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 THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

ERIN M. ERHARDT
Counsel of Record
MICHAEL T. JEAN
NATIONAL RIFLE ASSOCIATION OF AMERICA – INSTITUTE FOR LEGISLATIVE ACTION
11250 Waples Mill Road
Fairfax, VA, 22030
(703) 267-1158
EErhardt@nrahq.org
Counsel for Amicus Curiae

October 4, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil-rights organization and is widely recognized as America's foremost defender of Second Amendment rights. It was founded in 1871, by Union generals who, based on their experiences in the Civil War, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA has approximately four million members, and its programs reach millions more.

The NRA has been advocating for firearms rights and for adequate due process safeguards for decades. Both of those issues are at the center of this appeal. The NRA also has other cases that are stayed pending the outcome of this case. *See* Memorandum to Counsel or Parties, *Nat'l Rifle Ass'n of Am., Inc. v. Bondi*, No. 21-12314, Dkt. 88 at *1 (11th Cir. July 21, 2023). The outcome of this case will necessarily affect the NRA's interests in current and future litigation efforts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Rahimi should not only lose his Second Amendment liberties, but he should also lose all of his liberties—*if the allegations against him are ultimately proven true with sufficient due process*. But constitutional safeguards cannot be set aside to obtain those

[1] In accordance with Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, its members, or its counsel has made a monetary contribution for the preparation or submission of this brief.

ends. Just like shortcutting the Constitution to coerce confessions out of violent criminals like Ernesto Miranda cannot be justified, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), shortcutting it to deprive people of their Second Amendment rights cannot be justified either. That line of reasoning has been squarely rejected: "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 n.3 (2022) ("'The right to keep and bear arms ... is not the only constitutional right that has controversial public safety implications.'") (citation omitted). That line of reasoning must, once again, be rejected with respect to 18 U.S.C. § 922(g)(8). Rahimi can only be deprived of his rights consistently with the right to keep and bear arms and the right to due process. That has not happened yet.

Section 922(g)(8) does not pass muster under *Bruen's* text, history, and tradition analysis. Undoubtedly, violent and dangerous individuals can be deprived of their Second Amendment rights. But § 922(g)(8) does not require a finding that the individual is actually dangerous. Nor were individuals traditionally deprived of their Second Amendment rights through peace bonds, which is how domestic violence was historically addressed and is the closest thing to a dead ringer to modern protective orders. Instead, individuals were deprived of their Second Amendment rights upon conviction of an offense. If the allegations

against Rahimi are true, then the county prosecutor's office had multiple chances to prosecute him for multiple violent offenses and deprive him of his rights consistent with the Second Amendment. But the prosecutor's office chose not to do so. It took the easier route and pursued a protective order. That choice, however, cannot deprive Rahimi of his rights consistently with the Second Amendment's history and tradition.

Section 922(g)(8) is also unconstitutional because it does not have sufficient due process protections. It pays lip service to due process requirements, but lip service does not cut it. Several circuit courts have ruled that its notice requirement is minimal. It merely requires that the individual be notified of the time and place of a hearing—it does not require notice of the hearing's subject matter. The ability to participate in the hearing is minimal, too. As long as one would understand that they could speak at the hearing, then the requirement has been satisfied. The statute also lacks a standard of proof, and state protective-order statutes generally require proof by preponderance of the evidence at most, which is insufficient to deprive people of other fundamental rights in quasi-criminal contexts. Nor are there any right-to-counsel requirements like there are when other fundamental rights are on the line in adverse proceedings. The Court would not sanction depriving individuals of any other fundamental rights without more safeguards. It should not sanction it here.

ARGUMENT

I. SECTION 922(g)(8) IS INCONSISTENT WITH THE NATION'S HISTORY AND TRADITION OF FIREARMS REGULATION.

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). And "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). Courts are not to engage in interest balancing when the conduct is covered by the text of the Second Amendment. The "Second Amendment 'is the very *product* of an interest balancing by the people.'" *Id.* at 2131 (quoting *D.C. v. Heller*, 554 U.S. 570, 635 (2008)) (emphasis in original). "It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* Section 922(g)(8) fails under this standard.

A. The plain text of the Second Amendment covers Section 922(g)(8).

The first question in *Bruen* was "whether the plain text of the Second Amendment protects [the] proposed course of conduct." *Id.* at 2134. In answering that question, the Court's analysis was limited to the "Second Amendment's text" and ordinary interpretive principles. *Id.* at 2134–35. Because the word "'bear' naturally encompasses public carry," *id.* at 2134, it

was easy to conclude that carrying a firearm in public was protected by the Second Amendment's plain text. *Id.* at 2143. There was no dispute about whether the individual plaintiffs in *Bruen* were "part of 'the people' whom the Second Amendment protects" or whether handguns were "arms" protected by the Second Amendment. *Id.* at 2134 (citations omitted). *Heller* had already answered those questions. 554 U.S. at 580, 592. And those answers apply here. But to the extent that any additional analysis is required, *Bruen's* plain-text analysis applies.

"The first salient feature of the [Second Amendment's] operative clause is that it codifies a 'right of the people.'" *Id.* at 579. The text does not impose any limitations on who the people are. "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581.

The Constitution also mentions "the people" in six other provisions, and "the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* "The people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* (quoting *United States v. Verdugo–Urquidez,* 494 U.S. 259, 265 (1990)) (quotations omitted).

The "political community," moreover, is a term that has been consistently used in reference to either a particular government body or the people subject to a particular government body. *Texas v. White*, 74 U.S. 700, 720–21 (1868), *overruled by Morgan v. United States*, 113 U.S. 476 (1885) (noting that a "state" is a "political community" under the Constitution, but

sometimes "state" refers to "a people or political community, as distinguished from a government"); *Denezpi v. United States*, 142 S. Ct. 1838, 1845 (2022) (citation omitted). A political community is "an association of persons for the promotion of their general welfare." *Minor v. Happersett*, 88 U.S. 162, 165–66 (1874). A member of the political community is synonymous with a "'subject,' 'inhabitant,' and 'citizen.'" *Id.* at 166. Ordinary Americans are "the people."[2]

True, this Court also referred to the people as "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635. But even prisoners nevertheless retain some First Amendment rights. *See, e.g., Pell v. Procunier*, 417 U.S. 817, 822 (1974). And unless the term is a chameleon, with different meanings in different clauses of the Constitution—and *Heller* gave every indication that it is not, 554 U.S. at 580—then Rahimi was part of the people before the protective order issued and deprived him of his rights. *See Kanter v. Barr*, 919

[2] Some scholars have argued that Second Amendment rights are political rights, primarily connected with the right to vote, and that the people are voters. Akhil Reed Amar, *The Bill of Rights* *48 n.* (1998) ("Amar") ("There is some fuzziness at the edges, but arms bearing and suffrage were intimately linked two hundred years ago and have remained so."). This is because the only other time that the original Constitution uses the phrase "the people" (outside of the Preamble), it refers to voters, and groups often obtained the right to vote after bearing arms for their country. *Id.* (citation omitted). Others have suggested that *Heller's* reference to the political community means that only "'eligible voters'" have the right to keep and bear arms. *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1079 (2013). The NRA believes that voters, like the militia, are a "subset of 'the people,'" *Heller*, 554 U.S. at 580, and Rahimi accordingly would have been part of the people when the protective order was issued.

F.3d 437, 453 (7th Cir. 2019), *abrogated by Bruen*, 142 S. Ct. at 2127 n.4 (Barrett, J., dissenting) ("[T]he question is whether the government has the power to disable the exercise of a right that [the people] otherwise possess, rather than whether they possess the right at all."). And he could only be deprived of his rights via that protective order if that process is consistent with the historical traditions of firearm regulations. It is not.

B. Civil protective order deprivations are inconsistent with the history and tradition of firearms regulations.

The government must show that § 922(g)(8) "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127. *Bruen* identified two alternative historical inquiries. First is the "fairly straightforward" inquiry. *Id.* at 2131. This applies "when a challenged regulation addresses a general societal problem that has persisted since the 18th century." *Id.* Under this inquiry, the Court looks to "the lack of a distinctly similar historical regulation addressing that problem" or "if earlier generations addressed the societal problem … through materially different means." *Id.*

The second approach is the "more nuanced approach," which gets applied in "cases implicating unprecedented societal concerns." *Id.* at 2132. But again, "history guide[s] our consideration of modern regulations that were unimaginable at the founding." *Id.* Under this approach, the government can satisfy its burden by "identify[ing] a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133 (emphasis in original). The analogue must do more than "remotely resemble" the modern regula-

tion, but it does not have to be a "dead ringer." *Id.* (citations omitted). The analogue's similarity is measured by "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. Comparing the regulatory burden on the right and the justification for the burden are "*central* considerations when engaging in an analogical inquiry. *Id.* (emphasis in original) (citations and quotations omitted); *see also* Richard A. Posner, *How Judges Think* 183 (2008) (The critical question is "whether the differences make the policy that informs the [analogue] inapplicable to the [modern regulation]."). The government cannot meet its burden under either analysis.

1. Section "922(g)(8)'s purpose is to reduce 'domestic gun abuse.'" *United States v. Rahimi*, 61 F.4th 443, 455 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (citation omitted). Domestic violence has unfortunately existed long before and long after the founding. And although it was never condoned, it was, again unfortunately, not taken as seriously as it should have been for much of the nation's history. At the founding, it was primarily regulated through sureties or peace bonds. *Codd v. Codd*, 2 Johns. Ch. 141, 141–43 (N.Y. Chan. 1816) (declining to impose a peace bond on a previously violent husband who was out-of-state for the last eight years but granting custody and care of the children to the wife). Indeed, courts often would not hear criminal domestic violence cases because it was thought to be too embarrassing for the parties. *State v. Rhodes*, 61 N.C. 453, 456–57 (1868); *Bradley v. State*, 1 Miss. 156, 157–58 (1824) (A husband could be convicted of assault and battery of his wife only if his conduct went beyond moderately chastising her,

which was shameful but allowed at common law.). It was not until the late-nineteenth century that society began to consider criminal laws addressing domestic violence. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, 11 Crime & Just. 19, 35–44 (1989).[3] But progress was slow; even well into the 20th century, the doctrine of "coverture" or "*feme covert*," under which a women's rights to sue were subsumed by her husband upon marriage thereby limiting her rights to recover for domestic violence, Black's Law Dictionary 422, 695 (9th ed. 2009), existed in some form in eleven states, *United States v. Yazell*, 382 U.S. 341, 351 (1966).

This practice should be left in the past. *See, e.g., id. at* 343 ("[T]he peculiar institution of coverture … is now, with some exceptions, relegated to history's legal museum.") It, like other repugnant historical practices, has no rightful place in our Constitutional jurisprudence. Five years ago, this Court made that clear: "morally repugnant" precedents like the order at issue in *Korematsu v. United States*, 323 U.S. 214 (1944), and *Korematsu* itself, "'ha[ve] no place in law under the Constitution.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (citation omitted). So, too, then must be the case for repugnant practices that did not treat domestic violence with the interest that it deserved.

But to the extent that peace bonds are relevant historical analogues, they fall short. They are in fact the closest thing to a dead ringer for modern protective orders. A justice of the peace could grant a surety or peace bond "wherever a person has *just cause* to fear that another will … do him a corporal hurt, as by

[3] Available at https://www.jstor.org/stable/1147525.

killing or beating him, or that he will procure others to do him such mischief." 1 William Hawkins, Please of the Crown 254 (6th ed. 1787) (emphasis added). "A wife may demand [one] against her husband threatening to beat her." *Id*. at 253.

Section 922(g)(8) makes protective orders punitive in nature. Peace bonds, however, were preventative measures. *Bruen*, 142 S. Ct. at 2149 (citing 4 Blackstone, Commentaries 249). They were mainly issued upon threats to breach the peace in the future, not in response to actual breaches of the peace or other crimes already committed. *See, e.g., Ford v. State*, 50 So. 497, 498 (Miss. 1909). The defendant was required to give a certain amount of money as security to ensure that he would keep the peace, which would be forfeited if he could not. Kathleen G. McAnaney Laura A. Curliss C. Elizabeth Abeyta-Price, *From Imprudence to Crime: Anti-Stalking Law*, 68 Notre Dame L. Rev. 819, 868 (1993). That amount was often statutorily capped. *People ex rel. Smith v. Blaylock*, 191 N.E. 206, 208 (Ill. 1934). The NRA is not aware of any surety statutes that completely deprived individuals of their Second Amendment rights, and the government has not cited any, let alone enough to establish a historical tradition. Peace bonds, therefore, do not suffice under *Bruen*.

One final note on peace bonds is that they have had mixed success when challenged. *Bruen*, 142 S. Ct. at 2131 (If analogues "were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality."). Peace bond statutes have been invalidated on equal protection grounds because wealthy individuals can easily post the bond while individuals with lower incomes cannot.

Kolvek v. Napple, 212 S.E.2d 614, 617 (W. Va. 1975); *Ex parte James*, 303 So. 2d 133, 144 (Ala. Crim. App. 1974). And courts are split on whether peace-bond statutes violate the Due Process Clause by allowing individuals to be incarcerated by a standard of proof below beyond a reasonable doubt. *Compare Santos v. Nahiwa*, 487 P.2d 283, 285 (Haw. 1971) (invalidating the statute on these grounds), *with Commonwealth v. Miller*, 305 A.2d 346, 349 (Pa. 1973) *and State v. Gray*, 580 P.2d 765, 766–67 (Ariz. App. 1978) (upholding the statutes on these grounds). These precedents leave no doubt that peace bonds are not valid historical analogues.

2. That leads to the more nuanced approach. But even under this approach, the analogues are not relevantly similar. Start with the analogues that disarmed historically disfavored and "distrusted" groups, "like Loyalists, Native Americans, Quakers, Catholics, and Blacks." *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 105 (3d Cir. 2023). These laws, too, should be left in the past with the likes of *Korematsu*. Indeed, *Bruen's* discussion of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded* (1868), and other precedents used to disarm Blacks was not done in the context of analogical reasoning to limit the scope of the Second Amendment. 142 S. Ct. at 2150–51. It was done to find conduct protected by the right. Depriving only disfavored groups of certain conduct shows that the favored groups necessarily could exercise that conduct, and the conduct was therefore within the historical scope of the right. *See id.* at 2149 (Historical accounts of surety laws being enforced against Blacks only "is surely too slender a reed on

which to hang a historical tradition of restricting the right.").

Those restrictions are not relevantly similar to § 922(g)(8) either. They were effectively domestic arms embargoes—designed to disarm rebellious groups who might collectively take up arms. *United States v. Jackson*, No. 22-2870, 2023 WL 5605618, at *2–4 (8th Cir. Aug. 30, 2023) (Stras, J., dissenting from the denial of en banc review). And over 150 years ago, this Court said that the Second Amendment does not "hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them." *Ex parte Milligan*, 71 U.S. 2, 20 (1866). Those collective restrictions are therefore not relevantly similar—their "why" is a national-defense function.

Their "how" is also materially different, especially with loyalty concerns. Swearing an oath of loyalty to the United States and denouncing any allegiance to King George removed the prohibition. *Jackson*, 2023 WL 5605618, at *4, *8 (Stras, J., dissenting) (citation omitted). Thus, the ban on loyalists operated like a rebuttable presumption. It was not relevantly similar to § 922(g)(8) because the policies behind the two are different.

3. The collective bans do, however, shed light on the undeniable principle that violent and dangerous individuals can be deprived of their Second Amendment rights. *Kanter*, 919 F.3d at 451 (Barret, J., dissenting). But courts cannot merely defer to the legislature's determination about who is dangerous and who is not. *Bruen*, 142 S. Ct. at 2131; *Kanter*, 919 F.3d at 465 (Barret, J., dissenting) (citation omitted). Instead, history and tradition show the way.

Traditionally, people needed to be convicted before they could lose their Second Amendment rights. *Rahimi*, 61 F.4th at 458 ("[T]he early 'going armed' laws … only disarmed an offender after criminal proceedings and conviction."). This was often the case for rebels or traitors who took up arms collectively. For example, at the close of Shays' Rebellion in 1787, Massachusetts imposed a three-year arms ban on individuals "who *have been, or may be guilty of treason*, or giving aid or support to the present rebellion, and to whom a pardon may be extended." 1 Private and Special Statutes of the Commonwealth of Massachusetts from 1780–1805 at 145, 146–47 (1805) (emphasis added). That required a conviction because the legislature cannot declare anyone guilty of treason. That power lies with the judiciary. *Foster v. President, etc., of Essex Bank*, 16 Mass. 245, 270 (1819) ("[I]f the legislature were to enact, that *A. B.* was guilty of treason, and that he should suffer the penalty of death, it would be the sworn duty of the court, or of any member of it, to grant a *habeas corpus,* and discharge him…. [S]uch acts would not be lows [*sic*.]; and they never could be executed, but by a court as corrupt … as the legislature which should have passed them."); *Cooper v. Telfair*, 4 U.S. (Dall.) 14, 19 (1800) ("Had, then, the legislature power to punish its citizens, who had joined the enemy, and could not be punished by the ordinary course of law? It is denied, because it would be an exercise of judicial authority.").[4]

[4] In a separate Opinion, Justice Chase pointed out that "[t]here is, likewise, a material difference between laws passed by the individual states, during the revolution, and laws passed subsequent to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous test now ap-

Indeed, criminal liabilities are "serious[] … and … usually represent[] the moral condemnation of the community." *United States v. Bass*, 404 U.S. 336, 348 (1971). Depriving one of their rights flows naturally from criminal convictions. At the founding "the death penalty was 'the standard penalty for all serious crimes.'" *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring) (citation omitted). Those who were spared the death penalty were often subjected to "civil death," "a status 'very similar to natural death in that all civil rights were extinguished.'" *Kanter*, 919 F.3d at 459 (Barret, J., dissenting) (citation omitted).

The Constitution expressly allows individuals convicted of certain crimes to be disenfranchised. U.S. Const. amend. XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 54–55 (1974); *Severance v. Healey*, 50 N.H. 448, 450–51 (1870) (Civil War deserters could not be disenfranchised or deprived of their citizenship without a conviction.).[5] Convicts lose several other funda-

---

plied." *Id.* (opinion of Chase, J.). Thus, any legislative acts depriving individuals of their rights before the ratification of the Constitution may be useful in shedding light on the types of individuals who can be deprived of their rights. But they should not be relied on for the procedures by which they deprived individuals of their rights if they conflict with the Constitution's separation-of-powers or bill-of-attainder clauses. *See United States v. Emerson*, 46 F. Supp. 2d 598, 606 (1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001) (noting that Madison thought the Second Amendment belonged after the restriction on bills of attainder in Article I, § 9, cl. 3).

[5] Scholars who embraced the "virtuous citizen theory" have noted that unvirtuous citizens "were excluded from the right to arms precisely as (and for the same reasons) they were excluded from the franchise" and "the franchise and the right to arms were 'intimately linked' in the minds of the Framers and of prior and subsequent republican thinkers." Glenn Harlan Reynolds, *A*

mental rights in addition to their Second Amendment and voting rights. *Lewis v. United States*, 445 U.S. 55, 66 (1980) (holding office and practicing medicine) (citations omitted); *Samson v. California*, 547 U.S. 843, 850, 857 (2006) (parolees can be subjected to suspicionless searches because parole is "on the 'continuum' of state-imposed punishment."). And depriving someone of their firearms rights under § 922(g)(8) is punitive under the *Mendoza-Martinez* factors. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69, (1963) (Divesting a draft dodger of their citizenship was punitive in nature and lacked procedural safeguards.); *Smith v. Doe*, 538 U.S. 84, 97 (2003) (applying the *Mendoza-Martinez* factors to determine if a sex-offender-registration statute was punitive or regulatory).[6] Protective orders are not convictions, yet they effect punishments through § 922(g)(8).

Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 480–81 (1995); Amar, at *48 n.* (noting that the voting rights and arms rights are linked). The virtuous citizen theory has been criticized as being "vague" and "belied by the historical record." *Binderup v. Atty. Gen. United States of Am.*, 836 F.3d 336, 358 (3d Cir. 2016) (Opinion of Hardiman, J.). Nevertheless, if republican thinkers thought individuals could be deprived of their voting and arms rights for the same reasons, then they very well could have also thought both rights would be deprived through the same procedures.

[6] Those factors are: "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned."

Disarming individuals through criminal proceedings also shows that the conduct is serious enough to warrant losing civil rights. Indeed, the government alleges that Rahimi threatened to take the child that he shared with his girlfriend away, then physically assaulted her, fired a shot at a bystander who attempted to intervene in the situation, and then threatened to kill her if she spoke about the events. United States Brief at *2. Simple assault is a Class A misdemeanor, Tex. Penal Code § 22.01(a)-(b), and aggravated assault is a first-degree felony, Tex. Penal Code § 22.02(a)-(b). But for head-scratching reasons, the state chose to forgo criminal proceedings.

Instead, the prosecutor's office pursued an agreed-to protective order in February 2020. United States Brief at *2–3; *see also* Tex. Fam. Code § 81.007 (The prosecutor's office is responsible for filing applications for protective orders.). Rahimi allegedly violated that order multiple times, one of which resulted with him getting arrested. United States Brief at *3; *see also* Tex. Penal Code § 25.07(a) (violating the terms of the protective order is a criminal offense). And yet again, the prosecutor's office did not prosecute. It was not until November 2020, when Rahimi allegedly committed a separate aggravated assault on another woman, that the prosecutor's office chose to criminally prosecute him. United States Brief at *3.

All of this could have been avoided if Rahimi were prosecuted for the initial aggravated assault, just like serious offenders have been since the founding. The prosecutor's office had to be aware of the seriousness

---

Mendoza-Martinez, 372 U.S. at 168–69 (footnote citations omitted).

of domestic violence and the recidivism rates set forth in the studies cited in the United States's Brief at *29–32. Yet the prosecutor's office merely chose to obtain a protective order. It shortcut the Constitution's historical tradition for the ends that it wanted to obtain. The Constitution does not allow that.

4. Section 922(g)(8) is unconstitutional for the independent reason that it *allows* but does not *require* any findings that the individual actually poses a threat to their intimate partner. Thus, it is overbroad in that it deprives individuals of their rights without finding that they are dangerous or violent.

Judge Cummings pointed this out when he invalidated the statute under the Second Amendment over 20 years ago. *United States v. Emerson*, 46 F. Supp. 2d 598, 610–11 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001). The credible-threat-of-harm finding in § 922(g)(8)(C)(i) is disjunctive. The order can, inter alia, contain a finding that the individual poses a credible threat to their intimate partner's safety, "or" the order can prohibit the individual from using force against the intimate partner or their child without any findings. 18 U.S.C. § 922(g)(8)(C)(i)-(ii). "All that is required for prosecution under the Act is a boilerplate order with no particularized findings." *Emerson*, 46 F. Supp. 2d at 611; *see also id.* at 599 (Emerson never harmed or threatened to harm his wife or any member of his family. He only made a threatening phone call to the man with whom his wife was having an affair. Yet a form order was issued that prohibited him from harming his wife without a finding that he posed a threat to her.). Commentators have noted that, based on the testimony in the case, it was "routine for Texas courts to issue prophylactic re-

straining orders in divorce cases, without findings or even evidence that the acts prohibited in those orders would otherwise be likely to occur." Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157, 160 (1999). That is still the case today. *Joseph v. Joseph*, No. 14-20-00855-CV, 2022 WL 3205099, at *2–3 (Tex. App. Aug. 9, 2022) (The trial judge erred in making family-violence findings without an evidentiary hearing.). Judge Cummings concluded that without requiring particularized findings "the statute has no real safeguards against an arbitrary abridgement of Second Amendment rights" and "is over-broad and in direct violation of" the Second Amendment. *Emerson*, 46 F. Supp. 2d at 611.

He was right. Without requiring particularized findings § 922(g)(8) is "overinclusive." *Cf. Kanter*, 919 F.3d at 466 (Barret, J., dissenting). It lacks substantive safeguards and must fail.

II. SECTION 922(g)(8) FAILS TO PROVIDE BASIC PROCEDURAL DUE PROCESS SAFEGUARDS.

Even if § 922(g)(8) passes muster under the Second Amendment, it independently fails under the Fifth Amendment's Due Process Clause. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citations omitted); *United States v. Rehlander*, 666 F.3d 45, 48

(1st Cir. 2012) (collecting authorities) (holding that Maine's temporary mental-health observation statute did not have enough due process to deprive someone of their Second Amendment rights). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes*, 407 U.S. at 80 (citation omitted).

The government claims that § 922(g)(8) has "stringent" or "strict requirements" built into it that satisfy any due process concerns. United States Brief at *32, *44. Yet, when the shoe was on the other foot, and the government was on offense prosecuting individuals under the statute, it argued the opposite—quite successfully. Decades of circuit court precedents hold that § 922(g)(8) sets a *low bar* and its requirements are *minimal*. The government cannot have it both ways.

1. Start with the notice requirements. The Court has "repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn." *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991) (collecting authorities). At a minimum, the notice must "apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (collecting authorities) (holding that the notice was adequate in that it informed the party that their services might be terminated was still insufficient because it did not "inform them of the availability of 'an opportunity to present their objections.'"). Indeed, the "'opportunity to be heard' … 'has little reality or worth unless one is informed that the matter is pending and can choose for

himself whether to … contest.'" *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (citations omitted) (second alteration in original). This includes being advised of the charges. *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 546 (1985) (A "tenured public employee is entitled to oral or written notice of the charges against him."); *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972) (A parolee is entitled to notice covering the parole-violation hearing's purpose.). Section 922(g)(8) does not cut it.

Section 922(g)(8)(A) requires that the protective order be issued "after a hearing of which such person received *actual notice*." (Emphasis added). "Actual notice" merely means that the person *received* the notice. *Dusenbery v. United States*, 534 U.S. 161, 170 n.5 (2002). It has no substantive content requirements. It only requires "that the hearing must have been set for a particular time and place and the defendant must have received notice of that and thereafter the hearing must have been held at that time and place." *United States v. Spruill*, 292 F.3d 207, 220 (5th Cir. 2002). Courts have expressly rejected the idea that § 922(g)(8) requires the individual to receive "notice of the *content* of the hearing," i.e., "'notice *that a restraining order might issue*.'" *United States v. Young*, 458 F.3d 998, 1006 (9th Cir. 2006) (emphasis in original); *United States v. Myers*, 581 F. App'x 171, 173–74 (4th Cir. 2014) (same).[7]

[7] Some courts have gone even further and ruled that the defendant need not even receive a copy of the final order to be put on actual notice that they are prohibited from possessing a firearm because the statute only requires that one be "subject to" the order. *United States v. Napier*, 233 F.3d 394, 399 (6th Cir. 2000). These precedents are probably no longer good after *Rehaif*

Even worse, lower courts have acknowledged that § 922(g)(8)(A)'s "actual notice" requirement is insufficient under the Due Process Clause but have found that to be "immaterial." *Young*, 458 F.3d at 1007 n.19. The courts have reasoned that this would be akin to collaterally attacking the predicate protective order, and that cannot be done because this Court held that a felon could not collaterally attack his predicate conviction under § 922(g)(1). *Id*. (citing *Lewis*, 445 U.S. at 66). But due process principles are baked into criminal proceedings—"'fundamental fairness [is] essential to the very concept of justice.'" *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (citation omitted). That is not the case with protective-order proceedings.

2. Next comes the hearing requirement. The hearing must be conducted "in a meaningful manner.'" *Fuentes*, 407 U.S. at 80. Meaningfulness depends on the circumstances. *Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S. 886, 894–95 (1961). For example, when tenured public employees are terminated, they are entitled to "an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Ed.,* 470 U.S. at 546. And this Court has said that at a preliminary parole-violation hearing, the parolee may testify, introduce documents into evidence, call on witnesses, and confront opposing witnesses, after which a reasoned decision must be stated. *Morrissey*, 408 U.S. at 487–88. And that is just for the preliminary

---

v. United States, 139 S. Ct. 2191, 2195–96 (2019) (holding that one must know their status as a prohibited person under § 922(g)).

hearing. There is a subsequent permanent-revocation hearing with more due process. *Id.*

Section 922(g)(8) falls short, again. It requires that the defendant have an "opportunity to participate" in the hearing. 18 U.S.C. § 922(g)(8)(A). But courts have said this "'requirement is a minimal one'" or a "low bar." *United States v. Boyd*, 999 F.3d 171, 181 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 511 (2021) (quoting *Young*, 458 F.3d at 1009). "[T]he statute does not require that evidence actually have been offered or witnesses called," by either party. *United States v. Lippman*, 369 F.3d 1039, 1042 (8th Cir. 2004). It only requires that "'a reasonable person in [the defendant's] position would have understood that he was permitted to interpose objections or make an argument as to why an order of protection should not be imposed.'" *Boyd*, 999 F.3d at 181 (citations omitted). Evidence of a verbal exchange between the defendant and the court satisfies the requirement. *United States v. Bramer*, 956 F.3d 91, 98 (2d Cir. 2020); *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir. 1998).[8]

[8] Even though the bar is low, it's not clear that Rahimi's order passes because there was no hearing. *Rahimi*, 61 F.4th at 459 ("Rahimi apparently waived [the] hearing (the order states no formal hearing was held, and no record was created)."); *but see Ohio Bell Tel. Co. v. Public Utility Commission*, 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). And the order may conflict with Texas caselaw, which holds that family violence findings cannot be made under Tex. Fam. Code § 85.005(b) without an evidentiary hearing. *Joseph*, 2022 WL 3205099 at *2–3. That may be immaterial because the statutory standards are so low: "nothing in the language of 18 U.S.C. § 922(g)(8) indicates that it applies only to persons subject to a *valid,* as opposed to an *invalid,* protective

The statute, thus, requires less due process to deprive an individual of a fundamental right than what is afforded to parolees—who have already been convicted of a felony and have limited freedoms while on parole and less rights in general. *Samson*, 547 U.S. at 850. That is backwards. People who have not been convicted should receive more due process before they can be deprived of a fundamental right.

3. Section 922(g)(8) also lacks an adequate standard of proof. "The function of a standard of proof, as that concept is embodied in the Due Process Clause … is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted). Civil proceedings at the federal level and in Texas generally have a preponderance of the evidence standard. *Id.*; *Roper v. Jolliffe*, 493 S.W.3d 624, 638 (Tex. App. 2015) (rejecting the argument that a standard higher than preponderance of the evidence should have been applied for a protective order). Quasi-criminal matters generally require a showing of clear and convincing evidence. *Addington*, 441 U.S. at 424. And criminal trials require establishing guilt beyond a reasonable doubt. *Id.* The *Addington* Court held that the clear-and-convincing-evidence standard struck the proper balance between "the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed,"

---

order." *United States v. Hicks*, 389 F.3d 514, 535 (5th Cir. 2004) (emphasis in original).

while "minimize[ing] the risk of erroneous decisions." *Id.* at 425, 433.

Likewise, a showing of clear and convincing evidence is also required before permanently depriving a person of their fundamental parental rights. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982). Protective orders, including the orders issued under the Texas Family Code, can prohibit an individual from communicating with their children upon a showing of "good cause." Tex. Fam. Code § 85.022(b)(2)(C).[9] Some protective orders are perpetual and effect a final, permanent deprivation of a fundamental right. *See Kinkaid v. Thurston Cnty. Sheriff*, 845 F. App'x 621, 622 (9th Cir. 2021) (Plaintiff was denied a concealed carry license because of a permanent restraining order issued in 1996.).

Clear and convincing evidence should be the minimum standard to deprive someone of their rights with a protective order. Protective orders can effectively terminate parental rights by banning communication with the entire family. And like a protective order, 18 U.S.C. § 922(g)(8)(C)(i), a civil commitment requires showing, inter alia, that the person "poses a danger to himself or others." *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996). Civil commitments and protective orders (to a lesser extent) deprive people of their rights to move freely and to possess firearms. 18 U.S.C. § 922(g)(4), (8). And if clear and convincing evidence is "the proper protection of fundamental rights

[9] Texas Courts take the curious position that an order prohibiting communication with a child does not terminate parental rights merely because prohibiting the communication is authorized by the statute. *Roper*, 493 S.W.3d at 638 n.15 (citation omitted).

in circumstances in which the State proposes to take drastic action against an individual," *Cooper*, 517 U.S. at 368, for civil commitments, it must be the proper standard for protective orders that deprive individuals of their fundamental rights.

There is also a high "risk of erroneous decisions." *Addington*, 441 U.S. at 424. Judge Collins recently honed in on this: "Indeed, from what this record reveals, it is reasonably to be expected that the California courts perfunctorily issue temporary orders on the same day that they are requested with only minimal scrutiny and without findings that would be sufficient to support an automatic deprivation of Second Amendment rights." *Wallingford v. Bonta*, No. 21-56292, 2023 WL 6153588, at *15 (9th Cir. Sept. 21, 2023) (Collins, J., dissenting). That is not an isolated observation. By some estimates, 900,000 final restraining orders are issued in the United States each year; another 2–3 million temporary restraining orders are also issued. *Without Restraint: The Use and Abuse of Domestic Restraining Orders*, Coalition to End Domestic Violence, 10 (2021).[10] At the high end, "[a]n analysis of domestic violence restraining orders issued in Campbell County, West Virginia concluded 81% were unnecessary or false." *Id.* at 11. Furthermore, "it is estimated that at least half of all restraining orders are issued in the absence of direct injury or physical harm." *Id.* Some are based solely on allegations of emotional distress; others are requested—and rubber stamped—as a tactical or legal maneuver by the applicant. *Id.* at 9, 11. In fact, some have esti-

[10] Available at http://endtodv.org/wp-content/uploads/2021/04/Restraining-Orders.pdf.

mated that "40 to 50 percent of restraining orders are strategic ploys." Cathy Young, *Hitting below the belt*, Salon (Oct. 25, 1999).[11] There is no doubt that there is a significant risk of erroneous decision-making that results in the deprivation of a fundamental right, and a clear and convincing evidentiary standard should be required.

Section 922(g)(8) fails again. It has no standard of proof. It does not even require any evidence be entered or any witness testify. *Lippman*, 369 F.3d at 1042. And states only require a preponderance of the evidence or reasonable-grounds type standard of proof. *See* T. Gary Mitchell, *Making the Law Work for Domestic Violence Survivors: Defining the Proper Scope of Protective Orders, Defeating Malicious Prosecution Claims and Saving a Home in Bankruptcy*, 33 Women's Rts. L. Rep. 401, 409 n.26 (2012) ("A [2009] fifty state survey lists only one state (Maryland) that requires a standard of proof for issuance of a protection order higher than a preponderance of the evidence.").[12]

---

[11] Available at https://www.salon.com/1999/10/25/restraining_orders/.

[12] Peace bonds historically suffered the same procedural infirmities and stood on the same constitutionally shaky grounds as modern protective orders underlying § 922(g)(8). "In reporting a husband's violence as a breach of the peace, a wife's own informal testimony to the local justice of the peace could be sufficient for him to require her husband to put up a bond." Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 Early Am. Studies 221, 232–33 (2007). "No legal guide specified the particular degree of violence necessary to elicit such a guarantee, nor was there a particular standard of proof." *Id*. at 234.

4. Lastly, § 922(g)(8) does not require that counsel be afforded (or at least knowingly waived). *Bramer*, 956 F.3d at 98 (collecting authorities). Yet in Texas, the prosecutor's office is charged with pursuing protective orders, Tex. Fam. Code § 81.007, which makes the action "devastatingly adverse." *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1996). Indeed, the *M.L.B.* Court held that "[w]hen deprivation of parental status is at stake … counsel is sometimes part of the process that is due." *Id.* at 123. Texas courts afford the same right to counsel that is required in criminal cases to termination of parental rights cases because "both protect valuable personal rights from 'devastatingly adverse action.'" *In re C.L.S.*, 403 S.W.3d 15, 21 (Tex. App. 2012) (quoting *In re J.M.S.*, 43 S.W.3d 60, 63 (Tex. App. 2001) (citing *M.L.B.*)). These cases can only proceed without counsel if the court has ensured, and the record reflects, that the defendant "competently, voluntarily, knowingly, and intelligently" waived his right to counsel. *Id.* at 19. The Second Amendment is also a valuable personal right. It is fundamental just as parental rights are. But § 922(g)(8), again, does not afford it the same process that is due to other fundamental rights.

* * *

The Court would not allow any other fundamental right (voting, worship, search and seizure, interstate travel, parenting and procreating, marriage, speech, self-incrimination, trial by jury, etc.) to be deprived through such minimal process. But if the minimal process afforded by § 922(g)(8) is sufficient to deprive individuals of one fundamental right, then it is sufficient to deprive them of other rights in the bundle; the Second Amendment "is not 'a second-class

right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen* 142 S. Ct. at 2156 (citation omitted). The Constitution requires more, and § 922(g)(8) fails to deliver.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ERIN M. ERHARDT
Counsel of Record
MICHAEL T. JEAN
NATIONAL RIFLE
ASSOCIATION OF AMERICA –
INSTITUTE FOR
LEGISLATIVE ACTION
11250 Waples Mill Road
Fairfax, VA, 22030
(703) 267-1158
EErhardt@nrahq.org
MJean@nrahq.org

October 4, 2023

Counsel for Amicus Curiae