesota Supreme Court Task Force for Gender Fairness in the Courts reported that:

> Witnesses told the Task Force that when a judge issues a mutual OFP [Order for Protection] there is a significant disincentive to seek enforcement. When police officers are called out to enforce the order and learn that it is a mutual OFP they often arrest both parties, "just to be safe," even if there isn't any evidence of mutual abuse.

*Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report*, 15 Wm. Mitchell L. Rev. 827, 879 (1989). *See also* Jud. Council of Cal., *supra*, at 230-31 (similar findings).

As a result of § 922(g)(8), mutual orders disarm victims of intimate partner violence, stripping them of their right to keep and bear arms for self-defense when they likely need it most. It is well-known that when the victim is leaving—or when she has acted to assert her independence from her abuser (like seeking a CPO)—is the deadliest time for victims. Under § 922(g)(8), she is left vulnerable if her abuser violates the order against him and threatens her with homicidal violence.

All this also disproportionately affects racial minorities and victims of same-sex domestic violence. For heterosexual couples, "dual arrests in domestic violence incidents, and the entering of mutual restraining orders that often follow, happen in about 1 percent of cases"; the number "jumps to almost 30 percent in cases of same-sex domestic violence." Andreano, *supra*, at 1048 (citing Alexandra Masri, *Equal Rights, Unequal Protection: Institutional Failures in Protecting and Advocating for Victims of Same-Sex Domestic Violence in Post-Marriage Equality Era*, 27 Tul. J.L. & Sexuality 75, 84 (2018); David Hirschel, Nat'l Criminal Justice Reference Serv., *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates* (July 25, 2008)). Similarly, "[d]ual arrests in all domestic violence cases decreased by 40 percent when the offender was white…." Hirschel, *supra*, at 11.

## IV. The Consequences of a System that Lacks Procedural Safeguards Before Revoking the Fundamental Right to Bear Arms

As this brief has shown, the procedures for obtaining a domestic violence CPO in many U.S. states fall far short of what should be required before civil liberties can be revoked. Indeed, tackling the crime of domestic violence as a matter of civil law strips the accused of the rights that attach to criminal proceedings, like a jury trial and legal counsel. It also makes getting an order of protection increasingly simple, as states adopt the broadest definitions of "domestic violence" and apply the lowest civil standards of proof.

This, in turn, makes the system ripe for abuse by those who would seek to gain advantages in divorce proceedings or manipulate the system to exert control over and further abuse their intimate partners. Indeed, "a litmus test of how vulnerable TROs are to abuse is how easy they are to obtain." Slocum, *supra*, at 662 (quoting Wendy McElroy, *Abuse of Temporary Restraining Orders Endangers Real Victims*, FoxNews.com, Dec. 27, 2005, http://www.foxnews.com /story/0,2933,179842,00.html)).

The result is a system that ensnares both guilty and innocent alike and even exposes victims to abuse by their partners. In his concurrence, Judge Ho put it best:

> The net result of all this 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). Abusers might even remind their victims of the existence of § 922(g)(8) and the entry of a mutual protective order to taunt and subdue their victims. 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.*

*Rahimi*, 59 F.4th at 467 (Ho, J., concurring) (emphasis added).

## CONCLUSION

The Court should affirm the sound judgment of the Fifth Circuit and hold that 18 U.S.C. 922(g)(8) violates the Second Amendment to the United States Constitution.

Respectfully submitted,

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