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 *AMICUS CURIAE* OF THE CENTER FOR PROSECUTOR INTEGRITY IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

We offer the Court a restated issue in this case.

Whether Congress can constitutionally criminalize, as a felony, the possession of a firearm based upon accusations in a civil hearing and a civil finding of "credible threat."

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Center for Prosecutor Integrity [CPI] submits this brief *amicus curiae* in support of the United States Public Defender and the Fifth Circuit Court of Appeals.

The Center for Prosecutor Integrity is a 501(c)(3) corporation dedicated to assisting the justice system in improving due process of law, addressing social problems and delivering justice.[1] One of the corporation's functions includes a project to address Domestic Violence, worldwide, known as the Coalition to End Domestic Violence [CEDV]. The project has 105 affiliates and partners in 34 countries around the globe and is dedicated to assisting institutions in solving problems associated with ending domestic violence.

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

18 U.S.C. § 922(g)(8) is unconstitutional on its face because:

- Domestic violence is not a gendered crime.

- Congress does not have the authority to enact the statute under the Commerce clause.

- Judge Ho's concerns regarding the integrity of restraining order proceedings are valid and germane.

- There are no historical precedents or statutes that completely eliminate (criminalize) a person's rights under Amend. II without the due process safeguards attending criminal convictions.

REASONS FOR AFFIRMING THE FIFTH CIRCUIT's OPINION

Had Mr. Rahimi been convicted of a felony crime involving weapons before he was charged with violating 18 U.S.C.§ 922(g)(8) ["statute" or "922(g)(8)"] this case might not be before this Court. Absent the due process protections of a criminal proceeding, however, a citizen's Second Amendment rights should remain intact.

The Department's argument is that an individual who is accused of domestic violence, or potential domestic violence in a civil proceeding is a domestic abuser or "wife batterer," and forfeits all of their rights under the Second Amendment. Brief of Appellant at 9. *Cf. United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023) ("The covered individual forfeits his Second Amendment right for the duration of the court's order. This is so even when the individual has not been criminally convicted or accused of any offense and when the underlying proceeding is merely civil in nature.") Therefore, argues the Department, Congress may criminalize any exercise of Second Amendment rights by a person accused in a civil proceeding of being a "credible threat," or who is restrained from domestic violence.

This argument is not supported in the opinions of this Court.

First, the Department, Congress and supporting *amici* reason from a discriminatory premise that "domestic violence" is a gendered crime. Congress

actually passed 18 U.S.C. § 922(g)(8) in 1994 on the finding that domestic violence is a "gendered crime." The legislative history reads:

> In enacting Title II of the Violence Against Women Act, Congress detailed the effects on interstate commerce as follows:
>
> Gender based crimes and the fear of gender based crimes, restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. S.R. 103-138 103d Congress, Pub.L. 103-322.

United States v. Bunnell, 106 F. Supp. 2d 60, 65 (D. Me. 2000).

There is virtually no history in the United States, prior to this statute, and none at the time of the passage of Amend II, that criminalized exercise of Second Amendment rights because someone was accused in a civil proceeding of a gendered crime.

We believe it is appropriate to address the false gender stereotypes presented in the Appellant's, brief and the briefs of its *amici* supporters, to assist in analyzing the Fifth Circuit's decision, to analyze the statute under the Commerce Clause and to analyze Judge Ho's concurring opinion.

I. Domestic Violence is not Gendered

Throughout the Appellant's opening briefs, and in many of the supporting *amici* briefs, counsel are citing statistics that are inaccurate and unfounded. These statistics represent false stereotypes about domestic violence.

A. Domestic Violence is the leading cause of death for Women Between the Ages of 15 and 44?

This myth has been endlessly perpetuated in the mass media, government reports and court filings. It is not true and is not appropriate for consideration in this Court.

The myth started in 1992 when the media misquoted it from an article written by the U.S. Surgeon General in the Journal of the American Medical Association.[2] The report was commenting on another report on the fatalities of African American women in one hospital in one violent neighborhood in Philadelphia.[3] The fatalities pertain to just that particular

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[2] Novello AC, Rosenberg M, Saltzman L, Shosky J. Fromthe Surgeon General, US Public Health Service. JAMA. 1992 Jun 17;267(23):3132. doi: 10.1001/jama.267.23.3132. PMID: 1593724. Available at:
https://pubmed.ncbi.nlm.nih.gov/1593724/

[3] Jeane Ann Grisso and others, A Population-based Study of Injuries in Inner-City Women, *American Journal of Epidemiology*, Volume 134, Issue 1, 1 July 1991, Pages 59-68. https://doi.org/10.1093/oxfordjournals.aje.a115993 (Am J

emergency room in that particular hospital. In addition, it was a statistic that was unrelated to domestic violence. The fatalities were attributable to all forms of violence which precipitated the fatalities.

Reliable and recent statistics from the Center for Disease Control show that domestic violence is not in the leading twenty causes of death for women in the age group 20-44.[4]

B. Men kill 4,000 women every year in domestic violence?

This stereotype is disingenuous. Men do kill about 4,000 female spouses each year in Domestic Violence. The same statistics, however, show that women kill 3,000 men every year in domestic violence. Wilson, M.I. and Daly, M., *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the U.S.*, 30 Criminology 189-216 (1992). Homicides in domestic violence are not gendered.

Further, in the cases in which men kill women in domestic violence, roughly half of those cases involve men acting in self-defense as "Battered Men." Linda Kelly, *Disabusing the Definition of Domestic Violence:*

Epidemiol. 1991;134:59-68). Available at: https://academic.oup.com/aje/article-abstract/134/1/59/90321

[4] United States, Department of Health and Human Services, Centers for Disease Control and Prevention. "Leading Causes of Death in Females, United States, 2018, available at: https://www.cdc.gov/women/lcod/index.htm.

How Women Batter Men and the Role of the Feminist State, 30 Fla. St. U. L. Rev. 806 (2003). ("However, the remaining 50% of couples who report violence by only one spouse further breaks down to reveal that while the husband is the sole perpetrator in one half of such cases, the wife is the sole perpetrator in the remaining half.") *See*, Hope Toffel, Note, *Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. Cal. L. Rev. 337 (1996)).

C. Women Initiate the Majority of Domestic Violence

Further, according to a conclusive and definitive study on domestic violence completed by Harvard Medical School, women initiate domestic violence in 70% of cases. Whitaker DJ, Haileyesus T, Swahn M, Saltzman LS, *Differences in frequency of violence and reported injury between relationships with reciprocal and nonreciprocal intimate partner violence.* 5 Am J Public Health 941-7 (2007) ("Table 2 – Nonreciprocal Domestic Violence Perpetrated by women (70.7%)").[5]

Harvard medical school also found in the study that the most reliable predictor of injury or death for women, in domestic violence, occurs when the woman initiates violence against the man. *Id.* at 946. (" A recent meta-analysis found that a woman's

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[5] Available: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1854883/

perpetration of violence was the strongest predictor of her being a victim of partner violence." *Id.* Citing: Stith SM, Smith DB, Penn CE, Ward DB, Tritt D., *Intimate partner physical abuse perpetration and victimization risk factors: a meta-analytic review*. 10 Aggress Violent Behav 65–98 (2004).

The assertion that domestic violence is a "gendered crime" is based only upon false stereotypes. *See generally*, Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 Dick. L. Rev. 337 (2015) ("Moreover, those arrested for domestic violence crimes now include heterosexual women, lesbians, and gay men; abuse is as common in same-sex relationships as in their heterosexual counterparts. Failure to take such factors into account perpetuates a one-dimensional image of the batterer as a controlling, heterosexual, male villain-a stereotype that impedes efforts to coordinate effective responses to domestic violence and entrenches gendered hierarchies that affect men, as well as women.")

II. Congress does not have the authority to enact the statute under the Commerce clause.

The Respondent's arguments on Congress' lack of authority to enact the statute under the Commerce clause are sound.

The lower courts are steadily disregarding this Court's ruling in *United States v. Lopez* 514 U.S. 549, 557, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) in relation to the statute. The *Lopez* opinion holds, in no uncertain terms, that the constitutional threshold for

Congress to regulate local crimes requires not just an "affect" on interstate commerce, but the threshold requires "a substantial effect on interstate commerce." "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce." *Lopez* at 556.

The circuit courts are holding that Congress had the authority under the commerce clause to enact 922(g)(8) because it included in the elements of the crime a jurisdiction requirement. According to the lower courts, that jurisdiction requirement is that the firearm must be "in or affecting commerce." *See United States v. Bostic*, 168 F.3d 718, 722-24 (4th Cir. 1999) (§ 922(g)(8) constitutional under the Commerce Clause and the Fifth and Tenth Amendments), *cert. denied*, 527 U.S. 1029 (1999); *United States v. Cunningham*, 161 F.3d 1343, 1345-47 (11th Cir. 1998) (Court rejected a Commerce Clause challenge to § 922(g)(8), finding it constitutional on its face); *United States v. Wilson*, 159 F.3d 280, 284-89 (7th Cir. 1998) (§ 922(g)(8) constitutional under the Commerce Clause and the Fifth and Tenth Amendments), *cert. deni*ed, 527 U.S. 1024 (1999); *United States v. Pierson*, 139 F.3d 501 (5th Cir. 1998) (§ 922(g)(8) constitutional under the Commerce Clause), *cert denied*, 525 U.S. 896 (1998).

The lower courts then, uniformly, hold that if a firearm is manufactured in another state than the state in which it is found in the possession of a defendant, the jurisdictional requirements of 922(g)(8) satisfy the restrictions under the Commerce clause.

United States v. Gill, 39 Fed. Appx. 548 (9th Cir. 2002). Gill was convicted of possessing a firearm in violation of section 922(g)(8). On appeal to the Ninth Circuit, he argued that the statute as applied to him exceeds Congress' Commerce Clause authority. The Ninth Circuit rejected his argument, citing many lower court decisions that establish that proof that the firearm was manufactured out of state is sufficient to establish the requisite jurisdictional element of the statute and thus to survive an as-applied challenge to the statute.

If this Court were to accept this analysis of the commerce clause, in relation to weapons or any other item sold or transported across state lines, there would be no limits on Congress' power under the Commerce clause. Virtually any item that was manufactured and transported across state lines could serve as a basis for Congress to exercise its powers over state crimes under the Commerce clause. This Court warned against such expansion of power in *Lopez*.

> In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." [Citations omitted]

U.S. v. Lopez, 514 U.S. 549, 557, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

This Court has also held, unequivocally, that penal laws that prohibit felons from possessing firearms are within a traditional area of state or local concern. *United States v. Bass*, 404 U.S. 336, 349-50 (1971). *Scarborough v. United States*, 431 U.S. 563 (1977).

This court held in Lopez, *supra*, that the language in 922(q)(1)(A) of "in or affecting commerce" was not sufficient on its face to validate a federal firearms statute that criminalized possession of a firearm in a school zone. The Court unequivocally held that such prohibition on the possession of a firearm must require proof, beyond a reasonable doubt, that the possession of the firearm had "substantially affected interstate commerce" in order to be a valid constitutional exercise of "Congress' power to regulate activities in and affecting commerce."

> The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." 2 F.3d 1342, 1367-1368 (1993). Because of the importance of the issue, we granted certiorari, 511 U.S. ----, 114 S.Ct. 1536, 128 L.Ed.2d 189 (1994), and we now affirm.

Lopez, *supra* at 551.

This Court's decision in *U.S. v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) provides some guidelines to the application of *Lopez*' Commerce Clause analysis to gendered crimes (or "gender motivated crimes") addressed under the Violence Against Women Act.

First, this court should examine the statute to see if it regulates economic conduct. No one even suggests that a citizen, in exercising their Second Amendment rights to possess a firearm is engaging in economic activity. In affirming the holding of the circuit court in *Lopez*, Chief Justice Rehnquist, writing for the majority, stated that the mere possession of a firearm does not substantially affect interstate commerce. *See Lopez* at 549. Imputing Commerce Clause authority for 922(g)(8) fails the first prong of the *Lopez* analysis.

Second, the *Lopez* and *Morrison* decisions provide a possible "commerce clause hook" if the statute seeks to "regulate and protect" an item that substantially affects interstate commerce. *Lopez,* at 557 ("Second, Congress is empowered to **regulate and protect** the instrumentalities of interstate commerce, or persons or things in interstate commerce, . . . [**Bold added for emphasis**]). The firearms the Respondent constructively possesses in his home have no effect on interstate commerce. In addition, 922(g)(8) has nothing to do with protecting the commerce of firearm(s) in interstate commerce. There is no Commerce Clause

"hook" in this case under the second prong of the *Lopez* analysis.

The third test for Commerce Clause jurisdiction that *Lopez* articulates is if "the regulated activity 'substantially affects' interstate commerce." *Lopez,* at 558. Congress justified its authority for 922(g)(8) under the Commerce Clause by arguing that since victims of domestic violence might be in the workforce, the adverse effects of domestic violence, on alleged victims of domestic violence, substantially affects interstate commerce.

However, virtually any person adversely affected by any crime who might be in the workforce would have the same level of effect on interstate commerce as any alleged victim of domestic violence. If this Court were to validate this Congressional reasoning then there are effectively no restrictions under the Commerce Clause on Congress regulating local and state crimes. This is expressly against this Court's long history of rulings on Commerce Clause authority. *United States v. Bass*, 404 U.S. 336, 349-50 (1971). *Scarborough v, United States*, 431 U.S. 563 (1977).

III. Judge Ho's concerns regarding the integrity of restraining order proceedings are valid and germane.

Judge Ho examined the lack of substantive due process and procedural due process in our system of restraining orders regarding gendered crimes. Addressing Judge Ho's concerns is vital to maintaining

(or restoring) public trust and confidence in our judicial system.

The Department argues that Judge Ho's concerns about restraining orders are "unsound" because he questions the integrity of massive numbers of restraining orders issued in the United States. The Department points out in their brief "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." *Voorhees v. Jackson*, 10 Pet. 449, 472 (1836). Brief of Appellant at 44.

The Department is overlooking the fact that Judge Ho's concerns, as articulated in his concurring opinion are themselves "an act of a court of competent jurisdiction."

A. Judge Ho's concerns

Tens of millions of Americans who are victims of the aggressive system of protective orders in the United States, share Judge Ho's concerns.

A professional study conducted by the Center for Prosecutor Integrity (*Amicus Curiae*) performed in 7 countries shows high percentages of the population who have been victimized by false accusations of domestic abuse.[6] Of over a thousand participants in the

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[6] Available at:

https://endtodv.org/wp-content/uploads/2023/03/8-Country-False-Allegation-Survey-8-3.15.2023.xlsx

study in the U.S. 10% report that they have been victims of false accusations of domestic abuse.[7]

This federal statute, 922(g)(8) criminalizes and invalidates the second amendment rights of over 1,5000,000 innocent Americans every year who are subject to restraining orders issued by civil courts.[8] Most of these orders (90%) originate in *ex parté* hearings or hearings with only *pro forma* review standards. The courts issuing these ex parté restraining orders enter them into a government maintained, national database of domestic abusers. [9] The result is that an accused is, *ex parté*, immediately restrained from purchasing a firearm because he cannot pass a background check with the entry on the domestic abuser database.

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[7] Available at: https://endtodv.org/survey-false-allegations-of-abuse-are-a-global-problem-women-most-often-the-accusers/

[8] Statistics are compiled from the National Crime Information Computer and the National Center for State Courts (NCSC) data for the year 2008. Although we were unable to locate statistic analysis for more recent years, it is reasonable to believe that the 2008 statistics in any given year would vary in direct proportion to the population of adults in the U.S..

Available at: https://www.acrosswalls.org/datasets/punishment-us-dv-synth/?otxkey=datasets-punishment-us-dv-synth&otxrp=sheet%3A+restraining+orders+nationally

[9] The register is the Protection Order File of the National Criminal Information Center, which is maintained by the Criminal Justice Information Services Division of the Federal Bureau of Investigation. Fed. Bureau of Investigation, NCIC National Crime Information Center. Available at: http://www.fbi.gov/hq/cjisd/ ncic_brochure.htm.

Denying the Second Amendment rights of someone in a civil restraining order proceeding is but one of the severe affects on someone accused in those civil proceedings.

The procedural due process required by *Mathews v. Eldridge*, 424 U. S. 319 (1976), should govern the validity of findings in civil restraining order cases which become an element of the crime under 922(g)(8). *Medina v. California*, 505 U. S. 437, controls when state procedural rules that are part of the criminal process, such as in prosecutions under 922(g)(8), are at issue.

Under *Mathews* there are three considerations that this Court should balance in examining civil restraining orders as an element of a federal crime — the private interest affected; the risk of erroneous deprivation of that interest through the procedures used; and the governmental interest at stake. Pp. 6–10.

1. Private Interests at Stake

If we examine the private interests at stake in civil restraining order cases, we can add serious criminal liability under 922(g)(8) to a long list of other very serious constitutional interests. For example, under the system of "protective orders" throughout the United States, a civil court with or without a hearing can render a person accused of domestic violence homeless.

In the domestic violence advocacy industry, these are known as "kick out orders." *See e.g.*, Tex. Rev. Civ.

Stat. § 85.021(2) (2023) ("In a protective order, the court may: … (2) grant exclusive possession of a residence to a party and, if appropriate, direct one or more parties to vacate the residence …"). Other interests at stake include:

> "Personal Conduct Orders." Typically criminalizes the respondent communicating with the petitioner and other petitioner-associated persons.
>
> "Stay-Away Order." Criminalize the respondent coming within a petitioner-specified distance in yards from places the accuser chooses.
>
> "Animals: Possession and Stay-Away Order." Gives accuser "sole possession, care, and control of animals listed" and criminalizes the respondent coming within petitioner-specified distance of the animals.
>
> "Child Custody and Visitation." Give the accuser a new or modified child custody or visitation order.
>
> "Child Support." Gives the accuser a new or changed child support order.
>
> "Property Control." Gives accuser sole right to "temporary use, possession and control of the property listed."
>
> "Debt Payment." Orders respondent to

> make specified financial payments to specified persons on specified dates.
>
> "Property Restraint." The judge can order that the person not borrow against, sell, or hypothecate any property.
>
> "Spousal Support." Order the respondent to pay spousal support to the accuser.
>
> "Lawyer's Fees and Costs." Order the respondent to pay some or all of the accuser's lawyer fees and costs.
>
> "Batterer Intervention Program." Order the respondent to attend a batterer invention program and show proof of completion to the court.
>
> "Other Orders." The accuser can petition to specify any other acts desired to be imposed under the force of law.
>
> "Time for Service." The accuser can request that the court give the respondent less than reasonable time to prepare for a legal hearing that could deprive the respondent of fundamental liberties for up to five years.

See, David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 RUTGERS L. REV. 1009, 1014 (2005).

The issuance of a restraining order also deprives the accused of the presumption of innocence in collateral or subsequent criminal proceedings including proceedings under 922(g)(8). *Compare Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 337 (6th Cir. 2014) ("Domestic-violence misdemeanants, by definition, are violent and non-law-abiding […]."), with *id.* at 340 ("The prohibition in § 922(g)(8) targets presumptively violent, albeit law-abiding, individuals."), *reversed on other grounds by* 837 F.3d 678 (6th Cir. 2016) (*en banc*).

This use of civil restraining orders as predicates for federal criminal liability becomes a critical constitutional issue as the lower courts unanimously deny an accused under 922(g)8) the right to a collateral attack on the legality or constitutional integrity of the restraining orders. *See U.S. v. Young,* 458 F.3d 998 (2006).

In *Young*, the Ninth Circuit dealt with a due process challenge to Section 922(g)(8). The circuit noted that like the statute at issue in *Lewis v. United States,* 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), Section 922(g)(8) does not allow for a challenge to the predicate offense. The only explicit requirement of the statute is that the defendant receive a hearing of which he had actual notice and an opportunity to participate. Thus, relying on *Lewis*, the circuit held that absent Congressional authorization, it would not entertain a collateral inquiry into the constitutionality of state court restraining order proceedings "which is immaterial except to the extent that the federal statute explicitly requires certain procedural

protections." 458 F.3d at 1005.

Any one of these infringements on liberty and property interests of an accused, in a restraining order proceeding, is a serious judicial intrusion on the liberty, constitutional and property interests of the accused. Those intrusions are in addition to the extensive criminal liabilities that 922(g)(8) imposes on the accused for innocent exercise of Second Amendment rights. These intrusions into liberty interests, property interests and articulated First and Second Amendment rights should require extensive due process protections.

2. Due Process Provided

If we examine the due process required in these state restraining order proceedings, however, due process seems almost non-existent. For example, the Texas scheme of issuing restraining orders, to comply with the requirement that an accused have "actual notice" and "opportunity to participate" in the hearing, includes the following provision on a "hearing" and "notice" for issuing domestic abuse restraining orders:

> (c) The court may recess the hearing on a temporary *ex parté* order to contact the respondent by telephone and provide the respondent the opportunity to be present when the court resumes the hearing. Without regard to whether the respondent is able to be present at the hearing, the court shall resume the hearing before the end of

> the working day." Tex. Rev. Civ. Stat. § 83.006(c) (2023).

The domestic violence industry (heavily funded by the Department of Justice and the Violence Against Women Act) coaches married persons to aggressively pursue restraining orders, regardless of merit, against a spouse to make a mere showing that the accused spouse is a "credible threat." The mere finding of "credible threat" in a protective order is expressly one of the elements of the crime under 18 U.S.C. § 922(g)(8). "What does that mean?" *U.S. v. Davis*, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). "In our constitutional order, a vague law is no law at all." *Id.*

A court finding that an accused is "a credible threat" is so vague and broad that it could apply, for example, to an accused who tested positive for the COVID virus and is therefore a "credible threat" to his spouse and children.

If anyone should think this is a far-fetched or absurd hypothetical use of the statute's term "credible threat," then we would invite this Court's notice of a restraining order proceeding in New Mexico. Judge Ho mentioned this case in his concurring opinion. The state civil court granted a woman a "protective order" against the television personality David Letterman. The court found that Mr. Letterman was a "credible threat" because the woman was fearful of him while watching him on television.[10]

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[10] Application for a Restraining Order in the First Judicial

Under § 922(g)(8), on its face, Mr. Letterman, if Mr. Letterman had constructive possession of firearms in his home, became immediately guilty of a federal felony on the court entering the "restraining order." This further impacts the constitutional rights of an innocent accused as § 922(g)(8) is a strict liability statute with no *mens rea* and no *actus reus* required for imposing federal felony liability.

3. Government Interests at Stake

There is no evidence that this aggressive scheme is having any preventative or positive effect regarding domestic violence. If we are to believe the narratives of the Appellant and its *amici curiae* supporters, the problem of domestic violence has not lessened since the Violence Against Women Act was initially enacted.

The sole purpose of the millions of restraining orders which are granted profusely, and their collateral consequences, serves only to inflict damage on the innocent accused and the guilty alike.

B. Restraining Orders are a Modern Day Star Chamber

One legal author cited by Judge Ho has compared the restraining order scheme and collateral punishments as a reincarnation of the British Star Chamber. Since Judge Ho cited the author's article in his

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District Court Santa Fe division, State of New Mexico, *Colleen Nestler v. David Letterman*, No. D-001-CV-2000502772 (2005).

concurring opinion, the same author has published a new article on our scheme of restraining orders. Heleniak, David N., "*Shuttering the New Star Chamber: Toward a Populist Strategy Against Criminal Equity in the Family Court*," 17 Liberty Univ. Law. Rev. Article 2, Issue 2 (2023). The British Star Chamber was one of the abuses of the legal system that our Bill of Rights was designed to prevent.

The British Star Chamber derives its name from the star spangled ceiling in its courtroom in Westminster. The Court was an arm of the monarchy and its use was to suppress dissent towards the King or Queen. The Star Chamber paid lip service to due process of law, but was arbitrary and designed to circumvent the criminal courts and insure orders, judgments and mandates in favor of the King or Queen.

This Court once described our immigration hearings at the beginnings of the 20th Century as Star Chamber proceedings because they had the practical effect of insuring that immigrants, though lawfully citizens of the United States, would be deported. *United States v. Ju To*y, 198 U.S. 253 (1905). Commenting on a cooperative scheme between Federal and State governments in immigration matters, Mr. Justice Holmes wrote for the majority:

> . . . he may not have the means of employing counsel to present his case to the Secretary. If this be not a star-chamber proceeding of the most stringent sort, what more is necessary to make it one? I do not see how any one can read those rules and hold that

> they constitute due process of law for the arrest and deportation of a citizen of the United States. If they do in proceedings by the United States, they will also in proceedings instituted by a state, and an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of a state, proceeding in strict accord with exactly similar rules.

Similarly, especially with the strict liability of 922(g)(8), the Appellant enjoys the power to arrest and convict anyone with a domestic violence restraining order, based on a vague finding of "credible threat" entered against them, simply for exercising their otherwise lawful and protected Second Amendment rights.

The Appellant and Congress have a serious interest at stake in preventing and redressing domestic violence. The Appellant and Congress do not have a legitimate interest in circumventing or abbreviating the Bill of Rights with a statute based on false gender stereotypes.

IV. There are no historical precedents or statutes that completely eliminate (criminalize) a person's rights under Amend. II without the due process safeguards attending criminal convictions.

In the *Heller* decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008) this Court noted the English Militia Act of 1622 as the recognized predecessor of

the Second Amendment. *Heller*, 554 U.S. at 593. ("This right," which restricted the Militia Act's reach in order to prevent the kind of politically motivated disarmaments pursued by Charles II and James II, "has long been understood to be the predecessor to our Second Amendment."")

We believe the origin of the Second Amendment lies in the laws and constitutions of ancient Greece. This is important in analyzing historical laws at the time our founders enacted the Second Amendment.

The right to bear arms under the English Militia Act was a grant of Parliament. The ancient Greeks, and our Founders, viewed the right to bear arms as a profound and individual human right to ensure human equality. Our Founders were schooled in the classics. At the time of the enactment of the Second Amendment a lawyer was not considered educated without being able to read the ancient minds in their original Latin or Greek. "… to read the Latin & Greek authors in their original is a sublime luxury." Jefferson, T. (1800) Letter from Thomas Jefferson to Joseph Priestley. Philadelphia, 27 Jan.

The first declaration of the human right to bear arms appears in Aristotle's Constitution for the City of Athens as a right not only for individual defense, but also a responsibility for the defense of a Constitutional state. ARISTOT. CONST. ATH., CH. 37. The Founders did not have the benefit of knowing the Athenian Constitution as it was not discovered until the late nineteenth century. However, our Founders were very familiar with Aristotle's works on Politics

which forms the basis for the philosophy underlying the human right to bear arms. Carl J. Richard, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (Cambridge: Harvard University Press, 1994), esp. ch. 5; *cf*. John Zvesper, "*The American Founders and Classical Political Thought*," History of Political Thought 10 (1989): 701–18.

This Court has noted the importance of the individual and human right to bear arms as necessary for an orderly civilization conceived in liberty. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (Emphasizing that a person's right to bear arms for self-defense is a "fundamental right necessary to our system of ordered liberty"). "In a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens." (Aristotle, POLITICS, Book 3, ch VII).[11]

A fundamental right, such as the right and responsibility to bear arms, should not be vulnerable to aggressive civil process infringement. "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." 1 The Papers of Thomas Jefferson 344 (J. Boyd ed. 1950)).

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[11] ἀλλὰ μάλιστα τὴν πολεμικήν: αὕτη γὰρ ἐν πλήθει γίγνεται: διόπερ κατὰ ταύτην τὴν πολιτείαν κυριώτατον τὸ προπολεμοῦν καὶ μετέχουσιν αὐτῆς οἱ κεκτημένοι τὰ ὅπλα. Aristotle. ed. W. D. Ross, Aristotle's Politica. Oxford, Clarendon Press (1957).

A. The statute is a strict liability statute that is constitutionally impermissible.

This statute criminalizes the lawful possession of a firearm or ammunition at the instant a court enters a domestic violence restraining order (even if the defendant simply constructively possesses the firearm or ammunition in his home at the moment the court issues the restraining order).

To be guilty of a federal felony, under this statute (on its face), the Defendant is not required to perform any act (*actus reus*), or have any mental state (*mens rea*). On its face, the statute does not even require notice of the issuance of the order.

The Respondent in this case was guilty of felony possession of a firearm the instant the judge entered the protective order. The only act was the act of the court. The only mental state Respondent had was knowledge of a hearing at which the court acted to impose federal criminal liability on him under the statute. Respondent committed no criminal act. Respondent had no criminal state of mind.

There were no findings on which he could make a meaningful appeal. The Respondent agreed to the restraining order. There is no evidence that he agreed to the single sentence finding in the order that the Respondent had committed domestic violence. That single conclusory finding denies him due process as it is not an adequate finding on which he could base a meaningful appeal of the order. *See Specht v. Patterson,* 386 U.S. 605 (1967) (Held: The invocation of the

Act, which entails the making of a new charge leading to criminal punishment, requires, under the Due Process Clause, that petitioner be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own, and that there be findings adequate to make meaningful any appeal that is allowed. *Williams v. New York*, 337 U. S. 241, (distinguished. Pp. 386 U. S. 608-611.)

This instant criminal liability merely for possessing a firearm happens to over a million and a half citizens per year in the U.S.

In some cases, such as possession of illegal controlled substances, mere "possession" may be an *actus reus* under a criminal statute. In the case of illegal controlled substances the Defendant has taken an illegal act in acquiring possession of the illegal controlled substance.

In the case of a firearm, however, a Defendant's acquisition of the firearm prior to the restraining order is not only legal, it is protected under the Second Amendment.

In light of this court's ruling in *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) there must be some criminal mental state [*scienter*] before the government can impose any criminal liability for possession – i.e. that the Defendant intends to commit a crime.

The statute criminalizes the Defendant's

otherwise lawful possession of a firearm the instant the court enters the restraining order. This Court has previously addressed its concerns with this type of instant strict liability in construing a predecessor to 922(g)(8).

> So far as the record reflects, the petitioner in this case acquired the four weapons in question before he was convicted of a felony in August, 1972. Until that time, his possession of the guns was entirely legal under federal law. Under the Court's construction of 18 U.S.C.App. § 1202(a)(1), however, the petitioner was automatically guilty of a serious federal criminal offense at the moment he was convicted in the state felony case.

Scarborough v. United States, 431 U.S. 563 (1977) (Stuart, J. dissenting).

The lower courts are also construing 922(g)(8) as a strict liability statute with no *scienter* (criminal state of mind) requirement in the statute as required under this court's ruling in *Morissette*, *supra*. *See e.g. United States v. Coccia*, 249 F. Supp. 2d 79 (D. Mass 2003) (The Court concluded that § 922(g)(8) does not require that a defendant have actual knowledge of the particular court order at issue in order to sustain a conviction.)

To the extent the Court is examining history to determine if statutes similar to 922(g)(8) existed at the time our Framers adopted the Second Amendment,

early cases and commentaries from the Framing era demonstrate the principle that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952). Our founders did not have any laws that were strict liability statutes such as 922(g)(8) at the time they adopted the Second Amendment.

Serious crimes at the time of the enactment of 922(g)(8) required *scienter* as one of their elements. *Ibid*. And this understanding endured through the end of the nineteenth century. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401, 419 (1993); Colin Manchester, *The Origins of Strict Criminal Liability*, 6 Anglo-Am. L. Rev. 277, 279–80 (1977); *but see* Richard G. Singer, *The Resurgence of Mens Rea: III-The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 339, 340–73 (1989).

Such a *scienter* requirement would require proof beyond a reasonable doubt that the defendant was "possessing" a firearm with an intent to violate the restraining order. There is no such requirement in 922(g)(8) or in the lower courts' construction of the statute.

B. The Circuit Court Correctly Applied the Historically Accurate Jurisprudence.

The essence of the Circuit Court's opinion is contained in this passage:

> And § 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). In other words, where "going armed" laws were tied to violent or riotous conduct and threats to society, § 922(g)(8) implicates a much wider swath of conduct, not inherently dependent on any actual violence or threat. Thus, these "going armed" laws are not viable historical analogues for § 922(g)(8).

The Circuit court recognized that 922(g)(8) is so broad that it is not narrowly tailored to achieve the desired result of disarming a violent person. The statute disarms any person accused in a cursory civil proceeding of being a "credible threat" that may or may not have arisen from any actual violence. Even if the restraining order in question contains a finding of violence, such a critical determination was not made with the circumstantial guarantees of due process that attend criminal proceedings. As Judge Ho and commentators have documented, the civil restraining orders in the US have the lowest standards of due process available in our system of jurisprudence.

Justice Barrett addressed the issue in a dissenting opinion during her tenure on the Seventh Circuit.

> BARRETT, *Circuit Judge*, dissenting. History is consistent with common sense: it

> demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*.

Kanter v. Barr, 929 F.3d 437 (2019). The essence Justice Barrett's analysis is that a person known, with the certainty of a criminal conviction, to be a violent person is subject to government forfeiture of Second Amendment rights; however, absent due process safeguards of a criminal conviction on a crime involving a weapon the government should be restrained from infringing on Second Amendment rights.

> But their dispossession of *all* felons—both violent and nonviolent—is unconstitutional as applied to Kanter, who was convicted of mail fraud for falsely representing that his company's therapeutic shoe inserts were Medicare-approved and billing Medicare accordingly.

Id.

We believe Justice Barrett's analysis in the *Kanter* case is the appropriate standard that conforms to both this Court's *Heller* opinion and its *Bruen* opinion.

Historically, people adjudicated as insane or mentally incompetent also are subject to forfeiture of Second Amendment rights. In the case of insanity, however, this Court has held that infringement of liberty, property or presumably other vested Constitutional

rights requires elevated due process. In the case of commitment proceedings, for example, this Court has consistently held that such proceedings required elevated due process and evidentiary standards of proof by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418 (979) (A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. Pp. 441 U. S. 425-433.)

Historically, the jurisprudence of this Court has always imposed heightened as opposed to lax due process standards for infringement on enumerated constitutional rights.

CONCLUSION

This Court should uphold the decision of the Court of Appeals.

Respectfully Submitted,
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