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 *AMICI CURIAE* FOR THE TEXAS ADVOCACY PROJECT AND OTHER DIRECT LEGAL SERVICES ORGANIZATIONS IN SUPPORT OF PETITIONER

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Cases

Antonyuk v. Hochel,
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Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,
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California Rifle & Pistol Ass'n, Inc. v. City of Glendale, No. 2:22-CV-07346-SB-JC, 2022 WL 18142541 (C.D. Cal. Dec. 5, 2022) 22

Card v. Grinman,
5 Conn. 164 (Conn. 1823) 7

District of Columbia v. Heller,
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Dobbs v. Jackson Women's Health Org.,
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Gerstein v. Pugh,
420 U.S. 103 (1975) 16

Hickman v. State,
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Kanter v. Barr,
919 F.3d 437 (7th Cir. 2019) 4

Kiddie v. Kiddie,
563 P.2d 139 (Ok. 1977) 15

Lassiter v. Dep't of Soc. Servs.,
452 U.S. 18 (1981) 15

McDonald v. City of Chicago,
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New York State Rifle & Pistol Ass'n, Inc. v. Bruen,
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Pennsylvania v. Finley,
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People v. Madeyski,
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Rummel v. Estelle,
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Santosky v. Kramer,
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Schlamp v. State,
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Shelby Cnty., Ala. v. Holder,
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Simpson v. State,
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State v. Courchesne,
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State v. Garlington,
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Street v. State,
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Turner v. Rogers,
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United States v. $493,850.00 in U.S. Currency,
518 F.3d 1159 (9th Cir. 2008) 15

United States v. Bena,
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United States v. Edge,
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United States v. Emerson,
270 F.3d 203 (5th Cir. 2001) 17

United States v. Gore,
No. 2:23-CR-04, 2023 WL 2141032
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United States v. Lindsey,
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United States v. Melrose E. Subdivision,
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United States v. Raines,
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United States v. Saccoccia,
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United States v. Salerno,
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United States v. Silvers,
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United States v. Wendt,
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United States v. Wilson,
159 F.3d 280 (7th Cir.1998), *cert. denied*,
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Washington State Grange v. Washington State Republican Party,
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Williams v. State,
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Constitutions and Statutes

18 U.S.C. § 921(a)(32) 23

18 U.S.C. § 922(d)(1) 6

18 U.S.C. § 922(g)(8) 3-6, 13, 14, 16-21, 23, 24, 27

18 U.S.C. 922(g)(9) 29

Militia Act of 1662,
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Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (1994) 19, 20

ALASKA STAT. § 18.66.100(b) (2022) 18

ARIZ. REV. STAT. ANN. § 13-3602(E) (2022) 18

ARK. CODE ANN. § 9-15-205(a) (West 2022) 18

CAL. FAM. CODE § 6300(a) (West 2022) 18

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CONN. GEN. STAT. ANN. § 46b-15 (West 2023) 19

D.C. CODE § 16-1005(c) (2022) 18

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FLA. STAT. ANN. § 741.30(6)(a) (West 2022).............18

GA. CODE ANN. § 19-13-3(b) (West 2023) 18

2 Thomas R.R. Cobb, A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA (1851) 7, 8

HAW. REV. STAT. § 586-4 (2023)................................18

HAW. REV. STAT. § 586-5.5 (2023).............................18

IDAHO CODE ANN. § 39-6306(1) (2022) 18

750 ILL. COMP. STAT. ANN. § 60-214(a) (West 2022).18

IND. CODE ANN. § 34-26-5-9(a) (West 2023).............18

IND. CODE ANN. § 34-26-5-9(h) (West 2023).............18

IND. CODE ANN. § 34-26-6-10 (West 2023) 18

IOWA CODE ANN. § 236.5(1) (West 2023)...................18

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KY. REV. STAT. ANN. § 403.740(1) (West 2023) 18

MD. CODE ANN. FAM. LAW § 4-506(c)(1)(ii) (West 2022)...18

MD. CONST. of 1776, art. 3...8

MASS. GEN. LAWS ANN. CH. 209A § 4 (West 2022)....18

MASS. REV. STAT., ch. 134, § 16 (1836)......................21

MASS. CONST. art. VI (1780) 8

An Act Concerning the Militia, 1837 Mass. Gen. Laws 54 7

ME. REV. STAT. ANN. TIT. 19-A § 4110 (2022) 18

An Act Additional to an Act to Organize, Govern and Discipline the Militia of this State, 1837 Me. Public Laws 423 7

MICH. COMP. LAWS ANN. § 600.2950(4) (West 2023) 18

MISS. CODE ANN. § 93-21-15 (West 2023) 18

MO. ANN. STAT. § 455.040 (West 2022) 18

MONT. CODE ANN. § 40-15-202(1) (2023) 18

N.H. REV. STAT. ANN. § 173-B-3(VII)(a) (2023) 18

N. H. CONST. Pt. 2, art. 90 (1784) 8

N.J. STAT. ANN. § 2C-25:29(a) (West 2023) 18

N.J. CONST. of 1776 ¶ XXII 8

An Act for the Regulating, Training and Arraying of the Militia, 1778 N.J. Session Laws 42 7

An Act for Establishing and Conducting the Military Force of New Jersey, 1806 N.J. Session Laws 536 7

N.M. STAT. ANN. § 40-13-4 (West 2023) 18

N.Y. FAM. CT. ACT. § 842 (West 2023) 18

N.Y. CONST. sec. 17 (1846) 8

NEV. REV. STAT. ANN. § 33.020(5)-(6) (West 2023) ...19

ACTS OF NORTH CAROLINA 1715, c. 31 8

ACTS OF NORTH CAROLINA 1778, c. 5 8

N.C. GEN. STAT. ANN. § 50B-2(c)(5) (West 2022) 18

N.D. CENT. CODE ANN. § 14-07.1-02(2)-(3) (2023) 18

OHIO REV. CODE ANN. § 3113.31(2)(a) (West 2023) .. 19

OKLA. STAT. ANN. TIT. 22 § 60.3 (West 2023) 19

23 PA. CONS. STAT. ANN. § 6107(a) (West 2022) 19

An Act for the Regulation of the Militia of this Commonwealth, 1822 Penn. Session Laws 1316 ... 7

Act of January 28, 1777, 30 STAT. AT LARGE OF PENNSYLVANIA 8

R.I. GEN. LAWS ANN. § 15-15-4 (2023) 19

CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1643 8

S.C. CODE ANN. § 20-4-50 (2023) 19

S.C. CODE ANN. § 20-4-70(A) (2023) 19

2 STAT. AT LARGE OF SOUTH CAROLINA, 401 (Cooper ed. 1837) 8

S.D. CODIFIED LAWS § 25-10-6 (2023) 19

TENN. CODE ANN. § 36-3-605(a)-(b) (West 2023) 19

TEX. FAMILY CODE § 84.001(a)(b) (West 2021) 19

TEX. PEN. CODE ANN. § 25.07 14

TEX. FAMILY CODE § 6.501 (West 2020) 17, 18

TEX. FAMILY CODE § 6.502 (West 2020) 17, 18

TEX. FAMILY CODE § 82.005 (West 2019) 19

TEX. FAMILY CODE § 85.001 (West 2019) 19

TEX. FAMILY CODE § 85.001 (2023), Act of May 28, 2023, 88th Leg., R.S., ch. 688................................19

UTAH CODE ANN. § 78B070604(1)(a)(b) (West 2023)..19

VA. CODE ANN. § 16.1-253(F) (West 2023) 19

VA. CODE ANN. § 16.1-253.1(D) (West 2023).............19

VT. STAT. ANN. TIT. 15 § 1103(c)(1) (2022).................19

Virginia: ORDINANCES OF CONVENTION, MAY 1776, Chap. V, §VI, in 9 HENING'S STAT. AT LARGE.........8

W. VA. CODE ANN. § 48-27-501 (West 2023) 19

WASH. REV. CODE ANN. § 7.105 (West 2023).............19

WIS. STAT. ANN. § 813.0250(2) (West 2022)..............19

WYO. STAT. ANN. § 35-21-104 (2023) 19

Other Authorities

1 Francis Newton Thorpe, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES (1909) 7, 8

Nick Breul and Desiree Luongo, *Making it Safer: A Study of Law Enforcement Fatalities Between 2010-2016,* U.S. Department of Justice, Community Oriented Policing Services, (2017) at 24, https://cops.usdoj.gov/ric/Publications/cops-w0858-pub.pdf 30

Centers for Disease Control and Prevention, National Center for Health Statistics, Marriages and Divorces, *Provisional number of divorces and annulments and rates: United States, 2000-2021*, available at https://www.cdc.gov/nchs/data/dvs/marriage-divorce/national-marriage-divorce-rates-00-21.pdf 20

Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. ____ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545) 11

John A. Conley, *Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257 (1985) 9

Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel under Anglo-American Law*, 1688-1868, LAW & CONTEMP. PROBS. 73 (2020) 8

Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1713-14 (2012) 24, 25

MICHAEL DALTON, THE PRACTICE, DUTY AND POWER OF THE JUSTICES OF THE PEACE (1774) 9

JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE (1774) 6, 7, 9, 21

Carolina Diez et. al., *State intimate partner violence-related firearm laws and intimate partner homicide rates in the United States*, *1991 to 2015*, ANN. INTERN. MED. 167:536–43, 2017 28

Federalist No. 53 .... 11, 12

Record Book of Ebenezer Ferguson Justice of the Peace, December 1799 to July 1800, digitized for Kellen Funk and Sandra G. Mayson, *Bail at the Founding*, PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES, Research Paper No. 23-11, https://srn.com/abstract+4367646 9

Lisa B. Geller et. al., *The role of domestic violence in fatal mass shootings in the United States*, 2014-2019, 8 INJURY EPIDEMIOLOGY 38 (2021) 29

Liza H. Gold, M.D., *Domestic Violence, Firearms, and Mass Shootings*, 48 J. AM. ACAD. PSYCHIATRY LAW 1 (2020) 28, 30

John Gramlich, *What the data says about gun deaths in the U.S.,* Pew Research Center, available at https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/ 25

Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 262 (2020) 4, 5

WILLIAM HAWKINS, 1 TREATISE OF THE PLEAS OF THE CROWN (6th ed. 1777) 9

VICTORIA L. HOLT, ET. AL., CIVIL PROTECTION ORDERS AND RISK OF SUBSEQUENT POLICE-REPORTED VIOLENCE., JAMA, Vol. 288, No. 5 (Aug. 7, 2002)..32

Jay Janner, *Texas Church Shooter Had 'a Purpose and a Mission' in Family Feud, Investigator Says*, AUSTIN AMERICAN-STATESMAN, Nov. 7, 2017, https://www.nbcnews.com/storyline/texas-church-shooting/texas-church-shooter-may-have-been-targeting-his-mother-law-n817961.......................29

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) (cited in Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006)) 31

Aaron J. Kivisto and Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, 48 J. AM. ACAD. PSYCHIATRY LAW 26 (2020) 28

Andrea McKenzie, *'His Barbarous Usages,' Her 'Evil Tongue: Character and Class in Trials for Spouse Murder at the Old Bailey, 1674-1790'* AM. J. OF LEGAL HISTORY, September 2017, Vol. 57. No. 3 .26

Kyle Meinick, *"Nobody's safe": Lawyers take precautions after Ga. Attorney's killing*, WASHINGTON POST (December 15, 2022) 30

ERIC H. MONKKONEN, MURDER IN NEW YORK CITY (2001) 25, 26

National Center on Protection Orders and Full Faith & Credit, Battered Women's Justice Project, *State Statutory Provisions Addressing Mutual Protection Orders*, (2017), https://bwjp.org/assets/ncpoffc-mutual-protection-order-matrix-revised-2017.pdf 31

Kim Parker, et. al., *The demographics of gun ownership*, Pew Research Center (2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/...20

Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337 (2015)...........................27

Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000)...25, 26

Peter Slocum, Comment, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 SETON HALL L. REV. 639 (2010)...23

Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship, 2021*, Bureau of Justice Statistics, U.S. Dep't of Justice (December 2022),

available at https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021....27

SUSAN B. SORENSON AND REBECCA A. SCHUT, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature, Trauma, Violence & Abuse*, Vol. 19(4) 28

Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) 7

William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 Wm. & Mary L. Rev. 393 (1968) 7, 8

Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006) 31

GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE (1736) 5, 9, 21

Statement of Interest of *Amici Curiae*[1]

Texas Advocacy Project ("TAP") and other *Amici Curiae*, listed below, are non-profit organizations from around the country that provide life-changing and life-saving civil legal services to, and advocacy for, survivors of domestic violence, their families, and their communities. Our organizational community is committed to increasing access to justice in underrepresented and underserviced communities. By directly representing survivors, and supporting those that represent survivors, in domestic violence restraining order cases, we work towards a shared vision that all survivors live free from abuse. As a threshold matter, that vision can be realized only when domestic violence victims survive, the possibility of which is vastly diminished when an abuser has access to a firearm at critical junctures.

Amici Curiae joining this brief are:

- Atlanta Legal Aid Society, Inc.
- Bay Area Legal Aid
- Central California Legal Services
- Community Legal Aid SoCal
- Eastside Legal Assistance Program

[1] No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amici curiae* and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

- Georgia Legal Services Program
- Greater Hartford Legal Aid
- Indiana Health Advocacy Coalition
- Indiana Legal Services, Inc.
- Law Foundation of Silicon Valley
- Legal Aid of Arkansas
- Legal Aid of NorthWest Texas
- Legal Aid Society of San Diego
- Legal Services of Northern Virginia
- Los Angeles Center of Law and Justice
- Maryland Legal Aid
- New Haven Legal Assistance Association
- OneJustice
- SAFE Alliance
- Southeast Louisiana Legal Services Corporation
- Southern Arizona Legal Aid, Inc.
- Texas Legal Services Center
- University of Texas School of Law Domestic Violence Clinic
- Virginia Poverty Law Center

Summary of the Argument

The Fifth Circuit misapplied this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022): rather than a broad prohibition on possessing or carrying a gun, Section 922(g)(8) prohibits only those who have committed or threatened family violence from doing so, and only for the generally short period of time that they are subject to a protective order. The dangerousness, the Statute of Northampton, and the surety laws are therefore analogues; especially so because the nature of domestic violence has changed dramatically from 1791 until now. Also, the Fifth Circuit appears to misunderstand domestic violence protective orders ("DVPOs"), and, citing largely hypothetical concerns and dated anecdotes, invalidated Section 922(g)(8) based in part on that misunderstanding. As a direct result of the court of appeals' decision, domestic partners and children, and also first responders, by-standers and the general public, are at risk of serious or fatal injury.

Argument

I. The Fifth Circuit ignored *Bruen's* exhortation that analogues need not be "dead ringers."

Section 922(g)(8) differs materially from the laws this Court analyzed in *District of Columbia v. Heller,* 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and in *Bruen*. *Heller*, *McDonald*, and *Bruen* involved laws that broadly restricted the possession or carry of firearms, across the entire populace, with few exceptions. Section

922(g)(8) temporarily prohibits a person who, after notice and an opportunity for hearing, has been found to be a credible threat to the physical safety of an intimate partner or child from possessing or carrying a gun, for only the period of time that the DVPO is effective. As discussed below, the analogues are sufficient to establish that Section 922(g)(8) passes constitutional muster.

As a threshold matter, the Fifth Circuit's conceptual premise is wrong. All of the three categories of analogues it identified—the "dangerousness" exclusions, the prohibition on "going armed," and the surety laws—were directed at perceived "dangerousness." *See Kanter v. Barr*, 919 F.3d 437, 456-57 (7th Cir. 2019) (J. Barrett, dissenting); *see also* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 262 (2020). Although they achieved their purpose by different methods, they all showed that the government had the power to protect itself and its citizens from undue harm.

A. The "dangerousness" laws are analogues.

The Fifth Circuit held that the "dangerousness" laws were not analogues because they disarmed people by class, rather than based on an individual evaluation of dangerousness. Pet. App. 19a-20a. But, as stated below, some of the early "dangerousness" laws were individualized. The Statute of Northampton, discussed below, punished those who went "armed to terrify the King's Subjects." Later,

through the Militia Act of 1662, officers of the Crown had the power to disarm anyone they judged to be "dangerous to the Peace of the Kingdom." 13 & 14 Car. 2, c. 3, § 13 (1662). *See* Pet. Br. 14-15.

Assuredly, though, other dangerousness laws, such as disarming Catholics, enslaved persons, or Native Americans, were, in large part, categorical—although Catholics who swore an oath of allegiance could be armed, as could enslaved persons licensed by a justice of the peace, also individualized evaluations. Greenlee, *supra*, at 265; GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 13 (1736). But that does not mean that such laws are not analogues for Section 922(g)(8). While we no longer view certain religions, races, or economic classes as dangerous, Congress can rationally determine, in a way not constitutionally suspect, that certain classes are dangerous. Certainly, classifying persons as criminal based on their actions—rather than their identity—is fundamental to our criminal justice system. Section 922(g)(8) makes a categorical determination regarding who should have access to guns based on an individualized assessment of dangerousness. Congress rationally determined that this class of violent domestic offenders, i.e., those who have acted in such a way that there is a reasonable fear of bodily injury to their partner or child, and who had notice and an opportunity to state his or her case, should not possess a gun for the generally short period of time most persons are subject to a state-issued protective order. Further, as discussed below, contrary to the Fifth Circuit's opinion, Pet. App. 24a, Section 922(g)(8) protects more than identified individuals. The

"dangerousness" laws are analogues for Section 922(g)(8).

B. The "going armed" laws are analogues.

1. The "going armed" laws were designed to prevent harm by persons considered dangerous.

The "going armed" laws are analogues, even though under Section 922(g)(8), no guns are forfeited to the state. Instead, any arms that are relinquished or seized under Section 922(g)(8) are returned to the owner or possessor when the underlying state protective order expires. 18 U.S.C. § 922(d)(1).

The Fifth Circuit discounted four state analogues, stating that North Carolina common law did not require forfeiture and then, quoting dicta in *Bruen*, stated that three versions of the Statute of Northampton laws—Massachusetts, Virginia, and New Hampshire—were not sufficient to establish a tradition. The Fifth Circuit then further discounted Massachusetts and Virginia because Massachusetts removed its forfeiture provision four years after ratification, and Virginia did the same by 1847—***56 years after ratification***—leaving only New Hampshire, which the court then termed an outlier.

With respect, the Fifth Circuit was factually wrong. In the Province of North Carolina, the defendant could be disarmed for riding "armed with unusual and offensive Weapons." JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 13

(1774). Also, that Massachusetts and Virginia later decided to legislate differently, based on their own temporal circumstances, does not indicate they believed their law unconstitutional. Those laws, more likely, simply no longer fit their needs: the young states, which were largely rural, without professional law enforcement, sometimes engaged in hostilities with Native Americans, and fearful of "slave uprisings," often ***required*** their citizens to arm themselves to participate in hue-and-cry, to keep the peace, and to muster with the militia in order to provide for the "security of a free State."[2]

More importantly, the Statute of Northampton merely codified a long-standing British common-law prohibition on going armed, which was then incorporated into the common law of every colony, in some form or another, and later into the common law of the early states, either by constitution, statute, or judicial decision.[3] *See generally* William B. Stoebuck,

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[2] *See, e.g.*, Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–33 (1994); *see also* An Act for Establishing and Conducting the Military Force of New Jersey, 1806 N.J. Session Laws 536; An Act for the Regulation of the Militia of this Commonwealth, 1822 Penn. Session Laws 1316; An Act Concerning the Militia, 1837 Mass. Gen. Laws 54; An Act Additional to an Act to Organize, Govern and Discipline the Militia of this State, 1837 Me. Public Laws 423; An Act for the Regulating, Training and Arraying of the Militia, 1778 N.J. Session Laws 42.

[3] Connecticut: *Card v. Grinman*, 5 CONN. 164, 168 (Conn. 1823); Delaware: DEL. CONST. OF 1776 art. 25, reprinted in 1 Francis Newton Thorpe, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, 566-67 (1909) ("Thorpe"); Georgia: 2

Reception of English Common Law in the American Colonies, 10 WM. & MARY L. REV. 393 (1968); *see also* Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel under Anglo-American Law*, 1688-1868, LAW & CONTEMP. PROBS. 73, 87 (2020). If in the late 18th and early 19th centuries, only three states statutorily overrode the common-law incorporation of the Statute of Northampton, it was enforceable in other of the states as a matter of common law, unless deemed inapplicable (as it was in *Simpson v. State*, 13 Tenn. 356, 360 (1833)). It is often still part of their law today, even if it has changed in form over time. For example, Maryland (like North Carolina) also still recognizes common-law crimes such as riot and affray. *Schlamp v. State*, 390 Md. 724, 729 (2006); *Hickman v. State*, 193 Md. App. 238, 253 (2010). Under Maryland law, the only restrictions on punishment for a common-law crime are "that the sentence be within

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Thomas R.R. Cobb, A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA, 721 (1851) (Act of 1784); Maryland: MD. CONST. OF 1776, art. 3, 3 Thorpe, *supra*, 1686; Massachusetts: MASS. CONST. art. VI (1780), 3 Thorpe, *supra* 1910; New Hampshire: N.H. CONST. Pt. 2, art. 90 (1784), 4 Thorpe, *supra* 2469; New Jersey: N.J. CONST. OF 1776 ¶ XXII, 5 Thorpe, *supra* 2598; New York: N.Y. CONST. sec. 17 (1846), 5 Thorpe, *supra*, 2655; North Carolina: ACTS OF NORTH CAROLINA, 1715, c. 31, *see also* ACTS OF NORTH CAROLINA 1778, c. 5; Pennsylvania: Act of January 28, 1777, 30 STAT. AT LARGE OF PENNSYLVANIA; Rhode Island: CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1643, 6 Thorpe, *supra* 3210-11; South Carolina: 2 STAT. AT LARGE OF SOUTH CAROLINA, 401, 413-414 (Cooper ed. 1837) (Act of 1712); Virginia: ORDINANCES OF CONVENTION, MAY 1776, Chap. V, §VI, in 9 HENING'S STAT. AT LARGE 126.

the reasonable discretion of the trial judge and that it not be cruel and unusual punishment." *Street v. State*, 307 Md. 262, 266 (1986).

In the colonies and early states, common law was enforced largely by justices of the peace. John A. Conley, *Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 260-61, 283 (1985). Most of the justices were not lawyers but they did have access to compilations of the common law in the form of justice of the peace manuals. Those manuals recognized the prohibition on "going armed" to the terror of the people, as well. Conley, *supra*, at 261; *see also* MICHAEL DALTON, THE PRACTICE, DUTY AND POWER OF THE JUSTICES OF THE PEACE 30 (1774); DAVIS, *supra* at 13; WEBB, supra at 13; 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 367 (6th ed. 1777). Justice court records, where they exist, are not generally accessible—or decipherable. *See, e.g., Record Book of Ebenezer Ferguson Justice of the Peace, December 1799 to July 1800*, digitized for Kellen Funk and Sandra G. Mayson, *Bail at the Founding,* PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES, Research Paper No. 23-11 at 5, n. 13 https://srn.com/abstract+4367646. Regardless, we know that justices were guided by the justice of the peace manuals.

Modern state courts use those same manuals today. Multiple states' relatively recent recognition of the common-law "born alive" rule shows that even modern courts determine the common law in their state by reference to what was generally accepted in 1776, rather than by the absence of citation in their

state law since that time. *See, e.g., Williams v. State*, 316 Md. 677, 681 (1989) ("Thus, in ascertaining the common law of this State ***in the absence of clear Maryland case law on the subject***, we look to early English cases and writers on the common law, as well as cases from other jurisdictions.") (emphasis added). *See also State v. Courchesne*, 296 Conn. 622, 680 (2010) ("The defendant has offered no reason, and we know of none, why the born alive rule would not have been accepted as the law of this state at the time of its settlement.").

Finally, in light of post-*Bruen* decisions, we respectfully urge the Court to reconsider *Bruen*'s dicta stating that three states' early laws—out of thirteen—were insufficient to show that a particular practice was part of the history and tradition of the country. First, as discussed above, all thirteen original states (and virtually all other states) received English common law—including the Statute of Northampton—into their law. Unless a positive statute or constitutional provision overrode it, or it otherwise conflicted with local needs, the Statute of Northampton was presumptively part of that state's history and tradition.

Second, relying on historical silence—especially when records are missing or otherwise inaccessible—yields haphazard results, at best. It assumes that all history is recorded, but not only is the historical record largely missing from justice of the peace courts, Georgia's case law for the period from the founding until 1846 is unavailable. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 732–33 (2010). It further assumes that historical legislatures

always legislated to the maximum extent of their constitutional authority, regardless of conditions existing in their state at that time. *See, e.g.,* Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. ____ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545). As shown by the cases recognizing the born alive rule, states do not determine their own law only by reference to positive law, even today. Relying on silence in the historical record creates an anomaly: "If gun-related conduct was permitted in early American society, it has now become a legal right," Charles, *supra* at 7, whereas, if the record is silent, regulation is prohibited. But this Court recently observed that a state's failure to legislate on an issue does not mean it has determined it could not act. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2255 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.").

Third, requiring a threshold minimum of early states that positively restricted firearms in a particular fashion federalizes the law of early American states, more than 200 years after the fact—and in a way clearly not anticipated by the Founders. *See, e.g.*, Hamilton, A., Madison, J., Jay, J. Federalist No. 53:

> The great theatre of the United States presents a very different scene. The laws are so far from being uniform, that they vary in every State; whilst the public

> affairs of the Union are spread throughout a very extensive region, and are extremely diversified by the local affairs connected with them . . . .

In *Rummel v. Estelle*, 445 U.S. 263 (1980), Justice Rehnquist, writing for the Court, held that Texas's law sentencing Rummel to life in prison after his three felony convictions—obtaining $80 worth of goods with a fraudulent credit card, passing a forged check for $29.36, and obtaining $120.75 by false pretenses—had not been unconstitutionally applied under the Eighth Amendment. The Court rejected Rummel's challenge, holding that the fact that ***only three states' laws—out of fifty***—were comparably harsh did not make the punishment unconstitutional. The Court reasoned that "a constitutionally imposed uniformity [is] inimical to traditional notions of federalism." *Id.* at 282. Here, as in *Rummel*, the Court is defining the parameters of a provision in the Bill of Rights by reference to state law; here, as in *Rummel*, those states' laws were equal under the Constitution.

In addition, picking and choosing which colony's or state's laws represent the nation's "history and tradition" while holding others do not, violates the principle of equal sovereignty. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 542 (2013) ("Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'"). Lower courts are now requiring both a critical mass of states and of population, discarding as not part of the nation's history or tradition laws followed by several, but purportedly not enough,

states and also the laws of states with small populations, *see*, *e.g., Antonyuk v. Hochel*, ___ F.Supp.3d ___, 2022 WL 16744700, *61 (N.D. New York Nov. 7, 2022). Once again, this requirement yields a result ***not*** anticipated by the Founders. Courts are not only determining historical facts but also weighing and measuring them.

Finally, as discussed below, Section 922(g)(8) protects more than an identified person. Because the Statute of Northampton, despite its ancient provenance, became part of the common law of England and then of colonial and early America, and was directed at threats from dangerous persons, it is an analogue.

2. The Fifth Circuit's concern that the underlying protective order issues in a civil proceeding is irrelevant: the crime prosecuted, under both state and federal law, is the violation of the civil order.

The Fifth Circuit held that the "going armed" cases were not analogues to Section 922(g)(8) because ***in the underlying state court civil proceeding***, Rahimi agreed to an order "without counsel or other safeguards that would be afforded him" in a criminal proceeding. Pet. App. 23a. The Fifth Circuit's concerns about the underlying proceeding appear to be two-fold: because the proceeding is civil in nature, the defendant has no right to an attorney and the burden of proof is lower than beyond a reasonable doubt. Both concerns are misplaced.

Right to counsel. Rahimi was not criminally charged in the underlying proceeding. Under both state and federal law, criminal exposure arises only if and when the person subject to a protective order violates that order. *See, e.g.,* TEX. PEN. CODE ANN. § 25.07; 18 U.S.C. § 922(g)(8). Rahimi's DVPO expressly advised him that violating the order was punishable either by contempt or as a separate criminal violation and that he was forbidden by federal law from possessing a gun. Rahimi had direct personal notice of the effect of violating the DVPO. Rahimi's current Section 922(g)(8) charge is based on his violation of a prohibition in the underlying agreed DVPO, i.e., possessing a firearm, and he was ably represented by counsel in this proceeding.

No Sixth Amendment right to counsel exists outside of the criminal context. *Turner v. Rogers*, 564 U.S. 431, 441 (2011). Therefore, this Court has held there is no due process right to counsel in habeas proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Even in civil asset forfeiture proceedings, which seek the forfeiture of property involved in or used for criminal acts, no constitutional right to counsel exists under either the Sixth Amendment or due process. *United States v. Saccoccia*, 564 F.3d 502, 505 (1st Cir. 2009); *People v. Madeyski*, 94 Cal. App. 4th 659, 663 (2001).

Numerous other types of cases exist in which a person could lose substantial rights but still have no right to counsel. Those include eminent domain proceedings, suits by the government to collect taxes, disputes with the government over ownership of land, and suits in which an individual sues the government

for patent violations. *See e.g., Saccoccia*, 564 F.3d at 505.

Nor is there a due process right to an attorney in divorce proceedings, even though the state will permanently divide marital property and determine conditions for access to the parties' children. *See, e.g., Kiddie v. Kiddie*, 563 P.2d 139, 143 (Ok. 1977). Even in cases in which the state could terminate a person's right to the care, custody, and management of their child—a right adjudged to be a fundamental right, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)—this Court has held there no per se due process right to an attorney. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981).

The Fifth Circuit's holding also conflicts with decisions from the Seventh, Eighth, and Tenth Circuits, all of which hold that a person need not be represented by counsel in the underlying state proceeding. *See United States v. Bena*, 664 F.3d 1180, 1185 (8th Cir. 2011); *United States v. Edge*, 238 F. App'x 366, 369 (10th Cir. 2007); *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir.1998), *cert. denied*, 527 U.S. 1024 (1999).

Burden of proof. It is also irrelevant that the burden of proof in the underlying proceeding is a preponderance of the evidence rather than beyond a reasonable doubt. Although a criminal defendant has certain constitutional rights, civil asset forfeiture is regularly used to seize assets suspected of use in a crime, before trial, and in a civil proceeding—based only on probable cause. *United States v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008);

United States v. Melrose E. Subdivision, 357 F.3d 493, 504 (5th Cir. 2004). Further, as the Fifth Circuit noted, persons who are suspected of committing, but not convicted of a crime, and who are presumed innocent can be jailed before trial, based again only on probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Temporarily prohibiting a person from possessing a gun, after he or she has been found by a preponderance of the evidence to have committed or threatened domestic violence, is a lesser constitutional burden.

3. The Fifth Circuit wrongly discounted the "going armed" analogues based on its mistaken assumption that predicate Section 922(g)(8) orders are routinely entered in divorce cases.

The Fifth Circuit mistakenly asserted that predicate domestic violence orders are commonly issued in divorces in which there has been no violence. Pet. App. 24a. The court stated, "§ 922(g)(8) works to disarm not only individuals who are threats to other individuals but also every party to a domestic proceeding (think: divorce court) who, with no history of violence whatever, becomes subject to a domestic restraining order that contains boilerplate language that tracks § 922(g)(8)(C)(ii)." *Id.* It is true that a court, in a divorce, may issue a temporary restraining order ("TRO") without notice or hearing to restrain the parties from, among other things, secreting assets or disparaging their partner to their children—and that the TRO can sometimes restrain one or both parties

from violence. *See, e.g.,* TEX. FAMILY CODE ANN. § 6.501 (West 2020). In Texas, the TRO, which cannot be a predicate Section 922(g)(8) order, may be replaced with temporary orders, after notice and hearing. TEX. FAMILY CODE ANN. § 6.502 (West 2020). An order issuing from that hearing could possibly be a Section 922(g)(8)(C)(ii) predicate order: that was the type of order upheld by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

In that case, Emerson had been enjoined from threatening or injuring his family after a hearing in which the court found he had threatened the life of his wife's paramour and had testified that he was suffering from "anxiety" and was not "mentally in a good state of mind." *Emerson*, 270 F.3d at 211. The *Emerson* court upheld the Section 922(g)(8)(C)(ii) conviction, holding that even though the underlying order contained no express findings, a Texas injunction would not issue unless the issuing court concluded, based on adequate evidence developed at a hearing, "that the party restrained would otherwise pose a realistic threat of imminent physical injury to the protected party." *Emerson*, 270 F.3d at 264.

Additionally, some courts sign standing orders that issue in certain family law cases, on a pro forma basis. That could have been the type of order that the Fifth Circuit addressed below. Pet. App. 24a. But as discussed above, such orders, issued without notice and an opportunity to participate in a hearing, are not predicate Section 922(g)(8) orders. The Fifth Circuit cited no support for its assertion that the language of pro forma standing orders ordinarily tracks Sections 922(g)(8)(B) and (C)(ii), or that such orders are issued

after notice and hearing, as they must be, to be predicate orders. In Texas, standing orders are issued without notice or a hearing under Texas Family Code § 6.501, and, if a party requests a hearing under Texas Family Code § 6.502, the court would have to make the implied findings required by Texas law and upheld by the *Emerson* court, for the order to issue. It is only then that such an order could possibly serve as a predicate Section 922(g)(8)(C)(ii) order.

By contrast, predicate DVPOs issue after notice and a hearing, and, in at least forty-six states, state law requires that the trial court find that domestic violence has occurred or is likely to occur before issuing a DVPO.[4] For example, under Texas Family

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[4] *See, e.g.,* ALASKA STAT. § 18.66.100(b) (2022); ARIZ. REV. STAT. ANN. § 13-3602(E) (2022); ARK. CODE ANN. § 9-15-205(a) (West 2022); CAL. FAM. CODE § 6300(a) (West 2022); COLO. REV. STAT. ANN. § 13-14-106(1)(a) (West 2022); D.C. CODE § 16-1005(c) (2022); DEL. CODE ANN. TIT. 10 § 1043(e) (2022); DEL. CODE ANN. TIT. 10 § 1044 (2022); FLA. STAT. ANN. § 741.30(6)(a) (West 2022); GA. CODE ANN. § 19-13-3(b) and (c) (West 2023); HAW. REV. STAT. § 586-4 (2023); HAW. REV. STAT. § 586-5.5 (2023); IDAHO CODE ANN. § 39-6306(1) (2022); 750 ILL. COMP. STAT. ANN. § 60-214(a) (West 2022); IND. CODE ANN. § 34-26-5-9(a) and (h) (West 2023); IND. CODE ANN. § 34-26-6-10 (West 2023); IOWA CODE ANN. § 236.5(1) (West 2023); KAN. STAT. ANN. § 60-3106(a) (West 2023); KY. REV. STAT. ANN. § 403.740(1) (West 2023); MASS. GEN. LAWS ANN. CH. 209A § 4 (West 2022); MD. CODE ANN. FAM. LAW § 4-506(c)(1)(ii) (West 2022); ME. REV. STAT. ANN. TIT. 19-A § 4110 (2022); MICH. COMP. LAWS ANN. § 600.2950(4) (West 2023); MISS. CODE ANN. § 93-21-15 (West 2023); MO. ANN. STAT. § 455.040 (West 2022); MONT. CODE ANN. § 40-15-202(1) (2023); N.C. GEN. STAT. ANN. § 50B-2(c)(5) (West 2022); N.D. CENT. CODE ANN. § 14-07.1-02(2)-(3) (2023); N.H. REV. STAT. ANN. § 173-B-3(VII)(a) (2023); N.J. STAT. ANN. § 2C-25:29(a) (West 2023); N.M. STAT. ANN. § 40-13-4 (West 2023); N.Y. FAM. CT. ACT. § 842 (West 2023);

Code § 82.005, a person seeking a protective order who is a party to a suit for dissolution of marriage must file a petition, as all DVPO applicants must, under Texas Family Code § 85.001, which the trial court could grant only if it finds that family violence has occurred and is likely to occur again in the future. *See, e.g.,* TEX. FAMILY CODE ANN. §§ 82.005; 85.001 (West 2019).[5] Section 85.001 was also the basis of the DVPO issued against Rahimi. These procedural protections are typical of modern DVPOs. The Fifth Circuit was simply mistaken.

Importantly, if the Fifth Circuit was right, we would have seen many, many Section 922(g)(8)(C)(ii) cases in which there had been no history of violence. Section 922(g)(8) was promulgated in 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub.

NEV. REV. STAT. ANN. § 33.020(5)-(6) (West 2023); OHIO REV. CODE ANN. § 3113.31(2)(a) (West 2023); OKLA. STAT. ANN. TIT. 22 § 60.3 (West 2023); 23 PA. CONS. STAT. ANN. § 6107(a) (West 2022); R.I. GEN. LAWS ANN. § 15-15-4 (2023); S.C. CODE ANN. § 20-4-50 (2023); S.C. CODE ANN. § 20-4-70(A) (2023); S.D. CODIFIED LAWS § 25-10-6 (2023); TENN. CODE ANN. § 36-3-605(a)-(b) (West 2023); TEX. FAM. CODE ANN. § 84.001(a)(b) (West 2021); UTAH CODE ANN. § 78B070604(1)(a)(b) (West 2023); VA. CODE ANN. § 16.1-253(F) (West 2023); VA. CODE ANN. § 16.1-253.1(D) (West 2023); VT. STAT. ANN. TIT. 15 § 1103(c)(1) (2022); W. VA. CODE ANN. § 48-27-501 (West 2023); WASH. REV. CODE ANN. § 7.105 (West 2023); WIS. STAT. ANN. § 813.0250(2) (West 2022); WYO. STAT. ANN. § 35-21-104 (2023). In other states, a different procedure, like Connecticut's risk analysis, may be performed. CONN. GEN. STAT. ANN. § 46b-15 (West 2023).

[5] Recent changes to Texas Family Code § 85.001 will become effective on September 1, 2023. *See* Act of May 28, 2023, 88th Leg., R.S., ch. 688.

L. No. 103–322, § 110401(c), 108 Stat. 1796, 2014–2015 (1994). Between 2000 and 2021, in 45 reporting states—not including California—18,363,289 divorces were granted. Centers for Disease Control and Prevention, National Center for Health Statistics, Marriages and Divorces, *Provisional number of divorces and annulments and rates: United States, 2000-2021*, available at https://www.cdc.gov/nchs/data/dvs/marriage-divorce/national-marriage-divorce-rates-00-21.pdf (last visited Aug. 18, 2023). Roughly 40% of American households own guns. Kim Parker, et. al., *The demographics of gun ownership*, Pew Research Center (2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/. If state courts regularly imposed pro forma conditions during a typical divorce that created a violation of Section 922(g)(8), regardless of a history of actual or threatened domestic violence, we would expect to have seen many thousands (or hundreds of thousands) of such prosecutions. Instead, we've found ***none***. Comparing the number of divorces that occur with the distinct lack of Section 922(g)(8) prosecutions of persons with no history of violence or threatened violence, it is clear that Section 922(g)(8) has worked as intended for almost thirty years. The Fifth Circuit's speculative concerns are misplaced. Further, as discussed below, the court wrongly considered hypothetical Section 922(g)(8)(C)(ii) prosecutions in a case in which the order contained Section 922(g)(8)(C)(i) findings.

C. The surety laws are analogues.

The Fifth Circuit held that the surety laws requiring a bond to ensure that the bonded party keep the peace were not analogues because those laws were less restrictive than Section 922(g)(8). Pet. App. 26a. Those ancient surety laws, which were described in Blackstone and later incorporated into the law of the colonies and early states by constitution, statute, or common law, were also enforced by justices of the peace. *See* WEBB, *supra*, at 5,7; DAVIS, *supra*, at 6. Although intended to be preventative, the laws allowed a potentially dangerous person to be imprisoned before trial if he or she could not produce a surety. *See State v. Garlington*, 56 S.C. 413 (1900). The imprisoned person was completely deprived of freedom as well as access to arms. By no measure is the possibility of prison less restrictive than temporarily eliminating a person's access to guns, based on findings of abuse proven by a preponderance of the evidence.

Later surety statutes prohibited a person from carrying an "offensive and dangerous weapon" unless he could find a surety, if a complainant had alleged that there was reason to fear that the person would breach the peace. *See* MASS. REV. STAT., ch. 134, § 16 (1836); *see also Bruen*, 142 S. Ct. at 2148 n.23. The statutes requiring a surety, and forbidding carry without it, are a more-than-sufficient analogue for a statute that prohibits a person from keeping or carrying a gun when a court has found by a preponderance of the evidence that the person has committed or is likely to commit domestic violence.

The Fifth Circuit also justified its rejection of the surety laws as analogues, as it did with the "going armed" laws, on its mistaken assumption that predicate domestic violence orders are commonly issued in divorces in which there has been no violence. Pet. App. 26a. Here, again, the Fifth Circuit's assumption is wrong.

II. The Fifth Circuit wrongly disregarded the Constitution's case-or-controversy limitation.

The Fifth Circuit effectively held that the Supreme Court, in *Bruen*, had *sub silencio,* overturned years of jurisprudence that would require the person claiming an act is facially unconstitutional to establish that no set of circumstances exists under which the act would be valid. *See, e.g., United States v. Salerno*, 481 U.S. 739, 755 (1987). The court of appeals thereby ignored Article III's case-or-controversy requirement, untethering its analysis from the facts and the law of the case before it—something other post-*Bruen* cases have refused to do.[6] That was reflected in the court's free-ranging discussion of hypothetical statutes (one that disarms for failure to drive an electric vehicle or recycle, Pet. App. 11a), speculative events (that pro

[6] At the time of drafting, only district courts have published opinions. *See, e.g., United States v. Lindsey,* No. 4:22-cr-00138-SMR-HCA-1, 2023 WL 2597592, at *2 (S.D. Iowa Mar. 10, 2023); *United States v. Gore*, No. 2:23-CR-04, 2023 WL 2141032, at *1 (S.D. Ohio Feb. 21, 2023); *United States v. Wendt*, No. 4:22-CR-00199-SHL-HCA-1, 2023 WL 166461, at *6 (S.D. Iowa Jan. 11, 2023); *California Rifle & Pistol Ass'n, Inc. v. City of Glendale*, No. 2:22-CV-07346-SB-JC, 2022 WL 18142541, at *8 (C.D. Cal. Dec. 5, 2022).

forma family law court orders are routinely predicate Section 922(g)(8) orders, Pet. App. 24a, and that DVPOs are particularly abused, Pet. App. 37a-41a (Ho, J., concurring)), and irrelevant events (the unfortunate but irrelevant temporary restraining order issued against David Letterman, which was not a predicate Section 922(g)(8) order because the parties were not intimate partners and it was not issued after notice and a hearing, Pet. App. 39a (Ho, J., concurring)[7]). But Justice Thomas, in *Washington State Grange v. Washington State Republican Party*, warned that, "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." 552 U.S. 442, 449–50 (2008). *See also United States v. Raines*, 362 U.S. 17, 20–21 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them.").

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[7] The concurrence apparently relied on Peter Slocum, Comment, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?,* 40 SETON HALL L. REV. 639 (2010), for its analysis. The comment, among other things, states as fact that "Mr. Letterman was placed on a national register of domestic abusers." Not only is the statement unsupported, but the TRO that issued against David Letterman was not, and could not be, a predicate Section 922(g)(8) order. A predicate order must be between intimate partners, must issue after notice and an opportunity for a hearing, and must contain particular findings or restrictions. Many different types of TROs and protective orders issue, most of which are not predicate Section 922(g)(8) orders. *See, e.g.*, § 922(g)(8); § 921(a)(32).

Under Article III's case-or-controversy stricture, the Fifth Circuit wrongly, in the context of a case to which Section 922(g)(8)(C)(i) was applicable, bootstrapped its hypothetical (and ill-founded) Section 922(g)(8)(C)(ii) concerns in order to invalidate Section 922(g)(8) on its face. *Compare Bena*, 664 F.3d at 1185 (refusing to consider possible deficiencies under § 922(g)(8)(C)(ii) in a facial challenge brought by a defendant who had been found to have committed family violence).

III. Domestic violence, particularly deadly domestic violence, exists today in a way that it did not, historically.

Further, the changed nature of domestic violence since 1791 means that the degree of fit between the historical analogue and Section 922(g)(8) need not be as precise. As this Court stated in *Bruen*, "the Founders created a Constitution—and a Second Amendment—'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'" *Id.* at 3132. A crisis exists now that did not in 1791.

A. Gun violence is a greater social ill now than it was at the founding.

Gun violence in general is a greater social ill now than it was at the founding. It was only as cheaper and more reliable handguns "proliferated in large numbers" and "society underwent a host of profound social and economic changes in the early decades of the nineteenth century" that guns (and knives) "gradually became a social problem." Saul Cornell, *The Right to Carry Firearms Outside of the*

Home: Separating Historical Myths from Historical Realities, 39 FORDHAM URB. L.J. 1695, 1713-14 (2012). In New York City, from 1797 to 1857, only 12% of the 520 murders where the weapon or method is known were by gun. ERIC H. MONKKONEN, MURDER IN NEW YORK CITY 38 (2001). But by 2020, 80% of all murders in the United States were by gun. John Gramlich, *What the data says about gun deaths in the U.S.,* Pew Research Center, available at https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/.

B. Although domestic violence has been with us for centuries, as commonly occurring gun violence against intimate partners and children has not.

Gun violence, particularly fatal gun violence, against family members or intimate partners was virtually unheard of in 1791. As one historian has stated,

> Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. ***Indeed, anyone wanting either to murder his family or protect his home in the eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm***.

Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 110 (2000) (emphasis added). Indeed, before the mass production of handguns, "at a close distance a dagger or sword was more reliable and therefore more deadly." MONKKONEN, *supra*, at 27. In England, in the years from 1674-1790, of the 128 cases at Old Bailey in which the defendant was tried for the murder of a spouse or intimate partner, only 3.12% of the deceased had been shot. Andrea McKenzie, '*His Barbarous Usages,' Her 'Evil Tongue: Character and Class in Trials for Spouse Murder at the Old Bailey, 1674-1790,'* AM. J. OF LEGAL HISTORY, September 2017, Vol. 57. No. 3, pp. 352-384 at 363, 370. When family members were murdered—a less frequent occurrence then than now—they were often strangled, bludgeoned, poisoned or drowned, but rarely shot. McKenzie, *supra.* Even in 1841, "[a] careless firing could easily injure the shooter, so haste, anger, and vicious personal feelings were far more easily expressed with sticks, axes, knives, hammers, chairs, rocks, and boots." MONKKONEN, *supra*, p. 32. Gun violence against one's spouse or intimate partner is a distinctly modern phenomenon.

C. At the Founding, men (or women) were far less likely to murder their spouses or partners, because they had no readily available, reliably lethal, weapon.

Researchers have shown that there were far fewer murders of spouses in early America. Spousal murder occurred very infrequently in the New England colonies—only 0.1 per 100,000 in

Massachusetts Bay Colony between 1630 and 1692. Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention,* 120 PENN ST. L. REV. 337, 340 n.40 (2015). In 2021, although there are regional differences, the estimated murder rate across the U.S. for spouses and intimate partners had increased to approximately .83 per 100,000—an eight-fold increase. Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship, 2021*, Bureau of Justice Statistics, U.S. Dep't of Justice (December 2022), available at https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021. There were simply fewer domestic murders in the absence of access to a readily available, easily utilized, lethal weapon.

IV. Temporarily prohibiting guns saves lives and prevents nonfatal gun injuries and assaults.

Although domestic violence affects primarily the battered spouse or partner, the physical harm from domestic violence spills far beyond those victims. Contrary to the Fifth Circuit's opinion (Pet. App. 20a, 24a), Section 922(g)(8) protects more than an identified person.

Violence against the intimate partner. Prohibiting the abuser from possessing a gun for the duration of the protective order reduces lethal violence against the intimate partner: states that require the surrender of firearms in the respondent's possession have been associated with a 9.7% lower total domestic violence murder rate and 14% lower firearm-related domestic violence murder rates than states without

these laws. Carolina Diez et. al., *State intimate partner violence-related firearm laws and intimate partner homicide rates in the United States, 1991 to 2015*, ANN. INTERN. MED. 167:536–43, 2017. *See United States v. Silvers*, No. 5:18-CR-50-BJB, 2023 WL 3232605, at *3 (W.D. Ky. May 3, 2023) (wife shot to death five days after protective order issued but without removal of guns). Removing guns also prevents nonfatal gun injuries and assaults, which are both underreported and even less well-documented; however, a recent study has attempted to quantify that harm. Susan B. Sorenson and Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, *Trauma, Violence & Abuse*, Vol. 19(4), p. 431-442 (2019). The study estimates that one million women have had an intimate partner use a gun against them. That "use" includes being shot, shot at, or pistol-whipped by that intimate partner. *Id.* at 435. Also, an estimated 4.5 million women have had their intimate partner threaten them with a gun, to "control, denigrate, intimidate, monitor, and restrict" them, a form of coercive control. *Id.* at 431-432, 437.

Violence against children and third parties. Bystanders, including children, friends, and strangers, are also affected by intimate partner homicide. Firearm use increased the incidence of additional victims by 70.9% in domestic violence homicides compared to 38.7% in nondomestic homicides. Aaron J. Kivisto and Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, 48 J. AM. ACAD. PSYCHIATRY LAW 26, 29 (2020). *See also* Liza H. Gold, M.D., *Domestic*

Violence, Firearms, and Mass Shootings, 48 J. AM. ACAD. PSYCHIATRY LAW 1, 4 (2020). For the period from 2005 to 2014, 20% of all child homicides were related to intimate partner violence. *Id*. Of those, 61.7% of the children were shot to death. *Id*. .

The connection between mass shootings and domestic violence is well-documented. Researchers found that, between 2014 and 2019, 68.2% of mass shooters killed at least one family member or had a history of domestic violence. Lisa B. Geller et. al., *The role of domestic violence in fatal mass shootings in the United States*, 2014-2019, 8 INJURY EPIDEMIOLOGY 38, at 5 (2021). The Sutherland Springs church shooter was a textbook example: previously convicted of assaulting a former wife and stepson, he then used an automatic weapon to massacre twenty-six worshippers and injure many more, while hunting down his mother-in-law. Jay Janner, *Texas Church Shooter Had 'a Purpose and a Mission' in Family Feud, Investigator Says,* AUSTIN AMERICAN-STATESMAN, Nov. 7, 2017, https://www.nbcnews.com/storyline/texas-church-shooting/texas-church-shooter-may-have-been-targeting-his-mother-law-n817961. Tragically, because of his prior domestic violence conviction, the shooter should have been precluded from possessing a gun under a separate statute, 18 U.S.C. 922(g)(9), but his name had not been added to the federal database. *Id*.

First responders are also affected. Police calls related to domestic violence have been found to constitute the single largest category of calls received by police, accounting for anywhere from 15 to more

than 50% of all calls. Nick Breul and Desiree Luongo, *Making it Safer: A Study of Law Enforcement Fatalities Between 2010-2016*, U.S. Department of Justice, Community Oriented Policing Services, (2017) at 24. From 2015 to 2016, 41% of law enforcement officers' "line of duty" deaths occurred while responding to a call involving a domestic dispute. *Id*. at 26. All officers killed had been shot to death and another four officers suffered nonfatal gun injuries. *Id*.

Other classes of persons, such as family law attorneys, are also at risk of assault or death at the hands of the abusive spouse. Roughly one-third of family law attorneys in a recent survey reported that they had been the victim of violence or of threats of violence. Kyle Meinick, *"Nobody's safe": Lawyers take precautions after Ga. Attorney's killing*, WASHINGTON POST (December 15, 2022).

Congress's decision to temporarily remove guns from a person found to have committed or threatened domestic violence is supported by analogues designed to prevent harm by dangerous persons.

V. Contrary to the concurring opinion, a protective order is a quick and effective method by which to protect a victim, while providing due process to the abuser.

The concurring opinion was broadly critical of DVPOs. The concurrence's principal authority for its quotes regarding gamesmanship and strategy in obtaining protective orders are from a single original source, in which the author discussed conversations in mediation with three couples some thirty years ago.

See, e.g., 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) (cited in Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 62 n.257 (2006)). Not only did Kandel fail to show that three anecdotes were representative of the roughly million divorces taking place each year, but the law governing protective orders has changed significantly in thirty years. As discussed above, almost every state now requires particular findings to issue a DVPO, based on facts proven by a preponderance of the evidence.

Even the mutual protective orders with which the concurrence expressed concern, Pet. App. 39a-41a, are often prohibited by modern protective order statutes. Instead, in most states, a court must evaluate each application for a protective order on its own facts and are often prohibited from issuing mutual protective orders. *See, e.g.*, National Center on Protection Orders and Full Faith & Credit, Battered Women's Justice Project, *State Statutory Provisions Addressing Mutual Protection Orders*, (2017), https://bwjp.org/assets/ncpoffc-mutual-protection-order-matrix-revised-2017.pdf. These were legislative concerns, legislatively addressed.

Finally, in every judicial proceeding, from criminal prosecutions to garden-variety contract cases, there is a possibility that a party will perjure himself or herself, that a court will rule injudiciously, or that the application of law to particular facts may

be unfair. These risks and concerns are not unique to DVPOs.

DVPOs can quickly and efficiently defuse escalating violence. The victim can seek an ex-parte TRO for an immediate crisis, quickly followed by a hearing on the merits of a longer DVPO. At the DVPO hearing, the respondent has an opportunity to defend himself or herself. The DVPO issues only if the victim proves by a preponderance of evidence that family violence has occurred or is likely to occur. The DVPO, should it issue, precludes possession of a gun only for the duration of the order. DVPOs are also effective: studies show that a victim with a protective order is 80% less likely to be re-victimized. Victoria L. Holt, et. al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, JAMA, Vol. 288, No. 5 (Aug. 7, 2002). Although a protective order will not stop all violence, removing guns makes fatal and serious nonfatal injury less likely.

Conclusion

The Court should reverse the Fifth Circuit's decision.

Respectfully submitted.

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