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# PRO SE WHAT?! ORDERS OF PROTECTION, CREDIBLE THREATS TO PHYSICAL SAFETY, AND RESTRICTING ACCESS TO FIREARMS

Amy J. Feagans\*

## ABSTRACT

*Orders of protection provide survivors of domestic abuse a level of security by limiting contact between the parties. In 2019, the New Mexico legislature amended the Family Violence Protection Act (FVPA) to provide additional protections through orders of protection by requiring the respondent to relinquish their firearms to law enforcement where the court finds there is a “credible threat to the physical safety” of the petitioner. In 2023, the New Mexico Supreme Court clarified the required showing for obtaining an order of protection and held that the court must find prior domestic abuse. But the “credible threat” standard required for the relinquishment of firearms remains undefined causing confusion for pro se petitioners and allowing for potential misapplication by the courts.*

*This Note examines the link between domestic violence and firearms in New Mexico. Next, it discusses order of protection jurisprudence in New Mexico with an emphasis on the burden placed on pro se petitioners. Finally, this Note discusses changes the State of New Mexico should make to allow for the meaningful implementation of the firearms restrictions in the FVPA, including (1) adding a definition of “credible threat” to the FVPA, (2) amending of the petition for an order of protection, and (3) substantive continuing education for hearing officers, special commissioners, and judges who work with orders of protection.*

## INTRODUCTION

Imagine a survivor of domestic abuse decides to leave her<sup>1</sup> abusive relationship. Only one police report alleging abuse was ever filed, but no criminal

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1. Please note, this paper opts to use “she/her” pronouns when referring to survivors/petitioners and “he/him” pronouns when referring to abusers/respondents. This is for clarity in the writing and

charges were pursued. Upon leaving the relationship, the abuser begins to escalate in his behavior prompting the survivor to seek an order of protection. In filling out the petition, the survivor cites the reported incident and alleges that the respondent has threatened to kill her. She also asks the court to require the respondent to relinquish his firearms. Will she secure the order of protection? And if so, will the court restrict the respondent's access to firearms?

Survivors of domestic violence in New Mexico have long relied on the Family Violence Protection Act (FVPA) to secure orders of protection limiting contact with their abusers. An order of protection is an “injunction or a restraining or other court order granted for the protection of a [survivor] of domestic abuse.”<sup>2</sup> In 2019, the New Mexico Legislature attempted to provide survivors with additional protections to address the lethal outcomes of domestic violence incidents involving firearms through Senate Bill 328.<sup>3</sup> The Bill expanded the categories of those who could be punished criminally for possessing firearms to include those who are subject to orders of protection under the FVPA and created a mechanism for the affirmative relinquishment of firearms by those individuals.<sup>4</sup>

In 2023, New Mexico's appellate courts contended with some of the requirements for granting orders of protection under the FVPA.<sup>5</sup> In *Nguyen v. Bui*, the New Mexico Supreme Court held that the FVPA does not require a petitioner to show an “imminent harm” to secure an order of protection.<sup>6</sup> A month later, the New Mexico Court of Appeals held that a showing of fear or a necessity by the petitioner is not required.<sup>7</sup>

The recent appellate cases have highlighted the misapplication of certain provisions of the FVPA by the district courts, namely Section 40-13-5(A).<sup>8</sup> These decisions provide clarity about the amount of evidence required to secure an order of protection;<sup>9</sup> but they also highlight remaining ambiguity of the recently adopted firearms provisions, like Section 40-13-5(A)(2).<sup>10</sup> Section 40-13-5(A)(2) requires a finding of a “credible threat to the physical safety of [the petitioner]” for a court to utilize the provisions requiring a respondent to relinquish their firearms and prohibiting the purchase of firearms.<sup>11</sup> The “credible threat” requirement is undefined by the FVPA and situated for misapplication in the district courts.

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hypotheticals presented, but also reflects data that women are the predominant survivors of domestic abuse and men the predominant aggressors. *See, e.g.,* Andy Myhill, *Measuring Domestic Violence: Context is Everything*, 1 J. GENDER-BASED VIOLENCE 33 (2017). This is not to suggest that men cannot be survivors, that women cannot be aggressors, or that domestic violence is absent among queer or gender nonconforming relationships.

2. N.M. STAT. ANN. § 40-13-2 (2019).

3. *See* S.B. 328, 54th Leg., 1st Sess. (N.M. 2019).

4. *Id.*

5. *See* *Nguyen v. Bui*, 2023-NMSC-020, 536 P.3d 482.; *Karla J.C. v. Montañó*, A-1-CA-40544, 2023 WL 5624546 (N.M. Ct. App. Aug. 31, 2023); *see also* N.M. STAT. ANN. §§ 40-13-1 to -13 (1987, as amended through 2019).

6. 2023-NMSC-020, ¶ 1, 536 P.3d at 483.

7. *See* *Karla J.C.*, 2023 WL 5624546, at \* 3.

8. *See* *Nguyen*, 2023-NMSC-020, 536 P.3d 482; *Karla J.C.*, 2023 WL 5624546.

9. *See* *Nguyen*, 2023-NMSC-020, 536 P.3d 482; *Karla J.C.*, 2023 WL 5624546.

10. N.M. STAT. ANN. § 40-13-5(A)(2) (2019).

11. *Id.*

Beyond that, the process of securing an order of protection and the relevant firearms restrictions is arduous for pro se petitioners. In most protective order proceedings, neither party typically has legal representation.<sup>12</sup> The distinction between what is required to secure the order and what is required to secure the firearms restrictions is likely difficult for petitioners to grasp, if they are aware of it at all.

*Nguyen* established a lower evidentiary threshold for survivors of abuse to secure an order of protection; instead of an “imminent harm” requirement, plaintiffs now must make a showing of past abuse. This clarification will undoubtedly expand access to orders of protection granted under the FVPA. But those who also seek to restrict access to firearms for the restrained party will be required to show both past abuse and a “credible threat” to allow the court to make the requisite secondary finding. If they are unaware or unclear on the secondary requirement, petitioners will not be able to secure important protections from potentially lethal abuse.

Research concerning domestic violence protective orders indicates that restricting access to firearms provides vital protections and ultimately reduces intimate partner homicide rates.<sup>13</sup> However, New Mexico’s appellate courts have understandably been reluctant to interfere with the rights of restrained parties.<sup>14</sup> Additionally, the secondary “credible threat” requirement seemingly indicates the legislature intended to offer some due process protections for the rights of the restrained party.<sup>15</sup>

This Note does not argue that the evidentiary threshold for a showing of a “credible threat” to restrict the restrained party’s rights to firearms should be lesser or that the threshold for securing an order of protection should be higher.<sup>16</sup> Rather, this Note argues that, to ensure the relinquishment of firearms provision is accessible to petitioners and consistently applied by the courts, (1) the “credible threat” requirement of the FVPA should be defined, (2) any requirements of the definition of the “credible threat” requirement should be articulated in the standardized petition, and (3) hearing officers, special commissioners, and district court judges should receive specialized training relating to orders of protection.

Part I of this Note will examine the prevalence of domestic violence and the link between domestic violence, gun violence, and intimate partner homicide in New Mexico. Part II will discuss New Mexico district courts’ prior misapplication of the FVPA and recent clarifications stemming from appellate cases. Additionally, this part examines the ways in which the FVPA remains unclear and a failed legislative attempt to clarify it. Part III discusses the appropriateness of both the threshold for

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12. Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 557 (2006).

13. Elizabeth Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 337 (2006).

14. See, e.g., *Best v. Marino*, 2017-NMCA-073, ¶¶ 25, 58, 404 P.3d 450, 458, 463 (2017) (stating that the “purpose of an order of protection is to prevent future harm to a protected party” and “it is “permissible to limit a restrained party’s ability to engage in certain activity—including the exercise of . . . free speech” but finding the restriction of internet access “overbroad.”).

15. See N.M. STAT. ANN. § 40-13-5(A)(2) (2019).

16. In fact, it will argue that the threshold for the secondary requirement cannot be lowered because of the restrained party’s due process rights via the Fourteenth Amendment and the initial finding requirement should not be raised to allow survivors greater access to orders of protection.

securing the order of protection and the threshold for establishing “credible threats” with an eye toward due process considerations regarding the respondent’s rights to access firearms and ongoing federal litigation. Finally, Part IV will discuss recommendations to ensure petitioners seeking an order of protection are able to effectively and meaningfully seek the full protections offered by the FVPA.

## I. DOMESTIC VIOLENCE IN NEW MEXICO

Domestic violence (also called intimate partner violence) is not a uniquely New Mexican problem. Domestic violence definitions vary but typically fall along the lines of “a pattern of behavior in any relationship that is used to gain, or maintain, power[,] and control over an intimate partner.”<sup>17</sup> The United Nations estimates that one in three women experience domestic violence globally<sup>18</sup> and although it is a global issue, the United States has similarly high rates of abuse, estimating “as many as one in four women and one in nine men are survivors of domestic violence.”<sup>19</sup>

### A. Domestic Violence is a cycle and pervasive problem in New Mexico

The modern cycle of domestic violence is typically characterized by four phases: tension-building, abuse, reconciliation, and calm<sup>20</sup> (older models replace both the reconciliation and calm phases with a remorse phase).<sup>21</sup> In the first phase, tension and frustration on the part of the abuser builds until it reaches a peak point where the abuser cannot control himself.<sup>22</sup> The result, the abuse phase, culminates in the loss of control resulting in violent action, including physical, psychological, emotional, sexual, or financial abuse.<sup>23</sup> The abuse phase may last seconds or days.<sup>24</sup> As the abuse phase ends, the abuser begins to feel relief and the tension dissipates resulting in attempts to make amends for the abuse.<sup>25</sup> Finally, in the calm phase, the abuser will shift from apologetic behavior to minimizing the behavior.<sup>26</sup> Typically, this cycle of abuse is continuous and escalates in both frequency and severity.<sup>27</sup> Of

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17. Academic Impact, *Examining Domestic Violence Around the World: The Cost of Doing Nothing*, UNITED NATIONS (Nov. 27, 2023, 9:41 PM), <https://www.un.org/en/academic-impact/examining-domestic-violence-around-world-cost-doing-nothing> [https://perma.cc/6G6S-25VJ].

18. *Id.*

19. Martin Huecker, et al., *Domestic Violence*, NAT’L INST. OF HEALTH (Nov. 27, 2023, 10:01 PM), <https://www.ncbi.nlm.nih.gov/books/NBK499891/#:~:text=Family%20and%20domestic%20violence%20is,are%20survivors%20of%20domestic%20violence> [https://perma.cc/554G-RTUU].

20. Hope Gillette, *The 4 Stages of the Cycle of Abuse: From Tension to Calm and Back*, PSYCHCENTRAL (July 15, 2022), <https://psychcentral.com/health/cycle-of-abuse>, [https://perma.cc/9RHB-9A2S].

21. Parveen Azam Ali & Paul B. Naylor, *Intimate partner violence: A narrative review of the feminist, social and ecological explanations for its causation*, 18 *AGGRESSION & VIOLENT BEHAV.* 611, 612 (2013).

22. *Id.* at 613.

23. *Id.*; see also Gillette, *supra* note 20.

24. Azam Ali & Naylor, *supra* note 21, at 613.

25. Gillette, *supra* note 20.

26. *Id.*

27. Mary Ann Liebert, *Domestic Violence: Challenges to Medical Practice*, 2 *J. WOMEN’S HEALTH* 73, 73 (1993).

course, there are challenges with confirming how the cycle of abuse escalates due to issues of underreporting of the violence itself and differing analyses of what constitutes an escalation.<sup>28</sup>

Intimate partner violence in New Mexico is far more pervasive than in the United States generally.<sup>29</sup> Reported incidents of domestic violence in New Mexico are nearly three times the national average, with more than 17,000 survivors identified by law enforcement in 2013.<sup>30</sup> Some studies have estimated that once underreporting is factored into an analysis of the pervasiveness of domestic violence in New Mexico, the number of survivors nearly doubles.<sup>31</sup> Beyond the sheer number of incidents, at times, domestic violence has been responsible for between seventeen and twenty-six percent of all homicides in New Mexico.<sup>32</sup>

### **B. Challenges for survivors of domestic abuse in the criminal justice system and safeguards in New Mexico law**

While domestic violence presents significant social and public health problems,<sup>33</sup> it also presents complex legal problems.<sup>34</sup> Often these problems intersect; for example, intimate partner homicide is the “most common type of lethal violence against adult women in industrialized occidental countries.”<sup>35</sup> Intimate partner homicide is, of course, a crime, but it also implicates social and public health issues related to social factors, such as age, socioeconomic status, unemployment, and education, and health factors, such as alcohol or drug abuse and the perpetrator’s mental health.<sup>36</sup>

28. Lee Bamham, Geoffrey C. Barnes & Lawrence W. Sherman, *Targeting Escalation of Intimate Partner Violence: Evidence from 52,000 Offenders*, 1 *CAMB. J. EVIDENCE-BASED POLICING* 116, 119–21 (2017).

29. Lisa Broidy, Danielle Albright & Kristine Denman, *Deterring Future Incidents of Intimate Partner Violence: Does Type of Formal Intervention Matter?*, 22 *VIOLENCE AGAINST WOMEN* 1113, 1114 (2016).

30. *Id.*

31. *See, e.g.*, BETTY CAPONERA, *INCIDENCE AND NATURE OF DOMESTIC VIOLENCE IN NEW MEXICO VI: AN ANALYSIS OF 2005 DATA FROM THE NEW MEXICO INTERPERSONAL VIOLENCE DATA CENTRAL REPOSITORY*, v (2006), [https://nmcsap.org/wp-content/uploads/Betty\\_Caponera\\_DV\\_in\\_NM\\_VI\\_2005\\_Data\\_web.pdf](https://nmcsap.org/wp-content/uploads/Betty_Caponera_DV_in_NM_VI_2005_Data_web.pdf) [<https://perma.cc/8BQ6-4VZU>] (indicating that in 2005 law enforcement identified 18,778 survivors, while the SSV identified 36,594).

32. *See Id.* at 36 (2006) (stating 17% of total homicides were the result of domestic violence); *see also* FBI UNIFORM CRIME REPORT FOR 2018, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-8/table-8-state-cuts/new-mexico.xls> [<https://perma.cc/6N9D-D93X>] (indicating 118 homicides in New Mexico); NEW MEXICO INTIMATE PARTNER VIOLENCE DEATH REVIEW TEAM, *ANNUAL REPORT 2021: FINDINGS & RECOMMENDATIONS FROM CY2018 INTIMATE PARTNER VIOLENCE DEATHS (2021)* [hereinafter *ANNUAL REPORT 2021*] (indicating 31 homicides were the result of domestic violence in 2018).

33. Azam Ali & Naylor, *supra* note 21, at 611.

34. *See, e.g.*, Azam Ali & Naylor, *supra* note 21 (discussing the negative consequences of mandatory arrest and domestic violence policies in the US); Balos, *supra* note 12 (arguing for counsel in protective order proceedings to promote fairness and equal access to legal protections from domestic violence).

35. Catarina Abrunhosa et al., *Crimes Against Women: From Violence to Homicide*, 36 *J. INTERPERSONAL VIOLENCE* NP12973 (2021).

36. *Id.*

Generally, states have codified certain crimes as “domestic violence offenses” when they are perpetrated against family, household members, or intimate partners” and commonly include assault, battery, sexual assault, rape, stalking, and violation of protection orders.<sup>37</sup> This is true of New Mexico’s FVPA, which defines two types of domestic abuse offenses.<sup>38</sup> The first type results from incidents of stalking or sexual assault “whether committed by a household member or not.”<sup>39</sup> The second type stems from incidents of abuse by one household member against another where abuse can consist of physical harm, severe emotional distress, bodily injury, strangulation, or suffocation (among others).<sup>40</sup>

Still, research indicates that survivors of domestic violence have mixed feelings towards the criminal justice system. Survivors often criticize the criminal justice system because it is “highly adversarial, is incident focused, and disaggregates the survivor’s experience.”<sup>41</sup> The system is not ideally suited to responding to domestic violence and often exacerbates the power differential between parties while forcing survivors to face their abusers.<sup>42</sup> It also forces survivors to hostile cross-examination by “questioning credibility and challenging veracity.”<sup>43</sup> Protecting survivors of domestic abuse requires that the criminal justice system respond when survivors call and provide survivors some measure of control over the deployment of criminal interventions.<sup>44</sup>

Efforts to reform and to create avenues that are more responsive to domestic violence survivors have resulted in the creation of statutory civil orders of protection.<sup>45</sup> In New Mexico, survivors of domestic abuse can seek orders of protection via the FVPA.<sup>46</sup> Section 40-13-3 describes the contents and standard form of petitions for orders of protection; while Sections 40-13-3.2 to 40-13-5 detail the safeguards and procedures available to survivors upon the filing and subsequent issuance of an order of protection.<sup>47</sup> Sections 40-13-3.2 and 40-13-4 deal with ex parte emergency orders of protection and temporary orders of protection.<sup>48</sup> If the court issues either of those orders, they provide short lived relief to petitioners, with ex parte emergency orders expiring within seventy-two hours or the next judicial day and temporary restraining orders requiring a hearing within ten days to determine further action.<sup>49</sup>

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37. *Domestic Violence*, 17 GEO. J. GENDER & L. 211, 222 (Dania Bardavid, Marissa Chiarolanio & Allison Strittmater eds., 2016).

38. N.M. STAT. ANN. § 40-13-2(D)(1)–(2) (2019).

39. *Id.*

40. *Id.*

41. Balos, *supra* note 12, at 565.

42. *Id.*

43. *Id.*

44. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFFALO CRIM. L. REV. 801, 858 (2001).

45. Balos, *supra* note 12, at 561.

46. See N.M. STAT. ANN. §§ 40-13-1 to -13 (as amended through 2019).

47. *Id.* §§ 40-13-3.2 to -5.

48. *Id.* §§ 40-13-3.2 to -4 (as amended through 2008).

49. See *id.* § 40-13-3.2(E); *id.* § 40-13-4(A)(3).

To secure protections for a longer duration through the FVPA, petitioners must pursue an order of protection through Section 40-13-5.<sup>50</sup> These orders of protection are issued “[u]pon finding that domestic abuse has occurred” (or upon stipulation of the parties) and allows the court to order the respondent to refrain from abusing or initiating contact with the protected party, to grant possession of the residence, and to award temporary custody of children, among other things.<sup>51</sup> These are vital safeguards in a survivor’s assertion of autonomy and right to bodily integrity and in supporting their autonomy in decision-making about their children.<sup>52</sup> Protective orders have been proven to be effective in reducing domestic violence against women.<sup>53</sup>

However, the FVPA also offers additional safeguards in instances where the court determines that the restrained party is a “credible threat to the physical safety” of the petitioner under Section 40-13-5(A)(2).<sup>54</sup> In instances where a “credible threat” is found, the court may restrain the respondent’s access to firearms while the order is in effect by requiring that firearms be relinquished to law enforcement and prohibiting the purchase, receipt, or possession of firearms.<sup>55</sup> Studies of laws providing similar safeguards to survivors through the restriction of the respondent’s access to firearms have shown a reduction of intimate partner homicide.<sup>56</sup> The importance of providing effective intervention for survivors of domestic violence cannot be overstated. It is essential in combatting violent consequences faced by survivors, their families, and the community at large.<sup>57</sup>

In addition to the FVPA, survivors of domestic violence who pursue orders of protection are protected to a degree by Section 30-7-16, which makes it a misdemeanor offense for a person subject to an order of protection to possess a firearm.<sup>58</sup> Unlike Section 40-13-5 of the FVPA, which requires the affirmative relinquishment of firearms and prohibits the purchase of firearms, Section 30-7-16 criminalizes the possession of firearms.<sup>59</sup> Notably, the provisions of Section 30-7-16 are not triggered by a “credible threat” finding<sup>60</sup>, but take effect as soon as the order

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50. *Id.* § 40-13-5 (2019).

51. *Id.* § 40-13-5(A), (B)(1)–(3); *see id.* § 40-13-5(B)(4)–(7) for additional safeguards courts may impose under § 40-13-5(A).

52. Balos, *supra* note 12, at 564–65.

53. *Id.* at 566.

54. N.M. STAT. ANN. § 40-13-5(A)(2) (2019).

55. *Id.* at § 40-13-5(A)(2)(a)–(b).

56. Vigdor & Mercy, *supra* note 13, at 337.

57. Broidy et al., *supra* note 29, at 1114.

58. N.M. STAT. ANN. § 30-7-16 (2019).

59. *See* N.M. STAT. ANN. § 40-13-5 (2019); N.M. STAT. ANN. § 30-7-16 (2019).

60. Currently, judges are also not required under the FVPA to provide notice of Section 30-7-16 in the order of protection itself, despite being required to provide notice of the related federal statutes that similarly criminalize possession of firearms by respondents of domestic violence orders of protection under 18 U.S.C. § 922(g)(8). As written, Section 30-7-16, while a boon to survivors, will almost certainly be the subject of a due process challenge by a respondent at some point because it does not require a “credible threat” be shown and the FVPA does not require written notice in the order. That said, this Note focuses on due process concerns only as they relate to the affirmative requirement to relinquish firearms under Section 40-13-5(A)(2).



of protection is issued.<sup>61</sup> This means that once a petitioner has made a showing sufficient for the court to make a finding of past abuse and secures the order, the restrained party is automatically precluded from possession of firearms.<sup>62</sup>

Still, these safeguards may prove elusive to survivors of domestic abuse who often struggle alone with the legal process and interaction with the judicial system. Increasingly, litigants in cases for orders of protection are unrepresented, with some studies reporting eighty percent of survivors of domestic abuse seeking orders of protection pro se.<sup>63</sup> Research also indicates that parties who have legal representation are “significantly more likely to obtain protective orders and to obtain comprehensive relief in those orders.”<sup>64</sup> The lack of representation thus creates a barrier for survivors in accessing the relinquishment provisions of the FVPA and for ensuring notice of Section 30-7-16.

Additionally, while research suggests that orders of protection are effective in reducing domestic violence in the aggregate, not all offenders follow the conditions of their orders.<sup>65</sup> In some circumstances, violations of orders of protection may result in death to the survivor/petitioner.<sup>66</sup> Similarly, it can be difficult to enforce the provisions of an order of protection, particularly with respect to restriction of firearms.<sup>67</sup> These factors further hinder survivors who seek protection through the civil restraining order process.

### C. Relationship between domestic violence and firearms

Approximately 4.5 million women alive in the United States have been threatened with a gun by an intimate partner, and nearly 1 million have been shot.<sup>68</sup> There is a strong connection between intimate partner violence and firearms, including an increased risk of homicide by an intimate partner by twenty times when a firearm is accessible.<sup>69</sup> Beyond homicide, some suggest that abusers who have access to firearms engage in “more severe domestic violence than those who do not.”<sup>70</sup> Research makes a compelling showing that “access to firearms is a significant mechanism of harm in [intimate partner violence]” and enforcing restrictions on firearm access where there are orders of protection “is important in a comprehensive approach to reduce [intimate partner violence].”<sup>71</sup>

New Mexico reflects general research concerning the relationship between domestic violence and firearms. Data from the last three annual reports from the New

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61. See N.M. STAT. ANN. § 30-7-16 (2019).

62. See N.M. STAT. ANN. § 40-13-5 (2019); N.M. STAT. ANN. § 30-7-16 (2019).

63. Balos, *supra* note 12, at 567–68.

64. *Id.* at 569.

65. April M. Zeoli et al., *Removing Firearms From Those Prohibited From Possession by Domestic Violence Restraining Orders: A Survey and Analysis of State Laws*, 20 TRAUMA, VIOLENCE, & ABUSE 114, 115 (2019).

66. *Id.*

67. *Id.* at 116.

68. Alexandria Goodyear et al., *The Role of Firearms in Intimate Partner Violence: Policy and Research Considerations*, 41 J. PUB. HEALTH POL’Y 185, 186 (2019).

69. *Id.* at 186.

70. Zeoli et al., *supra* note 65, at 115.

71. Goodyear et al., *supra* note 68, at 193.

Mexico Intimate Partner Violence Death Review Team indicates that, of the intimate partner violence homicides that were reviewed, over half were committed with firearms— with one year reaching a maximum of 64.5 percent.<sup>72</sup> For example, in its 2021 report, the New Mexico Intimate Partner Violence Death Review Team reviewed sixty-six incidents of intimate partner violence in which at least one party died.<sup>73</sup> In those sixty-six incidents, thirty-one people died by homicide and of those thirty-one deaths, twenty were facilitated by firearm use.<sup>74</sup>

Despite the clear connection between access to firearms and intimate partner homicide, respondents have a constitutional right to bear arms. The right to bear arms has evolved over the last fifteen years. First in 2008, the United States Supreme Court held that “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense” violates the Second Amendment.<sup>75</sup> That case also recognized that individuals may be disqualified from the exercise of Second Amendment rights in certain circumstances.<sup>76</sup> The Court addressed the Second Amendment again in 2010, concluding that the Second Amendment is a fundamental right and that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment amongst the states.<sup>77</sup>

More recently, the Court clarified the right to keep and bear arms extends to “[bearing] arms in public for self-defense” but reiterated that those rights apply only to “law-abiding citizens.”<sup>78</sup> That case also introduced a new test, the *Bruen* test, that requires that regulations be justified by a historical tradition of analogous firearm regulations, not by important or compelling state interests.<sup>79</sup> The recent Second Amendment jurisprudence at the federal level has extended due process rights in relation to the right to bear arms and articulated a new test for determining the validity of restricting those rights.<sup>80</sup> It remains to be seen how the changing landscape of Second Amendment rights will affect domestic violence proceedings.

## II. ORDER OF PROTECTION JURISPRUDENCE IN NEW MEXICO

Section 40-13-5(A) of the FVPA establishes one requirement for a petitioner to secure an order of protection and a second requirement to secure firearms related protections.<sup>81</sup> The first threshold is the requisite baseline to secure the order of protection, and requires a “finding that domestic abuse has occurred” or

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72. ANNUAL REPORT 2021, *supra* note 32, at 3; NEW MEXICO INTIMATE PARTNER VIOLENCE DEATH REVIEW TEAM, ANNUAL REPORT 2020: FINDINGS & RECOMMENDATIONS FROM CY2017 INTIMATE PARTNER VIOLENCE DEATHS, 3 (2020); NEW MEXICO INTIMATE PARTNER VIOLENCE DEATH REVIEW TEAM, ANNUAL REPORT 2019: FINDINGS & RECOMMENDATIONS FROM CY2016 INTIMATE PARTNER VIOLENCE DEATHS, 3 (2019).

73. ANNUAL REPORT 2021, *supra* note 32, at 3.

74. *Id.*

75. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

76. *Id.* (the Court emphasized that the right applies to law abiding citizens).

77. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010).

78. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 70–71 (2022).

79. *Id.* at 2126.

80. *See Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742; *Bruen*, 597 U.S. 1.

81. N.M. STAT. ANN. § 40-13-5(A) (2019).

stipulation from the parties.<sup>82</sup> The second finding requires the court to determine that the respondent presents “a credible threat to the physical safety” of the petitioner.<sup>83</sup> Meeting the “credible threat” requirement determines whether a respondent’s access to firearms may be restricted.<sup>84</sup> The “finding of abuse” requirement has been interpreted by the courts, whereas the “credible threat” requirement remains untested and undefined.

**A. Misapplication of the FVPA by district courts demonstrated in *Nguyen v. Bui* and *Karla J.C. v. Montaño***

Despite the relatively straightforward language “finding that domestic abuse has occurred,” Section 40-13-5(A) has been misapplied by the district courts in New Mexico.<sup>85</sup> Two recent appellate cases, *Nguyen v. Bui* and *Karla J.C. v. Montaño*, demonstrate a clear misunderstanding by the district courts of what a petitioner is required to demonstrate to secure an order of protection.<sup>86</sup> In both of those cases, the district courts placed additional burdens on the petitioners beyond the statutory requirement.<sup>87</sup>

In *Nguyen*, the Supreme Court considered whether a hearing officer misapplied the requirement for securing an order of protection by requiring the petitioner also show she was in imminent danger.<sup>88</sup> The petitioner in that case was a minor when the alleged abuse occurred and unable to file a petition for an order of protection on her own.<sup>89</sup> After turning eighteen,<sup>90</sup> she filed a petition for order of protection from domestic abuse under Section 40-13-3(A) alleging she was sexually assaulted<sup>91</sup> by the respondent, Khiem Bui, while she was a minor.<sup>92</sup> The petitioner testified that the abuse began when she was twelve years old and the respondent was twenty.<sup>93</sup> The abuse continued for two years until the petitioner “removed [her]self from the situation” in the fall of 2018 and had minimal contact with the respondent after that.<sup>94</sup> The petition was filed in February 2021.<sup>95</sup>

A hearing officer denied the order of protection stating, “not to minimize what happened in the past . . . but . . . I don’t see . . . *the immediacy of the need* for

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82. *Id.*

83. *Id.* §40-13-5(A)(2).

84. *Id.*

85. *See, e.g.*, *Nguyen v. Bui*, 2023-NMSC-020, 536 P.3d 482.; *see also* *Karla J.C. v. Montaño*, A-1-CA-40544, 2023 WL 5624546 (N.M. Ct. App. Aug. 31, 2023).

86. *See Nguyen*, 2023-NMSC-020, 536 P.3d 482; *see also Karla J.C.*, 2023 WL 5624546.

87. *See Nguyen*, 2023-NMSC-020, 536 P.3d 482; *see also Karla J.C.*, 2023 WL 5624546.

88. *Nguyen*, 2023-NMSC-020, ¶ 1, 536 P.3d at 483.

89. *Id.* at ¶ 6, 536 P.3d at 484.

90. Because the petitioner was a minor at the time of the abuse, she waited until she reached the age of majority to file the petition on her own. *See Nguyen*, 2023-NMSC-020, ¶ 6, 536 P.3d at 484.

91. Domestic abuse includes “sexual assault whether committed by a household member or not,” N.M. STAT. ANN. § 40-13-2(D)(2) (2019).

92. *Nguyen*, 2023-NMSC-020, ¶ 6, 536 P.3d at 484.

93. *Id.* at ¶ 7, 536 P.3d at 484.

94. *Id.*

95. *Id.* at ¶¶ 8–9, 536 P.3d at 484.

an order of protection.”<sup>96</sup> The petitioner filed objections to the hearing officer’s order, but the district court denied the objections and affirmed and adopted the hearing officer’s order of dismissal. The Court of Appeals reversed the district court concluding that the district court erred “by requiring Petitioner to establish ‘immediacy’” for an order of protection under Section 40-13-5.<sup>97</sup>

The respondent filed a petition for writ of certiorari, which the Supreme Court granted. The Supreme Court considered whether the hearing officer improperly denied the petition by requiring the petitioner to show imminent danger.<sup>98</sup> The Supreme Court determined that the plain language of the statute is clear and that the “only predicate finding required is that domestic abuse has occurred.”<sup>99</sup> The Court proclaimed that the FVPA contains no language requiring a petitioner to state why the order is needed and does not require a showing of “a threat of future harm.”<sup>100</sup> The Supreme Court affirmed the Court of Appeals in holding that the hearing officer erred “in adding a requirement that Petitioner must show immediacy of harm” and the district court erred in “accepting this conclusion of law.”<sup>101</sup>

In 2023, the interpretation of the FVPA’s “showing of abuse” threshold<sup>102</sup> came into question a second time in *Karla J.C. v. Montaña*.<sup>103</sup> In that case, the Court of Appeals considered if the district court had erred by denying a petition for an order of protection because petitioners did not show “fear and necessity to obtain an order of protection.”<sup>104</sup> In *Karla J.C.*, a mother filed a petition for an order of protection on behalf of her child, alleging that the respondent raped<sup>105</sup> the child in August 2021.<sup>106</sup> The district court granted a temporary restraining order.<sup>107</sup> The respondent denied the allegations in his answer and at a hearing for an order of protection under Section 40-13-5.<sup>108</sup> At the conclusion of the hearing, the district court stated that the petitioners had not met the burden of proof because the child did not “either say that she was afraid of [respondent] and that an order of protection was necessary.”<sup>109</sup>

In its memorandum opinion, the Court of Appeals applied *Nguyen* to reach its conclusion.<sup>110</sup> Ultimately, the Court of Appeals concluded that “[j]ust as Section 40-13-5 contains no language requiring a petitioner to present evidence showing a

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96. *Id.* at ¶ 10, 536 P.3d at 484–85 (emphasis added).

97. *Id.* at ¶ 12, 536 P.3d at 485.

98. *See id.*

99. *See id.*; *see also* N.M. STAT. ANN. § 40-13-5(A) (2019).

100. *Nguyen*, 2023-NMSC-020, ¶¶ 16–17, 536 P.3d at 485.

101. *Id.* at ¶ 18, 536 P.3d at 486.

102. Although Section 40-13-5(A) requires a “finding that domestic abuse occurred,” this Note refers to this requirement as the “showing of abuse” requirement/threshold because the onus is placed on the petitioner to show evidence of prior abuse.

103. *See generally* *Karla J.C. v. Montaña*, A-1-CA-40544, 2023 WL 5624546 (N.M. Ct. App. Aug. 31, 2023).

104. *Karla J.C.*, 2023 WL 5624546, at \* 1.

105. *See supra* note 72 for further explanation on what qualifies as domestic abuse under the FVPA.

106. *Karla J.C.*, 2023 WL 5624546, at \* 1.

107. *Id.*

108. *Id.*

109. *Id.* at \* 4.

110. *Id.* at \* 2.

need for the order, [it] also contains no language requiring a petitioner to state that they are in fear of a respondent.”<sup>111</sup> Although the district court’s order dismissing the petition stated the petitioners did not prove by a preponderance of the evidence that an incident of domestic abuse occurred, it did not contain any findings to support that conclusion.<sup>112</sup> The Court of Appeals looked to the district court’s oral remarks from the hearing to clarify that fear and necessity were the only elements considered by the district court.<sup>113</sup> The failure of the district court to identify any other elements it considered led the Court of Appeals to conclude the district court abused its discretion by requiring the child petitioner to prove she feared the respondent and had a necessity for the order.<sup>114</sup> The Court of Appeals characterized the abuse of discretion as a “misapprehension of law.”<sup>115</sup>

*Nguyen* and *Karla J.C.* provided much needed clarification on the threshold requirement to secure an order or protection. Rather than requiring petitioners to make a showing of an “immediate need,” “imminent danger,” or “fear,” the appellate courts relied on the plain language of the statute. Therefore, when a petitioner produces sufficient evidence that allows the court to make a finding of past domestic abuse, the “court *shall* enter an order of protection.”<sup>116</sup>

#### **B. The effect of *Nguyen* and *Karla J.C.* and the remaining ambiguity of the FVPA**

The clarification of the “showing of abuse” requirement in *Nguyen* and *Karla J.C.* will improve the consistent application of the FVPA across the districts when issuing orders of protection.<sup>117</sup> The clarification is much needed and should remedy the misapplication of Section 40-13-5(A) by the district courts. But *Nguyen* and *Karla J.C.* have broader implications as well. In addition to creating uniform application amongst the district courts, the clear “showing of abuse” requirement will directly impact pro se petitioners by lessening the evidentiary burden required to secure an order of protection.

Pro se petitioners will be able to rely on the plain language of Section 40-13-5(A) in filling out their petition. The “showing of abuse” requirement must be proven by a preponderance of the evidence.<sup>118</sup> This showing will be easier to make than the “imminent harm,” “fear,” or “immediate need” showings that were being improperly required by the district courts. This showing also will provide greater access to orders of protection under the FVPA for survivors of domestic abuse, but especially pro se petitioners. Petitioners most at risk who seek protection from violence are “highly unlikely to have legal representation to help them navigate the intricacies of the process and to advocate on their behalf.”<sup>119</sup> Therefore, having a

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111. *Id.* at \* 3.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Nguyen v. Bui*, 2023-NMSC-020, ¶ 4, 536 P.3d 482, 483 (emphasis added).

117. *See id.*; *Karla J.C.* 2023 WL 5624546.

118. *Karla J.C.*, 2023 WL 5624546, at \* 3.

119. Balos, *supra* note 12, at 566–67.

clear and simple requirement for securing an order or protection will make it easier for unrepresented petitioners to understand what they must show and to effectively articulate their past abuse. Ultimately, *Nguyen* and *Karla J.C.* should create greater access to orders of protection.

In addition, Form 4-961 NMRA, the Supreme Court approved petition for order of protection from domestic abuse used in conjunction with Section 40-13-5, will aid petitioners.<sup>120</sup> Form 4-961(5) NMRA prompts the petitioner to detail past incidents of physical abuse.<sup>121</sup> Practically, even if a petitioner is unclear of what they must show to secure the order, the inclusion of section five in Form 4-961 will facilitate a showing of past abuse and aid petitioners in securing orders of protection.

However, petitioners will continue to be disadvantaged in terms of restricting respondents' access to firearms. Section 40-13-5(A)(2) allows the court to restrict a respondent's access to firearms when it determines the "restrained party presents a credible threat to the physical safety of [the petitioner]."<sup>122</sup> However, unlike the clarified "showing of abuse" requirement, the "credible threat" requirement is undefined, situated for misapplication by the district courts, and less obvious to petitioners. The "credible threat" requirement is not defined in the FVPA. Therefore, aside from the statutory language itself, there is no guidance as to what constitutes a credible threat.<sup>123</sup> The resulting ambiguity may lead to differing applications by the district courts. Additionally, Form 4-961 NMRA does not make it clear that the "credible threat" showing is a separate requirement from the "showing of abuse."

The "credible threat" requirement and application of Section 40-13-5(A)(2) has not come before the New Mexico appellate courts and neither *Nguyen* nor *Karla J.C.* dealt with firearms restrictions directly.<sup>124</sup> But in effect, *Nguyen* and *Karla J.C.* will widen the gap between the "showing of abuse" and "credible threat" requirements and will likely confuse petitioners. Prior to the clarification of the "showing of abuse" requirement, the requirement of imminent harm and credible threat could somewhat overlap, easing the burden on petitioners seeking firearms restrictions by partially consolidating the requirements. However, the clarified "showing of abuse" requirement is a decidedly lower evidentiary requirement than the imminent harm requirement. Petitioners will now have to understand and show that in addition to past abuse, there is some ongoing credible threat warranting the restriction of a respondent's access to firearms.

Beyond the definitional issues in the statute, the areas of Form 4-961 NMRA dealing with credible threats or firearms are not consolidated into one coherent section.<sup>125</sup> The current organization of Form 4-961 NMRA obscures the availability of the firearms related provisions by lumping in the "credible threat" showing with the general "showing of abuse." Additionally, the Form does not clearly link the description for credible threat in Section 5(B) to the firearms related

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120. See Form 4-961 NMRA (2019).

121. *Id.*

122. N.M. STAT. ANN. § 40-13-5(A)(2) (2019).

123. See *id.*

124. See *Nguyen v. Bui*, 2023-NMSC-020, 536 P.3d 482; *Karla J.C. v. Montaño*, A-1-CA-40544, 2023 WL 5624546 (N.M. Ct. App. Aug. 31, 2023).

125. Form 4-961 NMRA (2019).

provision in Section 2(B).<sup>126</sup> Aside from the final request to the court in Section 6(J), there is no indication that the credible threat section is related to firearms.<sup>127</sup> Beyond that, it offers no insight into how the description for credible threat in Section 5(B) differs from the descriptions of abuse in Section 5(A) to secure the order itself.<sup>128</sup> All of this makes it difficult for petitioner to understand the restriction of a respondent's firearms is an additional available safeguard, beyond ordinary domestic violence orders of protection.

The ambiguity of the "credible threat" requirement and unclear burden on petitioners creates room for arbitrary interpretation and inconsistent application by the judiciary. Some improper judicial enforcement of domestic violence laws may result "not from defiance but from ignorance" about domestic violence and the cycle of abuse generally.<sup>129</sup> Regardless of the reasons for improper judicial enforcement, it is clear that judicial behavior can have profound effects on the outcome of domestic violence cases; it can result in less violence or continued violence, and it can create reluctance by survivors to seek protection through the judicial system or faith in the judicial system.<sup>130</sup> When a requirement, like "credible threat", is misapplied it can signal to the abuser that domestic violence is not taken seriously and can jeopardize a survivor's willingness to utilize the judicial system.

In New Mexico, it will be difficult for the district courts to consistently apply the "credible threat" requirement. "Without a definition of 'credible threat' it makes things different for judicial officers, attorneys, and parties at the trial level to make sure they are implementing what the legislature wants. It is hard to rule accordingly when there is no agreed upon definition."<sup>131</sup> Beyond the lack of a clear definition, misapplication may stem from a lack of understanding the scheme of domestic violence laws. "Judges are subject to the same myths about domestic violence as the general public and may not know about or understand the legal remedies available in these cases."<sup>132</sup>

Whatever the reason, the misapplication of the "credible threat" requirement by the district courts in New Mexico could result in or contribute to the death of petitioners for orders of protection (and likely has). Laws restricting access to firearms by individuals subject to orders of protection are an effective way to reduce intimate partner homicide rates, especially where purchase of firearms is explicitly prohibited as well.<sup>133</sup> If courts misapply the "credible threat" requirement and firearms restrictions are denied, it will frustrate the effectiveness of the FVPA's firearms restriction provisions. Further, there is significant risk to the petitioner who is more likely to be a victim of homicide when there is a firearm in the home.<sup>134</sup> In individual cases the misapplication itself can result in the denial of firearms

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126. *Id.*

127. *Id.*

128. *Id.*

129. Gail Goolkasian, *Judging Domestic Violence*, 10 HARV. WOMEN'S L. J. 275, 279 (1987).

130. *Id.* at 277-78.

131. Interview with Hon. Rosemary Cosgrove-Aguilar, Bernalillo Metropolitan Court Judge, N.M. (Oct. 26, 2023).

132. Goolkasian, *supra* note 129, at 279.

133. Vigdor & Mercy, *supra* note 13, at 337.

134. Goodyear et al., *supra* note 68, at 186.

restrictions, which has dire implications in terms of intimate partner homicide risk. Finally, misapplication will also contribute to the confusion of pro se petitioners contending with a complex legal system.

### C. Failed amendments expanding the FVPA and clarifying “credible threats”

In January of the 2023 Regular Session, New Mexico Senator Antoinette Sedillo Lopez and Representative Pamela Herndon introduced and sponsored Senate Bill 18 which proposed amendments to the FVPA.<sup>135</sup> The proposed amendments would add a second avenue to Section 40-13-5(A) for securing an order of protection upon finding “that there is immediate danger of abuse.”<sup>136</sup> This would further expand access to orders of protection.

Additionally, among the amendments was the insertion of a definition of “credible threat.”<sup>137</sup> The proposed definition would have clarified that a “credible threat” includes:

a statement, act, or course of conduct that serves no legitimate purpose and is done with the intent and apparent ability to carry out the threat and that would cause a person who is the target of the threat to fear for the person’s safety or life or to fear bodily injury.<sup>138</sup>

The proposed amendment would mean that credible threats do not require the use (or threatened use of a firearm) and could arise from the totality of the conduct, in addition to direct expression. Senate Bill 18 did not recommend the removal of the “physical safety” language required by Section 40-13-5(A)(2).<sup>139</sup> However, the proposed definition of credible threat does not limit the petitioner to showing only physical violence but also allows statements or a course of conduct to demonstrate a “credible threat to the physical safety” as required by Section 40-13-5(A)(2).<sup>140</sup> In spite of providing much needed clarification, the bill was indefinitely postponed after February 2, 2023.<sup>141</sup>

*Nguyen* and *Karla J.C.* were decided in July 2023 and August 2023, respectively.<sup>142</sup> The legislature should look to *Nguyen* and *Karla J.C.* as much needed clarification of the existing “showing of abuse” requirement. But lawmakers should also consider *Nguyen* and *Karla J.C.* a first step and a signal that further clarification and review of the FVPA is urgently needed.

135. S.B. 18, 56<sup>th</sup> Leg., 1<sup>st</sup> Sess. (N.M. 2023).

136. *Id.* § 7.

137. *Id.* § 2.

138. *Id.*

139. *Id.* § 7.

140. N.M. STAT. ANN. § 40-13-5(A)(2) (2019).

141. NEW MEXICO LEGISLATURE, *Bill Finder*, (Nov. 1, 2023, 1:00 PM), <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=18&year=23> [<https://perma.cc/B3GE-WZH4>].

142. *See Nguyen v. Bui*, 2023-NMSC-020, 536 P.3d 482; *Karla J.C. v. Montañó*, A-1-CA-40544, 2023 WL 5624546 (N.M. Ct. App. Aug. 31, 2023).



### III. “CREDIBLE THREATS” AND THE BALANCE OF RIGHTS

It may seem that the simplest solution to the likely misapplication of the “credible threat” requirement by the courts and the subsequent confusion by pro se petitioners would be to require only the “showing of abuse” requirement. However, requiring only a “showing of abuse” would create an imbalance between the rights of the parties and due process concerns regarding respondents’ right to bear arms. Access to firearms is a fundamental right in the United States—a tradition of such importance that it was included in the Bill of Rights.<sup>143</sup> The right to bear arms has been expanded by the United States Supreme Court in recent years.<sup>144</sup> The Court’s continued willingness to grant certiorari to Second Amendment related cases signals the importance of the right to bear arms.<sup>145</sup>

The two-step approach where (1) orders of protection are required to be issued upon a finding of prior abuse and (2) firearms restrictions can only be accessed by a secondary finding that the respondent is a credible threat and has been provided with proper notice reflects the balance of rights New Mexico’s legislature has struck. Given the jurisprudence concerning the right to bear arms, utilizing only the “showing of abuse” requirement would not be sufficient to overcome the due process concerns about respondents’ ability to access firearms. To ensure respondents’ constitutional rights to access firearms are not arbitrarily or needlessly infringed upon, the two requirements could only be consolidated if the “showing of abuse” requirement was eliminated and the “credible threat” requirement served as the threshold for both the order of protection itself and the firearms restrictions.

If that were the case, the greater access to orders of protection resulting from *Nguyen* and *Karla J.C.* would be extinguished. In the interest of providing access to some protection from domestic violence, New Mexico should not seek to make it more difficult for a petitioner to secure an order of protection. So, the “showing of abuse” requirement and “credible threat” requirement must differ, with the latter being a secondary finding predicated on more a more substantial evidentiary showing. This means that to facilitate access to orders of protection by petitioners and to protect the rights of respondents, New Mexico must pursue other avenues to ensure the “credible threat” requirement is applied fairly and understood by the pro se petitioners and respondents alike.

#### A. *United States v. Rahimi* and the constitutionality of restricting access to firearms for respondents of orders of protection

In addition to all the recent Second Amendment decisions, the individual right to possess firearms is again the subject of ongoing litigation before the United States Supreme Court. *United States v. Rahimi* will examine the constitutionality of 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by those subject to

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143. U.S. CONST. amend. II.

144. See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, III., 561 U.S. 742 (2010); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022).

145. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, III., 561 U.S. 742 (2010); and *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022).

domestic violence restraining orders.<sup>146</sup> The parties will have to address the constitutionality of § 922(g)(8) under the historical analogue standard articulated in *Bruen*. The Petition for Writ of Certiorari comes after a Fifth Circuit decision which found § 922(g)(8) to be unconstitutional using the *Bruen* test stating, “our ancestors would never have accepted [§ 922(g)(8)].”<sup>147</sup>

The Supreme Court heard Arguments on November 7, 2023.<sup>148</sup> On behalf of the United States government, Solicitor General Elizabeth Preloger argued the Fifth Circuit profoundly erred by interpreting *Bruen* as a prohibition of widespread common-sense firearm regulations, like those found in § 922(g)(8).<sup>149</sup> She went on to argue that *Bruen* recognized the ability of Congress to disarm individuals who are not law-abiding, responsible citizens.<sup>150</sup> General Preloger argued that those who pose a danger through their access to guns are not responsible citizens and that the United States has a historical tradition of disarming dangerous people.<sup>151</sup> The government’s argument seemingly satisfies the historical tradition component of *Bruen*, as General Preloger was able to draw on many historical analogues regarding the disarming of non-responsible or dangerous people.

However, the respondent’s counsel, J. Matthew Wright, argued that § 922(g)(8) was enacted “without the benefit of *Heller*, *McDonald*, and *Bruen*” and as a result created an unconstitutional proceeding in which an individual’s fundamental right could be denied.<sup>152</sup> Mr. Wright argued that “there’s no history of bans for people who were [citizens]” but conceded that courts have “always had a broad power against the people brought before them” and that Mr. Rahimi is a “dangerous person.”<sup>153</sup>

During oral argument, some of the conservative justices seemed open to accepting judicial findings of dangerousness in the context of orders of protection as a sufficient support for the law, despite no legal twin from the founding era.<sup>154</sup> Such reasoning could signal that analysis under the *Bruen* standard requires “enduring principles at a high level of generality and not [fixation] on minute differences.”<sup>155</sup> Ultimately, if the Supreme Court finds that § 922(g)(8) is constitutional, the practice

146. Question Presented, *United States v. Rahimi* (2023) (No. 22-915); it is worth noting that the Question Presented is an overt simplification of 18 U.S.C. 922(g)(8) which in its entirety requires the restrained party be subject to a court order that includes “a finding that such a person represents a credible threat to the physical safety of [the petitioner]; or . . . by its terms explicitly prohibits the use, attempted use, or threatened use or physical force against [the petitioner] that would reasonably be expected to cause bodily injury.”

147. *United States v. Rahimi*, 61 F.4th 443, 2023 WL 2317796 (5th Cir. 2023).

148. SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-915.html> [<https://perma.cc/E7MJ-3RCR>].

149. Transcript of Oral Argument at 4, *United States v. Rahimi* (2023) (No. 22-915).

150. *Id.* at 4.

151. *Id.* at 5–7, 10.

152. *Id.* at 59.

153. *Id.* at 473, 477, 479.

154. Adam Liptak, *Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/us/politics/supreme-court-gun-rights-domestic-violence.html?searchResultPosition=5> [<https://perma.cc/MBQ5-KBHN>].

155. This was a substantial portion of the argument offered by the State at oral argument. *See id.*

of restricting a respondent's access to firearms through orders of protection would be unchanged. Still, states should verify that the language in their state statutes mirrors the language in § 922(g)(8). Beyond that, states should examine their specific laws to ensure the requirements and standards expressed are clear and accessible to petitioners.

Alternatively, if the U.S. Supreme Court finds that § 922(g)(8) is unconstitutional, Section 40-13-5(A)(2) and Section 30-7-16 would not survive. The impact such a ruling would have on petitioners for orders of protection would be dire at the state level and nationally. There would undoubtedly be an increase in intimate partner homicides in New Mexico absent the relinquishments and possession protections.

### **B. The constitutional need for the “credible threat” requirement for firearms restrictions and New Mexico’s balance of rights**

As it stands, New Mexico has seemingly struck a balance of petitioner and respondents' rights through the additional “credible threat” requirement, which is nearly identical to the standard contested in *Rahimi*. Both Section 40-13-5(A)(2) and Section 922(g)(8) require notice and a finding that the restrained party is a “credible threat to the physical safety.”<sup>156</sup> However, the definitions of underlying abuse differ slightly with § 922(g)(8) requiring an order that restrains the respondent from “harassing, stalking, or threatening . . . or [from] engaging in other conduct” placing reasonable fear of bodily injury to an intimate partner or child<sup>157</sup> while New Mexico's restrictions require only an order of protection based on a finding of past domestic abuse.<sup>158</sup>

New Mexico's “credible threat” requirement must seek to balance the unenumerated right of survivors to be free from violence with the clearly enumerated rights of respondents. It has frequently been said that there is a “basic human right to be free from violence and abuse.”<sup>159</sup> This sentiment has been proclaimed at various times by the federal government and demonstrated through legislation aimed at addressing the rights of survivors of domestic violence.<sup>160</sup> Still, it is difficult to identify a source of such rights (no such right is enumerated in the U.S. Constitution or the New Mexico Constitution).<sup>161</sup> Nevertheless, the idea of a right to be free from violence permeates the domestic violence discussion.<sup>162</sup>

New Mexico has historically been reluctant to use orders of protection to restrict a respondent's enumerated rights beyond what is absolutely necessary to shield the petitioner. For example, in one of the few cases dealing with orders of

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156. N.M. STAT. ANN. § 40-13-5(A)(2) (2019); 18 U.S.C. 922(g)(8)(A), (C)(i) (2022).

157. *Id.* § 922(g)(8).

158. N.M. STAT. ANN. § 40-13-5(A)(2) (2019); *see id.* § 40-13-2(D) for the statutory definition of domestic abuse.

159. Presidential Proclamation 9181—National Domestic Violence Awareness Month, 2014 (September 30, 2014).

160. *See, e.g.*, Violence Against Women Act, 34 U.S.C. 12291 (2022).

161. *See* U.S. CONST.; N.M. CONST.

162. Perhaps, such a right could be inferred from the New Mexico Constitution's Article II, Section 4 which recognizes inherent rights including the rights of “enjoying and defending life and liberty” and of “seeking and obtaining safety and happiness.” *See* N.M. CONST. art. II, § 4.

protection to reach the New Mexico Court of Appeals,<sup>163</sup> *Marino v. Best*, the Court of Appeals overturned a district court order that imposed a restriction of the respondent's ability to access the internet. In that case, the respondent was found to be stalking the petitioner, meeting the requisite "showing of abuse" threshold to secure an order of protection.<sup>164</sup> Two years later, the district court addressed an alleged violation and in a hearing found the respondent had violated the order of protection and further ordered that respondent "not use the internet or any social media for any purpose other than contacting her attorney or accountant."<sup>165</sup> The Court of Appeals found the restriction of internet access to be "unconstitutionally overbroad" and a "clear prior restraint on her First Amendment right to speech" despite the respondent's use of social media for stalking purposes and the resulting continued emotional distress of the petitioner.<sup>166</sup>

In terms of firearms related restrictions, at times New Mexico has been reluctant to legislate and/or enforce restricted access to firearms through civil orders. For example, New Mexico's Red Flag law, allowing for "extreme risk firearm protection order[s]" in certain circumstances through the civil judicial system,<sup>167</sup> took effect in 2020.<sup>168</sup> If granted, the temporary order restricts the respondent's access to firearms.<sup>169</sup> At the time of the legislation, some district courts refused to pursue firearms restrictions through the law, some New Mexico counties responded with "Second Amendment Sanctuary Resolutions," and 29 of the 33 sheriffs signed a declaration against the legislation.<sup>170</sup> All of this adds to the confusion surrounding the appropriate balance of rights and how that balance should be achieved and enforced.

#### IV. RECOMMENDATIONS FOR THE STATE OF NEW MEXICO

To ensure petitioners for domestic violence are able to effectively and meaningfully seek the full force of protections given by Section 40-13-5, (1) the legislature should clarify the "credible threat" requirement to correct misapplication by the courts, (2) the Supreme Court should amend Form 4-961 NMRA to clarify what petitioners are expected to demonstrate, and (3) hearing officers, special commissioners, and judges involved with orders of protection should be required to receive training.

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163. The New Mexico Supreme Court denied cert. *See Best v. Marino*, 2017 WL 11595782, at \* 1 (N.M. Aug. 31, 2017).

164. *Best v. Marino*, 2017-NMCA-073, ¶ 8, 404 P.3d 450, 455 (2017).

165. *Id.* at ¶ 13, 404 P.3d at 456.

166. *Id.* at ¶ 55, 58, 404 P.3d at 462-63.

167. N.M. STAT. ANN. § 40-17-3 (2020).

168. *See id.* §§ 40-17-1 to -13.

169. *See id.* § 40-17-6; *id.* § 40-17-8.

170. Rob Kuznia, et al., *Nobody told her about this gun-safety measure in her state. Now she wonders if it could have saved her daughter's life*, CNN (July 10, 2023), [https://www.cnn.com/2023/07/10/us/gun-safety-red-flag-new-mexico-invs/index.html#:~:text=The%20fiercest%20resistance%20in%20New,but%20the%20civil%20judicial%20system.\[https://perma.cc/TB2X-3TXX\]](https://www.cnn.com/2023/07/10/us/gun-safety-red-flag-new-mexico-invs/index.html#:~:text=The%20fiercest%20resistance%20in%20New,but%20the%20civil%20judicial%20system.[https://perma.cc/TB2X-3TXX]).

### A. Necessary amendments to the Family Violence Protection Act

The legislature should examine the proposed amendments from Senate Bill 18 again in their entirety. But there are two particular amendments that could hugely impact the ability of petitioners to access meaningful firearms restrictions. First, the New Mexico legislature should amend the FVPA to include a “credible threat” definition. As illustrated above, the lack of a definition causes numerous problems for the application of the FVPA. Primarily, a credible threat definition would provide much needed clarity for pro se petitioners so that they are aware of what they need to show to secure the firearms related restrictions. Secondly, a credible threat definition would also create uniformity amongst the district courts in the issuance of firearms restrictions.

While any credible threat definition would be beneficial to petitioners seeking firearms restrictions through the FVPA, the definition proposed in Senate Bill 18 is ideal.<sup>171</sup> The “credible threat” definition in Senate Bill 18 creates four main elements for a credible threat. First it requires statement(s), act(s), or a general course of conduct as the vehicle for a threat.<sup>172</sup> Second, it defines a threat as “credible” by requiring the threat itself to serve “no legitimate purpose.”<sup>173</sup> Third, the threat must be issued “with the intent and apparent ability to carry out the threat.”<sup>174</sup> Finally, the threat must cause “a person who is the target of the threat to fear for [their] safety or life or to fear bodily injury.”<sup>175</sup> In addition to the definition put forth by Senate Bill 18, the legislature may also consider requiring credible threats be shown by clear and convincing evidence. The four Senate Bill 18 elements, coupled with the clear and convincing evidentiary standard, will ensure that the credible threat definition is robust enough to protect the respondent’s right to bear arms by only deeming subjective concerns that are objectively supported to be “credible threats.”

Additionally, the definition in Senate Bill 18 also clarifies that the threat may be indirect in some circumstances and that use or threatened use of a firearm is not a requirement for a credible threat.<sup>176</sup> Both of these provisions make it clear that petitioners may rely on a variety of statements, acts, or a course of conduct, the totality of which creates an indirect threat and are not required to show use or threatened use of a firearm. These provisions will ease the burden on petitioners by clarifying what they are required to show and by improving uniformity in the application by the district courts.

Second, the legislature should consider the value of amending the FVPA to require courts to provide notice of Section 30-7-16, which prohibits possession of firearms by certain persons at the state level, whenever an order of protection is issued. Currently, Section 40-13-5(C) only requires an order of protection to “contain notice . . . that federal law . . . prohibits possession of firearms by certain persons.”<sup>177</sup>

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171. See S.B. 18, 56th Leg., 1st Sess. (N.M. 2023); N.M. STAT. ANN. §§ 40-13-1 to -13 (amended through 2019).

172. S.B. 18, 56th Leg., 1st Sess. (N.M. 2023).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. N.M. STAT. ANN. § 40-13-5(C) (2019).

The legislature should amend Section 40-13-5(C) to explicitly require the court order to contain notice that, in addition to federal law, state law prohibits possession of firearms by those subject to an order of protection and that possession is a punishable misdemeanor offense.

Although Section 30-7-16 does not require the relinquishment of firearms to law enforcement, it does offer survivors some protection by making it a misdemeanor for the respondent of an order of protection to be in possession of a firearm, similarly to 18 U.S.C. 922. It is unlikely that either pro se petitioners or pro se respondents would be aware of the unlawful possession state law unless they were informed on the record or via the order. While the relinquishment facilitated by Section 40-13-5 is likely more effective due to the affirmative requirement to relinquish firearms, Section 30-7-16 could also offer substantial protection to survivors through deterrence.

## **B. Amending the petition for an order of protection (Form 4-961 NMRA)**

In addition to the legislature considering amendments to the FVPA, New Mexico's Supreme Court should consider amendments to Form 4-961 NMRA. Form 4-961 is the Supreme Court approved "Petitioner for Order of Protection from Domestic Abuse."<sup>178</sup> The petition prompts the petitioner to include "all information known by the petitioner" and serves as the impetus for (most) proceedings brought under the FVPA, including those brought under Section 40-13-5.<sup>179</sup>

In its current state, the portions of Form 4-961 related to credible threats and firearms are dispersed throughout the petition.<sup>180</sup> The "credible threat" description is located within the "Domestic Abuse" section of the petition (Section (5)(B)).<sup>181</sup> The organization of the Form makes it unclear that a "credible threat" finding is separate from a finding of domestic abuse and that it relates to the respondent's right to access firearms.

The Form should be amended to create a new section following the "Domestic Abuse" section that is dedicated to "Credible Threats." The section should remove Sections 2(B) (where the petitioner lists all known firearms in the respondent's possession) and 5(B) (where the petitioner explains the respondent is a credible threat) to consolidate them, incorporate a similar instruction to the instruction within the "Domestic Abuse" section, and prompt the petitioner to provide the relevant information for a secondary finding that the respondent is a credible threat (in addition to a finding of past abuse). Such a section could look like this:

### **6. CREDIBLE THREATS<sup>3</sup>**

A. The respondent has made the following statements, committed the following acts, and/or pursued the following course of conduct leading me to believe that respondent is a credible threat to my physical safety:

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178. Form 4-961 NMRA (2019).

179. *Id.*

180. See Form 4-961(2)(B) NMRA dealing with firearms; Form 4-961(5)(B) dealing with credible threats; Form 4-961(6)(J) dealing with both credible threats and firearms.

181. See Form 4-961(5)(B) NMRA (2019).

*(describe in detail the statements, acts, or course of conduct, including when and where.)*

**Statements:** \_\_\_\_\_

**Acts:** \_\_\_\_\_

**Course of conduct:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Place:** \_\_\_\_\_

B. The respondent has the following firearms (make/model):

\_\_\_\_\_

*(use additional pages if needed)*

A new credible threat section of the petition would clearly signal to petitioners that a credible threat is distinct from prior abuse and linked directly to firearms. It would also be particularly helpful to associate a use note with the section that signals the petitioner to skip the new section if they do not intend to request the court make a finding in accordance with Section 6(J) (where the petitioner may request the court to find respondent a credible threat and be required to relinquish any firearms).

Additionally, the Form should be amended so that current Section 6(J) includes the additional statutory language: “and be prohibited from purchasing, receiving, or attempting to purchase additional firearms while this order is in effect.”<sup>182</sup> Petitioners may not be motivated to seek firearms restrictions unless it is clear that respondents will also be prohibited from securing new firearms. Furthermore, the Form (or subsequent order) should be clear that a deprivation of firearms is temporary and only exists while the order is in effect.

Finally, the “Domestic Abuse” section should be amended to include all abuse as defined under the FVPA. Given the Supreme Court’s ruling in *Nguyen* and *Karla J.C.* relying on plain language and the FVPA’s comprehensive definition of domestic abuse, the Form should reflect the other types of domestic abuse. While the Form does currently list a section for “other abuse,” the other types of domestic abuse should be given the same distinction as physical abuse. After all, the Court has held that Section 40-15-5 requires only a “finding that domestic abuse has occurred” and makes no distinction between physical abuse and the other enumerated types of domestic abuse.<sup>183</sup> The section should be revised to include checkboxes to enumerate the various “other abuse” types in addition to the space provided to describe the “other abuse.” This additional information would make it clear to petitioners the types of abuse that support an order of protection under the FVPA and give the “other” forms of domestic abuse the same treatment as physical abuse.

All the proposed amendments would be consistent with the Supreme Court’s recent analysis of the FVPA and provide clarity to pro se petitioners seeking orders of protection and the additional safeguards related to firearms restrictions. Moreover, leaving the Form in its current state would continue to obscure the “credible threat” requirement by lumping it in with the “Domestic Abuse” section

182. See N.M. STAT. ANN. § 40-13-5 (2019).

183. See *id.* § 40-13-5(A).

and rely entirely on the petitioner's unlikely knowledge that a "credible threat" is a secondary finding of the court, separate from prior abuse.

### C. Comprehensive Training for Hearing Officers, Special Commissioners, and Judges Concerning Orders of Protection

Historically, courts have been criticized for the lack of training and understanding regarding domestic violence laws.<sup>184</sup> In New Mexico, the delegation of responsibilities from district court judges to special commissioners and hearing officers has been the subject of scrutiny before. Some have claimed that "the rules and statutes governing the appointment and district court review of judicial officers in . . . domestic violence cases in New Mexico district courts do not consistently meet constitutional requirements."<sup>185</sup> Further, the New Mexico Court of Appeals has previously expressed "grave concerns" about district courts providing the required judicial review for recommendations by hearing officers and special commissioners.<sup>186</sup> *Nguyen* and *Karla J.C.* may support the Court of Appeals' concerns that district courts might "automatically" sign "stick-noted orders" prepared by hearing officers and special commissioners.<sup>187</sup> The misinterpretation of the FVPA by hearing officers in *Nguyen* and *Karla J.C.* had a clear impact on the recommendations.<sup>188</sup> Yet both recommendations were approved by the district courts (the *Nguyen* recommendation was approved over the petitioner's objection).<sup>189</sup> Whether the district courts' approval came through failure to review or similar misinterpretation, specialized training is essential to the successful implementation of the FVPA.

Judicial officers, such as hearing officers and special commissioners, are critical to "the efficient management of New Mexico's judiciary."<sup>190</sup> But all such judicial officers should possess the requisite training to effectively make recommendations to the district courts. Rule 25-103 NMRA requires hearing officers and special commissioners to annually attend judicial education programs.<sup>191</sup> Hearing officers and special commissioners are required to take six credit hours, one of which must be earned in ethics.<sup>192</sup> Ultimately, the judiciary should invest in comprehensive training for hearing officers and special commissioners that is required prior to any recommendations being made and recurring annually thereafter to review and update as the FVPA and Section 30-7-16 are amended. Additionally, judges, hearing officers, and special commissioners should be educated on domestic violence, including the cycle of violence and the challenges survivors face in the justice system.

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184. Goolkasian, *supra* note 129.

185. Seth McMillan, *District Court Review of Judicial Officers in New Mexico Domestic Violence and Domestic Relations Cases: Rethinking the Rules*, 36 N.M. L. REV. 487, 515 (2006).

186. *Id.*

187. *Id.*

188. See *Nguyen v. Bui*, 2023-NMSC-020, 536 P.3d 482; *Karla J.C. v. Montaño*, A-1-CA-40544, 2023 WL 5624546 (N.M. Ct. App. Aug. 31, 2023).

189. See *Nguyen v. Bui*, 2023-NMSC-020; *Karla J.C. v. Montaño*, A-1-CA-40544 (2023).

190. McMillan, *supra* note 185, at 515.

191. Rule 25-103 NMRA (1998).

192. New Mexico Training Requirements (Nov. 28, 2023, 10:19 PM) [<https://perma.cc/U6LS-4PZK>].



## V. CONCLUSION

Domestic violence and domestic violence homicide are pervasive problems in New Mexico.<sup>193</sup> States that have used firearms restrictions via order of protection have seen a reduction in domestic violence homicides.<sup>194</sup> The requirements to secure firearms restrictions through protective orders in New Mexico are difficult for survivors to understand and access. Additionally, the ambiguity in the “credible threat” requirement leaves too much room for judicial interpretation which may result in inconsistent application by the courts. New Mexico will not see a meaningful reduction in domestic violence homicides as long as the requirements of the FVPA are unclear.

New Mexico should combat these problems by (1) amending the FVPA to clarify the “credible threat” requirement and provide notice of the related criminal unlawful possession statute, (2) amending Form 4-961 NMRA to clearly signal to petitioners that the firearms restrictions are available and to indicate an additional “credible threat” showing is required to secure them, and (3) by continuing comprehensive training for members of the judiciary who deal with orders of protection.

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193. See Broidy et al., *supra* note 29, at 1114.

194. See, e.g., Vigdor & Mercy, *supra* note 13; Goodyear et al., *supra* note 68, at 193.