No. 22-915

IN THE
Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

ZACKEY RAHIMI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CATO INSTITUTE AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a federal law that categorically forbids anyone who is subject to a domestic violence restraining order from possessing a firearm without adequate procedural safeguards is facially unconstitutional.

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INTEREST OF THE *AMICI* CURIAE[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato files amicus briefs, publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because it involves the interplay of two fundamental rights—due process and gun ownership—within the context of a statutory scheme that was enacted before this Court clarified that the Constitution protects an individual right to keep and bear arms and without proper regard for all of the legally relevant interests at stake.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files amicus briefs when its objectives or those of its clients are directly implicated.

Among other rights the Institute seeks to protect is the right of armed self-defense, and in that regard the

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[1] Rule 37 statement: No party's counsel authored this brief in any part and no person or entity other than *amici* funded its preparation or submission.

Institute has represented parties and appeared as amicus in several cases involving this fundamental right. *See, e.g., Marszalek v. Kelley*, No. 20-CV-4270, 2022 WL 225882 (N.D. Ill. Jan. 26, 2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Korwin v. Cotton*, 323 P.3d 1200 (Ariz. 2014). Institute scholars have also published important research on the right to possess firearms. *See, e.g.*, Timothy Sandefur, *The Permission Society* ch. 7 (2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

The right of women to be free from physical abuse at the hands of men has received short shrift throughout our nation's history. And so has the right of the people to keep and bear arms. This case presents those rights in direct—but not insoluble—conflict. Contrary to the maximalist positions of opposing partisans, our nation's traditions present no obstacle to disarming genuinely dangerous people and abundant guidance for how to accomplish that result with due regard for the fundamental rights of all concerned. But doing so will require fresh legislation, because § 922(g)(8) is both historically anomalous and legally deficient in failing to ensure an adequate measure of procedural due process.

Respondent persuasively demonstrates that there is no remotely similar historical analogue to § 922(g)(8). This is scarcely surprising since members of the founding generation did not lightly disarm those whom they considered full members of the polity. If that lacuna does not end the Court's inquiry—as faithful application of *Bruen* would seem to entail—then there is the additional problem of § 922(g)(8)'s manifest failure to

ensure adequate pre-deprivation procedures before gun owners are stripped of their fundamental right of armed self-defense. And while Congress can rewrite the statute to cure those infirmities, this Court may not.

ARGUMENT

Anyone who has ever challenged a traffic ticket knows from personal experience that the government may take $50 or $100 with only the slightest nod to procedural due process. But the greater the stakes for the affected individual—termination of parental rights, say, or of public employment—the more (and more reliable) pre-deprivation protections the law requires. Section 922(g)(8) is infirm both because it lacks any historical analogue *and* because it mandates the suspension of a fundamental constitutional right without ensuring that the person from whom that right is stripped receives the fair process that he or she is due. Both infirmities can be readily fixed—but that is the legislature's prerogative, not the judiciary's.

I. SECTION 922(G)(8) FAILS TO ENSURE THAT GUN OWNERS RECEIVE SUFFICIENT PRE-DEPRIVATION PROCESS BEFORE THEIR SECOND AMENDMENT RIGHTS ARE SUSPENDED.

Few principles are more deeply embedded in American law than the requirement of an adequate legal process before the government may deprive someone of their life, liberty, or property. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). And it is axiomatic that the nature and extent of that process depends on the relevant circumstances, including the

magnitude of the stakes for all concerned. As the Court explained in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), "[o]nce it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that *due process is flexible and calls for such procedural protections as the particular situation demands*." (emphasis added); *see also Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (quoting *Morrissey* for same proposition).

Section 928(g)(8) was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 (U.S. Br. 27) at a time when this Court had not yet determined whether the Second Amendment protects an individual right to own firearms and every circuit court to consider that question had said it does not. *See United States v. Emerson*, 270 F.3d 203, 220 & n.11 (5th Cir. 2001) (noting that "none of our sister circuits has subscribed" to the "individual rights model" and collecting cases). Thus, the prevailing view in the courts at the time of § 922(g)(8)'s enactment was that there was no federal constitutional right to possess firearms, and therefore the amount of process required to dispossess someone was either zero or its near equivalent. *See, e.g.*, *United States v. Baker*, 197 F.3d 211, 216–17 (6th Cir. 1999) (upholding conviction under § 922(g)(8) and rejecting defendant's procedural due process argument on the premise that the "*nature of th[e] proceeding*" giving rise to § 922(g)(8) exposure "*has no effect* on the constitutionality of a § 922(g)(8) prosecution") (emphases added).

The bare-bones framework for dispossession upon issuance of a domestic violence restraining order set

forth in § 922(g)(8) evinces a legislative perception that the stakes for the gun owner are negligible and that the amount of process required to extinguish his Second Amendment rights is correspondingly minimal. Thus, all that § 922(g)(8) requires is notice of the proceeding and an opportunity to participate, together with *either* an express finding of dangerousness *or* an explicit prohibition of the use or threatened use of force against an intimate partner or child.

Notably, there is no requirement that respondents be advised beforehand that issuance of the order will render it unlawful for them to possess firearms; no requirement that they be provided with counsel; no requirement that the issuing court make any specific factual findings; and no provision for a heightened standard of proof, as this Court has held is constitutionally mandated "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (holding that termination of parental rights must be supported by clear and convincing evidence rather than a "fair preponderance") (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

Again, this Court has repeatedly held that "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (internal quotation marks omitted). Indeed, so fundamental is the norm of proportionality between the magnitude of an individual's exposure and the quality of the process to which they are

constitutionally entitled that it is reflected not just in civil cases but in criminal prosecutions as well. Thus, the Court has held that there is no right to court-appointed counsel when the defendant is not facing potential incarceration, *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); that there *is* a right to court-appointed counsel but *not* a jury trial for "petty" offenses where the maximum punishment is six months or less of incarceration, *Baldwin v. New York*, 399 U.S. 66, 70–71 (1970); and that there is a right *both* to court-appointed counsel *and* to a jury trial for "serious" crimes with a potential sentence of more than six months. *Id.* at 73–74 (jury trial); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (court-appointed counsel). In short, the greater the stakes for the defendant, the more and better process the Constitution requires.

Beyond the requirement that the amount of process a person receives be roughly proportionate to the magnitude of their exposure, there is no hard-and-fast rule about how much process is due in any given setting. In the civil-forfeiture context, for example, the Court has held that the government must generally provide notice and a hearing before seizing real property, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993), but has not extended that requirement to the seizure of personal property such as vehicles and money.[2]

To determine what process is due in cases involving some particular curtailment of liberty or deprivation

[2] The Court granted certiorari this spring in *Culley v. Marshall*, No. 22-585, to determine whether due process requires a prompt post-seizure hearing for civil forfeitures of motor vehicles.

of property, the Court typically applies the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which considers (1) the nature of the private interest affected; (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional safeguards; and (3) the government's interest, "including the administrative burden that additional procedural requirements would impose." *James Daniel Good*, 510 U.S. at 53. Application of those considerations to § 928(g)(8)'s forced divestment of gun owners' personal property and suspension of their right to armed self-defense reveals a lack of meaningful process that would be intolerable with respect to any right deemed fundamental such as free speech, interstate travel, or the free exercise of religion.

Starting with the nature of the private interest affected, the right of an individual to defend him- or herself against other people[3] and even animals[4] has long been recognized as fundamental. And while it is of more recent vintage, the right of *armed* self-defense now appears to be considered fundamental as well. *See New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2151 (2022) (noting that in the wake of the Civil War, the "fundamental right" of freed slaves to keep and bear arms in public "was systematically

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[3] *See, e.g.*, *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002) (holding that right to claim self-defense in criminal prosecution "is deeply rooted in our traditions" and collecting cases).

[4] *See State v. Hull*, No. 31078-7-III, 185 Wash. App. LEXIS 2935, at *5 (Wash. Ct. App. Dec. 18, 2014) (self-defense against dog); *People v. Lee*, 32 Cal. Rptr. 3d 745, 755 (Cal. Ct. App. 2005) (same).

thwarted"); *see also Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring) ("The reasoning of the Massachusetts court"—i.e., that stun guns are not protected by the Second Amendment—"poses a grave threat to the fundamental right of self-defense."). Reprehensible as the physical abuse of an intimate partner certainly is, perpetrators of domestic violence do not thereby forfeit entirely their fundamental right of self-defense—though the means of effectuating that right may doubtless be curtailed *to some extent* by an appropriately tailored law.

Next, the risk of erroneous deprivation presented by the lax procedural standards of § 922(g)(8) is high, as explained by the Respondent (Resp. Br. at 46–48) and in Judge Ho's concurring opinion below, where he explains how civil protective orders are "often used as a tactical device in divorce proceedings,"[5] "are granted to virtually all who apply,"[6] and have even been used to disarm "*victims* of domestic violence," leaving them "in greater danger than before."[7]

Finally, the government's burden in providing additional procedural safeguards ranges from trivial (requiring pre-hearing notice to respondent that issuance of a domestic violence restraining order will trigger automatic criminalization of continued gun ownership), to modest (mandating a heightened burden of proof such as clear and convincing evidence and requiring issuing courts to make specific findings to show the

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[5] *United States v. Rahimi*, 61 F.4th 443, 465 (5th Cir. 2023) (Ho, J., concurring).

[6] *Id.* at 466.

[7] *Id.*

standard was met), to moderate (supplying court-appointed counsel for indigent respondents).

This Court need not delineate a roadmap for what a constitutionally adequate procedure for disarming perpetrators of domestic violence might look like. For now, it is enough to say that the threadbare procedures set forth in § 922(g)(8) would be considered woefully inadequate to support the abrogation of other fundamental rights such as the ability to petition the government for redress of grievances by attending a city council meeting, or accessing the Internet, or traveling about the country. The right of armed self-defense is no less important and no less entitled to an appropriate measure of procedural due process.

II. RESPONDENTS' LACK OF MOTIVATION TO CHALLENGE APPLICATIONS FOR CIVIL PROTECTIVE ORDERS PRESENTS ADDITIONAL DUE PROCESS CONCERNS WITH RESPECT TO § 922(G)(8).

Besides the lack of constitutionally adequate procedures described above, another problem with § 928(g)(8) is that most respondents would appear to have scant motivation to challenge applications for domestic violence restraining orders—and may in some cases have affirmative incentives not to challenge them, even when they have meritorious grounds for doing so.

For starters, it appears defendants in § 922(g)(8) prosecutions are often unaware that issuance of a domestic violence restraining order will render their possession of firearms immediately and automatically

unlawful.[8] Someone who believes the only real effect of such an order will be to expressly prohibit them from doing something that is already unlawful (physically assaulting another person)—or at the very least unethical (harassing, stalking, or threatening an intimate partner or their child)—would appear to have scant reason to challenge the application for that order, particularly if they perceive (apparently correctly, *see* Resp. Br. at 3 & n.2) that doing so would likely be futile, especially without counsel.

Even more demotivating is the entirely rational concern that exercising one's right to challenge an application for a domestic violence restraining order may not only be futile, but affirmatively harmful to the respondent's well-being. As Respondent explains, Texas prosecutors have "powerful leverage to avoid a contested hearing" in the form of a one-way fee-shifting provision that exposes respondents—but not

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[8] Surprise is a common thread among defendants in § 922(g)(8) prosecutions. *United States v. Napier*, 233 F.3d 394 (6th Cir. 2000) (challenging statute on due process grounds, among others, for failing to require notice of its prohibitions); *Garmene v. LeMasters*, 743 N.E.2d 782 (Ind. App. 2001) (defendant argues he did not receive sufficient notice that hearing in his absence could result in firearm prohibition); *United States v. Elkins*, 780 F. Supp 2d 473 (W.D. Va. 2011) (defendant argued scienter unsupportable where he had no knowledge of prohibition). It appears district courts have uniformly held that § 922(g)(8) convictions do not require defendants have knowledge that their possession of a firearm is unlawful. *See United States v. Miller*, 646 F.3d 1128 (8th Cir. 2011) (collecting cases); *United States v. Perkins*, No. 2:12-cr-00354-LDG (CWH), 2012 U.S. Dist. LEXIS 173258 (D. Nev. Dec. 6, 2012) (defendant's mental state was immaterial and inadmissible).

petitioners—to the imposition of attorney's fees in protective-order cases. Resp. Br. at 4–5 & n.4.

A party's lack of opportunity or motivation to participate in a proceeding that can produce adverse consequences for that party in a subsequent proceeding raises serious due process concerns, as recognized in a number of different settings. Thus, for example, Federal Rule of Evidence 804(b)(1) allows the introduction of former testimony against a party who had "an opportunity and similar motive to develop" that testimony "by direct, cross-, or redirect examination" in the prior proceeding. Notably, the Government understands the importance of opportunity and motive in that setting perfectly well, as reflected by the arguments it makes when it seeks to exclude from a criminal trial defense-favoring grand-jury testimony of witnesses who have become unavailable, often due to the invocation of their Fifth Amendment right against self-incrimination. *See, e.g.*, *United States v. Salerno*, 505 U.S. 317, 320–25 (1992).

Claim preclusion is another area where a party's opportunity to participate in an earlier proceeding or motive to make certain arguments during that proceeding can have important implications for due process. For example, in *Taylor v. Sturgell*, 553 U.S. 880, 889, 904 (2008), this Court unanimously rejected the doctrine of "virtual representation" that various lower courts would apply to bind someone to the judgment in a proceeding to which they were not a party if they had a sufficiently close "identity of interests" with a litigant in that proceeding, together with other factors such as "substantial participation" or "tactical maneuvering" to avoid preclusion. *See also Howitson v. Evans*

Hotels, *LLC*, 297 Cal. Rptr. 3d 181, 193–94 (Cal. Ct. App. 2022) (holding that whether non-litigant was in privity with a party to a proceeding sufficient to trigger claim preclusion against them depends in part on whether the litigant had a "strong motive" to assert a common interest shared by the litigant and non-litigant).

While it is true that Section 922(g)(8) requires actual notice and an opportunity to participate in the hearing to determine whether a civil protective order will issue, it is doubtful whether the opportunity to participate is a truly meaningful one when there is no requirement that the respondent be informed about the true stakes of that hearing (immediate suspension of Second Amendment rights), no compelling reason for most people to vigorously challenge the issuance of an order commanding them not to do something illegal or unethical, and in some cases strong countervailing incentives to participation, including exposure to attorney's fees.

Participation matters not for purely symbolic or formalistic reasons but for the highly practical reason that contested proceedings tend to produce outcomes that are more accurate and therefore more just. A statutory scheme that provides the simulacra of adversarial engagement with little of the substance raises significant due process concerns when it provides the mechanism by which hundreds of thousands of Americans are suddenly—and in many if not most cases unwittingly—stripped of their fundamental constitutional right to armed self defense.

CONCLUSION

The policy goals embodied in § 922(g)(8) are vital, and Congress should have both the opportunity and the impetus to advance those goals in a constitutionally compliant statute that is consistent both with the nation's tradition of gun regulation and with the requirements of procedural due process. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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