No. 22-7757

In the

Supreme Court of the United States

Samuel Lee Morrison,

Petitioner,

v.

United States of America,

Respondent.

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

PETITIONER'S REPLY BRIEF

JESSICA GRAF
**Counsel of Record*
JESSICA GRAF, PLLC
2614 130th Street
Suite 5 PMB 1030
Lubbock, Texas 79423
(806) 370-8006
jessica@jessicagraflaw.com

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REPLY BRIEF

I. If the Court does not grant certiorari now, it should hold Petitioner's case pending *Rahimi*.

Respondent claims that this Court should not hold Petitioner's case pending its decision in *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (No. 22-915), boldly asserting that *Rahimi*—where the Court will decide the constitutionality of 18 U.S.C. § 922(g)(8)—will have nothing to offer on another federal criminal firearm statute. (Opp. at 9). The Fifth Circuit, at least, disagrees. *See United States v. Collette*, No. 22-51062 (5th Cir. Aug. 16, 2023) (holding in abeyance case concerning the constitutionality of 18 U.S.C. § 922(g)(1) pending the outcome in *Rahimi*).

Rahimi is the Court's first foray into the constitutionality of criminal statutes in a post-*Bruen* landscape. While this case and *Rahimi* concern different crimes, the Court will confront arguments applicable to both, including whether the Second Amendment only protects "law-abiding citizens" and, if so, the definition of law-abiding; how courts should analyze whether the Government has met its burden to establish a historical analogue; and what evidence amounts to a "tradition" of firearms regulation. *See* Brief for the United States at 13–27, 38–41, *United States v. Rahimi* (No. 22-915). Indeed, Respondent relies on some of the same arguments here as it does in *Rahimi*. *See id.* at 24 (discussing surety statutes which required certain individuals who carried firearms to post bonds); Opp. at 5–6 (same). *Rahimi* is certain to provide relevant guidance for Petitioner's case.

That this case is on plain error review is not dispositive. *See* (Opp. at 9–10). An error is "plain" so long as it is plain at the time of appellate review. *Henderson v.*

United States, 568 U.S. 266, 277 (2013). Petitioner's appeal is not yet final. And the Fifth Circuit is currently considering whether § 922(n) is unconstitutional on plenary review, a decision that *Rahimi* will almost certainly influence. *See United States v. Quiroz*, No. 22-50834 (5th Cir.). This Court will remand plain error cases for further consideration in light of its decisions. *E.g. United States v. Johnson,* 979 F.3d 632, 635 (9th Cir. 2020) (on remand for further consideration in light of *Rehaif v. United States*, 588 U.S. __, 139 S. Ct. 2191 (2019)); *United States v. Cruz*, 418 F.3d 481, 483 (5th Cir. 2005) (on remand for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Smith*, 264 F.3d 518, 519 (5th Cir. 2001) (on remand for further consideration in light of *Apprendi v. New Jersey,* 530 U.S. 466 (2000)).

A law that violates the Second Amendment "is no law at all." *See United States v. Davis*, 588 U.S. __, 139 S. Ct. 2319 (2019). If § 922(n) is unconstitutional, Petitioner can establish entitlement to relief. As *Rahimi* is critical to this case's outcome, the Court should, at least, hold it pending *Rahimi*.

II. Respondent cannot establish that Section 922(n) comports with this Nation's historical tradition of firearms restriction.

Under *Bruen*, Respondent must point to "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131–32 (2022). The historical evidence should show a "governmental practice" that has been "open, widespread, and unchallenged since the early days of the Republic," with greatest weight given to founding-era laws. *Id.* at 2136–37. Respondent failed to meet

its burden of showing that § 922(n) is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

A. There is no evidence that criminal defendants were historically disarmed while on pretrial release.

First, there is no specific historical tradition of restricting firearm receipt or possession by criminal defendants who have been released pretrial. The lack of historical firearm restrictions on indictees is not surprising. At the founding, the *right* to bear arms was also deeply connected to the historical *duty* to bear arms. *See* Joyce Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 1–10, 138–40 (1994); Nicholas J. Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 219–22 (3d ed. 2022) [Johnson]. Indeed, the Second Amendment codified an individual right, but the prefatory clause clarifies that the purpose of that right was to "prevent elimination of the militia." *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). This duty to bear arms was reflected in federal and state laws *requiring* most citizens to keep firearms, as part of militia service. *See, e.g.*, Second Militia Act, § 1, 1 Stat. 271 (May 8, 1792). These laws "exempted" certain classes of people, but not indictees. *Id.* § 2, 1 Stat. 272; *cf.* Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 Tex. Rev. L. & Pol. 245, 278 (2021) (finding no evidence that those with criminal convictions were excluded from militia duties of firearm ownership). The colonies generally required even indentured servants—often convicted criminals—to be armed for militia service. *See* Johnson 185, 191–92. It follows that, while "the Second Amendment is not limited to only those in the militia,

it must protect at least the pool of individuals from whom the militia would be drawn." *Firearms Pol'y Coal., Inc. v. McCraw*, __F. Supp. 3d __, No. 4:21-cv-1245-MTP, 2022 WL 3656996, at *5 (N.D. Tex. Aug. 25, 2022). Disarming indictees would have made little sense to the founders because it would have effectively relieved them of a civic duty.

Respondent offers three categories of historical practices as possible analogues for § 922(n): (1) pretrial detention for capital crimes, (2) pretrial release sureties, and (3) firearm seizure incident to arrest. Each argument fails to satisfy the *Bruen* standard.

B. None of Respondent's cited historical practices are relevantly similar analogues for § 922(n).

1. Pretrial detention is not a historical analogue for § 922(n).

Respondent misplaces reliance on pretrial detention as an analogue for § 922(n). (Opp. at 5). Pretrial detention is not a historical *firearm* regulation, so it is not even relevant to the *Bruen* analysis. In any event, Respondent's argument is based on the flawed premises that most crimes were capital offenses at the founding and that criminal defendants were rarely released. Both are incorrect.

a. Most crimes were not capital offenses at the founding.

Respondent's position that most indictees were detained at the founding rests entirely on its significant overstatement of the availability of capital punishment and, consequently, the prevalence of detention without bail at the time. The First Congress, for example, only recognized a select few felonies as capital. *See* Crimes Act, 1 Cong. Ch. 9, 1 Stat. 112 (1790). These were limited to treason, murder, certain

piracy and felony on the high seas offenses, prison break for capital offenders, and counterfeiting. *Id*. Conversely, the Crimes Act enumerated far more crimes that were not capital, including: manslaughter, misprision of treason, accessory, interference with diplomatic immunity, passport obstruction, mayhem, perjury, obstruction, judicial bribery, and property crimes such as larceny. *Id*. Virtually all these crimes were, like those subject to § 922(n), punishable by more than a year in prison, illustrating that they were considered "serious" but were still not capital. *Id*.

Respondent's theory is more consistent with pre-colonial English law, but "during the period leading up to the founding, the connection between felonies and capital punishment started to fray." *Kanter v. Barr*, 919 F.3d 437, 459 (7th Cir. 2019) (Barrett, J., dissenting). "Capital punishment was not as common a penalty in the American colonies" as in England, and the colonies recognized "far fewer" capital crimes. *See Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring). The death penalty was used sparingly in the colonies and, by the time the Constitution was ratified, the term felony was no longer "strongly connected with capital punishment[.]" *Kanter*, 919 F.3d at 459 (Barrett, J., dissenting) (citing Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42 (1993); John D. Bessler, CRUEL & UNUSUAL 52–53 (2012)). Respondent is simply wrong that the body of capital offenses from the founding serve as a comparable proxy for all felonies today.

b. Criminal defendants were often released pretrial at the founding.

Because Respondent misunderstands the prevalence of capital punishment at the founding, it misconstrues how often criminal defendants were detained without bail. Federal offenses that were not capital required bail. *See, e.g.*, Judiciary Act, 1 Stat. 73, Sec. 33 (1789). Indeed, bail was available to those accused of felonies and almost every state entering the union adopted an explicit right to bail, a right that would be unnecessary if, as Respondent suggests, virtually every offense was capital and every offender detained. *See* (Opp. at 5).

Many of those indicted for felonies today, and thus subject to § 922(n), would not have been detained without bail at the founding. Individuals charged with felonies in the 18th century were routinely released from custody pending trial. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 78–86 (1977); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 925–30 (2013) [Hegreness].

Respondent asserts, however, that, once *indicted*, capital defendants were generally unbailable. *See* (Opp. at 5). Though evidence suggests this was a common practice, it was not uniform. *See* Thomas F. Davidson, *The Power of Courts to Let to Bail*, 24 Am. L. Reg. 1, 3 (1876) (noting many courts followed this English practice but describing practice to hold a bail hearing after indictment in the 19th century in states like Indiana, Mississippi, and Ohio). Moreover, founding-era indictments generally required far more proof and certainty of guilt than modern indictments. *See* Dr. Robert Schehr, *Standard of Proof, Presumption of Innocence, and Plea*

Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-Trial Criminal Procedure, 54 Cal. W. L. Rev. 51, 72–75 (2017) (noting American grand juries at the founding and up to the early 20th century generally applied a stricter historical standard of proof closer to the trial burden, rather than the modern probable cause standard). Regardless of whether an indictment for a capital offense generally foreclosed pretrial release, such indictments are not meaningful proxies for modern indictments and most modern crimes were not capital at the founding.

c. Historical pretrial detention practices are not relevantly similar to § 922(n).

Respondent's pretrial detention argument is not only ahistorical, but it also fails to satisfy *Bruen*'s "relevantly similar" standard. Respondent ignores *Bruen*'s directive to compare challenged statutes to the historical tradition of *firearm* regulation. *Id*. at 2130. *Bruen* considered only firearms restrictions in its historical analysis, *id*. at 2138–53, and none of the proposed historical analogues were as tenuously related to the challenged statute as those offered here by Respondent. Pretrial detention and § 922(n) do not comparably burden the right of armed self-defense. *See id*. at 2133. Section 922(n) affects those who have been *released*, not those who have been detained pretrial. The need for armed self-defense is not the same while in custody, where the State bears a duty to protect detainees. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). And, historically, only the narrow category of capital offenders was likely to be detained, while indictees for any state or federal felony, specifically those adjudicated not to pose a flight risk or danger, are subject to § 922(n).

2. Pretrial surety practices are not historical analogues for § 922(n).

Respondent next argues that historical practices of pretrial release, by bail or surety, provide support for § 922(n). (Opp. at 5–6). Those practices did not restrict the possession or receipt of firearms. They are not firearm regulations, and they differ in purpose from § 922(n), focusing primarily on the appearance of the defendant rather than any potential danger to the community. The mere use of bail or surety as part of pretrial release is in no way "relevantly similar" to § 922(n) under *Bruen*.

Those accused of a crime could historically be released pretrial upon payment of bail or securing a surety. *See* John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. Chi. L. Rev. 1285, 1299–1303 (2021). In the 17th and 18th centuries, the American colonies favored sureties, with payment only upon default, rather than prepayment of bail. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. Crim. L. & Criminology 701, 713–714 (2018). Respondent never identifies *any* purported restriction, much less a *firearm restriction*, as part of a surety. The surety role was analogous to that of a bail bondsman, not a modern pretrial officer or court. *Cf.* Hegreness at 939; Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 Wash. & Lee L. Rev. 1297, 1329 (2012) ("the personal surety system eventually morphed into the commercial bondsman system").

3. The practice of disarming a person while under arrest is not a historical analogue for § 922(n).

Respondent next argues that the common law of arrest is a historical precursor to Section 922(n). Opp. at 6–7. But the practice of temporarily disarming individuals who are actively under arrest is not "relevantly similar" to § 922(n).

The Fourth Amendment cases cited by Respondent rest on an obvious premise: when a person is arrested and has a firearm on him or her, police do not permit that person to keep that firearm while in custody, processing, and jail. *See Agnello v. United States*, 269 U.S. 20, 30 (1925); *Chimel v. California*, 395 U.S. 752, 762–63 (1969). The cases clarify that searching for weapons incident to arrest prevents the use of the weapon to resist arrest or escape from custody. *See Chimel*, 395 U.S. at 762–63. The cases do not address the Second Amendment. Nor are they the type of specific historical evidence required by *Bruen*. None of the cases suggest that arrestees have historically been more broadly deprived of firearms in their homes, that their disarmament historically persisted past their release from custody, or that they were not permitted to obtain additional firearms once released. *Cf. id.* at 763–64 (limiting the search-incident-to-arrest principle to the immediate vicinity of the arrestee at the time of the arrest).

Respondent cites one Second Amendment case, an Arkansas plurality opinion upholding a concealed weapons prohibition. *See State v. Buzzard*, 4 Ark. 18 (1842). The opinion notes in dicta that Second Amendment rights are not limitless and that arrestees have historically been divested of their arms. *Id.* at 21. It does not provide

further historical evidence for the practice and, likewise, does not assert that such disarmament extended beyond the period the person was in police custody.

The arrest practice is not "relevantly similar" to § 922(n). It does not pose a comparable burden on the Second Amendment right. *See Bruen*, 142 S. Ct. at 2133. Section 922(n) imposes criminal sanctions for a person receiving a firearm while under indictment for any state or federal felony. A person can be subject to the restriction for years. An arrestee, on the other hand, is simply not permitted to carry a firearm on his or her person during the time they are under arrest, a period which would typically last hours or days unless they are ordered detained further. *See, e.g.*, Fed. R. Crim. P. 5(a)(1)(A) (requiring an arrestee appear before a judge "without unnecessary delay").

Nor is § 922(n) comparably justified to the practice of disarming those under arrest. *See Bruen*, 142 S. Ct. at 2133. A person in police custody, like any person on more prolonged pretrial detention, has a reduced need for self-defense. And the prospect of arrestees or detainees carrying firearms while in a jail or in the back of a police car presents unique dangers and safety concerns, entirely dissimilar to a person obtaining a firearm while released to the general public.

C. Restrictions on other constitutional rights are not properly considered under *Bruen* and are not historical analogues for § 922(n).

Respondent lastly reasons that indictees can be subjected to limitations including on speech and travel, so they can necessarily be disarmed. (Opp. at 8). This argument is inconsistent with *Bruen*. *Bruen* does not permit analogy to other constitutional deprivations to satisfy Respondent's historical burden.

Bruen found support for its underlying textual and historical framework in the jurisprudence for other constitutional rights, like the First Amendment. *See Bruen*, 142 S. Ct. at 2130, 2132, 2156. But there is no reference to restrictions on other constitutional rights anywhere in the *Bruen* historical analysis itself. *See id.* at 2138–56. When applying the *Bruen* framework to a Second Amendment challenge, a court must analyze the "Nation's historical tradition of *firearm regulation*," not historical laws implicating other constitutional rights. *Id.* at. 2130 (emphasis added).

Under *Bruen*, the Court cannot assess § 922(n)'s constitutionality under the Second Amendment by simply extending caselaw addressing other rights, particularly those that applied means-end scrutiny. Rather, Respondent must show § 922(n) is consistent with the Nation's historical tradition of firearm regulation. *See Bruen*, 142 S. Ct. at 2130. It has failed to do so.

CONCLUSION

Petitioner asks this Court to grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the alternative, he asks that the Court hold the case pending *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (No. 22-915).

Respectfully submitted,

/s/ Jessica Graf
Jessica Graf, PLLC
2614 130th Street
Suite 5 PMB 1030
Lubbock, Texas 79423
Telephone: (806) 370-8006
E-mail: jessica@jessicagraflaw.com

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