No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

– v. –

ZACKEY RAHIMI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF CENTER FOR REPRODUCTIVE RIGHTS, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

MARGARET A. DALE
MICHELLE K. MORIARTY
ADAM FARBIARZ
SARAH A. EMMERICH
JANA R. RUTHBERG
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036

DIANA KASDAN
Counsel of Record
AMY MYRICK
ALEXANDER WILSON
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3697
dkasdan@reprorights.org

Attorneys for Amicus Curiae
Center for Reproductive Rights

322968

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE* [1]

The Center for Reproductive Rights (the "Center") works to ensure reproductive rights are protected in law as fundamental human rights. This includes advocating to improve maternal health equity and outcomes in the United States by addressing systemic discrimination and failures to respect pregnant and birthing people's autonomy and physical integrity. Collaborating with partners and ally organizations, the Center seek to reduce preventable maternal deaths and morbidities by securing government policies and constitutional rights that ensure pregnancy and childbirth are safe, healthy, and supported.

Since its founding in 1992, the Center has litigated and appeared as amici before the Supreme Court in dozens of cases addressing critical reproductive health and constitutional issues, including as counsel for respondent in *Dobbs v. Jackson Women's Health Organization*. The Center submits this brief to address the constitutional and real-world harms of the Fifth Circuit's decision below for pregnant and postpartum people. Specifically, the Center offers important data demonstrating that gun violence by intimate partners is a leading cause of maternal mortality contributing to the national maternal health crisis. The Center also has a vital interest in ensuring that this Court's precedent

---

[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than Amicus and its counsel made any monetary contribution toward the preparation and submission of this brief.

regarding judicial consideration of the Nation's history and tradition does not become a straightjacket, as in the Fifth Circuit's decision, that denies full constitutional protection to people who are pregnant, birthing, and postpartum.

SUMMARY OF ARGUMENT

Pregnancy and childbirth should be safe and joyful, but tragically, they sometimes trigger intimate partner violence. When a gun is involved, it can be deadly. In the United States, homicide is a leading cause of death for pregnant and postpartum people and the majority of those deaths involve firearms. The lethal combination of partner abuse and gun violence is part of a larger national maternal and reproductive health crisis that affects the lives and health of tens of thousands of pregnant and postpartum people each year.

18 U.S.C. § 922(g)(8) addresses one aspect of this crisis by disarming dangerous people who are subject to domestic violence protective orders. The Fifth Circuit found it unconstitutional by misapplying *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), and requiring examples of analogous historical regulations that address the same problem in the same way. But historically, even while restricting dangerous gun possession in other contexts, the law failed to prohibit domestic abuse. Likewise, it failed to recognize and protect pregnant people's right to life and reproductive autonomy, including the right to make decisions about their bodies and live free from violence at the hands of intimate partners. Indeed, at times, the law has affirmatively authorized exclusion of pregnant people

from the sphere of constitutional protections. As a result, people who were pregnant or experiencing violence in relationships, or both, frequently had to act and survive outside history's formal legal framework.

The legacy of these legal exclusions is ongoing, massive real-world harm, reflected in homicide statistics for pregnant people, and the public health crisis that ensued from *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). But a judicial approach that seeks to rely on and replicate the formal law of the past cannot consider or rectify these harms that pregnant people experience every day.

Accordingly, this Court should reject the Fifth Circuit's misinterpretation of *Bruen* and clarify that an ossified and incomplete reading of the Nation's history and tradition cannot be used to deny full constitutional protection to pregnant people, or others historically excluded from political life. Specifically, the Court should reject any judicial approach that systematically withholds protection against violence from pregnant people and compounds the real-world harms that flow from past and current denials of their life, liberty, and equality.

ARGUMENT

I. A NATIONAL MATERNAL HEALTH CRISIS IS THREATENING THE LIVES AND SAFETY OF PEOPLE DURING PREGNANCY AND POSTPARTUM, AND INTIMATE PARTNER GUN VIOLENCE IS A MAJOR CONTRIBUTOR.

Pregnancy and childbirth should be safe, healthy, and supported experiences, free from preventable health harms and the risk of violence. But that is not the reality in the United States, where maternal mortality and severe health consequences from pregnancy-related causes are on the rise.[2] A large majority of maternal deaths in the United States are preventable through measures including earlier detection and treatment of complications and conditions, improvements in delivery of health care, and policy and legal changes.[3] But political and other factors have impeded solutions and sometimes imposed devasting additional harms. *See infra* Sec.

---

[2] Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021*, CDC (March 2023), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.pdf (discussing mortality); Dorothy A. Fink et al., *Trends in Maternal Mortality and Severe Maternal Morbidity During Delivery-Related Hospitalizations in the United States, 2008 to 2021,* Obstetrics & Gynecology, 13–14 (June 22, 2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2806478 (discussing mortality and morbidity).

[3] Eugene Declercq & Laurie C. Zephryin, *Maternal Mortality in the United States: A Primer*, The Commonwealth Fund (Dec. 16, 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer.

II.B. These harms fall unequally across the population, with Black, Indigenous, and other people of color facing the greatest health risks in pregnancy and childbirth due to racism, inadequate access to services, and underinvestment in overall care.[4]

In addition to these systemic threats to a healthy and safe pregnancy, becoming pregnant is often a trigger for intimate partner abuse.[5] Pregnancy has been shown to both increase the risks of intimate partner violence and intensify the level of violence experienced in abusive relationships.[6] Injuries inflicted during pregnancy and postpartum also are more likely to be fatal.[7] Within this context, abusive partners' access to guns poses a uniquely deadly threat to the lives and health of pregnant and postpartum people.

---

[4] *See, e.g.*, Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J. L., Med. & Ethics 506, 510–15 (2020); Saraswathi Vedam, et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, Reprod. Health, 9–12 (June 11, 2019); Judith A. Lothian, *The Continued Mistreatment of Women During Pregnancy and Childbirth*, 28 J. Perinatal Educ. 183, 184 (Oct. 1, 2019).

[5] Shaina Goodman, *Intimate Partner Violence Endangers Pregnant People and Their Infants*, Nat'l P'ship for Women & Fams. (May 2021), https://nationalpartnership.org/report/intimate-partner-violence/.

[6] *Id.*

[7] *Id.*

A. Homicide Is a Leading Cause of Death for Pregnant and Postpartum People, and the Majority of Those Deaths Involve Firearms.

Homicide is a leading cause of death of pregnant and postpartum people in the United States,[8] the rate of these killings being among the highest in the world.[9] Pregnancy-associated homicide lies at the intersection of multiple public health crises in the United States, including gun violence, the

---

[8] *See* Maeve E. Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States*, 2018–2019, 138 Obstetrics & Gynecology 762, 762 (Nov. 1, 2021) [hereinafter *Homicide During Pregnancy*]; Maeve E. Wallace, *Trends in Pregnancy-Associated Homicide*, *United States, 2020*, 112 Am. J. of Pub. Health 1333, 1333–36 (Sept. 1, 2022) [hereinafter *Trends in Pregnancy-Associated Homicide*]; Diana Cheng & Isabelle L. Horon, *Intimate-Partner Homicide Among Pregnant and Postpartum Women*, 115 Obstetrics & Gynecology 1181, 1181–86 (June 2010); Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States,* 1991–1999, 95 Am. J. Pub. Health 471, 471–77 (2005).

[9] Charlotte Cliffe et al., *Homicide in Pregnant and Postpartum Women Worldwide*, 40 J. Pub. Health Pol'y. 180, 180 (June 2019). Women in the United States are 28 times more likely to die by homicide committed with a firearm than women in peer countries. *Guns and Violence Against Women, Everytown Res. & Pol'y. (Oct. 17, 2019), https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/* [hereinafter *Guns and Violence Against Women*].

worsening trends in maternal health, and intimate partner violence.[10]

Generally, the risk of physical abuse during pregnancy is staggering, with an estimated 324,000 pregnant people physically abused by intimate partners in the United States each year.[11] Becoming pregnant often adds stress to relationships and can be a frightening impetus for abuse to start or escalate,[12] including when the abusing partner is upset about an unplanned pregnancy,[13] stressed due to the financial burdens that having a child imposes, or jealous that their partner's attention may shift to the new baby or to a new relationship.[14]

Statistics show that the risk of homicide likewise increases for pregnant and postpartum people.[15] A 2020 study found that the risk of homicide

---

[10] *Homicide Leading Cause of Death for Pregnant Women in U.S.*, Harv. T.H. Chan Sch. of Pub. Health, 1 (Oct. 21, 2022), https://tinyurl.com/mw5h4v9m; Rebecca B. Lawn & Karestan C. Koenen, *Homicide is a Leading Cause of Death for Pregnant Women in US*, BMJ (Oct. 19, 2022), http://dx.doi.org/10.1136/bmj.o2499; Elizabeth Tobin-Tyler, *A Grim New Reality – Intimate-Partner Violence after* Dobbs *and* Bruen, 387 The New Eng. J. of Med. 1247, 1247–49 (Oct. 6, 2022).

[11] Goodman, *supra* note 5.

[12] *Id.*

[13] Lois James et al., *Risk Factors for Domestic Violence During Pregnancy: A Meta-Analytic Review*, 28 Violence & Victims 359, 367 (June 2013).

[14] *Id.* at 361.

[15] *See, e.g.*, Maeve E. Wallace et al., *Firearm Relinquishment Laws Associated with Substantial Reduction in Homicide of*

was 35% higher for this group than for those who were of reproductive age but not pregnant or postpartum.[16] In 64% of homicides of pregnant and postpartum people, intimate partner violence was a factor.[17] Notably, more than half of homicides, between around 55% and 65%, committed against pregnant and postpartum people occurred in the home.[18]

There are racial and age-based disparities in the risk for pregnancy-associated intimate partner homicide. The threat of intimate partner homicide for Black women who are pregnant is more than eight times higher than for nonpregnant Black women.[19] Up to 55% of pregnant homicide victims in 2020 were non-Hispanic Black women.[20] Guns are involved in the majority of pregnancy-associated homicides

---

Pregnant and Postpartum Women, 40 Health Affs. 1654, 1654–62 (2021) [hereinafter *Firearm Relinquishment Laws*].

[16] *Trends in Pregnancy-Associated Homicide*, *supra* note 8, at 1333.

[17] Anna M. Modest et al., *Pregnancy-Associated Homicide and Suicide: An Analysis of the National Violent Death Reporting System, 2008–2019*, 140 Obstetrics & Gynecology 565, 572 (Oct. 1, 2022).

[18] *Trends in Pregnancy-Associated Homicide*, *supra* note 8, at 1334 (finding 55% of homicides occur in the home); *Homicide During Pregnancy*, *supra* note 8 (finding 64.8% of homicides occur in the home).

[19] Aaron J. Kivisto et al., *Racial Disparities in Pregnancy-associated Intimate Partner Homicide*, 37 J. Interpersonal Violence 10938, 10949 (Feb. 2, 2021).

[20] *Trends in Pregnancy-Associated Homicide*, *supra* note 8, at 1334.

committed against Black women.[21] And young people are at especially high risk: Pregnant and postpartum girls aged 10 through 19 are six times more likely to be killed in a homicide as compared to other age groups.[22] Heartbreakingly, studies show that women and girls aged 10 to 19 represented 13.2% of all murdered pregnant and postpartum people in 2018–2019 in the United States.[23]

While the availability of a gun heightens the danger of violence to any intimate partner, the increased risk to pregnant and postpartum partners is particularly great.[24] From 2008 to 2019, 68% of pregnancy-associated homicides (451 of 660) in the United States involved guns.[25] In 2020, the rate of pregnancy-associated homicides that involved guns was an astronomical 81%, or 153 of 189.[26] These guns are often wielded by intimate partners. One study examining pregnancy-associated homicides found that, for those in which the victim-offender relationship could be identified, 63.2% were intimate-partner homicide cases, and firearms were used in about six out of ten of those homicides.[27] Texas-specific data from 2021 demonstrates that of the 204

---

[21] Kivisto, *supra* note 19, at 10950.

[22] *Homicide During Pregnancy*, *supra* note 8.

[23] *Id.*

[24] *Guns and Violence Against Women*, *supra* note 9; *Homicide during Pregnancy*, *supra* note 8; *Trends in Pregnancy-Associated Homicide*, *supra* note 8, at 1333–36.

[25] Modest, *supra* note 17, at 568.

[26] *Trends in Pregnancy-Associated Homicide*, *supra* note 8.

[27] Cheng, *supra* note 8, at 1182.

victims of intimate partner homicide in the state, 169 (over 80%) were women and 127 (over 75% of those women) were killed with a gun.[28, 29]

Disarming abusers can make a life and death difference. One fifty-state study found that state laws prohibiting possession of firearms by people subject to domestic violence restraining orders were associated with reductions in homicides of pregnant and postpartum people.[30] The study also found that in

---

[28] *2021 Honoring Texas Victims, Family Violence Fatalities*, Tex. Council on Fam. Violence (2021), https://tcfv.org/wp-content/uploads/tcfv_htv_summary_facts_2021.pdf.

[29] This is consistent with the fact that intimate partner violence is a widespread problem. Although people of all genders and sexual orientations are impacted by intimate partner violence, available data indicates that women with male partners are more likely to experience intimate partner violence. About four in ten U.S. women have experienced intimate partner violence in their lifetime, and more than one out of every three women murdered in the United States is killed by an intimate partner. *Fast Facts: Preventing Intimate Partner Violence,* CDC (Oct. 11, 2022), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html; Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief—Updated Release*, CDC, 2 (Nov. 2018); *see also Guns and Violence Against Women*, *supra* note 9 (discussing that the share of homicides committed by dating partners has been increasing for three decades, and the likelihood of being killed by a dating partner is the same as the likelihood of being killed by a spouse); Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship, 2021*, Bureau of Just. Stat. (Dec. 2022), https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021.

[30] *Firearm Relinquishment Laws*, *supra* note 15. Compared to states without a law prohibiting people subject to a domestic-

states that had at least one intimate-partner firearm prohibition law, homicides of pregnant and postpartum people committed with guns occurred at a rate of 1.34 deaths per 100,000 live births; in states without such laws, the rate was 2.75 deaths per 100,000 live births.[31] Another study found that states that prohibit persons subject to intimate partner violence-related restraining orders from possessing firearms have seen a 14–16% reduction in intimate partner homicide generally.[32]

B. Preventing Intimate Partner Gun Violence is One Component of Addressing the Broader Maternal and Reproductive Health Crisis in the United States.

The country is facing a dire maternal health crisis, and violence around pregnancy is one interwoven factor. Even excluding homicides, the United States has the highest maternal mortality rate

---

violence restraining order from possessing a gun, the reduction in pregnancy-associated homicides was significant at an alpha level (p-value) of less than 0.10 where the state, in addition to prohibiting possession, required abusers to relinquish their guns; where no relinquishment was required, the data showed a directionally substantial, but not statistically significant, reduction in homicides. *Id*. at Ex. 4.

[31] *Id.* at Ex. 2.

[32] Carolina Diez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States*, 1991–2015, 167 Annals of Internal Med. 536 (Oct. 17, 2017), https://tinyurl.com/3sn4v9z2.

among industrialized nations.[33] According to the Centers for Disease Control and Prevention ("CDC"), in 2021 (the most recent year available), the rate of death from (non-homicide) maternal causes was 32.9 deaths per 100,000 live births, compared with a rate of 23.8 in 2020 and 20.1 in 2019.[34] These numbers are staggering when compared to maternal mortality rates in other comparable countries, such as Canada, where the rate in 2020 was 8.6 deaths per 100,000 live births, France (8.7), the United Kingdom (6.5), and Australia (4.8).[35] Severe maternal morbidity, defined as "unexpected outcomes of labor and delivery that result in significant short- or long-term consequences to a woman's health," additionally affects as many as 50,000 American women each year.[36]

In the United States, access to high-quality medical care before, during, and after pregnancy is severely lacking, with only 12 maternity care providers per every 1,000 live births.[37] This dearth of

---

[33] Jamila Taylor & Anna Bernstein, *The Worsening U.S. Maternal Health Crisis in Three Graphs*, The Century Found, (Mar. 2, 2022), https://tcf.org/content/commentary/worsening-u-s-maternal-health-crisis-three-graphs/.

[34] Hoyert, *supra* note 2.

[35] Taylor, *supra* note 33.

[36] Fink, *supra* note 2.

[37] Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the U.S. Compared to 10 Other Developed Countries*, The Commonwealth Fund (Nov. 18, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries.

care not only exacerbates already high maternal morbidity and mortality rates, but also reflects countless missed opportunities to detect abuse and protect patients. For example, "prenatal care presents a unique window of opportunity in which health care providers can foster trusting relationships with pregnant women, thereby increasing the likelihood of intimate partner violence detection and mitigating its related negative consequences to both mother and child."[38]

The country's lack of affordable and accessible prenatal care disproportionately affects people living away from cities,[39] people with low incomes,[40] and people of color,[41] populations that are already

---

[38] Jeanne L. Alhusen et al., *Intimate Partner Violence During Pregnancy: Maternal and Neonatal Outcomes*, 24 J. Women's Health 100, 103 (2015).

[39] *Health Disparities in Rural Women*, Comm. on Health Care for Underserved Women Op. No. 586, Am. C. of Obstetricians & Gynecologists (Mar. 2009, reaff'd 2021), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2014/02/health-disparities-in-rural-women.pdf [hereinafter *Health Disparities in Rural Women*].

[40] Lindsay K. Admon, et al., *Insurance Coverage and Perinatal Health Care Use Among Low-Income Women in the U.S., 2015–2017*, 4 Obstetrics & Gynecology 1 (Jan. 27, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2775636.

[41] Latoya Hill et al., *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/.

disadvantaged by structural and systemic inequalities. For example, a majority of low-income people experience disruptions in health insurance during pregnancy and the postpartum period.[42] Moreover, people of color experience disproportionate harm during pregnancy, childbirth and postpartum.[43] Black patients are 2.1 times more likely to experience severe maternal morbidity and 1.5 times more likely to have a preterm delivery than white patients.[44] Additionally, in rural parts of the country, pregnant people struggle to find maternity care, with less than 50% of rural women living within a 30-minute drive of the nearest hospital offering postnatal services.[45]

There is also little mental health support for people coping with postnatal and pregnancy-related psychiatric issues such as depression, anxiety, and mood disorders, which affect one in five new mothers during pregnancy and the year following birth.[46] For example, there are only three inpatient facilities devoted to maternal healthcare in the entire

---

[42] Admon*, supra* note 40.

[43] Taylor, *supra* note 4, at 515; Vedam, *supra* note 4, at 9–12; Lothian, *supra* note 4, at 184.

[44] Jana J. Richards*, Racial Justice in Maternal Health: How to reduce Black Maternal Mortality*, Univ. of Chi. Med. (Apr. 12, 2023), https://www.uchicagomedicine.org/forefront/womens-health-articles/disparities-black-maternal-health.

[45] *Health Disparities in Rural Women*, *supra* note 39.

[46] Anna Mutoh, *The Tragedy of Being a New Mom in America,* Wall St. J. (Aug. 3, 2022, 8:02 AM), https://www.wsj.com/articles/mothers-mental-health-women-postpartum-depression-7b548f43.

country.[47] The dearth of resources may be especially harmful to those suffering from intimate partner violence, as this group generally has a higher prevalence of psychiatric disorders than those who do not experience such violence, and also faces unique barriers to seeking help.[48]

This same population is also vulnerable to other systemic failures. For example, while in many states Medicaid coverage for income-eligible pregnant people must cover prenatal care and childbirth, it terminates two months postpartum, leaving new parents uninsured at a time when they may be facing multiple challenges including mental and physical health conditions,[49] and are at increased risk for intimate partner violence.[50] Further, the United States does not offer any form of paid time off for new parents.[51] While the Family and Medical Leave Act allows some employees to take leave from work to care

---

[47] *Id*.

[48] Sherry Lipsky & Raul Caetano, *Impact of Intimate Partner Violence on Unmet Need for Mental Health Care: Results From the NSDUH*, Psychiatry Online (Jun. 1, 2007), https://ps.psychiatryonline.org/doi/10.1176/ps.2007.58.6.822.

[49] Usha Ranji et al., *Expanding Postpartum Medicaid Coverage*, Women's Health Pol'y (Mar. 9, 2021), https://www.kff.org/womens-health-policy/issue-brief/expanding-postpartum-medicaid-coverage/.

[50] Alpna Agrawal et al., *Postpartum Intimate Partner Violence and Health Risks Among Young Mothers in the United States: A Prospective Stud*y, Maternal & Child Health J., 7 (Oct. 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4142118/.

[51] Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags on Paid Leave*, N.Y. Times (Oct. 25, 2021), https://tinyurl.com/7s8vmjm3.

for a child for up to 12 weeks, the law does not apply to all workers and does not require employers to continue paying the employee, leaving many new parents in a precarious financial position.[52] Across the country, only 23% of private sector employees receive any paid leave.[53] Paid leave is especially critical for people experiencing partner violence, as the economic benefits may facilitate leaving an abusive relationship, or reduce financial stress that precipitates violent behavior.[54]

This failure of government to ensure necessary health and social supports during and after pregnancy, in turn, can exacerbate the occurrence and severity of intimate partner violence, which is often triggered by pregnancy and stressors associated with it.[55] Thus, while remedying the maternal health crisis requires systemic change on many fronts, laws that temporarily disarm dangerous persons who pose a threat to their intimate partners are one way policy-makers are addressing the deadly intersection of pregnancy, intimate partner violence, and guns. This

---

[52] Jessica Booth, *How Maternity Leave Affects Your Health*, Forbes (Jan. 30, 2023), https://www.forbes.com/health/family/how-maternity-leave-affects-health/.

[53] *The U.S. Needs Paid Family and Medical Leave*, A Better Balance (July 26, 2021), https://www.abetterbalance.org/resources/the-u-s-needs-paid-family-and-medical-leave/.

[54] *See* Ashley Schappel D'Inverno et al., *Preventing Intimate Partner Violence Through Paid Parental Leave Policies,* Preventative Med., 19 (2018).

[55] *See* notes 5–8 and 13–15 and accompanying text.

intervention alone is not sufficient to fully protect all pregnant peoples' rights to life and reproductive autonomy, or to guarantee the right to a healthy pregnancy and postpartum period, but it is a critical safeguard.

II. JUDICIAL CONSIDERATION OF OUR NATION'S HISTORY AND TRADITION MUST NOT DENY PREGNANT PEOPLE FULL CONSTITUTIONAL PROTECTION.

The Fifth Circuit below held facially unconstitutional 18 U.S.C. § 922(g)(8), a law that allows temporary disarming of people who pose a threat to their domestic partners. *See* Pet. App. 2a. Contrary to this Court's direction in *Bruen*, it applied a test that seeks to narrowly copy the regulatory regime of the past, which failed to adequately protect the rights and safety of people subject to private violence in relationships. The Fifth Circuit's opinion amplifies constitutional and real-world harms inflicted on pregnant people by *Dobbs*, which also employed a rigid and exclusionary version of historical analysis. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241–57 (2022). This Court should reject the Fifth Circuit's misinterpretation of *Bruen* and clarify that animating constitutional principles safeguard the rights and safety of pregnant people, who were historically outside the law's reach and protection.

A. The Fifth Circuit's Approach to History and Tradition Systematically Denies Pregnant People Protections Against Violence.

In considering the constitutionality of 18 U.S.C. § 922(g)(8), the Fifth Circuit applied a historical interpretative test that it derived from *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). *See* Pet. App. 7a. It stated that "the Government "bears the burden of 'justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation,'" and "[t]o carry its burden, the Government must point to 'historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation.'" Pet. App. 6a, 13a. In considering multiple laws from across time periods and jurisdictions that limited gun possession by dangerous persons, the court decided that all failed to establish a history and tradition that would permit temporary forfeiture of firearms by people under domestic violence restraining orders. In doing so, the Fifth Circuit incorrectly treated the existence of historical analogues as dispositive, rather than relevant, *see* Pet. Br. at 39–43, and laid out analogical criteria that systematically deny pregnant people protections against violence.

First, it took an exceedingly narrow approach to the "degree of similarity" that is required, ignoring *Bruen*'s guidance that a regulation need not have a historical "twin." *See Bruen*, 142 S. Ct. at 2133 (emphasis omitted). To determine the degree of similarity, the Fifth Circuit broke § 922(g)(8) down

into its underlying "why" and "how[s],"[56] requiring virtually identical analogues on all dimensions. Pet. App. 16a-17a. The "why," according to the court, is "to protect" a "specific person" from "domestic gun abuse." Pet. App. 16a. By narrowly framing the law's motivation only in terms of who the law aims to protect rather than who the law identifies as dangerous and subject to disarmament, the court from the outset weighted its analysis against the state's ability to regulate gun possession in connection with domestic or intimate partner relationships. In the early republic, government did not commonly protect people from violence in their family relationships.[57] Indeed, not only were domestic relations largely outside state intervention, at common law husbands were affirmatively permitted to use physical violence to discipline their wives and children.[58] Pregnancy and reproductive life were likewise removed from state supportive involvement, leaving little to no legal recourse against private abuse. Marital rape was long permitted, both at common law and through statutory

---

[56] An examination of the Fifth Circuit's rejection of analogue laws with similar "hows" to § 922(g)(8) is beyond the focus of this amicus brief. For a discussion of how the Fifth Circuit creates a "regulatory straightjacket" in this respect, *see* Pet. Br. at 32–44.

[57] Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 Am. Crim. L. Rev. 1777, 1781–82 (2012).

[58] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117, 2122–23 (1996). *See also* Pet. Br. at 40 (citing 19th century state court decisions refusing to consider domestic abuse cases on the basis that violence in the home was a matter of domestic privacy).

exemptions.[59] In rare cases when women sought assistance through the legal system, courts could decline to grant a divorce based on cruelty grounds when an unwanted pregnancy resulted from marital rape.[60]

Intimate partner violence, pregnancy, and their intersection were legally treated as matters managed within the domestic sphere of the home and family, where the state would neither protect pregnant people nor offer them rights to support their autonomy and equal status.[61] It was not until women's rights activists sought reform in the later 19th and 20th centuries that the legal system began to recognize and prohibit spousal abuse.[62] Likewise, as this Court has recognized in various contexts, modern legal protections to redress the law's historical failure to protect against pregnancy-related mistreatment and discrimination are justified and necessary. *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 204–05 (1991) (stating that the Pregnancy Discrimination Act (1978) was passed to rectify differential treatment of women under extant civil rights law "simply because of their capacity to bear children"); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728–30 (2003) (noting that the Family and Medical Leave Act (1993) sought to address

---

[59] Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373, 1392 (2000).

[60] *Id.* at 1472.

[61] *See* Suzanne A. Kim, *Reconstructing Family Privacy*, 57 Hastings L.J. 557, 568–69 (2006).

[62] Siegel, *supra* note 58, at 2127–30.

inadequate state and employer maternity leave policies, which had been informed by deeply-rooted gender stereotypes).

Second, turning to comparable historical laws, the Fifth Circuit rejected the majority of the government's regulatory examples on the grounds that they allowed disarming "people thought to pose a threat to the security of the state," for "the preservation of political and social order," or aimed at "curbing terroristic or riotous behavior, i.e., disarming those who had been adjudicated to be a threat to society generally, rather than to identified individuals." Pet. App. 19a, 20a, 24a. The Fifth Circuit held that because these laws focused on "threats to society," at large, instead of threats to individuals, they were "not viable historical analogues for § 922(g)(8)." Pet. App. 24a. The court's analogical criteria thus define permissible gun regulation based on the concerns of governing bodies in the colonial and early republican eras, primarily as expressed in formal law. In the court's reading, these overwhelmingly centered on political and public threats. And while the Fifth Circuit did not explicitly discuss private violence related to pregnancy, its characterization of "political and social order" seemingly excludes a right to safety in private and reproductive life. *See* Pet. App. 20a.

Third, further dooming regulatory attempts to support safety from guns during pregnancy, the court misapplied *Bruen*'s observation that if "the challenged regulation addresses a 'general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged

regulation is inconsistent with the Second Amendment.'" Pet. App. 14a. Clearly, the contemporary problem of gun availability combined with intimate partner abuse—making guns a leading cause of domestic homicide and death for pregnant and postpartum people—is new and different from any general societal problem that 18th century regulation might have addressed but did not. *See* Pet. Br. 41. Indeed, while domestic violence was common and legally permitted, gun homicides in the home were infrequent at the time of the founding. *Id.* That difference-in-kind justifies a more adaptive approach to historical interpretation under *Bruen*. 142 S. Ct. at 2132. But under the Fifth Circuit's stilted examination of history, any regulation to address gun violence in the context of domestic and intimate life may be precluded by the very fact that relationships were a haven for private violence, and society long failed to extend protections, with tragic results.[63]

Fourth, doubling down on a version of history that only looks at formal law to define "historical tradition," the Fifth Circuit declined to consider proposals to qualify the Second Amendment that were discussed but not ultimately adopted at state

---

[63] *Under the Rule of Thumb: Battered Women and the Administration of Justice*, U.S. Comm'n on Civil Rights (1982), https://www.ojp.gov/pdffiles1/Digitization/82752NCJRS.pdf; *see* 1 Sir Matthew Hale, *The History of the Pleas of the Crown*, 629 (1736) ("But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."); *see also* Hasday, *supra* note 59, at 1396–97 (explaining development of common law authority on marital rape).

ratification conventions. Pet. App. 20a. The court dispenses with these as sources of insight simply because "they were not enacted." *Id.* 20a-21a. An approach so focused on formal law that it rejects robust legislative debates—not as interpretive tools, but as a formative part of our Nation's history and tradition writ large—is incapable of even beginning to assess historical treatment of private and reproductive matters. At times when women, Black people, and others were excluded from political life, concern for the safety and rights of pregnant people was not a public issue animating legislative activity or enactments. But our history and tradition *does* include discussion of and resistance to private violence, and support for the rights of pregnant people to be safe from it.[64] A judicial examination of the Nation's past should acknowledge these exclusions, and view sources beyond a highly edited version of formal law as not just relevant, but revelatory. *See infra* Sec. III.

B. The Fifth Circuit's Decision Compounds Past and Current Denial of Full Constitutional Protection for Pregnant People.

The Fifth Circuit's approach, if affirmed, would impose constitutional and real-world harms on pregnant people that extend those wrought by *Dobbs*. In *Dobbs*, this Court overruled nearly fifty years of unbroken precedent holding that the Constitution

---

[64] *See* Siegel, *supra* note 58, at 2127–29 (discussing 19th century coalition-based campaigns against marital violence including protests, conventions, literature dissemination, and press coverage).

protects a fundamental right to abortion. And it employed a method of historical inquiry that, like the Fifth Circuit's problematic approach, systematically excludes pregnant people from the sphere of constitutional protections and subjects them to egregious, even life-threatening, present-day harms.

In *Dobbs*, the Court relied on a test that defined the scope of the Fourteenth Amendment's Due Process liberty guarantee based on rights "'deeply rooted in this Nation's history and tradition.'" *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). *Dobbs* did not explicitly state which aspects of the Nation's history or tradition courts ought to use to determine a liberty right's existence, but conducted an analysis limited to looking for a "positive *right*" in formal law. *Id.* at 2251 (emphasis in original). After surveying English and American common and statutory law from the founding and before, *Dobbs* focused narrowly on whether formal law recognized a right to abortion in 1868 when the Fourteenth Amendment was ratified, counting state statutes that criminalized abortions under certain circumstances and deeming those the "most important" indicator of whether liberty includes the right to end a pregnancy. *Id.* at 2249–53. Even while stating that history is the touchstone for defining liberty, *Dobbs* explicitly declined to consider more nuanced historical evidence about the reasons abortion bans were supported and passed, *id.* at 2255–56, instead emphasizing that the mere existence of criminal restrictions on abortion requires "[t[he inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation's history and traditions." *Id.* at 2253.

Dobbs reached its sweeping result without any consideration of the actual experiences of people seeking abortion, past or present, and dismissed or ignored the fact that abortion in early pregnancy was legal and common through much of American history, and rarely punished even when formally outlawed.[65] Likewise, the Court disavowed judicial consideration of the impact overturning the right to abortion would have on the health and lives of people who do not want to continue pregnancies.[66] The *Dobbs* Court ignored substantial evidence about the United States' maternal health crisis and how it would be exacerbated by permitting states to enact abortion bans.[67] And predictably, in the wake of *Dobbs*,

---

[65] *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 Tex. L. Rev. 1127, 1185 (2022).

[66] In its discussion of reliance on the right to abortion, the Court stated that *Casey*'s holding that abortion access facilitated "the ability of women to participate equally in the economic and social life of the Nation" was premised on "novel and intangible" interests and "an empirical question that is hard for anyone — and, in particular, for a court — to assess, namely, the effect of the abortion right on society and in particular on the lives of women." *Dobbs*, 142 S. Ct. at 2277. On that basis it disclaimed "the authority [and] the expertise" to consider evidence about how loss of the constitutional right would impact real people's lives. *Id.*

[67] *See* Brief for 547 Deans, Chairs, Scholars & Pub. Health Profs., the Am. Pub. Health Ass'n, the Guttmacher Inst., & the Ctr. for U.S. Pol'y as Amici Curiae Supporting Respondents at 10–16, Dobbs v. Jackson Women's Health Organization, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (No. 19-1392) (detailing how abortion access is critical to general health, including throughout pregnancy and childbirth); Brief for Birth

maternal health outcomes have worsened dramatically across the country. Obstetricians report that they cannot follow the standard of care, and their patients are suffering terrible adverse events.[68] And a large share of obstetrician-gynecologists believe that the decision has worsened pregnancy-related mortality (64%) and racial and ethnic inequities in maternal health (70%).[69] These harms are caused in part by the proliferation of states criminalizing abortion in ways that prevent pregnant people facing emergent complications from accessing life and health-saving abortion care.[70] In Texas, 13 patients who experienced catastrophic health crises but were denied abortions under the state's criminal abortion ban have had to share their stories of pain and loss in court, seeking clarification that the state cannot force

---

Equity Orgs. & Scholars as Amici Curiae Supporting Respondents at 5–16, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (No. 19-1392) (highlighting the disproportionate adverse maternal health outcomes of an abortion ban on Black women and pregnant people).

[68] Daniel Grossman et al., *Preliminary Findings: Care Post-Roe: Documenting Cases of Poor-Quality Care Since the Dobbs Decision*, Advancing New Standards in Reprod. Health (ANSIRH) (May 2023), https://tinyurl.com/2r7e74a5.

[69] Brittni Frederiksen et al., *A National Survey of OBGYNs' Experiences After* Dobbs, KFF (June 2023), https://files.kff.org/attachment/Report-A-National-Survey-of-OBGYNs-Experiences-After-Dobbs.pdf (obtaining responses from a nationally representative sample of OBGYNs practicing in the United States).

[70] *See* Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. Times (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html.

people to remain pregnant when they are at risk of deadly complications including infection and hemorrhage, or carrying fetuses with lethal conditions.[71] And every day, pregnant people across the country are experiencing similar threats to their fertility, health, and lives.[72]

Like the Fifth Circuit's analysis, the *Dobbs* Court's method of historical inquiry systematically fails to apply constitutional protections to the reality of pregnancy. As discussed above, affirmatively protecting the ability of women and pregnant people to make autonomous decisions about their lives and

---

[71] Laura Kusisto & Adolfo Flores, *Texas Women Denied Abortions Testify About Impact of State Bans*, Wall St. J. (July 19, 2023, 6:21 PM), https://www.wsj.com/articles/texas-women-denied-abortions-testify-about-impact-of-state-bans-999b8cff; Paul J. Weber, *Texas Women Denied Abortions Give Emotional Accounts in Court, Ask Judge to Clarify Law*, Associated Press (July 19, 2021, 6:53 AM), https://tinyurl.com/34kbpevb; Caroline Kitchener et al., *Texas Abortion Hearing Culminates With Tension And Emotions High*, Wash. Post (July 20, 2023, 6:06 PM), https://www.washingtonpost.com/politics/2023/07/20/texas-abortion-ban-hearing/.

[72] Susan Szuch, *After Missouri Banned Abortions, She Was Left 'With a Baby Dying Inside.' Doctors Said They Could Do Nothing,* Springfield News-Leader (Oct. 19, 2022), https://tinyurl.com/5as2adwt; Elizabeth Cohen & Amanda Musa, *Ohio Abortion Law Meant Weeks of "Anguish," "Agony" for Couple Whose Unborn Child Had Organs Outside Her Body*, CNN (Feb. 8, 2023), https://www.cnn.com/2023/02/08/health/ohio-abortion-long/index.html; Frances Stead Sellers et al., *The Short Life of Baby Milo*, Wash. Post (May 19, 2023, 11:36 PM), https://www.washingtonpost.com/health/interactive/2023/florida-abortion-law-deborah-dorbert.

bodies was not part of a formal rights agenda for much of the Nation's history. While people have always made decisions to end pregnancies in a wide range of circumstances, they often had to act outside the law's affirmative protections. *Dobbs* demonstrates that a method of historical inquiry focused narrowly on whether a particular aspect of reproductive autonomy—having an abortion, using contraception, or being protected from marital rape—was recognized as a matter of positive law, is inherently weighted against affirming the liberty rights essential to and exercised by people largely excluded from the public agenda.

Dobbs also shows that the closer a historical analysis hews to treating formal, statutory law as the primary source of evidence, the more likely it is to erase the rights of pregnant people. *Dobbs* noted that common law sources did not clearly support the criminalization of abortion throughout pregnancy, but held this "of little importance" given that in 1868, most states had adopted statutory abortion bans. *Id.* at 2252. *Dobbs* surveys cases and court proceedings involving real people who had abortions, and, even while finding no support for a "legal *right*," acknowledges that the common law tells a complex story. *Id.* at 2250–51 (emphasis in original). But *Dobbs* chose to sidestep this more nuanced common law treatment of abortion by labeling statutory law in 1868 as the "most important" representation of the Nation's "history and tradition." *Id.* at 2267. In doing so it obliterates the experience of pregnant people from the historical record and creates an incomplete account of how people have always needed, and acted, to control their own reproductive lives.

C. Binding the Law to Historical Legal Treatment of Reproductive and Private Life Threatens Pregnant Peoples' Health, Lives, and Safety.

By seeking to recreate discriminatory past legal regimes, the Fifth Circuit and *Dobbs* take ossified approaches to historical interpretation that harm pregnant people. First, societal recognition of how rights and regulation operate to remedy past abuses in the areas of pregnancy and private life has changed. Interpretive methods that look selectively at history do not assert otherwise, but deny that such changes are relevant. A legal standard that explicitly rejects evolving views about who should enjoy constitutional protections, and for what purposes, denies that the law can affirm long-established constitutional rights and limitations by recognizing that they apply in new ways. There is now wider recognition that the rights and safety of pregnant people must be protected to the same extent as others, including by laws that respond to new and newly recognized harms. *See Hibbs*, 538 U.S. 721 (upholding constitutionality of the Family and Medical Leave Act based on Congress's findings it was necessary to remedy historical workplace discrimination against "mothers or mothers-to-be"). This change manifests in law and policy solutions that were historically foreclosed. Any application of a legal standard to deny or short-circuit such developments will threaten the health, lives, and safety of pregnant people with devastating results.

Second, looking only at the formal law of the past poses dual harms. It erases the complex realities of pregnancy, reproductive life, and private violence

that people have always experienced, before, in, and after 1791 or 1868, but that the law did not address. And it risks perpetuating the harms that result from the law's shortcomings. It is undeniable that people have been choosing to end pregnancies throughout our Nation's history, choices that are fundamental to controlling their individual lives and role in society more broadly. *Dobbs* acknowledges as much, but holds that courts are not "equipped" to consider effects "on the lives of women." *Dobbs*, 142 S. Ct. at 2277.[73] Among the effects it writes off are the egregious harms to life and health that result when abortion is denied. It is equally undeniable that violence in relationships, including threats from weapons, and especially around reproductive control, has long been a harm that people experience in visceral ways.[74] Likewise, intimate partner violence against pregnant people has devasting present-day effects, and is a leading cause of death during pregnancy. *See supra* Sec. I. But the Fifth Circuit's exclusive reliance on historical formal law analogues leaves no place for considering that history, let alone present-day reality. In both *Dobbs* and the decision below, the law of the past serves as a straightjacket to prevent confrontation of entrenched actual harms.

The exclusions in these decisions are not neutral or judgment-free; instead, they demonstrate a judicial preference for a legal system that does not

---

[73] It further faults the dissent for "ha[ving] much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women." *Id.* at 2261.

[74] Hale, s*ee supra* note 63.

encompass the day-to-day, year-to-year experiences of people who could not participate in drafting a constitution, or deciding what social issues merit regulatory concern. The reality that people who were pregnant or experiencing violence in relationships, or both, had to protect their own lives and survive outside history's formal legal framework cannot mean that the Constitution forever ignores them. But a refusal to consider, recognize, and reject past abuses in the areas of pregnancy and private life does just that. It cuts off the possibility of future inclusion for those who were formerly excluded. It invites legal standards that trample on pregnancy and private life as a matter of constitutional principle.

III. THIS COURT SHOULD REJECT THE FIFTH CIRCUIT'S APPROACH TO HISTORY AND TRADITION AS CONTRARY TO CORE CONSTITUTIONAL PRINCIPLES, INCLUDING AUTONOMY AND SAFETY IN PRIVATE LIFE.

Bruen does not mandate the Fifth Circuit's approach to history and tradition. The court could have characterized the "why" for § 922(g)(8) more broadly to encompass overarching motivating goals—disarming people in response to dangerousness—instead of the more granular interest in protecting individuals subject to domestic violence. It could have looked for functional equivalents in modern-historical analogues, focusing on how "threats to society"—a problem that it found historically subject to regulation—include domestic violence, because domestic relationships are, and always have been, part of the social fabric. It instead adopted a

crushingly rigid version of historical analysis that will impose additional harms on pregnant people for all the reasons discussed above. This Court should reject that approach in favor of one that considers historical context in order to realize animating constitutional principles and values.

That means recognizing how constitutional guarantees cover rights, and groups, that historically were outside the law's reach and protection. History demonstrates that the state could regulate against dangerous use of guns, and for the public safety, but violence against partners was not recognized as a problem to which these constitutional principles should be applied. Likewise, the right to exercise decisions about one's body, safety, family, and private life is core to the Nation's history and traditions of life, liberty, and equality. But the relationship of these core commitments to the experience of pregnant people was not understood by those who made formal law of the past. These historical inequities require judicial recognition of the full scope of constitutional rights and protections for pregnant people, not replication of their denial.

CONCLUSION

The judgment of the court of appeals should be reversed.

August 21, 2023

Respectfully submitted,

DIANA KASDAN
Counsel of Record
AMY MYRICK
ALEXANDER WILSON
CENTER FOR
REPRODUCTIVE RIGHTS
199 Water Street
New York, NY 10038
(917) 637-3697
dkasdan@reprorights.org

MARGARET A. DALE
MICHELLE K. MORIARTY
ADAM FARBIARZ
SARAH A. EMMERICH
JANA R. RUTHBERG
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036