No. 22-915

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

ZACKEY RAHIMI,

*Respondent.*

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

# BRIEF OF GLOBAL ACTION ON GUN VIOLENCE, PROFESSORS LEILA SADAT, CARL T. BOGUS, AND DRURY D. STEVENSON, AS *AMICI CURIAE* SUPPORTING PETITIONER


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## Interests of *Amicus Curiae*[*]

*Amicus curiae* Global Action on Gun Violence (GAGV) is a non-profit organization dedicated to reducing gun violence throughout the world using litigation, human-rights advocacy, and messaging, with a focus on stopping cross-border gun trafficking. GAGV has presented reports and testimony at the Organization of American States, the Inter-American Commission for Human Rights, United Nations bodies, and numerous international conferences.

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[*] No counsel for any party authored this brief in whole or in part. No person or entity—other than *amici*, their members, or their counsel—made a monetary contribution specifically for the preparation or submission of this brief.

*Arms*. He has written many articles about the Second Amendment and gun regulation.

*Amicus curiae* Drury D. Stevenson is the Wayne Fischer Research Professor and Professor of Law at South Texas College of Law Houston. His research and writing focus on firearm regulation, gun violence prevention, and the Second Amendment, and he has published fifteen law review articles on these subjects, which have been cited by multiple courts.

## Introduction and Statement

The Second Amendment was only intended to protect a "right to keep and bear arms" in "a well-regulated militia" that was deemed "necessary to the security of a free State."[1] Private gun rights and self-defense were far from the Framers' minds. This is consistent with the founding principles of a civil society in which the government's central role is to protect the rights to "life, liberty and the pursuit of happiness." *Dist. of Columbia v. Heller*[2] and *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*[3] run afoul of these core principles and wildly misread the Second Amendment's text and history. They should be overruled.

For 220 years, the Second Amendment was understood to concern only its militia purpose. The Second Amendment did not—and properly understood, *does not*—restrict governmental police-power authority to

[1] U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.")

[2] 554 U.S. 570 (2008).

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

protect public safety. Throughout American history, federal and state governments have exercised broad authority to regulate guns to protect public safety. The Court has consistently respected this core governmental function by cabining the exercise of all constitutional rights if they place public safety at risk. That tradition is in keeping with international human rights law that the United States is obligated to follow. Now, with gun violence at epidemic levels,[4] there is a critical need for recognition of the government's authority to protect the right the Founders recognized first—the right to live.

The Court's erroneous rulings in *Heller* and *Bruen* have hamstrung the government in carrying out its core public safety function. *Heller* effectively deleted the text that guided Second Amendment jurisprudence for two centuries ("A well regulated militia, being necessary to the security of a free State"), ignored the Framers' militia focus, and established a private right to use handguns in self-defense that the Framers never mentioned or contemplated.[5] *Bruen* wrongly expanded the newly declared right to public

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[4] *See* Ari Davis et al., *A Year in Review: 2021 Gun Deaths in the U.S.* JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (June 2023), https://publichealth.jhu.edu/sites/default/files/2023-06/2023-june-cgvs-u-s-gun-violence-in-2021.pdf.

[5] Although the common law recognized a right to self-defense, the Second Amendment did not include such a right, nor did it necessarily encompass the use of guns. *See* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63, 68 (2020) ("The law of self-defense functions to shepherd conflicts away from lethal violence, and thus away from handgun violence, absent rare circumstances.").

spaces, and then—after disregarding the Amendment's history in *Heller*—purported to make history dispositive by requiring analogous laws from past centuries to justify modern regulation. By barring consideration of compelling present-day interests and government's longstanding authority to protect public safety, *Heller*'s potentially deadly right to private arms has become a "super right" that trumps all others. *Bruen* then proved the unworkability of its test by disregarding the overwhelming historical record that supported the challenged law there.

This case demonstrates how far *Heller* and *Bruen* strayed from the Framers' intent of protecting a "well-regulated militia." The United States Court of Appeals for the Fifth Circuit found that a man who beat his girlfriend, shot at drivers, into a home, and near children, and was subject to a domestic violence restraining order, has a constitutional right to possess guns.[6] *Bruen* commanded courts across the country not to consider present-day public safety needs (that would be forbidden "interest balancing"), and directed them to look to a past era—in this case, one in which women were considered less than full citizens and domestic violence was often accepted as a husband's marital right. Yet, nothing in the Second Amendment suggests that the Framers were concerned with traditional laws that ensured the safety of our country's

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[6] Petition for Writ of Certiorari, *United States v. Rahimi*, at 2-3.

citizens. And originalism, along with its other flaws, is not originalist.[7]

The challenged law should be upheld, even under *Heller* and *Bruen*, but the grounds for upholding it confirm why they should be discarded. Under those cases, the Court must rely on *Bruen*'s vague exception for laws addressing novel problems for which history provides no precedent, or on the historical tradition of preventing dangerous categories of people from possessing arms. The first approach recognizes the unworkability of handcuffing 21st century Americans who are plagued by gun violence to 19th or 18th century America when guns were far less dangerous[8] and gun violence—as well as domestic homicide[9]—less of a problem. The second approach—relying on the historical tradition of preventing dangerous categories of people from possessing arms—(properly) considers history at a higher level of generality than the *Bruen* majority did, revealing that *Bruen* was wrongly decided.

This Court should overrule *Heller* and *Bruen*, and return to the Second Amendment jurisprudence that

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[7] *See, e.g.*, Erwin Chemerinksy, *Even the Founders Didn't Believe in Originalism*, THE ATLANTIC (Sept. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334/ ("Strong evidence supports the conclusion that those who wrote the Constitution preferred that their views *not* be controlling.").

[8] A 1791-era musket could fire a single round and took thirty seconds to reload. Today's rifles can fire thirty rounds in thirty seconds. CARL T. BOGUS, MADISON'S MILITIA: THE HIDDEN HISTORY OF THE SECOND AMENDMENT 110-12 (2023).

[9] RANDOLPH ROTH, AMERICAN HOMICIDE 108 (2009).

was universally accepted for over two centuries. Only that approach is consistent with the Amendment's text, history, the American tradition of broad police-power authority, human rights law, and this Court's longstanding recognition that the exercise of constitutional rights must give way to the fundamental right to live.

## Argument

### I. The Court Should Recognize the Government's Broad Authority to Protect the Public from the Dangers of Firearms.

#### A. The United States Was Founded on Government Protection of Life and Liberty.

Since the founding, one of the United States' core mandates has been to preserve public peace and order. The Lockean notion of self-government was predicated on citizens belonging to "self-regulating communities" whose conception of freedom was tied to "the power and right of members to govern themselves, *that is*, to determine the rules under which the locality as a whole would be organized and regulated."[10] Early colonial governments adopted preservation of the peace and protection of the public order as key tenets

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[10] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 10 (1996); Saul Cornell, *Founding Fantasies vs. Historical Realities in the Second Amendment Debate*, DUKE CENTER FOR FIREARMS LAW (July 27, 2023), https://firearmslaw.duke.edu/2023/07/founding-fantasies-vs-historical-realities-in-the-second-amendment-debate/; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 493 (2004).

of their regulatory mandate.[11] Early American governments adopted the established common law policy of regulating weapons to protect against threats to community members' physical safety and "to preserve public peace and order."[12] *Heller* recognized the authority of the government to regulate weapons, arising from English common law.[13]

The country's founding documents enshrine both the citizenry's right to live and the government's duty to protect that right. The Declaration of Independence defines the core purpose of government—to protect man's unalienable rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men."[14] The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving "any person of life, liberty, or property without due process of law."[15]

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[11] Cornell, *Founding Fantasies, supra* note 10 ("Nothing was more central to [Founding era] legal reasoning than the preservation of 'the peace.'").

[12] Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW U. L. REV. 139, 167 n.139 (2021) (cataloguing colonial-era statutes and their antecedents implementing weapons restrictions to "prevent terror and preserve public order").

[13] *Heller*, 554 U.S. at 626.

[14] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[15] U.S. CONST. amends. V, XIV.

As Jefferson explained: "the care of human life & happiness, & not their destruction is the first and only legitimate object of good government."[16]

### B. The Court Regularly Cabins the Exercise of "First Class" Constitutional Rights When They Threaten Public Safety.

The Court's jurisprudence reflects a tradition of preserving life, constitutional liberty interests, and the government's broad police-power authority to protect safety.[17] The Court has cabined other "first class" constitutional rights by the fundamental interest in public safety. In *Brandenburg v. Ohio*, the Court limited the constitutional guarantees of free speech and free press where "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[18] The Constitution itself qualifies the Assembly right with the word "peaceably," underscoring the centrality of public safety,[19] and the Court proscribes the right to expressive conduct where there is an "intent to intimidate."[20] The Court

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[16] Thomas Jefferson, *To the Republicans of Washington County, Maryland* (March 31, 1809) FOUNDERS ONLINE, NATIONAL ARCHIVES, http://founders.archives.gov/documents/Jefferson/03-01-02-0088 (last visited August 15, 2023).

[17] *See* Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns and the Constellation of Constitutional Liberties*, 14 GEO. J. L. & PUB. POL'Y 187, 198-201 (2016).

[18] 395 U.S. 444, 447 (1969).

[19] U.S. CONST. amend. I; *see also Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (recognizing appropriate limits on right to public assembly).

[20] *Virginia v. Black*, 538 U.S. 343, 362 (2003).

subordinated the Fifth Amendment right against self-incrimination where a gun's presence created "a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[21] The Constitution allows for the suspension of habeas corpus rights "when in cases of Rebellion or Invasion the public safety may require it."[22] At its core, this jurisprudence recognizes the preeminence of the right the Founders declared first—the right to live.

This Court also has limited fundamental rights to serve broader societal purposes of encouraging citizen participation in the democratic process or increasing public confidence in institutions. In *Williams-Yulee*, the Court cabined free speech to increase public confidence in judicial integrity.[23] Voter registration can be restricted if the regulation might "encourage[] citizen participation in the democratic process."[24] That rationale applies with even greater weight to the Second Amendment, where lethal firearms impact public safety and confidence in shared institutions and spaces.[25]

No right requires public safety considerations more than the *Heller*-created right to lethal firearms, which "is unique among all other constitutional rights

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[21] *New York v. Quarles*, 467 U.S. 649, 649 (1984).

[22] U.S. CONST. art. I, § 9.

[23] *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015).

[24] *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

[25] *See* Blocher & Siegel, *supra* note 12, at 187.

because it permits the user of a firearm to cause personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly."[26]

## II. Human Rights Law Reinforces the Right to Live and Should Inform Second Amendment Jurisprudence.

### A. The Constitution Should be Construed, to the Extent Possible, to be Consistent with U.S. Obligations Under International Law.

A fundamental precept of international human rights is the protection of public safety. This principle is incorporated into treaties that are, under the Constitution's Supremacy Clause, treated as "the supreme Law of the Land . . . ."[27] Under longstanding

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[26] *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012), *aff'd sub nom. Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert, denied sub nom. Drake v. Jerejian*, 572 U.S. 1100 (2014).

[27] U.S. CONST. art. VI, cl. 2. Although the treaties applicable here may not be "self-executing," Restatement (Fourth) of Foreign Rels. L. ("Rest. (Fourth)") § 310 (Am. Law Inst. 2018), they "bind the United States as a matter of international law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). Accordingly, they are a source of binding obligations when construing federal law. *See Chew Heong v. United States*, 112 U.S. 536, 548-50 (1884); *Ma v. Ashcroft*, 257 F.3d 1095, 1114-15 (9th Cir. 2001). Such treaties may provide evidence of customary international law, making it independently operative in U.S. courts. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); *cf. Sosa*, 542 U.S. at 738 n.29.

Supreme Court precedent, U.S. courts enforce customary international law[28] obligations defined with adequate specificity, regardless of whether an independent legislative enactment follows.[29]

For more than two centuries, this Court has admonished that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[30] The same justifications for the "*Charming Betsy*" principle apply equally to interpretations of the Constitution. The Founding Generation understood international law to form part of the received common law.[31] The Constitution was drafted with international law as a set of background norms that this Court should acknowledge.[32]

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[28] Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." *See* Restatement (Third) of Foreign Rels. L. ("Rest. (Third)") § 102(2) (Am. Law Inst. 1987).

[29] *See Sosa*, 542 U.S. at 737-38; *The Paquete Habana*, 175 U.S. 677, 700 (1900); Rest. (Third) § 111(3); Rest. (Fourth) § 302, Reporters' Notes para. 14.

[30] *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 561-63 (2006); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 164 (2004); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-41 (1987).

[31] *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-29 (1989).

[32] *Cf. United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (the U.S. is "a member of the family of nations" by operation of international law).

Interpreting the Constitution in a manner that unnecessarily puts the United States at odds with international law has the potential to undermine the separation of powers.[33] This Court has accordingly consulted international law in its interpretation of numerous Constitutional amendments.[34]

Construing the Second Amendment to prevent states and the federal government from reasonably regulating firearms would put the United States at risk of violating its commitments under international human rights law to protect human rights to life, security of person, and health. When this Court evaluates whether restrictions on private firearms imposed by federal legislation comport with the Constitution, it should do so considering fundamental U.S. commitments under binding treaties and customary international law.[35]

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[33] *See generally* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 524-29 (1998).

[34] *See, e.g.*, *Roper v. Simmons,* 543 U.S. 551 (2005) (Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Fourteenth Amendment); *Trop v. Dulles*, 356 U.S. 86, 101-03 (1958) (Eighth Amendment); *Cunard S.S. v. Mellon*, 262 U.S. 100, 122-24 (1923) (Eighteenth Amendment); *Robertson v. Baldwin*, 165 U.S. 275, 283-86 (1897) (Thirteenth Amendment).

[35] These include the International Covenant on Civil and Political Rights, Dec. 16, 1966; S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967); 999 U.N.T.S. 171 (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21. 1965; S. Treaty Doc. 95-18; U.N.T.S. 195, 212; 95th Cong. (June 24, 1994) (ICERD); Universal Declaration of Human Rights, Dec. 8, 1948; G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) (UDHR); American Declaration of the Rights and

These international legal obligations require protecting individuals against private firearm violence and protecting victims of domestic violence from harm. The U.N. Special Rapporteur on violence against women has noted that protection orders are critically important in preventing and mitigating violence against women and urged all States to "take into account possession of or access to firearms" in assessing the risk to a woman's safety and "ensure that . . . protection orders are duly enforced by public officials and easily obtainable."[36]

### B. The United States Should Look to International Human Rights Law to Protect Those Under Its Jurisdiction from Violence by Private Firearms.

A proper construction of the Second Amendment, which allows for laws such as 18 U.S.C. §922(g)(8), is consistent with U.S. human rights obligations under international treaties and customary international law, including the right to life,[37] the right to security

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Duties of Man, May 2, 1948; OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979); 1 Annals of the O.A.S. 130 (1949) (ADRD); 1993 Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/48/4 (Dec. 20, 1993) (DEVAW); all are widely recognized as part of customary international law. *See also* Leila Nadya Sadat & Madaline George, *Gun Violence and Human Rights,* 60 WASH. U. J. L. & POL'Y 1 (2019).

[36] *Report of the Special Rapporteur on violence against women, its causes and consequences,* U.N. Human Rights Council, U.N. Doc. A/HRC/35/30 (June 13, 2017), paras. 103,112.

[37] ICCPR, *supra* n.35, art. 6; UDHR, *supra* n.35, art.3; ADRD, *supra* n.35, art. I.

of person,[38] and the rights to nondiscrimination and to equal protection of the laws on the basis of sex.[39] Human rights treaties and declarations provide women and children with the right to special protection,[40] including the right to be free from domestic violence, as the InterAmerican Commission on Human Rights found in *Jessica Lenahan (Gonzales), et. al. v. United States*, Case No. 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011). The International Convention on the Elimination of All Forms of Racial Discrimination also protects individuals disproportionately affected by intimate partner violence on the basis of race or ethnicity. Treaty Doc. 95-18, 95th Cong. (June 24, 2994) ("ICERD").[41]

Every State must "exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State."[42] This includes an obligation to "take appropriate measures to address the general conditions in society that may give rise to direct threats to life," such as "high levels of criminal and gun violence. . ."[43]

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[38] ICCPR, *supra* n.35, art. 9; UDHR, *supra* n.35, art. 3; ADRD, *supra* n.35, art. I.

[39] ICCPR, *supra* n.35, arts. 2(1) and 7; UDHR, *supra* n.35, art. 7; ADRD, *supra* n.35, art. II.

[40] ADRD, *supra* n.35, art. VII.

[41] Committee on the Elimination of Racial Discrimination (CERD), General recommendation XIV on Article 1, Paragraph 1, of the Convention, 42nd sess. (1993), para. 1, U.N. Doc. A/48/18 at 114 (1994).

[42] Human Rights Committee (HRC), General Comment No. 36, para. 7, U.N. Doc. CCPR/C/GC/36 (2019).

[43] *Id.* para. 26.

States must accordingly "protect their populations . . . against the risks posed by excessive availability of firearms,"[44] which "requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk . . . [including] victims of domestic and gender-based violence. . . and children."[45] CERD recently urged the United States to "redouble its efforts to prevent and combat violence against women."[46] Section 922(g)(8) does exactly this.

Article 2.2 of the ICERD calls on parties to adopt "special and concrete measures" to ensure that vulnerable racial groups have "the full and equal enjoyment of human rights and fundamental freedoms," including the right to protection from violence. A State's act or omission that causes a discriminatory effect may put the State in violation of international law.[47] The disparate impact of gun violence on minority communities undermines their human rights to be free from discrimination and to equal protection of the law. In the U.S., Black Americans make up about 15% of the population, but almost 60% of gun homicide victims.[48]

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[44] HRC No. 35, para. 9, U.N. Doc. CCPR/C/GC/35 (2014).

[45] *Supra* note 42, para. 23.

[46] HRC, Concluding Observations on the combined tenth to twelfth reports of the United States of America, ¶¶ 47-48, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

[47] *See* HRC, *CCPR General Comment No. 18: Non-discrimination*, ¶ 7 (Nov. 10, 1989); CERD, General recommendation, *supra* note 41.

[48] Gun Violence Archive 2020, https://www.gunviolencearchive.org/past-tolls.

In recent reports on U.S. human rights compliance, U.N. treaty bodies have noted that the U.S. government's failure to curb gun violence constitutes violations of the rights to life and to nondiscrimination under international law. [49]

Reasonable firearm safety legislation is essential to protecting human rights.[50] A construction of the Second Amendment that does not allow Congress to adopt such measures conflicts with the United States' international human rights commitments.

## III. *Heller* and *Bruen* Were Wrongly Decided and Should Be Overruled.

*Heller* and *Bruen* conflict with the text and original meaning of the Second Amendment, the American tradition to protect public safety, and America's obligations under human rights law. They should be overruled, and the Court should reinstate the time-honored construction of the Second Amendment, consistent with its text and history, that allows Americans to legislate the gun safety laws they want and need.

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[49] HRC, Concluding Observations on the fourth periodic report of the United States of America, at 5-6, UN. Doc. CCPR/C/USA/CO/4, Apr. 23, 2014; HRC, Concluding Observations on the combined seventh to ninth periodic reports of the United States of America, UN. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014).

[50] *See* Barbara Frey*, Prevention of human rights violations committed with small arms and light weapons*, ¶ 4, U.N. Doc. A/HRC/Sub.1/58/27 (June 25, 2003).

### A. *Heller* Was Wrongly Decided and Should Be Overruled.

Today's *Heller-Bruen* jurisprudence was unthinkable mere decades ago. For 220 years, the Court logically read the Second Amendment consistently with its text and historical purpose. As the *Miller* Court unanimously explained:

> With obvious purpose to assure the continuation and render possible the effectiveness of [militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[51]

The idea "that the Constitution is a barrier to reasonable gun laws . . . exceed[ed] the limits of principled advocacy,"[52] according to former Solicitor General and Harvard Law Dean Erwin Griswold in 1990. According to former Chief Justice Burger, the idea was "one of the greatest pieces of fraud . . . on the American public by special interest groups."[53] Less than 20 years later, however, it was accepted by five Justices in *Heller*.

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[51] *Miller v. United States*, 307 U.S. 174, 178 (1939).

[52] Erwin Griswold, *Phantom Second Amendment 'Rights'*, WASH. POST. (Nov. 4, 1990), https://www.washingtonpost.com/archive/opinions/1990/11/04/phantom-second-amendment-rights/f4381818-fed9-4e63-8d62-f62056818181/.

[53] MacNeil/Lehrer NewsHour, YouTube, Dec. 16, 1991, https://www.youtube.com/watch?v=hKfQpGk7KKw.

Between *Miller* and *Heller*, numerous articles—most by National Rifle Association or other gun organization lawyers—made the unsubstantiated private gun rights argument.[54] But, the historical record supporting the two-century consensus on the Second Amendment did not change. As detailed by Justice Stevens's *Heller* dissent, that history confirms the Amendment's militia purpose:

> The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. . . . Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.[55]

The Second Amendment's text and the historical record mandate Justice Stevens's conclusion that the Second Amendment "is most naturally read to secure to the people a right to use and possess arms in connection with a well-regulated militia."[56] The First

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[54] Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4 (2004).

[55] 554 U.S. at 637.

[56] *Id.* at 651; *see also* Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control,* 73

Congress extensively debated what became the Second Amendment—what it meant to them, and how it would be understood—and never mentioned an individual right to gun ownership or personal self-defense.[57] *Heller*'s conclusion that the Framers intended to hamstring governments in their primary objective to provide for public safety has no foundation in text or history.[58]

Madison's word choice confirms this militia purpose. He pointedly rejected alternate phrasings that recognized private gun rights, such as a New Hampshire proposal that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion," and a minority Pennsylvania proposal that recognized a "right to bear arms for the defense of themselves and their state, or the United States, or for the purpose of killing game."[59] Madison's text never mentions these private gun purposes.[60]

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FORDHAM L. REV. 487 (2004); Saul Cornell, *A New Paradigm for the Second Amendment,* 22 LAW & HIST. REV. 161 (2004).

[57] Dru Stevenson, *Revisiting the Original Congressional Debates About the Second Amendment,* 88 MO. L. REV. 455 (2023).

[58] 554 U.S. at 680.

[59] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 169 (Neil H. Cogan ed. 1997); THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen et al. eds. 1976).

[60] *See generally* Bogus, *supra* note 8.

Madison's first draft even exempted persons from bearing arms on behalf of the militia who were "religiously scrupulous of bearing arms,"[61] a nonsensical caveat if the Amendment merely provided a choice to possess arms for private defense. Historians and linguists have confirmed that "keep and bear arms" had a military meaning.[62] As the Supreme Court of Tennessee noted in 1840: "A man in pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said that he had borne arms. . . ."[63] Although *Heller* claims that "numerous instances" of "bear arms" and "keep arms" referred to weapons use outside of military service,[64] since then, experts in corpus linguistics have searched more than 120,000 texts, comprising virtually all surviving evidence of the period, and found non-military uses of the terms to be essentially nonexistent.[65]

*Heller*'s reading of the Second Amendment was not just atextual and ahistorical, but illogical. From 1789-2008, courts and the legal academy understood the Second Amendment as a logical sentence in which the clauses related—essentially: "Because a well-regulated militia is necessary to the security of a free State, the federal government may not infringe on the

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[61] *Heller*, 554 U.S. at 660 (Stevens, J., dissenting) (citing THE COMPLETE BILL OF RIGHTS 182–183 (N. Cogan ed. 1997)).

[62] *Heller*, at 646-651 (Stevens, J., dissenting).

[63] *Aymette v. State*, 21 Tenn. 154, 161 (Tenn. 1840).

[64] *Heller*, 554 U.S. at 583-84.

[65] Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 510 (2019); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 589 (2009).

right of people to participate in a state militia." *Heller* rendered the text illogical—essentially: "Because a well-regulated militia is necessary to the security of a free State, people who have nothing to do with a militia, or may even pose a threat to the security of a free State, have a right to use guns in private self-defense."

*Heller* has been roundly criticized across the ideological spectrum.[66] Gun rights supporter Professor Nelson Lund wrote that "at critical points" *Heller*'s reasoning is "defective" and "transparently non-originalist,"[67] and:

> Justice Scalia's *Heller* opinion itself shows that his use of history and tradition is little more than a disguised version of the kind of interest balancing that he purported to condemn.[68]

Judge Richard Posner noted that "[t]he irony is that the 'originalist' method would have yielded the opposite result."[69] Judge J. Harvie Wilkinson III

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[66] *See generally* Jonathan Lowy, Christa Nichols, Kelly Sampson, *Everything's at Stake: Preserving Authority to Prevent Gun Violence in the Second Amendment's Third Chapter*, 106 MINN. L. REV. 118, 132-134 (Nov. 2, 2021).

[67] Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009).

[68] Nelson Lund, *No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 22, 24 (2012).

[69] Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/3KQF -XVJG].

wrote that *Heller* represents "the Court's failure to adhere to a conservative judicial methodology in reaching its decision," and "an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves."[70] Historian William Merkel called *Heller*'s historical analysis a "conscious fraud."[71]

Justice Stevens called *Heller* the worst decision in his 34-year tenure[72] and saw it as sufficiently dangerous to warrant amending the Constitution.[73]

The Court can undo this error by simply returning to the long-understood meaning the Framers intended and overruling *Heller*.[74]

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[70] J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

[71] William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 349 (2009).

[72] John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, The Atlantic (May 14, 2019), https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/.

[73] *See generally* John Paul Stevens, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

[74] *McDonald v. City of Chicago*, 561 U.S. 742 (2010), should also be overruled as it relies on *Heller* and incorporates it although the Second Amendment was solely concerned with protecting state authority from federal infringement.

### B. *Bruen* Was Wrongly Decided and Should be Overruled.

*Bruen* further prevented federal and state governments from performing their public safety functions. The Court should overrule *Bruen*.

#### 1. *Bruen* Expanded on *Heller* to Create an Even Less Correct and More Dangerous Rule.

*Heller*'s problematic effects were somewhat contained by the two-step approach applied by every Circuit interpreting it, which allowed courts to consider governmental interests in preventing gun deaths.[75] But *Bruen* rejected "means-end scrutiny in the Second Amendment context" and held that "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[76] *Bruen* instructs lower courts to rely not on present-day public safety needs, but on models from 200 to 300 years ago (or earlier) at some unspecified level of generality, a method the Court understatedly concedes "has controversial public safety implications."[77]

The *Bruen* Court also conceded that "[h]istorical analysis can be difficult . . ." and "sometimes requires . . . making nuanced judgments about which evidence to consult and how to interpret it."[78] It then proved

[75] *Bruen*, 142 S. Ct. at 2126-27 (internal citations omitted).

[76] *Id.* at 2127.

[77] *Id.* at 2126, n. 3 (internal citations omitted).

[78] *Id.* at 2130.

the unworkability of its rule by finding a lengthy historical tradition of regulating public gun carrying insufficient to support New York's similar, century-old law.

Although *Bruen* claimed its historical test was preferable to judges making "'empirical judgments' about 'the costs and benefits of firearms restrictions …,'"[79] its selective approach to history—a discipline in which judges are amateurs at best—appeared results-oriented.[80] By "discount[ing] seemingly relevant historical evidence" that supported upholding modern gun regulations,[81] Justice Breyer suggested the Court was "pick[ing] their friends out of history's crowd" to support its flawed outcome.[82]

Justice Breyer's dissent aptly described *Bruen*'s Goldilocks approach to history:

> [T]he Court finds a reason to discount the historical evidence's persuasive force. Some of the laws New York has identified are too old. But, others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now im-

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[79] *Id.*

[80] *United States v. Bullock*, No. 18-CR-165, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022)

[81] *Id.* at 2179.

[82] *Id.* at 2180.

> possible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here.[83]

*Bruen*'s reliance on, and misinterpretation of, history opens the door to more erroneous and dangerous future rulings that ignore the essential consideration of public safety.

#### 2. The *Bruen* Test is "Unjustifiable and Unworkable."[84]

The *Bruen* test conflicts with the government's longstanding police-power authority to protect public safety and is therefore unjustifiable. As explained by Justice Breyer, "[t]he primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence. . . . I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them."[85] *Bruen* "prevents democratically elected officials from enacting laws to address the serious problem of gun violence."[86]

The *Bruen* test is also unworkable. As Justice Breyer explained, "[t]he Court's near-exclusive reliance on history is not only unnecessary, it is deeply impracticable. It imposes a task on the lower courts

[83] *Id*. at 2190.

[84] *Id*. at 2181.

[85] *Id*. at 2168.

[86] *Id*. at 2164.

that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its 'ends') against the methods used to achieve those objectives (its 'means'). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers."[87]

Relying on the past to assess solutions to today's problems impedes the government's public safety function, particularly, "when it comes to 'modern-day circumstances that [the Framers] could not have anticipated.'"[88] Laws that were unnecessary in the past may be needed now, as firearms have become more lethal,[89] and societal changes have made guns and gun violence far more serious problems today than in past centuries.[90]

Judge Carlton Reeves aptly described the dilemma courts face in relying on the 18th or 19th century to resolve 21st century gun issues:

> This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the

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[87] *Id.* at 2177.

[88] *Id.* at 2180 (quoting *Heller*, 554 U.S. at 721-22).

[89] *See* Roth, *supra* note 9 at 108.

[90] 142 S. Ct. at 2180. *See also* Robert J. Spitzer, *Is domestic abuse really protected by the Second Amendment?,* THE HILL (July 14, 2023), https://thehill.com/opinion/criminal-justice/4095991-is-domestic-abuse-really-protected-by-the-second-amendment/ (murder rates in the Colonial and early Federal Era were low, and rarely involved firearms).

> methodological and substantive knowledge that historians possess. . . . And we are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791. Yet we are now expected to play historian in the name of constitutional adjudication.[91]

*Bruen*'s application of history also diminishes confidence in the Court. As Judge Reeves noted: "an increasingly common attack" on *Bruen* is "that the Court simply 'cherry-picked' the historical record to arrive at its ideologically-preferred outcome.[92]

Although *Bruen* instructs judges "to employ 'analogical reasoning,'" it fails to "provide clear guidance on how to apply such reasoning."[93] Accordingly, courts are left to apply a wholly inadequate test that fails to consider public safety and permits purported historical traditions to be "cherry-picked" to justify dangerous outcomes.

More broadly, *Bruen* (and *Heller*) ignore Chief Justice Marshall's wisdom that "we must never forget, that it is a constitution we are expounding"—"a constitution[] intended to endure for ages to come, and

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[91] 2022 WL 16649175, at *1.

[92] *Id.* at *2 (citing Mark Joseph Stern, *Clarence Thomas' Maximalist Second Amendment Ruling Is a Nightmare for Gun Control*, SLATE (June 23, 2022); Saul Cornell, *Cherry-picked history and ideology-driven outcome:* Bruen's *originalist distortions*, SCOTUSBLOG (June 27, 2022) (referring to the Court's historical analysis as "an ideological fantasy")).

[93] *Id.*

consequently, to be adapted to the various crises of human affairs."[94] "When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland*, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters'. . . ."[95]

### 3. *Bruen* Creates a "Super Right" That Can Infringe on the Exercise of Other Rights.

*Bruen's* rejection of means-end scrutiny has created a "super right" that supersedes present-day safety needs. Worse, the nature of the right—to possess and use lethal firearms whenever the user deems necessary—is uniquely prone to infringing on the exercise of other rights. Guns not only deprive people of their right to live, they chill speech, disrupt peaceable assemblies,[96] threaten democratic participation,[97] and limit all manner of activities. *Bruen* effectively renders those rights "second class." As Justice Breyer ex-

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[94] *M'Culloch v. State*, 17 U.S. 316, 407, 415 (1819).

[95] *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 443 (1934) (citing *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

[96] *See, e.g.*, Gregory P. Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 Law and Contemporary Problems 169 (2020).

[97] Blocher & Siegel, *supra* note 12 at 161.

plained, "it is the Court's rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous."[98]

#### 4. *Bruen's* Flawed Analysis Has Already Led Courts to Strike Down Life-Saving Laws.

In its first year, *Bruen* has already resulted in dangerous rulings striking down laws protecting public safety.[99] "[P]ost-*Bruen* cases reveal an erratic, unprincipled jurisprudence, leading courts to strike down gun laws on the basis of thin historical discussion and no meaningful explanation of historical analysis… the new approach has generated wildly manipulable and unpredictable case outcomes."[100] Given the malleability of the historical test, and its questionable application in *Bruen*, courts will likely continue to reach inconsistent and unpredictable outcomes.

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[98] 142 S. Ct. at 2177 (Breyer, J., dissenting).

[99] There has also been no uniformity in District Court interpretations of 18 U.S.C. § 922. *See, e.g.*, *Range v. Att'y Gen. United States*, 69 F.4th 96 (3rd Cir. 2023) (§ 922(g)(1) is unconstitutional); *United States v. Price*, 635 F. Supp. 455, 466-67 (S.D. W.Va. 2022) (§ 922(g)(1) is constitutional but § 922(k) is unconstitutional); *United States v. Adger*, CR 122-102, 2023 WL 3229933, at ** 3-5 (S.D. Ga. May 3, 2023) (§ 922(n) is constitutional); *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 WL 16936043, at **2-6 (W.D. Okla. Nov. 14, 2022) (§ 922(n) is unconstitutional).

[100] Joseph Blocher & Eric Ruben, *Originalism-By-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 1, 5-6 (FORTHCOMING 2023).

### 5. This Case Shows How the *Bruen* Test Fails When Applied to a Public Safety Issue That Has Substantially Evolved Since Colonial Times.

Gun violence is one of the most destructive problems facing the United States, and consequently the world,[101] today.[102] Strong gun laws save lives.[103] Yet *Heller* and *Bruen* create unnecessary and unique obstacles that prevent governments from implementing life-saving measures.

Domestic violence with guns poses special problems to women and children. Firearms are now the leading cause of death of children and adolescents.[104] In the U.S., "[n]early one in ten incidents of domestic

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[101] Other nations also are affected by U.S. guns. *See* Sam Garcia, *How Texas's gun laws allow Mexican cartels to arm themselves to the teeth,* THE GUARDIAN, Oct. 17, 2022, https://www.theguardian.com/us-news/2022/oct/17/texas-lax-gun-laws-us-mexico-border.

[102] Phil Fontanarosa & Kirsten Bibbins-Domingo, *The Unrelenting Epidemic of Firearm Violence*, JAMA NETWORK, Sept. 27, 2022, https://jamanetwork.com/journals/jama/fullarticle/2796714.

[103] *See, e.g.*, *The Science is Clear: Gun Control Saves Lives,* SCIENTIFIC AMERICAN, May 26, 2022 (discussing studies) https://www.scientificamerican.com/article/the-science-is-clear-gun-control-saves-lives1/#:~:text=More%20than%20a%20dozen%20studies,have%20higher%20rates%20of%20homicide.

[104] *See, e.g.*, Goldstick, J., Cunningham, R., Carter, P., *Current Causes of Death in Children and Adolescents in the United States*, NEW ENG J. MED. 2022, https://publications.aap.org/pediatrics/article/150/6/e2022060070/189686/Firearm-Related-Injuries-and-Deaths-in-Children?autologincheck=redirected.

violence involves a gun…. [D]omestic violence involving a gun is twelve times more likely to result in death than domestic violence not involving a gun."[105]

The risks to women are even starker. *Approximately one-fourth of all women murdered in the United States are killed by a current or former intimate partner using a firearm.*[106] Women are five times more likely to be killed by an abusive partner when the abuser owns a gun.[107] American women are 21 times more likely to be killed with a gun than women in other developed countries.[108] Following its visit to the U.S. in 2015, the U.N. Working Group on Discrimination against Women and Girls in Law and Policy raised concerns at the "persistent, fatal consequences for women. . . in particularly in cases of domestic violence," due in part to the fact that abusers are not required to relinquish their guns.[109]

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[105] Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 3 (2005). *See also* Sadat & George, *supra* note 11.

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

[107] *Id.*

[108] Erin Grinshteyn & David Hemenway, *Violent Death Rates in the U.S. Compared to those of the other High-Income Countries, 2015,* 123 PREVENTATIVE MED. 20 (2019).

[109] Report of the Working Group on the Discrimination against women in law and in practice on its mission to the United States of America, U.N. Doc. A/HRC/32/44/Add.2, para. 77 (Aug. 4, 2016).

This case demonstrates why requiring analogous laws from past centuries leads to absurd results today. *Bruen* requires courts to rely on 18th and 19th century laws, but in that era domestic violence was not a crime or even a societal issue warranting attention, and husbands had a legal right to physically punish their wives.[110]

Pervading this period were "beliefs …that … a husband possesses the right to have sexual access to his wife; that nagging women … often provoke the beatings they receive; … and that the law should not disrupt this traditional pattern of support, except in unusual circumstances."[111]

In large part, regarding family violence, "[t]he whole of the eighteenth and half of the nineteenth century appears to have been a legislative vacuum. There is little evidence, aside from an occasional divorce case on grounds of "cruelty," to demonstrate even passing interest in this subject during the eighteenth century."[112] "No laws against family violence were passed from the time of the Pilgrim statute against wife beating in 1672 until a law against wife beating was enacted in Tennessee in 1850…."[113]

That domestic violence was not regulated in the past, particularly during a time when women could

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[110] Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

[111] Elizabeth Pleck, *Criminal Approaches to Family Violence*, 1640-1980, 11 CRIME & JUST. 19, 20-21 (1989).

[112] *Id.* at 29.

[113] *Id.*

not even vote, should not lead to the elimination of modern-day protections. Quite the opposite: "the Framers' relative silence on this problem reflects a blinkered moral sensibility with regard to domestic violence, not a determination about the scope of the right to keep and bear arms. To regard it as a binding Second Amendment tradition is to make a contemporary normative determination about which historical practices are worthy of constitutional respect and which are not."[114]

Similar problems are certain to arise in future cases where our moral sensibilities or legal standards have thankfully progressed, but *Bruen* chains us to our flawed past.

### IV. Even Under *Bruen*, the Challenged Law Should Be Upheld.

Even under *Bruen*'s incorrect test, § 922(g)(8) should be upheld. As Justice (then-Judge) Barrett noted in her dissent in *Kanter v. Barr*, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."[115] Historical evidence from the period acceptable under a *Bruen* analysis—before the late-19th-century—establishes broad legislative power to disarm groups of people based on the risk of danger to public safety. "Historical tradition," properly construed, establishes that § 922(g)(8)'s ban on firearm possession by those subject to a domestic

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[114] Joseph Blocher & Eric Ruben, *supra* note 101 at 21-22.

[115] 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J. dissenting).

protective order is not an "outlier [] that our ancestors would never have accepted."[116]

Justice Barrett noted that history establishes that "the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety."[117] These persons include "dangerous people who have not been convicted of felonies."[118]

As Justice Barrett recognized, since at least the 1790s, legislatures have "disqualified categories of people from the right to bear arms . . . when they judged that doing so was necessary to protect the public safety."[119] This unbroken thread continued through the late 1800s[120] and into the early 20th century.[121]

*Heller*, too, recognized that longstanding firearm prohibitions on felons are presumptively lawful.[122]

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[116] *United States v. Rahimi*, 61 F.4th 433, 454 (5th Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2133).

[117] *Kanter*, 919 F.3d at 454.

[118] *Id.*

[119] *Id.*

[120] *See State v. Hogan*, 63 Ohio St. 202, 215, 219 (1900); 1878 VT. ACTS 30, ch. 14 § 3; 1879 R.I. LAWS 110, ch. 806 § 3; 1880 OH. REV. ST. 1654, ch. 8 § 6995; Mass. Gen. Laws 232, ch. 257 § 4 (1880); Arthur Loomis Sanborn & John R. Berryman, 1 ANNOTATED STATUTES OF WISCONSIN, Containing the General Laws in Force October 1, 1889, at 940 (1889); 1897 IOWA LAWS 1981, ch. 5 § 5135.

[121] 1927 R.I. PUB. LAWS 257 § 3; 1931 PA. LAWS 498, ch. 158, § 4.

[122] *Heller*, 554 U.S. at 626-27.

*Heller* also relied on Blackstone's account of the Statute of Northampton as support for government's authority to ban "dangerous and unusual weapons," thereby affirming a body of law recognizing that government has an ancient prerogative to regulate guns, including to preserve the "public peace." As Justice Kavanaugh and Chief Justice Roberts's *Bruen* concurrence recognized, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations."[123]

Even under the misguided *Bruen* test, § 922(g)(8) withstands judicial scrutiny. As demonstrated *supra*, § 922(g)(8) deals with an "unprecedented societal concern"[124]—lethal domestic violence—that a modern Congress has appropriately addressed. The "nuanced approach"[125] that *Bruen* directs courts to undertake when presented with gun regulations addressing uniquely modern problems requires a finding that § 922(g)(8) is constitutional.

## Conclusion

This Court should overturn *Heller* and *Bruen*, and return to reading the Second Amendment consistent with its text and historical militia purpose. Americans today should be allowed to enact the strong public safety laws they want and need to protect people's lives from gunfire. But even under *Heller* and *Bruen*, the lower court's decision should be reversed.

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[123] *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, Roberts, C.J., concurring) (citing *Heller*, at 636).

[124] *Bruen*, 142 S. Ct. at 2132.

[125] *Id.*

Respectfully submitted.

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