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The Case for Domestic Violence Protective Order Firearm Prohibitions under Bruen

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THE CASE FOR DOMESTIC VIOLENCE PROTECTIVE ORDER FIREARM PROHIBITIONS UNDER *BRUEN*

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INTRODUCTION

For more than a decade after the Supreme Court held that the Second Amendment protected an individual right to possess a handgun in the home for self-defense in *District of Columbia v. Heller*,[1] courts relied on the well-documented connection between domestic abusers and firearm violence to uphold the laws prohibiting persons subject to domestic violence protective orders (DVPOs) from purchasing or possessing firearms. Research finds that these laws are associated with reductions in intimate partner homicide, making them a valuable tool for protecting victimized partners.[2] However, the constitutionality of those evidence-based laws is now in question due to the sea change in Second Amendment jurisprudence represented by *New York State Rifle and Pistol Ass'n v. Bruen*.[3] *Bruen* repudiated the use of tiers of scrutiny and requires that the government bear the burden of showing that a modern law is relevantly similar to historical firearms laws to be constitutional.[4] The Supreme Court has granted certiorari in *United States v. Rahimi*[5] to decide whether the 30-year-old federal law prohibiting the purchase and possession of firearms by persons subject to DVPOs, 18 U.S.C. § 922(g)(8), is consistent with the Second Amendment.

Before *Bruen*, public health research played a straightforward role in Second Amendment analyses of § 922(g)(8). Lower courts had no trouble using such research in their tiers-of-scrutiny analyses to determine that reducing firearm-involved domestic violence was an important

1. 554 U.S. 570, 635 (2008).

2. Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 329–31 (2006); April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 AM. J. EPIDEMIOLOGY 2365, 2367–68 (2018); April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 INJ. PREVENTION 90, 92 (2010).

3. 142 S. Ct. 2111 (2022).

4. *Id.* at 2126–29.

5. 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

governmental interest and that there was a reasonable fit between § 922(g)(8) and that interest. After *Bruen*, public health and social science research plays a more nuanced role in Second Amendment analyses. Such research must be connected to an underlying historical argument that implicates either the original plain text of the Second Amendment or the relevance of an historical analogue.[6]

In this Article, we illustrate how this connection can be made in the context of § 922(g)(8). We first introduce § 922(g)(8) and discuss how state analogs do or do not implement its proscription of firearm possession by those subject to DVPOs. We then lay out the relevant legal background, including *Heller*, post-*Heller* Second Amendment case-law concerning § 922(g)(8), and *Bruen,* before turning to the meat of our argument.

We next discuss *Rahimi* and other post-*Bruen* cases addressing § 922(g)(8), arguing that the law satisfies *Bruen*'s requirement that statutes regulating firearm access must be sufficiently similar to historical firearm laws. We argue that firearm-involved domestic violence is an "unprecedented societal concern" that requires a more nuanced approach to analogy.[7] A myopic search for founding-era bars on firearm possession by domestic abusers ignores both important differences in social norms surrounding women, marriage, and domestic violence and the significantly increased role of firearms in domestic violence today. Instead, § 922(g)(8) is more aptly analogized to historical laws evidencing the longstanding tradition of prohibiting "dangerous people from possessing guns,"[8] such as so-called "going armed laws," surety laws, and racist and discriminatory laws that prohibited firearm possession by enslaved persons, Native Americans, Catholics, and those who refused to swear loyalty oaths.

After establishing an argument rooted in history and analogy, we discuss the relevant social science and public health research. Comparing the rarity of firearm involved domestic violence at the founding to research showing how common and ever-increasing firearm-involved domestic violence is today helps illustrate that firearm-involved domestic violence is an "unprecedented societal concern."[9] We also share research supporting the claim that those subject to DVPOs are dangerous, and summarize research

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6. *Bruen*, 142 S. Ct. at 2126 (2022) (holding that the conduct at issue is presumptively protected by the Second Amendment when the plain text covers that conduct. The government then bears the burden of demonstrating that the modern law is consistent with the nation's historical tradition of firearm regulation. The government may demonstrate such tradition by analogizing modern firearms laws to historical firearms laws).

7. *Id.* at 2132.

8. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 142 S. Ct. at 2126 (evaluating an as-applied challenge to 18 U.S.C. § 922(g)(1)).

9. *Bruen*, 142 S. Ct., at 2132.

showing the extent of the danger domestic abusers pose to their victims, children, family, and community. Viewed in the aggregate, this research demonstrates both that the class barred by § 922(g)(8) is categorically dangerous and that the danger they pose is significant.

I. BACKGROUND

A. Domestic Violence Protective Order Firearm Prohibitions

The Gun Control Act of 1968 ("GCA") established comprehensive regulations for the manufacture, transportation, sale, and transfer of firearms.[10] The law prohibited, among other individuals, persons convicted of felony offenses, including domestic violence, from possessing firearms.[11] As part of the Violence Against Women Act of 1994, Congress extended the GCA's firearm possession prohibitions to persons subject to qualifying DVPOs.[12] Only orders issued against an "intimate partner" of the petitioner, defined to include current and former spouses, persons who share children in common, and persons who are or have cohabited, qualify under the federal law.[13] Additionally, only orders issued after the respondent received actual notice and an opportunity to participate at a hearing qualify under federal law.[14] Finally, the order must either include a finding that the respondent represents a credible threat to the physical safety of their intimate partner or child, or explicitly prohibit the respondent from using, attempting to use, or threatening to use physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.[15]

All 50 states and the District of Columbia, have laws that allow categories of individuals to seek civil protection orders to protect against domestic

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10. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

11. *Id.* § 922(h).

12. 18 U.S.C. § 922(g)(8) (prohibiting firearm possession by a person "(8) who is subject to a court order that . . .
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]").

13. 18 U.S.C. § 921(a)(32); 18 U.S.C. § 922(g)(8).

14. 18 U.S.C. § 922(g)(8)(A).

15. 18 U.S.C. § 922(g)(8)(B).

violence.[16] Protections vary by state, but often include prohibitions on physical abuse and contacting the protected party, and exclude the abusing party from shared premises.[17] Dozens of jurisdictions prohibit persons subject to DVPOs issued after notice and hearing from purchasing or possessing firearms,[18] and some prohibit firearm possession for *ex parte* orders.[19]

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16. ALA. CODE §§ 30-5-1–30-5-11 (LexisNexis 2023); ALASKA STAT. §§ 18.66.100—18.66.180 (2023); ARIZ. REV. STAT. §§ 13-3602, 13-3624 (LexisNexis 2022); ARK. CODE ANN. §§ 9-15-201–9-15-219 (1987); CAL. FAM. CODE § 6345 (Deering 2023); COLO. REV. STAT. §§ 13-14-100.2–13-14-110 (2023); CONN. GEN. STAT. §§ 46b-15–46b-19 (2023); DEL. CODE ANN. tit. 10, §§ 1041–1048 (2023); D.C. CODE § 16-1005 (2023); FLA. STAT. ANN. § 741.30 (LexisNexis 2023); GA. CODE ANN. §§ 19-13-1–19-13-6 (2023); HAW. REV. STAT. ANN. §§ 586-1586-13 (LexisNexis 2023); IDAHO CODE §§ 39-6301–39-–6318 (2023); 750 ILL. COMP. STAT. ANN. 60/201–60/227.1 (LexisNexis 2023); IND. CODE ANN. §§ 34-26-5-134-26-5-21 (LexisNexis 2023); IOWA CODE §§ 236.1–236.20 (2023); KAN. STAT. ANN. §§ 60-3101 – 60-3112 (2023); KY. REV. STAT. ANN. §§ 403.715–403.785 (LexisNexis 2023); LA. STAT. ANN. §§ 46:2131–46:2143 (2023); ME. STAT. tit. 19-A, §§ 4101–4116 (2023); MD. CODE ANN., FAM. LAW §§ 4-504–4-512.1 (LexisNexis 2023); MASS. ANN. LAWS ch. 209A, §§ 1-10 (LexisNexis 2023); MICH. COMP. LAWSSERV. § 600.2950 (LexisNexis 2023); MINN. STAT. § 518B.01 (2023); MISS. CODE. ANN. §§ 93-21-1–93-21-33 (1972); MO. REV. STAT. §§ 455.010–455.095 (2023); MONT. CODE ANN. §§ 40-15-201–40-15-204 (2023); NEB. REV. STAT. ANN. §§ 42-901– 42-931 (LexisNexis 2023); NEV. REV. STAT. ANN. §§ 33.017–33.100 (LexisNexis 2023); N.H. §§ 173-B:1–173-B:25 (LexisNexis 2023); N.J. REV. ANN. §§ 2C:25-17–2C:25-35 (2023); N.M. STAT. ANN. §§ 40-13-1–40-13-7.1 (LexisNexis 2023); N.Y. FAM. CT. ACT §§ 828, 842 (LexisNexis 2023); N.C. GEN. STAT. §§ 50B-1–50B-9 (2023); N.D. CENT. CODE §§ 14-07.1-01–14-07.1-20 (2023); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2023); OKLA. STAT. tit. 22, §§ 60–60.20 (2023); OR. REV. STAT. ANN. §§ 107.700–107.735(2023); 23 PA. CONS. STAT. ANN. §§ 6101–6122 (2023); 8 R.I. GEN. LAWS §§ 8-8.1-1–8-8.1-8, (LexisNexis 2023); S.C. CODE ANN. §§ 20-4-10–20-4-160 (2023); S.D. CODIFIED LAWS §§ 25-10-1–25-10-44 (2023); TENN. CODE ANN. §§ 36-3-601–36-3-627(2023); TEX. FAM. CODE ANN. §§ 81.001–88.008 (2023); UTAH CODE ANN. §§ 78B-7-601–78B-7-609 (LexisNexis 2023); VA. CODE ANN. §§ 16.1-253.1, 16.1-253.4, 16.1-279.1 (2023); VT. STAT. ANN. tit. 15, §§ 1101 -1115 –1110 (2023); WASH. REV. CODE ANN. §§ 7.105.225, 7.105.305, 7.105.315 (LexisNexis 2023); W. VA. CODE ANN. § 48-27-101–48-27-1004 (LexisNexis 2023); WIS. STAT. § 813.12 (2023); WYO. STAT. ANN. §§ 35-21-101–35-21-112 (2023).

17. *See, e.g.*, ALA. CODE § 30-5-7(c) (LexisNexis 2023); COLO. REV. STAT. § 13-14-105 (West 2023); VA. CODE ANN. § 16.1-279.1(A) (1950).

18. *See* ALA. CODE § 13A-11-72(a)(1), (h) (LexisNexis 2023); ALASKA STAT. § 18.66.100(c)(7) (2023); ARIZ. REV. STAT. § 13-3602(G)(4) (LexisNexis 2023); CAL. FAM. CODE § 6389 (Deering 2023); COLO. REV. STAT. § 13-14-105.5 (2023); CONN. GEN. STAT. §§ 29-28(b, 29-33(b), 29-36f(b), 29-37a(c), 29-37p(b) (2023); DEL. CODE ANN. tit. 10, § 1045(a)(8) (2023) D.C. CODE §§ 7-2502.01(a), 7-2502.03(a)(12)(A) (2023); FLA. STAT. ANN. § 790.233 (LexisNexis 2023) HAW. REV. STAT. ANN. § 134-7(f) (LexisNexis 2023); 750 ILL. COMP. STAT. ANN. 60/214(b)(14.5) (LexisNexis 2023); IND. CODE ANN. § 34-26-5-9(d)(4) (LexisNexis 2023) LA. STAT. ANN. § 46:2136.3 (2023); N.M. STAT. ANN. § 40-13-5(A)(2) (LexisNexis 2019) N.Y. FAM. CT. ACT LAW § 842-a (LexisNexis 2023); 23 PA. STAT. CONS. STAT. § 6108(a)(7) (2023); S.C. CODE ANN. § 16-25-30(A)(4) (2023); WASH. REV. CODE ANN. § 7.105.310(1)(m) (LexisNexis 2023).

19. *See, e.g.*, ARIZ. REV. STAT. § 13-3624(D)(4) (2023) (a court issuing an emergency order of protection may prohibit the defendant from purchasing or possessing firearms if it found that the defendant may inflict bodily injury or death on the plaintiff); NEB. REV. STAT.

Some states also require the relinquishment or removal of firearms from persons subject to DVPOs, though instructions on how this is to happen vary dramatically.[20] In Alaska, for example, a court issuing a final domestic violence protective order may order the respondent to surrender firearms if it finds that the respondent was in actual possession of or used a firearm during the commission of the domestic violence but does not specify a timeframe in which to comply, an entity to whom the respondent must surrender firearms, nor a mechanism for providing proof of surrender.[21] In comparison, Wisconsin law explains in detail how firearms are to be surrendered and how compliance with the order to surrender is to be ensured.[22] Wisconsin law instructs respondents to surrender firearms to law enforcement or a court-approved third party within a particular window of time.[23] Respondents are also required to provide proof of compliance with the order to surrender firearms within a specified period of time.[24] Where the court finds that the respondent has failed to surrender firearms or failed to provide proof of compliance, it may notify law enforcement for investigation of the crime of unlawful possession of firearms.[25] This detailed firearm surrender process was passed into law in 2014 following a successful pilot program of the surrender protocol in several counties across Wisconsin.[26] Many jurisdictions have continued to seek to improve

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ANN. §§ 42-924(1)(a)(vii), 42-925(1) (LexisNexis 2023); 18 PA. STAT. AND CONS. STAT. ANN. § 6105(c)(6) (LexisNexis 2023) (prohibiting a person who is subject to a temporary order that required relinquishment of firearms during the period of time the order is in effect from purchasing or possessing firearms).

20. *See, e.g.*, IND. CODE ANN. §§ 34-26-5-9(d)(4), (g) (LexisNexis 2023) (instructing that a court issuing a domestic violence protection order after notice and hearing may "direct the respondent to surrender to a specified law enforcement agency the firearm, ammunition, or deadly weapon for the duration of the order for protection unless another date is ordered by the court"); 23 PA. CONS. AND STAT. §§ 6108(a)(7)), 6108.2–6108.3 (LexisNexis 2023) (outlining in detail the individuals to whom firearms must be surrendered, the manner of surrender, the timeframe for surrender of firearms, and processes to ensure compliance); TENN. CODE ANN. §§ 36-3-604(c)(1) (2023); 36-3-625(a)(1) (2009) (requiring that a person subject to a protection order that qualifies under 18 U.S.C. § 922(g)(8) must terminate physical possession of all the firearms they possess within 48 hours of the granting of the order).

21. ALASKA STAT. § 18.66.100(c)(7) (2023).

22. WIS. STAT. ANN. § 813.1285 (LexisNexis 2023).

23. *Id.* § 813.1285(1g)(a).

24. *Id.* § 813.1285(3)(a)(2).

25. *Id.* §813.1285(4)(b)(2).

26. *State of Wisconsin*, SAFER FAMS., SAFER CMTYS., https://www.preventdvgunviolence.org/community-spotlight/spotlight-wisconsin.html [https://perma.cc/JZY4-5BUR] (last visited Sept. 2, 2023); *see also* STEVEN G. BRANDL, AN EVALUATION OF THE FIREARM SURRENDER PILOT PROJECT IN WISCONSIN: FINAL REPORT 48-49 (Mar. 20, 2012), https://www.doj.state.wi.us/sites/default/files/ocvs/vawa/evaluation-final-report.pdf [https://perma.cc/4BVZ-XWN7].

implementation of DVPO firearm surrender.[27] Specificity in domestic violence protective order firearm removal processes is critical so that each individual and entity involved in the process knows how removal should be done and by whom. Enforcement is also critical, as one scholar noted, because the laws "are only effective if the relevant authorities enforce them, and unfortunately, enforcement has been a significant issue for programs across the United States seeking to disarm domestic abusers."[28]

B. Second Amendment Legal History and DVPOs

Though firearms in the hands of abusers pose a significant risk of death and injury to their intimate partners and others, regulations like the domestic violence protective order firearm prohibitions must be consistent with the Second Amendment. The Supreme Court has decided three foundational Second Amendment cases, the most recent of which is *Bruen*.[29] *Bruen* dramatically altered the framework that courts must use to evaluate Second Amendment cases. Applying this new test, federal courts have split on whether domestic violence protective order firearm prohibitions remain constitutional.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[30] In *District of Columbia v. Heller* (2008), the Supreme Court held that the Amendment protects "an individual right [to possess a handgun] unconnected with militia service"[31] and that "it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[32]

Justice Scalia undertook an historical review of founding era sources and comparable constitutional provisions to identify the original public meaning of the Second Amendment. In particular, he determined that the Amendment, through "right of the people," protects an individual right[33] and that self-defense sits at the core of the right.[34] Scalia's jurisprudential choice

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27. *See Community Spotlight*, SAFER FAMS., SAFER CMTYS., https://www.preventdvgunviolence.org/community-spotlight.html [https://perma.cc/29FZ-CRPF] (last visited Oct. 7, 2023).

28. Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 587 (2020).

29. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)

30. U.S. CONST. amend. II.

31. *Heller*, 554 U.S. at 610.

32. *Id.* at 635.

33. *See id.* at 579–81.

34. *See id.* at 630.

to root the right in history established both the substantive content of the right as applied to *Heller* (i.e., the holding) and the methodology for evaluating the coverage of the right moving forward.

Though the opinion threatened to potentially gut firearm legislation, Scalia clarified that "like most rights, the right secured by the Second Amendment is not unlimited"[35] and specifically noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing conditions and qualifications on the commercial sale of arms."[36] In other words, some limitations on the right were not to be doubted even though they clearly infringe on an individual's ability to bear weapons. But Scalia avoided specifying the standard or method of review for such limitations, instead noting that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home [handguns] . . . would fail constitutional muster."[37] It would fall to the lower courts to sort out a method.

Heller concerned several D.C. laws that in concert prevented D.C. residents from having loaded handguns in their home immediately accessible for self-defense and its holding only applied the right against the federal government.[38] In *McDonald v. City of Chicago*, the Supreme Court incorporated the Second Amendment, holding that *Heller* applied fully to the states.[39] Justice Alito delivered the opinion of the Court.[40] However, only Chief Justice Roberts and Justices Scalia and Kennedy joined Justice Alito's opinion in full.[41] In a section of his opinion not joined by Justice Thomas, Justice Alito reiterated that neither *Heller* nor *McDonald* cast doubt on firearm possession prohibitions for felons and the mentally ill.[42]

II. LEGAL ANALYSIS

A. Section 922(g)(8) – After *Heller* but Before *Bruen*

In the years following *Heller*, lower courts settled on a two-step method for determining whether a law regulating firearm possession

35. *Id.* at 626.
36. *Id.* at 626–27.
37. *Id.* at 628–29. *But see id.* at 628 n.27 (ruling out rational basis review).
38. *See id.* at 573–75.
39. *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 749–50 (2010).
40. *Id.* at 748.
41. *Id.*
42. *Id.* at 786.

unconstitutionally infringed on the Second Amendment.[43] At step one, courts asked whether the legislation at issue burdened, proscribed, or regulated conduct falling within the scope of the Second Amendment right.[44] Consistent with *Heller*, courts used some combination of precedent, history, and tradition to ascertain the Second Amendment's scope in step one.[45] If the legislation fell outside the historical meaning, the regulated activity was categorically unprotected.[46] Otherwise, courts turned to step two, which involved the application of the appropriate form of scrutiny.[47] For claims near the core of the right identified in *Heller*, the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," strict scrutiny applied.[48] For claims outside the core, courts applied intermediate scrutiny and asked whether the "challenged law served a 'significant,' 'substantial,' or 'important' governmental interest and, if so, whether the 'fit between the challenged [law] and the asserted objective was reasonable, not perfect.'"[49]

Using this method, five of the Courts of Appeals reviewed the constitutionality of § 922(g)(8) following *Heller*: *United States v. Reese*,[50] *United States v. Bena*,[51] *United States v. Chapman*,[52] *United States v.*

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43. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Chapman, 666 F.3d 220, 225 (4th Cir. 2012); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010); United States v. Bena, 664 F.3d 1180, 1182 (8th Cir. 2011); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); *see also* N.Y. Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022) ("[T]he Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.").

44. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019); United States v. Boyd, 999 F.3d 171, 185 (3d Cir. 2021).

45. *See* JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER 110 (2018); *see, e.g.*, United States v. Focia, 869 F.3d 1269, 1285-86 (11th Cir. 2017).

46. *See* United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) (internal quotation marks omitted).

47. *See, e.g.*, United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); BLOCHER & MILLER, *supra* note 45, at 110 (noting that courts often skipped step one if the scope question seemed too difficult).

48. *See, e.g.*, *Chester*, 628 F.3d at 680 (applying standard from District of Columbia v. Heller, 554 U.S. 570, 581 (2008)).

49. United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010) (internal quotations omitted).

50. *Id.* at 794.

51. 664 F.3d 1180, 1182 (8th Cir. 2011).

52. 666 F.3d 220, 224 (4th Cir. 2012).

McGinnis,[53] and *United States v. Boyd*.[54] These decisions universally upheld the constitutionality of § 922(g)(8).[55]

Three of the five Courts of Appeals cases evaluating the constitutionality of § 922(g)(8) did not engage extensively with the first step.[56] *Chapman* and *McGinnis* declined to determine whether the Second Amendment protects the prohibited behavior because, even if the Second Amendment covered the regulated conduct, these courts found that the law passed constitutional muster by satisfying the appropriate level of scrutiny required in step two.[57] In a single, conclusory sentence the *Reese* court found "little doubt that the challenged law . . . imposes a burden on conduct . . . that generally falls within the scope of the right."[58] In *Bena*, the Eighth Circuit conducted an historical review of the "people" to whom the common-law right to bear arms applied.[59] By surveying discussions of the right to bear arms in state ratifying conventions and the influential writings of William Blackstone, the Eighth Circuit found that the "common law . . . right to bear arms is limited to peaceable or virtuous citizens."[60] The court concluded that § 922(g)(8)(C)(i) does not implicate the Second Amendment because its requirement that the order include a finding of a "credible threat to the physical safety of [an] intimate partner or child" is consistent with the common law-tradition of limiting the Second Amendment to peaceable or virtuous citizens.[61] In *Boyd*, the Third Circuit approvingly echoed the analysis in *Bena*.[62] *Boyd* examined other cases to identify the underlying reason firearm regulations barring possession by felons and the mentally ill were constitutionally sound.[63] The court recognized the longstanding

53. 956 F.3d 747, 752 (5th Cir. 2020).

54. 999 F.3d 171, 176 (3d Cir. 2021).

55. *See supra* notes 48–54 and accompanying text.

56. *See* United States v. Mahin, 668 F.3d 119, 123–24 (4th Cir. 2012) (affirming *Chapman*, 666 F.3d 220). District courts in other circuits also regularly upheld § 922(g)(8) against Second Amendment challenges. *See, e.g.*, United States v. Knight, 574 F. Supp. 2d 224, 226 (D.Me. 2008); United States v. Witcher, No. 20-CR-116 (KMW), 2021 U.S. Dist. LEXIS 238076, at *16 (S.D.N.Y. Dec. 10, 2021); United States v. Luedtke, 589 F. Supp. 1018, 1025 (E.D. Wis. 2008); United States v. Schoendaller, No. 1:18-cr-00179-DCN, 2019 U.S. Dist. LEXIS 111618, at *5 (D. Idaho July 1, 2019); United States v. Gillman, No. 2:09-CR-896, 2010 U.S. Dist. LEXIS 63453, at *10 (D. Utah June 24, 2010).

57. *See McGinnis*, 956 F.3d at 756; *Chapman*, 666 F.3d at 225.

58. United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010).

59. United States v. Bena, 664 F.3d 1180, 1182 (8th Cir. 2011).

60. *Id.* at 1184.

61. *Id.* at 1184–85 (citing 18 U.S.C. § 922(g)(8)(C)(i)). The court did not discuss whether § 922(g)(8)(C)(ii) violated the Second Amendment because *Bena* brought a facial challenge and the state court in his case made a specific finding that he posed a threat to the safety of another. *Id.* at 1184.

62. *See* United States v. Boyd, 999 F.3d 171, 186 (3d Cir. 2021).

63. *See id.*

tradition barring dangerous persons from possessing guns, found that felons and the mentally ill were presumptively dangerous, and, consequently, concluded that laws prohibiting these classes' possession of firearms are constitutionally sound manifestations of the longstanding tradition of barring dangerous persons from possessing firearms.[64] Based on empirical studies illustrating the dangers of gun possession by domestic abusers, the *Boyd* court found those subject to DVPOs were indistinguishable from the class of "presumptively dangerous persons historically excluded from the Second Amendment's protections."[65]

Appellate courts interpreting § 922(g)(8) after *Heller* uniformly applied intermediate scrutiny in step 2.[66] Intermediate scrutiny applied because § 922(g)(8) creates a temporary burden to a "narrow class of persons who, based on their past behavior, are more likely to engage in domestic violence."[67] After comprehensive analyses of the problem of firearm-involved domestic violence, each appellate court also found § 922(g)(8) to be substantially related to the important governmental objective of reducing firearm-involved domestic violence.[68] Finally, the courts easily found a reasonable fit between § 922(g)(8) and reducing domestic firearm violence.[69] The *Chapman* decision typifies this analysis through both its description of § 922(g)(8)'s narrow scope (domestic context, limited duration, procedural requirements) and its summation of empirical analyses finding that those few individuals barred by § 922(g)(8) pose an especially high likelihood of using firearms in connection with domestic violence.[70]

After *Heller*, the Courts of Appeal settled on a two-step framework for evaluating Second Amendment challenges. Under this framework, courts universally upheld section § 922(g)(8) against Second Amendment challenges. However, in most cases, such analyses justified § 922(g)(8) using step two's means-end evaluation: an evaluation the Supreme Court would soon reject.

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64. *See id.* at 185–86 (citing Kanter v. Barr, 919 F.3d 437, 451, 454 (7th Cir. 2019) (Barrett, J., dissenting); Beers v. Att'y Gen., 927 F.3d 150, 158 (3d Cir. 2019), *vacated* Beers v. Barr, 140 S. Ct. 2758 (2020)).

65. *Boyd*, 999 F.3d at 185.

66. *See Bena*, 664 F.3d at 1184 (not engaging in step two because the challenge failed at step one).

67. United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010); *see also* United States v. McGinnis, 956 F.3d 747, 757 (5th Cir. 2020); United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012); *Boyd*, 999 F.3d at 188.

68. See *Reese*, 627 F.3d at 804; *McGinnis* 956 F.3d at 758; *Chapman*, 666 F.3d at 230; *Boyd*, 999 F.3d at 188–89.

69. *See supra* note 68 and accompanying text.

70. *See Chapman*, 666 F.3d at 228; *see also Reese*, 627 F.3d at 802; *McGinnis*, 956 F.3d at 758; *Boyd*, 999 F.3d at 189.

B. *New York State Rifle and Pistol Association v. Bruen*

In *New York State Rifle & Pistol Association., Inc. v. Bruen*, the Court considered whether a New York law restricting public carry licenses to applicants who demonstrate a special need for self-defense violated the Second Amendment.[71] Writing for a 6-3 majority, Justice Thomas first approved step one of the lower courts two-step process: "Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."[72] However, he then rejected the second step of the two-step framework crafted by the lower courts.[73] Instead, Justice Thomas crafted a second step rooted in history and analogy.[74] Using this approach, the Court found that may-issue licensing laws like New York's violate the Second Amendment.[75]

The Court replaced the tiers-of-scrutiny analysis in step two of the lower courts two-step process with a requirement that the government "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[76] Thomas instructed courts to engage in analogic reasoning to determine whether "modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[77] He noted that the Second Amendment is "neither a regulatory straightjacket nor a regulatory blank check" and specified that the government need only identify a "well-established and representative historical analogue, not a historical twin."[78] However, he did not shed further light on how similar historical analogues must be to pass muster. The Supreme Court also recognized that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[79] The Supreme Court did not expound on what makes a societal concern unprecedented, and lower courts' rulings disagree in their interpretation.[80] The Court then examined a

71. *See* 142 S. Ct. 2111, 2117 (2022).
72. *Id.* at 2127.
73. *See id.* at 2117–18.
74. *See id.* at 2118.
75. *See id.* at 2156.
76. *Id.* at 2130.
77. *Id.* at 2133.
78. *Id.*
79. *Id.* at 2132.
80. *Compare* United States v. Price, 635 F. Supp. 3d 455, 463 (S.D. W. Va. 2022) (finding that unprecedented societal problems are only those that would have been unimaginable at the founding), *with* United States v. Ryno, No. 3:22-cr-00045-JMK, 2023 US. Dist. LEXIS 94159, at *9–10 (D. Alaska May 31, 2023) (finding that domestic violence was an unprecedented societal concern because lawmakers at the founding and into the 19th century did not "recognize domestic violence as a societal problem meriting criminal liability"), *and*

wide range of historical sources from pre-ratification England through Reconstruction before rejecting New York's may-issue licensing regime.

As outlined in the previous section, several lower courts analogized § 922(g)(8) to regulations barring firearm possession by felons and mentally ill individuals that *Heller* found presumptively lawful.[81] The Court indirectly indicates its ongoing acceptance of such bars through its approval of "shall-issue regimes, which often require applicants to undergo a background check . . . [ensuring] only that those bearing arms in the jurisdiction are, in fact, 'law-abiding responsible citizens.'"[82] In a concurring opinion joined by Chief Justice Roberts, Justice Kavanaugh more explicitly reaffirmed the presumptive validity of those regulations listed in *Heller* and *McDonald*.[83] Justice Alito also reaffirmed such regulations in his concurrence.[84] As in *Heller,* the Court does not clearly justify why bars on possession by felons or individuals with mental illness are constitutionally permissible.[85] It remains unclear whether these restrictions are permissible because of step one, which would mean that scope of the Second Amendment simply does not cover such individuals *or* if they are permissible because of step two, which would make them permissible because historical analogues allowed such restrictions.

Bruen significantly changed Second Amendment jurisprudence. Though it kept the first step in the two-step analysis developed by the lower courts after *Heller*, *Bruen* categorically rejected the means-end analysis employed in the two-step analysis' second step.[86] *Bruen* replaced this step with an historical test that requires the government to justify its firearms regulations by identifying a historical analogue. By step one or by step two, § 922(g)(8)'s fate is now tied to history.

United States v. Quiroz, 629 F. Supp. 3d 511, 522 (W.D. Tex. 2022) ("[S]ociety, population density, and modern technologies are all examples of change[s] that would make something unthinkable in 1791 a valid societal concern in 2022."), *and* United States v. Banuelos, No. EP-22-CR-00903-FM, 2022 U.S. Dist. LEXIS 229948, at *7 (W.D. Tex. Nov. 10, 2022) (finding that an increase in organized crime and violence in the 1930s was an unprecedented societal concern), *and* United States v. Melendrez-Machado, 635 F. Supp. 3d 545, 550 (W.D. Tex. 2022) (finding that massively increasing crime rates in the 1960s and the assassinations of Martin Luther King Jr. and Robert F. Kennedy were an unprecedented societal concern).

81. *See supra* Section II.A.

82. *Bruen*, 142 S. Ct. at 2138 n.9.

83. *See id.* at 2162 (Kavanaugh, J., concurring).

84. *See id.* at 2157 (Alito, J., concurring).

85. *See generally id.*

86. *See id.* at 2117–18.

C. Section 922(g)(8) after *Bruen*

1. United States v. Rahimi

Though under the two-part test adopted by courts following *Heller* and *McDonald*, courts consistently upheld the domestic violence protective order firearm prohibition, under *Bruen*'s new framework, some courts have declared the law unconstitutional. On June 30, 2023, the Supreme Court agreed to hear an appeal of one such case, the Fifth Circuit's decision in *United States v. Rahimi*, which found § 922(g)(8) inconsistent with the national historical tradition of firearm regulation and therefore unconstitutional under the Second Amendment.[87] The Fifth Circuit wrote that Zackey Rahimi was "hardly a model citizen;"[88] an understatement if ever there were one. In December 2019, Rahimi got into an argument with his girlfriend, C.M., in a parking lot in Arlington, Texas.[89] After she attempted to leave, Rahimi grabbed C.M.'s wrist, knocking her down, dragged her to his car, picked her up, and pushed her into the car, causing her to hit her head on the dashboard.[90] Upon realizing that a bystander had witnessed his actions, Rahimi retrieved a firearm from his car and fired a shot into the air.[91] C.M. took the opportunity to flee, but later Rahimi called her on the phone and threatened to shoot her if she told anyone about the assault.[92] In February 2020, a Texas state court, after a hearing of which Rahimi had actual notice and the opportunity to participate, found that Rahimi had committed family violence, was likely to do so again in the future, and granted C.M. a protective order.[93] In August 2020, Rahimi violated the protective order.[94] In November 2020, Rahimi threatened another woman with a gun.[95] On December 1, 2020, Rahimi fired several shots from an AR-15 into the home of a man who had purchased narcotics from him.[96] The following day, after getting in a car crash, Rahimi exited the car, fired shots at the driver of the other vehicle, fled, returned, fired additional shots at the other car and fled again.[97] Three days later, in a

87. 61 F.4th 443, 460 (5th Cir. 2023), *cert. granted*, 2023 WL 4278450 (U.S. June 30, 2023) (No. 22-915).
88. *Id.* at 453.
89. Petition for Writ of Certiorari, *Rahimi*, 61 F.4th 443 (No. 22-915) at 1–2.
90. *Id*.
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id.* at 3.
96. *Id.*
97. *Id*.

residential neighborhood where children were present, Rahimi fired his gun into the air.[98] Several weeks later, during a road rage incident in which Rahimi followed a truck that had merely flashed its headlights at him, he fired several shots at another car that had been following the truck.[99] In early January 2021, after his friend's credit card was declined at a fast food restaurant, Rahimi fired several shots into the air.[100] After identifying Rahimi as a suspect in the shooting, Texas law enforcement obtained and executed a search warrant for Rahimi's home where they discovered firearms, ammunition and a copy of the protective order.[101]

At step one of *Bruen*'s two-step analysis, the Fifth Circuit determined that Rahimi's conduct was covered by the plain text of the Second Amendment.[102] The court in *Rahimi* interpreted *Heller*, *McDonald*, and *Bruen*'s repeated and consistent reference to "law-abiding, responsible citizens" in relation to "the people" to whom the right to keep and bear arms applies, to relate not to the scope of the right, but to the power of the legislature to take away the right.[103] Though the Fifth Circuit admits that Rahimi is "hardly a model citizen," it asserted that he remains one of "the people" covered by the Second Amendment, and his status as the subject of a domestic violence protective order is more properly analyzed under *Bruen*'s second step.[104]

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98. *Id*.

99. *Id*.

100. *Id*.

101. *Id.*

102. 61 F.4th 443, 453 (5th Cir. 2023), *cert. granted*, 2023 WL 4278450 (U.S. June 30, 2023) (No. 22-915).

103. *Id.* at 451–53.

104. *Id*. at 453; *cf.* Samantha L. Fawcett, *Upholding the Domestic Violence Firearm Prohibitors Under* Bruen*'s Second Amendment*, 18 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 405, 423 (2023) (suggesting that the proper inquiry at step one is whether the Second Amendment protects a person subject to an active domestic violence protective order); United States v. Bena, 664 F.3d 1180, 1184 (8th Cir. 2011) (upholding 18 U.S.C. § 922(g)(8) at step one of the pre-Bruen two-part test, finding that such individuals are not covered under the scope of the Second Amendment); United States v. McGinnis, 956 F.3d 747, 757 (5th Cir. 2020) (asserting, in its discussion of whether to apply strict or intermediate scrutiny, that persons "who, after an actual hearing with prior notice and an opportunity to participate, have been found by a state court to pose a 'real threat or danger of injury to the protected party[]' . . . are not the 'responsible citizens' protected by the core of the Second Amendment." (quoting United States v. Emerson, 270 F.3d 203, 262 (5th Cir. 2001); United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012))); United States v. Doty, No. 5:21-CR-21, 2022 WL 17492260 (N.D. W. Va. Sept. 9, 2022) (upholding the federal law prohibiting persons convicted of misdemeanor crimes of domestic violence at step one of the Bruen analysis, noting that "[n]othing in the historical record suggests a popular understanding of the Second Amendment at the time of the founding that extended to preserving gun rights for groups who pose a particular risk of using firearms against innocent people" (quoting United States v. Nutter, No. 2:21-cr-00142 2022 WL 3718518, at *8 (S.D. W. Va. Aug. 29, 2022))).

The Fifth Circuit determined that the government did not meet its burden at step two, failing to establish that § 922(g)(8) is consistent with the national historical tradition of firearm regulation. The court rejected as insufficiently analogous to § 922(g)(8) three categories of historical laws cited by the government: "(1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of 'dangerous' people, (2) English and American 'going armed' laws, and (3) colonial and early state surety laws."[105]

Because they were not adopted, the court rejected two proposals offered in Massachusetts's and Pennsylvania's ratifying conventions which would have limited the Second Amendment right to "peaceable citizens" or to those who had not committed crimes or who posed a real danger of public injury, respectively.[106] The court also rejected the ancient English offense of "going armed to terrify the King's subjects," and the four colonial and Early American analogues cited by the government, as insufficiently similar.[107] Noting that one of the colonial laws never required forfeiture of weapons, and two others removed forfeiture of weapons as a penalty, the Fifth Circuit ruled that these early laws failed to establish a "tradition" sufficient to satisfy the second part of *Bruen*'s test.[108] Furthermore, the court wrote that *how* and *why* the historic laws burdened the right, two of the important metrics of historical analogy identified by *Bruen*, differed from § 922(g)(8).[109] According to *Rahimi*, historic "going armed" laws disarmed individuals only after a criminal proceeding and conviction; whereas § 922(g)(8) disarms individuals after a civil proceeding where the individual is either determined to be a credible threat or the order "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force[.]"[110] Additionally, the court claimed that it appeared historic "going armed" laws were meant to disarm individuals who were a threat to society generally rather than identified individuals.[111]

The court rejected as insufficiently analogous historical laws disarming "dangerous" persons, writing that the reason *why* historical laws which disarmed enslaved persons, Native Americans, and individuals who refused to swear oaths of loyalty were enacted was different from the reason why § 922(g)(8) was enacted.[112] The purpose of the historical laws "was ostensibly

105. *Rahimi*, 61 F.4th at 456.
106. *See id*. at 457.
107. *See id.* at 457–59.
108. *See id*. at 458.
109. *See id*. at 458–59.
110. *Id*.
111. *Id*. at 459.
112. *Id.* at 457.

the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse[.]'"[113]

Finally, the court rejected as not relevantly similar historical surety laws,[114] which allowed individuals to seek a peace bond against another individual who threatened the peace.[115] Under English Common Law and in the 18th and 19th centuries, one way in which wives could gain some measure of safety from violent husbands was through surety laws, in which a violent husband could be required to put up a bond to guarantee his good behavior,[116] which could result in a firearm prohibition. Though the *Rahimi* court admits that the purpose of both surety laws and § 922(g)(8) are to protect an identified person against a threat from another identified person, and some of the mechanics of surety laws resemble § 922(g)(8), it determined that some aspects of *how* the laws burdened the right were too dissimilar.[117] Though surety laws, like § 922(g)(8), did not require a criminal conviction but merely a civil proceeding, the court wrote, surety laws imposed only a partial conditional restriction, prohibiting neither possession nor public carrying of firearms if the individual posted surety, where § 922(g)(8) is an absolute prohibition on possession.[118]

*2. Other Post-*Bruen *Cases Evaluating § 922(g)(8)*

In addition to the Fifth Circuit, ten federal district courts have evaluated § 922(g)(8) after the Supreme Court decided *Bruen*.[119] Two such federal district courts, like *Rahimi*, concluded that the law violated the Second Amendment.[120] In *United States v. Perez-Gallan* and *United States v. Combs*, the Western District of Texas and the Eastern District of Kentucky

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113. *Id*. (quoting United States v. McGinnis, 956 F.3d 747, 758 (5th Cir. 2020)).

114. *See id*. at 460.

115. *See* Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2577 (2022).

116. *See* Laura F. Edwards, *Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South*, 65 J. S. HIST. 733, 750 (1999).

117. *See Rahimi*, 61 F.4th at 459–60.

118. *See id*. at 460.

119. United States v. Kays, 624 F. Supp. 3d 1262 (W.D. Okla. 2022); United States v. Jordan, No. CR-22-00339-JD, 2022 U.S. Dist. LEXIS 240859 (W.D. Okla. Oct. 25, 2022); United States v. Perez-Gallan, 640 F. Supp. 3d 697 (W.D. Tex. 2022); United States v. Combs, No. CR 5:22-136-DCR, 2023 WL 1466614 (E.D. Ky. Feb. 2, 2023); United States v. James, No. CR-22-154-J, slip. op. (W.D. Okla. Mar. 20, 2023); United States v. Guthery, No. 2:22-CR-00173-KJM, 2023 WL 2696824 (E.D. Cal. Mar. 29, 2023); United States v. Robinson, No. 4:22-CR-165 RLW, 2023 WL 3167861 (E.D. Mo. May 1, 2023); United States v. Silvers, No. 5:18-CR-50-BJB, 2023 WL 3232605 (W.D. Ky. May 3, 2023); United States v. Gordon, 2:22-CR-00308-DS, slip op. (D. Utah Jun. 21, 2023); United States v. Brown, No. 2:22-CR-00239-JNP-CMR, 2023 WL 4826846 (D. Utah July 27, 2023).

120. *See Perez-Gallan*, 640 F. Supp. 3d at 713; *Combs*, 2023 WL 1466614, at *5.

determined that the plain text of the Second Amendment protected the conduct covered by § 922(g)(8) and that the law was inconsistent with the nation's historical tradition of firearm regulation.[121] The court in *Perez-Gallan* determined that domestic violence existed at the time of the Founding, that there was an absence of laws distinctly similar to § 922(g)(8), and therefore the law was arguably unconstitutional.[122] Despite this determination, the court proceeded with the more nuanced historical analogies.[123] Much like the Fifth Circuit, *Perez-Gallan* and *Combs* rejected as insufficiently analogous to § 922(g)(8) historical surety laws, state ratifying proposals, and laws that the government asserted evinced a national historical tradition of disarming "dangerous persons."[124] Unlike *Rahimi*, the court in *Perez-Gallan* accepted that at the Founding, categories of individuals determined to be a threat to public safety were disarmed; but distinguished this tradition from § 922(g)(8) by expressing doubt that the Founders would have considered domestic abusers a "threat to public safety."[125]

Eight federal district courts determined that § 922(g)(8) did not violate the Second Amendment.[126] Several of these courts evaluating § 922(g)(8) engaged in very little analysis in coming to this conclusion. *United States v. Kays*, for example, determined that the law was relevantly similar to laws that prohibited persons convicted of felony offenses from having firearms, which are presumptively lawful.[127] In a slip opinion, the Western District of Oklahoma assumed arguendo that the plain text of the Second Amendment covered the conduct regulated by § 922(g)(8) but concluded with little to no analysis that the law is consistent with the nation's historical tradition of firearm regulation.[128] In another slip opinion, the District of Utah found that the defendant was not a law abiding and responsible citizen as contemplated by *Heller* and *Bruen* and therefore his conduct was not covered by the plain

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121. *See Perez-Gallan*, 640 F. Supp. 3d at 701–02, 713; *Combs*, 2023 WL 1466614, at *3, *5.

122. *See Perez-Gallan*, 640 F. Supp. 3d at 703–05, 713.

123. *See id*. at 707–13.

124. *Id*. at 709–11; *Combs*, 2023 WL 1466614, at *5.

125. *See Perez-Gallan*, 640 F. Supp. 3d, at 711–15.

126. United States v. Kays, 624 F. Supp. 3d 1262 (W.D. Okla. 2022); United States v. Jordan, No. CR-22-00339-JD, 2022 U.S. Dist. LEXIS 240859 (W.D. Okla. Oct. 25, 2022); United States v. James, No. CR-22-154-J, slip. op. (W.D. Okla. Mar. 20, 2023); United States v. Guthery, No. 2:22-CR-00173-KJM, 2023 WL 2696824 (E.D. Cal. Mar. 29, 2023); United States v. Robinson, No. 4:22-CR-165 RLW, 2023 WL 3167861 (E.D. Mo. May 1, 2023); United States v. Silvers, No. 5:18-CR-50-BJB, 2023 WL 3232605 (W.D. Ky. May 3, 2023); United States v. Gordon, 2:22-CR-00308-DS, slip op. (D. Utah Jun. 21, 2023); United States v. Brown, No. 2-22-CR-00239-JNP-CMR, 2023 WL 4826846 (D. Utah July 27, 2023).

127. *See Kays*, 624 F. Supp. 3d at 1266–67.

128. *See James*, No. CR-22-154-J, slip. op. at 2.

text of the Second Amendment.[129] Even if the conduct were covered by the Amendment's plain text, the court in *Gordon* concluded without elaboration that there are sufficient historical analogues to § 922(g)(8).[130]

The remaining federal district courts engaged in a much more exhaustive analysis of § 922(g)(8) under *Bruen*'s two-step framework.[131] In *United States v. Robinson*, the court determined that it was still bound by Eighth Circuit precedent in *United States v. Bena* which had determined that possession of firearms by persons prohibited under § 922(g)(8) is not covered by the plain text of the Second Amendment.[132] Though all the remaining cases determined that the conduct regulated by § 922(g)(8) was covered by the plain text of the Second Amendment, they determined that the law was consistent with the nation's historical tradition of firearm regulation.[133] Finding that domestic violence is a modern societal concern, the court in *United States v. Jordan* determined that § 922(g)(8) was sufficiently analogous to state ratifying conventions' right to bear arms proposals, historical "going armed" laws, historical laws disarming "dangerous persons," and historical surety laws.[134] Also finding that domestic violence is a modern societal concern, *United States v. Guthery*, *United States v. Silvers*, and *United States v. Brown* found § 922(g)(8) sufficiently analogous to the laws cited in Jordan as well as historic so-called "going armed" laws.[135]

*3. Comparing and Critiquing Post-*Bruen *Cases Evaluating § 922(g)(8)*

Cases applying the *Bruen* framework to evaluate § 922(g)(8) have analyzed the same historical laws and come to polar opposite conclusions as to the constitutionality of the law.[136] This phenomenon is due to how narrowly or how broadly courts are analogizing § 922(g)(8) to historical firearms laws. Though the court in *Perez-Gallan* found § 922(g)(8) unconstitutional, it expressed uncertainty about whether *Bruen* compelled the outcome, writing that "the critical question lower courts now face is whether *Bruen* requires the regulatory landscape be trimmed with a scalpel

129. *See Gordon*, No. 2:22-CR-00308, slip op. at 2.

130. *See id*.

131. *See generally Jordan*, 2022 U.S. Dist. LEXIS 240859; *Guthery*, 2023 WL 2696824; *Robinson*, 2023 WL 3167861; *Silvers*, 2023 WL 3232605; *Brown*, 2023 WL 4826846.

132. *See Robinson*, 2023 WL 3167861 at *4, *6.

133. *See Jordan*, 2022 U.S. Dist. LEXIS 240859, at *7, *13–14; *Guthery*, 2023 WL 2696824, at *6, *8; *Silvers*, 2023 WL 3232605, at *5, *13; *Brown*, 2023 WL 4826846, at *6, *9.

134. *See Jordan*, 2022 U.S. Dist. LEXIS 240859, at *9–13.

135. *Guthery*, 2023 WL 2696824, at *8–9; *Silvers*, 2023 WL 3232605, at *13; *Brown*, 2023 WL 4826846, at *9.

136. *Compare Rahimi*, 61 F.4th at 461, *with Silvers*, 2023 WL 3232605, at *13.

or a chainsaw . . . one could easily imagine a scenario where separate courts can come to different conclusions on a law's constitutionality, but both courts would be right under *Bruen*."[137] Courts evaluating other firearm regulations have also expressed concern about how narrowly or broadly *Bruen* requires them to analogize to history.[138] For reasons not articulated in *Rahimi*, *Perez-Gallan*, or *Combs*, when faced with the option to apply *Bruen* narrowly or more broadly, these courts chose narrow, requiring extremely similar, if not identical, historical analogues.

Many courts and judges evaluating Second Amendment challenges to various federal laws both before and after *Bruen* have identified a broad historical tradition of disarming persons perceived to be dangerous.[139] Justice Barrett, then a judge for the Seventh Circuit, wrote in a dissenting opinion that "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns"[140] and that modern legislatures may prohibit persons from possessing firearms "based on present-day judgments about categories of people whose possession of guns would endanger the public safety[.]"[141] Justice Barrett also noted that the language in Pennsylvania's proposal guaranteeing the right to bear arms "unless for crimes committed, or real danger of public injury from individuals[]" are evidence of this historical tradition and represents "an effort to capture non-criminals whose possession of guns would pose the *same kind of danger* as possession by those who have committed crimes."[142] In his concurrence in *Binderup v. Attorney General*, Judge Hardiman, joined by four other judges of the *en banc* panel, wrote that "[t]he most cogent principle that can be drawn from traditional limitations

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137. *Perez-Gallan*, 640 F. Supp. 3d at 713; *see also Combs*, 2023 WL 1466614, at *15 (In his report, in which he recommended upholding 18 U.S.C. § 922(g)(8), the magistrate judge wrote, "the crux of the dispute is how broad or narrow of a historical lens does a court utilize in applying *Bruen*. In the wake of *Bruen* and until the appellate courts have a chance to clarify *Bruen*'s new framework, it falls on district courts to try to find some principled way to apply *Bruen*'s framework to the thousands of prosecutions that it may call into question.").

138. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 134–38 (2023).

139. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by* N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111 (2022) (evaluating an as-applied challenge to 18 U.S.C. § 922(g)(1)); Binderup v. Att'y Gen., 836 F.3d 336, 357 (3d Cir. 2016) (Hardiman, J., concurring); Folajtar v. Att'y Gen., 980 F.3d 897, 909 (3d Cir. 2020) (evaluating an as-applied challenge to 18 U.S.C. § 922(g)(1)); United States v. Goins, No. 555:22-cr-00091-GFVT-MAS-1, 2022 WL 17836677, at *12 (E.D. Ky. Dec. 21, 2022); United States v. Doty, No. 5:21-CR-21, 2022 WL 17492260, at *2 (N.D. W. Va. Sept. 9, 2022).

140. *See Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).

141. *Id.* at 464.

142. *Id.* at 456 (citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 665 (1971)).

on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment."[143] Citing historian Stephen Halbrook, Judge Hardiman wrote that debates at the ratifying convention revealed that such public declarations of the scope of the right provoked no apparent disagreement, representing "the commonplace understanding that 'dangerous persons could be disarmed[.]'"[144]

Both the majority and Judge Bibas in dissent in *Folajtar v. Attorney General* acknowledged the historical tradition of disarming dangerous persons, with the majority noting that danger to public safety was one reason among many that persons were historically disarmed[145] and Judge Bibas writing that "[h]istorically, limitations on the right were tied to dangerousness. In England and colonial America, the Government disarmed people who posed a danger to others. Violence was one ground for fearing danger, as were disloyalty and rebellion."[146]

Several courts evaluating § 922(g)(8) post-*Bruen* have similarly identified a historical tradition of disarming dangerous persons to uphold the law.[147] Unlike *Rahimi*, these courts have applied the *Bruen* framework more broadly, analogizing § 922(g)(8) to historical laws at a higher level of generality.[148] When considered together, these seemingly distinct features have paved the way for those courts upholding § 922(g)(8).[149]

In contrast to *Rahimi*, the courts in *Jordan*, *Silvers*, and *Brown* found right to bear arms proposals at state ratifying conventions that would have explicitly limited the right to "peaceable citizens" or to those who had not committed crimes or who posed a real danger of public injury to be persuasive.[150] *Silvers*, for example, noted that though they were not

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143. 836 F.3d at 357.

144. *Id.* at 367 (citing STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT 190–215 (2008)).

145. *See* 980 F.3d 897, 909 (3d Cir. 2020) (evaluating an as-applied challenge to 18 U.S.C. § 922(g)(1)).

146. *Id.* at 913 (Bibas, J., dissenting).

147. *See generally* United States v. Jordan, No. CR-22-00339-JD, 2022 U.S. Dist. LEXIS 240859 (W.D. Okla. Oct. 25, 2022); United States v. Robinson, No. 4:22-CR-165 RLW, 2023 WL 3167861 (E.D. Mo. May 1, 2023); *see also* United States v. Guthery, No. 2:22-cr-00173-KJM, 2023 WL 2696824, at *9 (E.D. Cal. Mar. 29, 2023); United States v. Silvers, No. 5:18-CR-50-BJB, 2023 WL 3232605, at *1 (W.D. Ky. May 3, 2023).

148. *See Guthery*, 2023 WL 2696824, at *7–8; *Robinson*, 2023 WL 3167861, at *4; *Silvers*, 2023 WL 3232605, at *7.

149. *See Guthery*, 2023 WL 2696824, at *7–8; *Robinson*, 2023 WL 3167861, at *5; *Silvers*, 2023 WL 3232605, at *7.

150. *See Jordan*, 2022 U.S. Dist. LEXIS 240859, at *11; *Silvers*, 2023 WL 3232605, at *12; United States v. Brown, No. 2:22-cr-00239-JNP-CMR, 2023 WL 4826846, at *11 (2023).

ultimately adopted, the proposals are "evidence of the scope of founding-era understandings regarding categorical exclusions from the enjoyment of the right to keep and bear arms."[151]

Unlike *Rahimi*, the *Silvers* court found that historical "going armed" laws were sufficient analogues to § 922(g)(8), noting Virginia's decision to amend their laws and remove forfeiture of weapons as a penalty "56 years after ratification . . . doesn't necessarily suggest that they did so based on a view that forfeiture was inconsistent with the U.S. Constitution."[152] And though the court in *Rahimi* doubted that the few examples of "going armed" laws presented by the government would establish an historical tradition, historians who filed an amicus brief in *Bruen* identified numerous "going armed" laws adopted by colonies, states, and territories before and after the Revolution and well into the 19th century.[153]

Though *Rahimi* dismissed laws disarming dangerous persons as disanalogous because, it asserted, the purpose of the historical laws were to preserve political and social order, the *Silvers* and *Brown* courts analogized more broadly.[154] *Silvers* wrote that fear of rebellion "surely encompasses fear of the violence that would bring[.]"[155] *Brown* similarly noted that it did not doubt that such laws were not enacted to prevent domestic violence, but zooming out, as *Bruen* allows, it asserted that the historical laws and § 922(g)(8) were both "intended to prevent the future threat of violence arising from a certain class of individuals."[156] The court in *Brown* also acknowledged that many of these historical laws that disarmed persons who were perceived at the time as dangerous are repugnant, *Bruen* requires that we evaluate our "grim past" to understand the scope of the Second Amendment.[157] Even the law review article cited in *Rahimi* noted that though most efforts to disarm individuals were intended to prevent armed rebellions, that "public safety was a concern[.]"[158] *Rahimi* similarly ignored

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151. *Silvers*, 2023 WL 3232605, at *12 (quoting Kanter v. Barr, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)).

152. *See Silvers*, 2023 WL 3232605, at *10 n.9.

153. Brief of Professors of Hist. and L. as Amicus Curiae Supporting Respondents at 8–14, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

154. *See generally* United States v. Silvers, No. 5:18-cr-50-BJB, 2023 WL 3232605 (W.D. Ky. May 3, 2023); *Brown*, 2023 WL 4826846.

155. *Silvers*, 2023 WL 3232605, at *14.

156. *See Brown*, 2023 WL 4826846, at *11 n.11; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133 (2022).

157. *Brown*, 2023 WL 4826846, at *10–11; *see also* Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. 30, 32 (2023).

158. *See* United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023), *cert. granted*, No. 22-915, 2023 WL 4278450 (U.S. June 30, 2023) (citing Joseph G.S. Greenlee, *The Historical*

that where historically domestic violence was addressed, it was done so because it was considered a crime against the public, not a crime against the wife.[159] Historian Laura Edwards wrote that at common law, women could seek peace warrants against an abusive husband, "legally transform[ing the] husbands' legitimate governance into illegitimate violence that endangered the public order."[160] *Rahimi*'s cramped analogy also ignores what current evidence tells us, and what *Guthery* asserts — that persons subject to DVPOs are a danger to their community as well as their intimate partners.[161] As many critics of *Rahimi* have identified, a particularized assessment of dangerousness, like § 922(g)(8), rather than a sweeping categorical prohibition based on stereotypes, should weigh in favor of its constitutionality.[162] The *Silvers* court also observed that § 922(g)(8) imposes a temporary firearm prohibition, lasting only as long as the protective order (which may be modified, terminated, or expire) was in effect.[163] Historical laws disarming persons who refused to swear oaths of loyalty imposed similar and even possibly heavier burdens on gun rights. Though such individuals could regain their arms "at any time by swearing a loyalty oath[]," if they did not swear such an oath they "could've theoretically been disarmed for life."[164]

Similarly, the court in *Guthery*, found surety laws to be sufficiently analogous to § 922(g)(8) and observed that § 922(g)(8) is not an "absolute deprivation," it imposes a conditional restriction, prohibiting possession temporarily while an individual is currently "subject to a specific, defined restraining order."[165] *Silvers* and *Brown* also found historical surety statutes

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Justification for Prohibiting Dangerous Persons from Possessing Arms, 20 WYO. L. REV. 249, 261 (2020)).

159. *See* Edwards, *supra* note 116, at 754 (1999).

160. *Id.* at 750.

161. *See* United States v. Guthery, No. 2:22-cr-00173-KJM, 2023 WL 2696824, at *8 (E.D. Cal. Mar. 29, 2023); *see also infra* Part III.

162. *See* Jacob Charles, *The Founders Didn't Disarm Domestic Abusers: Does That Mean We Can't?*, THE HILL (Feb. 15, 2023, 2:00 PM), https://thehill.com/opinion/judiciary/3859203-the-founders-didnt-disarm-domestic-abusers-does-that-mean-we-cant/ [https://perma.cc/SXB9-FXKE]; *see also* Mark Joseph Stern, *5th Circuit Rules That People Accused of Domestic Violence Have a Right to Keep Their Guns*, SLATE (Feb. 2. 2023, 5:29 PM), https://slate.com/news-and-politics/2023/02/5th-circuit-court-domestic-violence-second-amendment-right.html [https://perma.cc/5X8G-QNF8]; Madiba Dennie, *Originalism Is Going to Get Women Killed*, THE ATLANTIC (Feb. 9, 2023), https://www.theatlantic.com/ideas/archive/2023/02/originalism-united-states-v-rahimi-women-domestic-abuse/672993/ [https://perma.cc/5956-U2ZJ].

163. *See* United States v. Silvers, No. 5:18-cr-50-BJB, 2023 WL 3232605, at *15 (W.D. Ky. May 3, 2023).

164. *Id.*

165. *See* United States v. Guthery, No. 2:22-cr-00173-KJM, 2023 WL 2696824, at *9 (E.D. Cal. Mar. 29, 2023).

to be additional evidence of the historical tradition of disarming dangerous persons.[166]

The court in *Rahimi* asserted a bright line distinction between constitutionally impermissible firearm regulations based on civil proceedings and permissible regulations that require criminal convictions.[167] The *Silvers* court, however, noted that loyalty laws disarmed individuals who were neither "criminals nor traitors[.]"[168] Furthermore surety laws were civilly imposed restrictions that were criminally enforced, they could be sought by any private individual against another individual who had not yet committed a crime.[169] *Silvers* asserts that founding-era precedent and historical laws placed no weight on whether the regulation is based on criminal or civil processes; rather they are concerned with whether the process is legal.[170] *Silvers* further observed that in addition to the Second Amendment analysis, protective order laws "must surely comport with separate due-process protections regarding notice, hearing, and decisionmaking in connection with the deprivation of valuable rights."[171]

Despite some differences in how or why historical laws burdened the Second Amendment right, the court in *Silvers* viewed the "going armed" laws, disarming dangerous persons laws, and surety laws *in totality* rather than individually to evince an historical tradition of disarming persons determined to be dangerous.[172] As the court wrote, if "a single material difference is enough, then *Bruen*'s entire mode of analysis would make little sense."[173]

There are a number of factors that support analogizing more broadly. Professors Joseph Blocher and Eric Ruben argue that applying a higher symmetrical level of generality to both gun rights and regulations can mitigate the danger of historical anachronism in either direction — for example, rejecting a gun rights claim because modern models of firearms did not exist in 1791, and finding that persons subject to DVPOs have a right to possess firearms because no law in 1791 specifically prohibited it.[174] Applying a higher level of generality to historical analogy is more consistent

166. *See Silvers*, 2023 WL 3232605, at *11; *see also* United States v. Brown, No. 2:22-cr-00239-JNP-CMR, 2023 WL 4826846, at *13 (D. Utah July 27, 2023).

167. United States v. Rahimi, 61 F.4th 443, 455 (5th Cir. 2023), *cert. granted*, No. 22-915, 2023 WL 4278450 (U.S. June 30, 2023).

168. *Silvers*, 2023 WL 3232605, at *12.

169. *Id.*

170. *Id.* at *13.

171. *Id.*

172. *Id.* at *14.

173. *Id.* at *15.

174. Joseph Blocher & Eric Ruben, *Originalism-By-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 1, 10 (2023).

with the Supreme Court's treatment of gun rights. The Supreme Court in *Bruen* applied a *broad general* definition to "arms," repeating the assertion in *Heller* that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[175] Allowing courts to analogize to history at a higher level of generality and to consider groups of similar historical laws together rather than individually is also more consistent with *Bruen*'s directive to analogize modern laws with historical laws that *comparably* burden the right and that are *comparably* justified as well as its assurance that the new analytical framework did not require "dead ringer[s]" or "historical twin[s]" and would not turn the Second Amendment into a "regulatory straightjacket."[176] Indeed, *Bruen* described the Second Amendment as a provision that was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[177]

This approach is particularly appropriate for firearm regulations related to domestic violence. Domestic violence perpetrated with firearms is an unprecedented societal concern, identified in *Bruen* as requiring a more nuanced approach to historical analogy.[178] Though *Perez-Gallan* correctly noted that domestic violence occurred at and around the Founding,[179] it failed to take into account the prevailing social norms regarding the role of women in society and violence against women. Up until the 19th century, a wife had no separate legal identity from her husband. She had a duty to obey and serve him, while he had a duty to support her and represent her in the legal system.[180] A husband also retained the common law right to physically chastise his wife, which was recognized by certain courts well into the 19th century.[181] More importantly, the court in *Perez-Gallan* incorrectly identified the relevant societal concern as domestic violence when it should be *domestic violence perpetrated with firearms*.[182] Historian Randolph Roth wrote that "[f]amily and intimate partner homicides were extremely rare"

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175. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 582 (2008)).

176. *Id.* at 2133.

177. *Id.* at 2132 (quoting McCulloch v. Maryland, 17 U.S. 316, 415 (1819)).

178. *Id.*

179. *See* United States v. Perez-Gallan, 640 F. Supp. 3d 697, 701 (W.D. Tex. 2022).

180. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122 (1996).

181. *See* Edwards, *supra* note 116, at 750; *see also* Siegel, *supra* note 180, at 2122; Samantha L. Fawcett, *Upholding the Domestic Violence Firearm Prohibitors Under Bruen's Second Amendment*, 18 DUKE J. CONST. L. & PUB. POL'Y 405, 430 (2023) (collecting 19th century cases recognizing the right of chastisement or concluding that it was not the role of the court to intervene).

182. *See Perez-Gallan*, 640 F. Supp. 3d at 670.

between the 17th and 19th centuries.[183] And very few murders of spouses were committed with firearms before the Civil War.[184] Using judicial archives and media of the day, Dr. Roth compiled a dataset of homicides of adults committed in New England and the Chesapeake Bay Area in the seventeenth and eighteenth centuries.[185] During this period before and just after ratification of the Constitution and the Second Amendment, just 9% of homicides of a spouse were committed with a firearm in New England, and no spousal homicides were committed with a firearm in the Chesapeake Bay Area.[186] This pattern of spousal homicides being committed without firearms remained at least until the Civil War, despite an overall increase in spousal homicide and the emerging availability of handguns.[187] This is not true today, in which the percentage of intimate partner homicides committed with a firearm has long constituted the majority of intimate partner homicides, and has sat above 55% since 2014, reaching 60% in 2020.[188] It is, therefore, unsurprising that legislatures contemporaneous with the Founding did not specifically disarm domestic abusers. In stark contrast, today firearms are the most commonly used weapon in intimate partner homicide.[189]

The Eastern District of Kentucky's more nuanced approach to analogizing to historical laws to evince the nation's historical tradition of disarming persons determined to be dangerous is most consistent with the unprecedented nature of domestic violence perpetrated with firearms, the Supreme Court's treatment of the scope of arms, and its assurance that the historical analysis would not be unduly narrow.[190] Prohibiting persons subject to DVPOs from possessing firearms fits neatly into the national historical tradition. Such persons are dangerous to their intimate partners, children, extended family, first responders, and the general public.[191]

III. PUBLIC HEALTH RESEARCH

Unlike the period contemporaneous with the Founding, firearm-involved domestic violence represents a significant public health concern in modern

183. RANDOLPH ROTH, AMERICAN HOMICIDE 108, 250 (2009).

184. *Id.* at 252.

185. *See id.* at xi–xii.

186. *Id.* at 115.

187. *See id.* at 252.

188. James Alan Fox, *Multiply-Imputed Supplementary Homicide Reports File, 1976-2020* (unpublished dataset) (on file with author).

189. *See* Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017*, 6 VIOLENCE & GENDER 27, 31 (2019).

190. *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2132–33 (2022).

191. *See supra* Part III.

times. Domestic violence, with and without firearm involvement, is a pressing public health concern in the United States.[192] Estimates show that over 40% of women (or roughly 51 million) in the U.S. have been victims of contact sexual violence, physical violence, and/or stalking by an intimate partner and experienced a related impact, such as fear or injury, at some point in their lifetime.[193] Domestic violence also impacts men, with roughly 31 million reported to have experienced sexual violence, physical violence, and/or stalking by an intimate partner and experienced a related impact in their lifetime.[194] Women of certain racial and ethnic minorities have especially high rates of lifetime partner violence.[195] According to the 2022 National Intimate Partner and Sexual Violence Survey, analyzing data from 2016–2017, non-Hispanic Black women, non-Hispanic multiracial women and non-Hispanic American Indian or Alaska Native women reported higher prevalence rates of lifetime contact sexual violence, physical violence and/or stalking by an intimate partner (53.6%, 63.8% and 57.7%, respectively) compared to non-Hispanic White women (48.4%).[196]

The use of firearms in domestic violence is an urgent threat to the public.[197] Recent research conducted by Fridel and Fox uncovered that from 2010 to 2017, firearm-related murders of intimate partners increased by 26%, whereas those involving all other weapons continued their decades-long decline.[198] This increase in intimate partner homicides committed with firearms has continued into the 2020s.[199] When firearms are used by an intimate partner to commit violence, the risk of homicide is greater than if they used other weapons due to the increased lethality of firearms.[200] The critical link between firearm exposure and the risk of intimate partner homicide has been well-documented. Not only are the majority of these

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192. Jamila K. Stockman et al., *Intimate Partner Violence and Its Health Impact on Disproportionately Affected Populations, Including Minorities and Impoverished Groups*, 24 J. WOMEN'S HEALTH 62, 63 (2015).

193. RUTH W. LEEMIS ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 4 (2022).

194. *Id.* at 4.

195. *Id.* at 14.

196. *Id.* at 7.

197. April M. Zeoli et al., *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 EPIDEMIOLOGIC REVS. 125, 125 (2016).

198. Fridel & Fox, *supra* note 189, at 34.

199. Fox, *supra* note 188.

200. *See* Emma E. Fridel & Gregory M. Zimmerman, *Coercive Control or Self-Defense? Examining Firearm Use in Male- and Female-Perpetrated Intimate Partner Homicide*, J. RSCH. CRIME & DELINQ., 2 (July 25, 2022), https://journals.sagepub.com/doi/abs/10.1177/00224278221113564 [https://perma.cc/2GPC-EJ4Z].

homicides committed with a firearm,[201] but scholarly research has also shown that women are at an increased risk for homicide victimization, mainly by an intimate partner, if a firearm is kept in the home.[202] Furthermore, intimate partner violence that involves a firearm has a significantly higher likelihood of ending in homicide compared to intimate partner violence that involves other weapons.[203] In a seminal research study assessing the factors associated with men killing their female intimate partners, Campbell and colleagues found that male perpetrator firearm access was associated with a five-times-greater risk of intimate partner homicide.[204] Similarly, in a study of female intimate partner violence victims aged between 18 and 20 years old, the risk of homicide was greater when their abusive male partners had access to firearms.[205] Findings such as these call clear attention to the extreme precarity that female victims of intimate partner violence might encounter in the face of an armed abuser.

Just short of the extreme of intimate partner homicide are the substantial number of Americans who have had an intimate partner abuse them with a firearm in a *nonfatal* context. Recent estimates suggest that 25 million Americans have been abused by an intimate partner who either used a firearm against them or had access to a firearm.[206] In the same study, nearly 14% of women had experienced firearm threats at the hands of an abuser, had a firearm used on them as part of the abuse, or were threatened by an abuser who possessed or had easy access to a firearm.[207] In a nationally representative survey, it was found that 3.4% of nonfatal intimate partner violence events involved the use of a firearm.[208] This amounts to roughly 32,900 nonfatal firearm-involved intimate partner violence events annually.[209]

Nonfatal firearm abuse takes many forms. An abuser might brandish their firearm during an argument, or exhibit it in a hostile manner to imply a threat;

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201. Fridel & Fox, *supra* note 189, at 35; Fox, *supra* note 188.

202. James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES INTERNAL MED. 777, 779–80 (1997).

203. *See* Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3045 (1992).

204. *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

205. *See* Nancy Glass et al., *Young Adult Intimate Partner Femicide: An Exploratory Study*, 12 HOMICIDE STUD. 177, 181 (2008).

206. *See* Avanti Adhia et al., *Nonfatal Use of Firearms in Intimate Partner Violence: Results of a National Survey*, 147 PREVENTATIVE MED., June 2021, at 1, 4.

207. *See id.* at 5.

208. JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NONFATAL DOMESTIC VIOLENCE, 2003–2012 9 (Apr. 2014).

209. *See id.* at 3, 9 (3.4% of annual average of 967,710 intimate partner violence events = 32,902).

they may strike the victim with the firearm (commonly referred to as pistol whipping), they may threaten their intimate partner, or others, with the firearm, they may hold their victim at gunpoint or even shoot at them.[210] Even the knowledge that a firearm is easily accessible in the home is enough to cause extreme fear for those victimized by this violence.[211] Nonfatal firearm use might not feature as a single, discrete event.[212] Instead, this violence can be frequent and ongoing in the relationship. It can cause entrapment, extreme fear, and intimidation.[213] Nonfatal firearm abuse such as this facilitates a hostile environment, recognized as coercive control — which forms the bedrock of intimate partner violence.[214]

A. Costs of Firearm-Involved Domestic Violence

Firearm-involved domestic violence can have significantly damaging consequences for those victimized, going beyond physical injury or death. Victims are often rendered in a state of constant terror as a result of the violence they experience.[215] As mentioned, having a firearm easily accessible in the home, creates a considerable amount of fear for victims.[216] In scenarios in which an abusive partner has a firearm in the home, the possibility of violence and even death can loom large, so much so that some victims of this violence report fearing routine activities such as going to sleep.[217] Recent studies have underscored the significant adverse physical

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210. *See* TK Logan & Kellie Lynch, *Exploring the Nature, Scope, and Impact of Firearm Threats Among Women with Cohabitating Versus Noncohabitating Partners: Considerations for the Boyfriend Loophole*, 9 VIOLENCE & GENDER 11, 16 (2021); Kellie R. Lynch & TK Logan, *"You Better Say Your Prayers and Get Ready": Guns Within the Context of Partner Abuse*, 33 J. INTERPERSONAL VIOLENCE 686, 693 (2018); Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62, 64 (2005); Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412, 1414 (2004); Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE, & ABUSE 431, 436 (2018); Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249, 251 (2017).

211. *See* Leslie M. Tutty, *"I Didn't Know He Had it in Him to Kill Me": Nonlethal Firearms Use and Partner Violence Against Canadian Women*, 5 J. FORENSIC SOC. WORK 130, 139–40, 145 (2015); Lynch & Logan, *supra* note 210, at 693–94.

212. *See* Tutty, *supra* note 211, at 142; Lynch & Logan, *supra* note 210, at 693–94.

213. *See* Tutty, *supra* note 211, at 143; Lynch & Logan, *supra* note 210, at 693–94.

214. *See* Sorenson & Schut, *supra* note 210, at 432; Evan Stark, *Rethinking Coercive Control*, 15 VIOLENCE AGAINST WOMEN 1509, 1509–10 (2009).

215. *See* Lynch & Logan, *supra* note 210, at 695; Adhia et al., *supra* note 206, at 5; Erika M. Redding et al., *"He Will Not Leave Us Alone and I Need the Courts to Help": Defendants' Use of Nonphysical Violence in Domestic Violence Protective Order Cases*, 29 VIOLENCE AGAINST WOMEN 1044, 1052–54 (2023).

216. *See* Tutty, *supra* note 211, at 139–40; Lynch & Logan, *supra* note 210, at 693–94.

217. *See* Lynch & Logan, *supra* note 210, at 693.

and mental health outcomes that are associated with intimate partner firearm violence. Physical health impacts can range from back pain and migraines, to seizures and epilepsy.[218] Furthermore, firearm abuse is associated with persistent mental health problems, including anxiety, depression, lingering trauma and posttraumatic stress disorder.[219] In a study of women whose abusive partners had been charged with criminal domestic violence, those whose partners had used or threatened to use firearms experienced more severe symptoms of posttraumatic stress disorder than those women whose partners did not involve firearms in their abuse.[220] This type of violence can also impact the broader lives of victims, with some reporting missing work and school as a result of the violence.[221]

Relatedly, partner-victimized individuals have described the profound impact of surviving firearm violence committed by their partners. In one of the few qualitative studies with survivors of firearm-involved intimate partner violence, a woman shared that the abuse she endured changed her life "forever."[222] This woman disclosed that the abuse was so severe, she would never be able to forget feeling "scared and fearful" for her life.[223] Visible here is the immediate and prolonged trauma of firearm violence. For this victim, the abuse divided her life into two parts, before the violence and after. Her life was, to use Armstrong and Carlson's term, "irreparably remade" through the severity of firearm violence.[224] Surviving firearm violence tears at one's sense of self, safety, and feelings of security.[225] It is indisputable then that the toll of this trauma is extremely emotionally, physically, and socially challenging to heal from.

B. Impacts on Children

Firearm-involved intimate partner violence also represents an unprecedented societal concern given its impacts on children. The severe

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218. *See* Kellie R. Lynch & Dylan B. Jackson, *Firearm Exposure and the Health of High-Risk Intimate Partner Violence Victims*, 270 SOC. SCI. & MED., Feb. 2021, at 2, 5–6.

219. *See* Tami P. Sullivan & Nicole H. Weiss, *Is Firearm Threat in Intimate Relationships Associated with Posttraumatic Stress Disorder Symptoms Among Women?*, 4 VIOLENCE & GENDER 31, 34 (2017).

220. *See id.*

221. Adhia et al., *supra* note 206, at 5.

222. *See* Tutty, *supra* note 211, at 142.

223. *See id.*

224. Madison Armstrong & Jennifer Carlson, *We've Spent Over a Decade Researching Guns in America. This Is What We Learned*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/2021/03/26/opinion/politics/gun-reform-us.html [https://perma.cc/NFY4-6S44].

225. *See* Madison Armstrong & Jennifer Carlson, *Speaking of Trauma: The Race Talk, the Gun Violence Talk, and the Racialization of Gun Trauma*, 5 PALGRAVE COMMC'NS, 2019, at 1, 3.

impact of firearm-involved domestic violence can also radiate throughout the domestic sphere. As such, consequences of violence are not only felt in the immediate sense by the intimate partner, but also by children who see, hear, or are otherwise affected by the abuse of a parent.[226] This is particularly pertinent if we consider that child abuse co-occurs with domestic violence in an estimated 30–60% of households with children in which domestic violence takes place,[227] and that 31% of firearm homicides of children under the age of 13 years old were found to be related to intimate partner violence.[228] In the most extreme cases, children can be the witnesses to the violent death of a parent or are themselves killed by the violent intimate partner, who is often also their parent.[229] In fact, research shows that witnesses, including children, were more likely to be present when guns are involved in intimate partner violence than when no weapons are present.[230] Research has also shown that 8% of female survivors of nonfatal partner violence reported that their partner had also threatened to kill his family, and 1% reported that he threatened to harm their children.[231]

The psychological consequences of experiencing living in a household with domestic violence as a child are extremely serious, and these extend across all domains of the child's life. Broadly speaking, research has demonstrated that youth who have witnessed a friend and/or family member being injured or shot with a firearm within the past two years are more likely to experience symptoms of trauma.[232] And, as in the case of Adverse Childhood Experiences (ACEs), exposure to violence, including violence involving a gun, is associated with the onset of posttraumatic stress.[233] In

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226. *See* Jennifer L. Hardesty et al., *How Children and Their Caregivers Adjust After Intimate Partner Femicide*, 29 J. FAM. ISSUES 100, 108–10 (2008); Eva Alisic et al., *Children's Mental Health and Well-Being After Parental Intimate Partner Homicide: A Systematic Review*, 18 CLINICAL CHILD & FAM. PSYCH. REV. 328, 335–37 (2015); *see also* Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134, 137–41, 145 (1999).

227. Edleson, *supra* note 226, at 136.

228. Edleson, *supra* note 226, at 136; Katherine A. Fowler et al., *Childhood Firearm Injuries in the United States*, 140 PEDIATRICS, Jul. 2017, at 1, 7; *see also* Avanti Adhia et al., *Intimate Partner Homicide of Adolescents*, 173 JAMA PEDIATRICS 571, 573 (2019).

229. *See* Carrie LeFevre Sillito & Sonia Salari, *Child Outcomes and Risk Factors in U.S. Homicide-Suicide Cases 1999–2004*, 26 J. FAM. VIOLENCE 287, 290 (2011).

230. *See* Sorenson *supra* note 210, at 251.

231. *See* Campbell et al., *supra* note 204, at 1093–94.

232. *See* Heather A. Turner et al., *Exposure to Family and Friend Homicide in a Nationally Representative Sample of Youth*, 36 J. INTERPERSONAL VIOLENCE 4413, 4432 (2018).

233. *See* Theodore Thompson, Jr. & Carol Rippey Massat, *Experiences of Violence, Post-Traumatic Stress, Academic Achievement and Behavior Problems of Urban African-American Children*, 22 CHILD & ADOLESCENT SOC. WORK 367, 387 (2005); Sonali Rajan et al., *Youth Exposure to Violence Involving a Gun: Evidence for Adverse Childhood Experience Classification*, 42 J. BEHAV. MED. 646, 652 (2019).

relation to intimate partner homicide, outcomes may be particularly serious because of the reality that children face being "simultaneously the child of a murderer and a victim."[234] Psychological outcomes exhibited by the children might include post-traumatic stress disorder (PTSD), emotional disorders, and behavioral problems.[235] The trauma of parental intimate partner homicide also manifests in children as physical symptoms, including headaches and stomachaches, eating issues, and becoming unable to speak.[236] Great too are the material consequences in the lives of children victimized by this violence. Children face severe social upheaval in their lives as a result of firearm-involved intimate partner violence. For instance, in a study of 146 children who were affected by the intimate partner homicide of their mothers, 87% had to move from their homes after the homicide, which resulted in them leaving their schools and circle of friends who may have otherwise provided needed social support.[237] The effects of this violence on children's social worlds might also lead to worsening of academic outcomes (such as grades dropping and the child dropping out of school altogether).[238] Further research suggests that the impact of having one's parent murdered by another parent can cause long lasting trauma, at times extending into adulthood.[239] Additionally, children from minority racial and ethnic groups may be at a higher risk of deleterious health outcomes in all aforementioned domains due to enduring the harmful consequences of long standing, ingrained racism and discrimination.[240]

C. Impacts on Communities

Perhaps the most high-profile unprecedented societal concern posed by violent intimate partners who have access to a firearm is in their increased risk of killing multiple victims, including in mass shootings. Robust findings illuminate how intimate partner homicides frequently include additional fatal victims.[241] These victims might be linked to the perpetrator or victim of the homicide, either through a preexisting relationship (e.g., family, friends, new

234. Alisic et al., *supra* note 226, at 329.

235. *See* Linda A. Lewandowski et al., *"He Killed My Mommy!" Murder or Attempted Murder of a Child's Mother*, 19 J. FAM. VIOLENCE 211, 217–18 (2004); Alisic et al., *supra* note 226, at 335–36; Hardesty et al., *supra* note 226, at 108–109.

236. *See* Alisic et al., *supra* note 226, at 336; Hardesty et al., *supra* note 226, at 109.

237. *See* Lewandowski et al., *supra* note 235, at 213, 216.

238. *See* Alisic et al., *supra* note 226, at 337.

239. *See* Henrik Lysell et al., *Killing the Mother of One's Child: Psychiatric Risk Factors Among Male Perpetrators and Offspring Health Consequences*, 77 J. CLINICAL PSYCHIATRY 342, 346 (2016).

240. *See* Alisic et al., *supra* note 226, at 337.

241. *See* Russel P. Dobash & R. Emerson Dobash, *Who Died? The Murder of Collaterals Related to Intimate Partner Conflict*, 18 VIOLENCE AGAINST WOMEN 662 (2012).

dating partners of the victim, or coworkers) or simply through physical proximity to the violence (e.g., law enforcement officers, or even strangers).[242] In their analysis of intimate partner homicide in 16 U.S. states, Sharon G. Smith and colleagues found that between the years 2003 and 2009, nearly 30% of these incidents resulted in multiple deaths.[243] In the same study, nearly 50% of these additional deaths were of children or other family members of the abused intimate partner, 27% were identified as "other intimate partner[s]" (which the authors define as a current or past intimate partner of the targeted partner), 20% were friends and acquaintances of the targeted partner, 3% were strangers, and 1% were law enforcement officers who were active on the scene of the violence.[244] Cementing these findings further is research which shows that male-perpetrated intimate partner homicide results in multiple fatalities in approximately 40% of cases, whether through perpetrator suicide or additional homicides.[245] Indeed, men who used a firearm in a domestic homicide were almost two times as likely to kill at least one additional victim as men who killed their intimate partners by other means.[246] Furthermore, the risk of killing two or more people in a homicide is greater for those in intimate partner settings that involve a firearm than non-intimate partner homicides that involve a firearm.[247]

Finally, domestic violence also frequently plays a role in mass shootings, a uniquely late-20th and early-21st century concern. Findings suggesting that prior domestic violence can foreshadow mass shooting events. For example, in their analysis of mass shooters from 2014 to 2017, Zeoli and Paruk found that 38% of mass shooters had a history of perpetuating domestic violence.[248] Geller, Booty and Crifasi uncovered that in 59.1% of mass shootings between 2014 and 2019, the shooter shot an intimate partner and/or family members.[249] In 68.2% of these mass shootings, the perpetrator either shot at least one partner or family member or had a history of domestic

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242. *See id.*; Sharon G. Smith et al., *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System, 2003–2009*, 104 AM. J. PUB. HEALTH 461, 462 (2014); Sierra Smucker, *Suicide and Additional Homicides Associated with Intimate Partner Homicide: North Carolina 2004–2013*, 95 J. URB. HEALTH 337, 339 (2018).

243. Smith et al., *supra* note 242, at 462–63.

244. Smith et al., *supra* note 242, at 462.

245. *See* Aaron J. Kivisto, *Male Perpetrators of Intimate Partner Homicide: A Review and Proposed Typology*, 43 J. AM. ACAD. PSYCHIATRY & L. 300, 307 (2015).

246. Aaron J. Kivisto & Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, 48 J. AM ACAD. PSYCHIATRY & L. 26, 31 (2020).

247. *Id.*

248. *See* April M. Zeoli & Jennifer K. Paruk, *Potential to Prevent Mass Shootings Through Domestic Violence Firearm Restrictions*, 19 CRIMINOLOGY & PUB. POL'Y 129, 138 (2019).

249. *See* Lisa B. Geller et al., *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 INJ. EPIDEMIOLOGY, May 31, 2021, at 1, 4.

violence.[250] Findings such as these highlight that firearm-involved domestic violence has the potential to, and does, impact the public. There is a connection between multiple homicides and an offender's history of intimate partner violence. Firearm use in intimate partner violence is inextricable from the risk they pose to victimizing wider communities beyond a single individual in the domestic sphere.

In *United States v. Silvers*, Victor Silvers received the protective order underlying his § 922(g)(8) conviction on October 9, 2018, after "grabb[ing] [his wife Brittney Silvers] by the neck with one hand and str[iking] her in the face twice with his other hand" and "threaten[ing] [her] with his gun."[251] Five days later Brittney was dead.[252] Off-duty soldiers found her "stretched out in the yard, a male friend bleeding nearby, and Victor locked inside his car screaming."[253] Victor had shot Brittney in the head, neck, and chest.[254] In *United States v. Rahimi*, Zackey Rahimi had, within a roughly two year period, physically abused his girlfriend, threatened to shoot her, threatened a different woman with a firearm, fired shots into the air at least three separate times, fired shots at occupied vehicles twice, and fired an AR-15 into the home of a man he had sold drugs to.[255] The factual backgrounds of the § 922(g)(8) case law illustrate what the research outlined above proves: those subject to domestic violence protective orders are a danger to their intimate partners, their families, and their communities.

D. When Victims use Domestic Violence Protective Orders

DVPOs offer a relatively quick way for victims to gain legal protection from their abusers,[256] including, often, abusers' firearm violence. They are civil protective orders that may be initiated by the victim without a corresponding criminal case.[257] This is important for multiple reasons. Due to their civil court processes, an *ex parte* DVPO can be granted within days

250. *See id.* at 1, 5.

251. United States v. Silvers, No. 5:18-CR-50-BJB, 2023 WL 3232605, at *2 (W.D. Ky. May 3, 2023); United States v. Brown, No. 2-22-CR-00239-JNP-CMR, 2023 WL 4826846, at *2–3 (D. Utah July 27, 2023); *supra* Section II.C.iii.

252. *Silvers*, 2023 WL 3232605, at *3.

253. *Id.*

254. *Id.*

255. *See supra* Section II.C.i (citing United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *petition for cert. filed*, 2023 WL 2317796, at *2–3 (2023)); Roque Planas, *This Man is a Suspect in Multiple Shootings. His Case May Decide the Future of Gun Rights*, HUFFPOST (July 5, 2023, 12:55 PM), https://www.huffpost.com/entry/supreme-court-gun-rights-case-zackey-rahimi_n_64a551a0e4b0035bc5c9fe71 [https://perma.cc/Z663-E3YG].

256. *See* 25 AM. JUR. 2D DOMESTIC ABUSE AND VIOLENCE § 20.

257. *See id.*

of petitioning and a permanent DVPO within a month after that.[258] In comparison, the criminal process can be lengthy and depends on decisions made by law enforcement, prosecutors, and judges at each step to determine if the abuser will be held accountable. Additionally, some intimate partner violence (IPV) survivors do not want to involve the criminal justice system in their or their abusers' lives.[259] However, for some survivors DVPOs are the best option to obtain legal help in protecting themselves from further abuse.

Much of the research on DVPOs has been conducted with female victims of male violence.[260] This research shows that women petition for DVPOs after enduring physical or sexual violence and the decision to petition is often precipitated by particularly severe violence.[261] For example, research shows that most DVPO petitioners have suffered physical abuse at the hands of their intimate partners.[262] More than half of those who petition have suffered severe physical abuse.[263] For example, in one study, 61% of women who petitioned for a DVPO experienced severe IPV characterized by potentially lethal violence, forcible rape, or the infliction of major injuries.[264] An additional 22% experienced moderate IPV, characterized by physical abuse or the infliction of more minor physical injuries.[265] This is

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258. *See, e.g.*, OFF. OF THE EXEC. SEC'Y, JUV. & DOMESTIC RELS. DIST. CT. MANUAL 8-5–8-6 (Dep't of Jud. Services, 2023) (noting that where an individual files a petition for a preliminary protective order in cases of family abuse, a hearing shall be scheduled for the same day and a hearing for a final order shall be held within 15 days of the issuance of the preliminary protective order).

259. *See* TK LOGAN & ROB VALENTE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 3 (2015); BRIAN A. REAVES, POLICE RESPONSE TO DOMESTIC VIOLENCE, 2006–2015 3 (2017).

260. *See, e.g.*, Meredith E. Bagwell-Gray et al., *A Critical Examination of the Influences of Intimate Partner Violence, Help-Seeking, and Social Identity on Women's Experiences Seeking and Obtaining Civil Protection Orders*, WOMEN & CRIM. JUST., Feb., 2023, at 1, 6; Jill Theresa Messing et al., *Are Abused Women's Protective Actions Associated with Reduced Threats, Stalking, and Violence Perpetrated by Their Male Intimate Partners?*, 23 VIOLENCE AGAINST WOMEN 263, 267 (2016); Kathryn E. Moracco et al., *Who are the Defendants in Domestic Violence Protection Order Cases?*, 16 VIOLENCE AGAINST WOMEN 1201, 1206 (2010); TK Logan et al., *The Economic Costs of Partner Violence and the Cost-Benefit of Civil Protective Orders*, 27 J. INTERPERSONAL VIOLENCE 1137, 1140 (2012).

261. *See supra* note 260 and accompanying text.

262. *See* TK Logan et al., *Protective Orders in Rural and Urban Areas: A Multiple Perspective Study*, 11 VIOLENCE AGAINST WOMEN 876, 895 (2005); TK Logan & Robert T. Walker, *Civil Protective Order Effectiveness: Justice or Just a Piece of Paper?*, 25 VIOLENCE AND VICTIMS 322, 338 (2010); Messing et al., *supra* note 260, at 272; Katherine A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely to be Issued When Applications Mention Firearms?*, 30 EVALUATION REV. 266, 274 (2006).

263. *See* Logan & Walker, *supra* note 262, at 338.

264. Messing et al., *supra* note 260, at 268, 272.

265. *Id.*

consistent with previous research that found that at least 45% of DVPO petitioners had been physically injured by their abusers.[266] Up to 24% of petitioners report sexual violence.[267] Indeed, in a study of intimate partner violence survivors who sought shelter services, women who experienced more types of sexual violence were more likely to petition for a DVPO.[268] Finally, DVPO petitioners report that their children witnessed the violence in 53% of cases, were also harmed by the abuser in 14% of cases, and in 14% of cases the abuser threatened to kidnap the victim's children.[269]

Intimate partner violence survivors also petition for DVPOs when their abusers have used or threatened to use firearms against them.[270] One national survey found that 30% of survivors of firearm-involved intimate partner violence petitioned for a DVPO.[271] Conversely, a study of protective order applications in California found that 16% of applications explicitly mentioned firearms, and that firearms were more likely to be mentioned when the abuser was male than female.[272]

Survivors often petition for DVPOs only after accessing other services. In a study of women who had obtained a protective order against a male intimate partner, 37% of women had utilized victims' services for assistance with the violence in the six months prior to obtaining the order.[273] More commonly, however, women utilized the criminal justice system to try to gain safety. 81% of women had called the police in the six months prior to obtaining the order, resulting in 45% of the respondents spending an average of 19 days in jail.[274] Some of these police interactions resulted in arrests or charges: 11% of respondents had a felony charge or felony arrest and 42% had a misdemeanor charge or misdemeanor arrest.[275] In the end, 19% of abusers were convicted of a misdemeanor crime and 1% were convicted of a felony crime prior to the survivors obtaining the DVPO.[276] In fact, respondents to DVPOs often have criminal histories.[277] In one study,

266. Logan et al., *supra* note 262, at 897; Vittes & Sorenson, *supra* note 262, at 274.

267. Logan et al., *supra* note 262, at 894; Logan & Walker, *supra* note 262, at 338; Vittes & Sorenson, *supra* note 262, at 274.

268. Bagwell-Gray et al., *supra* note 260, at 9.

269. Vittes & Sorenson, *supra* note 262, at 273, 275.

270. KATHRYN E. MORACCO ET AL., PREVENTING FIREARMS VIOLENCE AMONG VICTIMS OF INTIMATE PARTNER VIOLENCE: AN EVALUATION OF A NEW NORTH CAROLINA LAW 3, 69 (2006).

271. Vivian H. Lyons et al., *Adult Help Seeking Behaviors Following Firearm-Related IPV and Threats to a Child: Results of a National Survey*, 38 J. FAM. VIOLENCE 775, 781 (2023).

272. Vittes & Sorenson, *supra* note 262, at 269, 275.

273. Logan et al., *supra* note 260, at 1144.

274. *Id. at* 1145.

275. *Id.*

276. *Id.*

277. Logan & Walker, *supra* note 262, at 337; MORACCO ET AL., *supra* note 270, at 42.

half of respondents had records of prior criminal charges of domestic violence against either the petitioner or a former partner.[278] In another, 71% reported police had been involved with at least one incident of abuse, with 45% of those having been arrested.[279] Zackey Rahimi, the defendant in the eponymous case soon to be heard by the Supreme Court, had committed physical violence against his intimate partner and threatened to shoot her, in addition to committing several other firearm crimes.[280] Indeed, it was in part because police obtained a warrant to search his residence as a firearm crime suspect in a string of separate shootings that it came to light that he was prohibited from firearm possession due to a domestic violence protective order.[281]

E. Research on DVPO Firearm Prohibition Laws

Researchers have found that domestic violence protective order firearm prohibtions are associated with decreases in intimate partner homicide.[282] Notably, they are associated with decreases in total intimate partner homicide as well as intimate partner homicide committed with firearms, which suggests that, instead of individuals switching to other methods to kill, the laws save lives.[283] There are differences between state laws which may lead to different levels of effectiveness, however. Researchers have found that when a state law specifically allows or mandates the court to require the respondent to relinquish any firearms they already own, there is a 10–12% associated decrease in intimate partner homicide.[284] When the firearm prohibition extends to dating partners (who are not covered under the federal law nor the laws of some states), there is an associated 13% decrease.[285] Finally, when the firearm prohibition extends to *ex parte* orders, which are put in place before a hearing that the respondent has the opportunity to attend, there is an associated 13% decrease in intimate partner homicide.[286]

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278. Moracco et al., *supra* note 260, at 1216.

279. Vittes & Sorenson, *supra* note 262, at 271–73.

280. Petition for a Writ of Certiorari at 2-3, United States v. Rahimi, 61 F.4th 443 (2023) (No. 21-11001).

281. *Id.* at 2–3.

282. *See* Vigdor & Mercy, *supra* note 2, at 332; Zeoli et al., *supra* note 2, at 2367–68; Zeoli & Webster, *supra* note 2, at 92.

283. *See* Vigdor & Mercy, *supra* note 2, at 332; Zeoli et al., *supra* note 2, at 2367–68; Zeoli & Webster, *supra* note 2, at 92.

284. Carolina Díez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS INTERNAL MED. 536, 540 (2017); Zeoli et al., *supra* note 2, at 2369.

285. Zeoli et al., *supra* note 2, at 2369.

286. *Id.*

These reductions, however, may be specific to intimate partner homicide of white victims. Researchers examined White and Black intimate partner homicide victimization separately and found that state-level laws were not associated with reductions in Black intimate partner homicide, though some were associated with reductions in white intimate partner homicide.[287] The federal domestic violence protective order firearm restriction, § 922(g)(8), however, was associated with a reduction in intimate partner homicide among Black Americans.[288] It is likely that this associated reduction was not entirely due to § 922(g)(8) (there were other changes in the Violence Against Women Act that may have helped reduce intimate partner homicide), however, we cannot parse out what percentage decrease was due to § 922(g)(8) versus other changes.[289]

CONCLUSION

Though the Supreme Court's decision in *Bruen* commanded a significant change in the way courts must evaluate Second Amendment cases, prohibitions on persons subject to DVPOs should satisfy *Bruen*'s new test. Domestic violence perpetrated with firearms is an unprecedented societal concern requiring a more nuanced historical analogy. Analogizing at a higher level of generality, a litany of historical laws evinces a national historical tradition of regulating firearms by persons determined to be dangerous. Modern day evidence-based research also plays a critical role in demonstrating that persons subject to DVPOs are dangerous. Taken together, it is clear that § 922(g)(8) fits neatly within this well-established national historical tradition. A contrary application of *Bruen* to strike down protections for victims of domestic violence would surely elevate, above nearly all other interests, the rights of abusers to have firearms they will use to kill, injure, and terrorize their intimate partners, families, emergency responders, and other members of the public.

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287. *See* Mikaela A. Wallin et al., *The Association of Federal and State-Level Firearm Restriction Policies with Intimate Partner Homicide: A Re-Analysis by Race of the Victim*, 37 J. INTERPERSONAL VIOLENCE NP16509, NP16520 (2022).

288. *Id.*

289. *Id.*