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 THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Second Amendment permits Congress to prohibit the possession of firearms by persons subject to a domestic-violence restraining order as a means of providing that those who exercise Second Amendment rights are "well regulated" within the meaning of that Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICI CURIAE

Amici are not-for-profit organizations whose mission is to advance the interests of local governments and those they serve. It is local governments and their officials that are most often called upon to address the causes and consequences of domestic violence.[1]

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live.

The United States Conference of Mayors is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000. Each city is represented in the Conference by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) is an advocate and resource for local governments and their attorneys. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

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[1] No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

In December 2019, respondent Zackey Rahimi was charged under Texas law as a result of his use of a firearm in the assault of his girlfriend. Pet. App. 73a-74a. On February 5, 2020, a state court entered a restraining order that prohibited Rahimi from, among other things, "[g]oing to or within 200 yards of the residence or place of employment" of his onetime girlfriend, and "[e]ngaging in conduct . . . reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass" either his ex-girlfriend or a member of her family or household, and prohibiting him from possessing a firearm. Pet. App. 3a.

Rahimi rather spectacularly failed to comply with the restraining order's prohibition on the possession of firearms. On December 1, 2020, after selling narcotics, Rahimi fired multiple shots into the buyer's residence. Pet. App. 2a. The next day, after he was involved in a car accident, Rahimi exited his vehicle, shot at the other driver, and then fled the scene, though he later returned in a different vehicle and shot at the other driver's car. *Id.* On December 22, Rahimi shot at a constable's vehicle. *Id.* On January 7, 2021, Rahimi fired multiple shots in the air after his friend's credit card was declined at a Whataburger restaurant. *Id.*

Rahimi was indicted on a federal charge of unlawfully possessing a firearm while subject to a domestic-violence restraining order. Pet. App. 3a-4a. The statute under which he was charged makes it unlawful to possess in interstate commerce or to receive any firearm that has been shipped or transported in interstate commerce when an individual:

> is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . .

18 U.S.C. § 922(g)(8).[2]

On the strength of then-binding Fifth Circuit precedent, the district court denied Rahimi's motion to dismiss the indictment on the ground that the statute under which he was charged deprived him of the right to keep and bear arms under the Second Amendment to the United States Constitution. Pet. App. 78a-80a.

On appeal, the court of appeals, relying on this Court's intervening decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022),

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[2] The statute adds: "The term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person." 18 U.S.C. § 921(32).

and, in particular, *Bruen*'s statement that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," Pet. App. 6a (quoting *Bruen*, 142 S. Ct. at 2129-30 (brackets in original)), concluded that Rahimi's "possession of a pistol and a rifle easily falls within the purview of the Second Amendment," *id.* at 14a, and that the government had "fail[ed] to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id.* at 27a.

SUMMARY OF THE ARGUMENT

The court of appeals believed that the Second Amendment right "to keep and bear arms" extended to Rahimi despite the domestic-violence restraining order running against him, and, therefore, § 922(g)(8) could not be sustained absent a longstanding tradition, dating to the framing era, of depriving domestic-violence abusers of their firearms. The court of appeals concluded that the government had failed to demonstrate that such a tradition existed, a conclusion that should be unsurprising in light of framing-era law's relative indifference to domestic violence, a tradition that has given way only in recent decades.

The scope of the right "to keep and bear arms," however, is not nearly as clear as the court of appeals believed. In fact, this Court has acknowledged that the Second Amendment's operative clause is ambiguous.

Even as it held that the Second Amendment protected an individual right to keep and bear arms in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court observed that in the framing era, the Second Amendment's operative clause had multiple meanings; the right to "bear arms" sometimes meant to "carry"

arms, but, the Court added, "[t]he phrase 'bear Arms" also had "an idiomatic meaning that was significantly different from its natural meaning: 'to serve as a soldier, do military service, fight' or 'to wage war.'" *Id.* at 584, 586.

The Court's precise holding on this point in *Heller* was narrow. The Court rejected the District's claim that "bear arms" unambiguously referred to the use of arms in connection with military service, explaining that the phrase "*unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities." 554 U.S. at 586 (emphasis in original). The Court thusly rejected the District's argument that "bear arms" unambiguously referred to the use of arms in connection with military service, while acknowledging that the phrase had multiple meanings.

Last Term, in *Bruen*, this Court again acknowledged ambiguity in the Second Amendment. The Court explained that it could properly consult the history and tradition of firearms regulation to assess the scope of Second Amendment rights because "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of *an ambiguous constitutional provision*." 142 S. Ct. at 2137 (emphasis supplied and citations omitted) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)).

In light of the acknowledged ambiguity in the Second Amendment's operative clause, reference to its preamble is appropriate. Indeed, in *Heller*, the Court explained that a preamble may be consulted "to resolve an ambiguity in an operative clause." 554 U.S. at 577. Accordingly, we now press an argument advanced by

neither the parties nor the Solicitor General, nor reached by the Court, in either *Heller* or *Bruen*: The ambiguity in the operative clause of the Second Amendment means that its preamble is properly consulted to clarify the scope of Second Amendment rights.

As for the preamble, *Heller* explained that the "well regulated Militia" referred to in the Second Amendment's preamble denotes not "the organized militia," but rather "all able bodied men," and, thusly, "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service." 554 U.S. at 596, 627.

Accordingly, the preamble expressly contemplates that those who exercise Second Amendment rights, even if not part of an organized militia, may be "well regulated." Those who "keep and bear arms" do so as part of a "Militia," whether organized or not, subject to regulation. The Second Amendment accordingly codifies an individual right to keep and bear arms extending to those not part of an organized militia, as *Heller* held, but the exercise of that right may be "well regulated."

Section 922(g)(8) should be sustained pursuant to Congress's power to "well regulate[]" the militia. Individuals that a judge has found, after notice and opportunity for hearing, present an immediate threat to others, are no proper part of a "well regulated Militia." Rahimi's violent and abusive behavior amply justified the imposition of discipline in the form of a suspension of his ability to keep and bear arms, at least as long as he remained subject to the restraining order that he so extravagantly flouted.

ARGUMENT

When the Constitution's text is clear, the burden on the government to demonstrate that history and tradition somehow limit the scope of a right codified in the Constitution is appropriately heavy. When it comes to the Second Amendment, however, the Constitution's text is ambiguous, as this Court has twice observed. Accordingly, the Second Amendment's preamble is properly consulted to assess the scope of the right "to keep and bear arms." The preamble makes plain that those who exercise that right may be "well regulated." Section 922(g)(8), in turn, represents the type of regulation properly imposed on a "well regulated Militia."

I. THE SECOND AMENDMENT EXPRESSLY CONTEMPLATES THAT THOSE WHO "KEEP AND BEAR ARMS" MAY BE "WELL REGULATED"

The Second Amendment is the only provision in the Bill of Rights that expressly contemplates regulatory authority. Those who exercise the right to keep and bear arms may be "well regulated."

A. Ambiguity in the Second Amendment's Text Warrants Reference To Its Preamble.

The Second Amendment provides: "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." U.S. Const. amend. II.

In *Heller*, the Court undertook "the examination of a variety of legal and other sources to determine the *public understanding* of a legal text in the period after its enactment or ratification." 554 U.S. at 605 (emphasis in original). After surveying the historical evidence concerning the original understanding of the

Second Amendment in the framing era, the Court concluded that the "right of the People" refers to individual rights, *id.* at 579-81, the right to "keep" arms means "possessing arms," *id.* at 583, and the right to "bear" arms means "carrying for a particular purpose—confrontation." *Id.* at 584. The Court invalidated the District of Columbia ordinance at issue because it "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628.

Importantly, *Heller* identified a critical textual ambiguity in the Second Amendment. When considering the District's argument that the original meaning of the phrase "bear arms" referred only to those who carried arms in connection with military service, the Court wrote that "[a]t the time of the founding, as now, to 'bear' meant to 'carry,'" 554 U.S. at 584 (citation omitted), but added that "[t]he phrase 'bear Arms' also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: 'to serve as a soldier, do military service, fight' or 'to wage war.'" *Id.* at 586.

Considering both the "idiomatic" and the "natural meaning" of the phrase "bear arms," the Court's precise holding was narrow; it concluded that the phrase "*unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities." 554 U.S. at 586 (emphasis in original).

To be sure, the Court also observed:

> Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no

> commentator has ever endorsed. Worse still, the phrase "keep and bear Arms" would be incoherent. The word "Arms" would have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom.

554 U.S. at 586-87 (citation omitted). This passage does not state that the phrase "bear arms" is unambiguous; it observes instead that it would be absurd to read the operative clause as limited to a right to be a soldier or wage war.

Thus, *Heller* did not hold that the right to "keep and bear arms" has only one meaning, unrelated to militia service. Nor would such a conclusion be tenable.

The historical evidence of ambiguity is plain. One post-*Heller* survey identified ample evidence that the phrase "bear arms" often had a military meaning in the framing era, even when not followed by "against." *See* Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. Early Repub. 585, 590 (2009) ("'bear arms' was used frequently in a military context without the proposition against").

Others have examined databases containing founding-era documents, using a technique that has come to be known as "corpus linguistics" which analyzes the most prevalent usages of specified terms in a database. These analyses have consistently found that the phrase "bear arms," even when used without the preposition "against," was most often used in the framing era to refer to carrying arms for purposes of military service.[3]

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[3] *See, e.g.*, Denis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L.Q. 509, 510 (2019) ("Founding-era sources almost always use *bear arms* in an

Bruen is equally plain on this point. The Court cautioned, "to the extent later history contradicts what the text says, the text controls." 142 S. Ct. 2137. Accordingly, to explain why it was appropriate to consult "this Nation's historical tradition of firearm regulation," *id.* at 2135, the Court wrote:

> [I]n *Heller* we reiterated that evidence of "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" represented a "critical tool of constitutional interpretation." . . . . And, in other contexts, we have explained that "a regular course of practice can liquidate & settle the meaning of' disputed or indeterminate terms & phrases" in the Constitution. In other words, we recognize that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of *an ambiguous constitutional provision*."

Id. at 2136-37 (emphasis supplied and further internal quotations and citations omitted) (quoting *Heller*, 554

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unambiguously military sense."); James C. Phillips & Josh Blackman, *Corpus Linguistics and* Heller, 56 Wake Forest L. Rev. 609, 679 (2021) ("The phrase *bear arms*, with *against*, is sufficient to make the phrase military. But the phrase *bear arms*, without *against*, can still invoke the military sense."); Josh Jones, Note, *The "Weaponization" of Corpus Linguistics: Testing* Heller*'s Linguistic Claims*, 34 B.Y.U. J. Pub. L. 135, 165 (2020) ("[I]t is emphatically not true that the preposition *against* was necessary to convey the specialized sense of *bear arms* at the time of the Founding."); Kyra Babcock Woods, Note, *Corpus Linguistics and Gun Control: Why* Heller *Is Wrong*, 2019 B.Y.U. L. Rev. 1401, 1421 (2019) ("The data presents strong evidence overall that the general public likely understood the right to *bear arms* as generally synonymous with militia service.").

U.S. at 605, *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020), and *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)).

The acknowledged and demonstrable ambiguity in the Second Amendment's operative clause warrants reference to its preamble since, as the Court explained in *Heller*, "[l]ogic demands that there be a link between the stated purpose and the command," and, accordingly, "[t]hat requirement of logical connection may cause a prefatory clause to resolve an ambiguity in an operative clause." 554 U.S. at 577.

This view of the interpretive significance of prefatory language has ample framing-era support; framing-era sources similarly endorse reference to preambles to clarify an ambiguous text. *See, e.g.*, 1 William J. Blackstone, Commentaries on the Law of England 59-60 (1765) ("[I]f words happen to be still dubious . . . . [T]he proeme, or preamble, is often called in to help the construction of an act of parliament."); I Joseph Story, Commentaries on the Constitution of the United States § 459, at 443-44 (1833) ("The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded . . . . It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part . . . .").

As for the preamble's reference to a "well regulated Militia," *Heller* concluded that the term "Militia" refers not to "the organized militia," but rather "all able bodied men," while "the federally organized militia may consist of a subset of them." 554 U.S. at 596. Thus, "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service . . . ." *Id.* at 627. Accordingly, *Heller* effectively treated the militia and

those who exercised the right to keep and bear arms as equivalent.

Thus, the preamble expressly contemplates regulatory authority not just over the organized military, but also the unorganized body of people able to exercise the right to keep and bear arms. Indeed, if the Second Amendment were understood to mean that only the organized militia was to be "well regulated," that interpretation of the term "militia" in the preamble would violate *Heller*'s injunction against interpreting a single word to "have two different meanings at once . . . ." 554 U.S. at 587.

The preamble, moreover, contemplates regulation and discipline of those who exercise the right to keep and bear arms. *Heller* explained that the phrase "well regulated" means "the imposition of proper discipline and training." 554 U.S. at 597. To similar effect, the first edition of Webster's dictionary, repeatedly cited in *Heller* to provide evidence of the original meaning of the Second Amendment, *id.* at 581, 582, 583, 595, defined "regulated" as "[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions." 2 Noah Webster, An American Dictionary of the English Language 54 (1828).[4]

Moreover, in its explication of the preamble in *Heller*, the Court added that the "'militia' referred to in Article I is the same body referred to by the

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[4] To similar effect, see 2 Samuel Johnson, A Dictionary of the English Language in Which the Words Are Deduced from Their Originals cdlxxvi (6th ed. 1785) (defining "regulate" as "[t]o adjust by rule or method" or "[t]o direct"). Johnson's dictionary was also repeatedly relied upon in *Heller* to provide evidence of the original meaning of the Second Amendment. *See* 554 U.S. at 581, 582, 584, 597.

Second Amendment," 554 U.S. at 597. Article I of the Constitution, in turn, provides that Congress may exercise regulatory and disciplinary authority over the militia and its members, even if not part of the federally-organized militia. *See* U.S. Const. art. I, § 8, cl. 16 ("The Congress shall have the power . . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.").

Accordingly, the Second Amendment embodies an individual right to keep and bear arms extending to those not part of an organized militia, but those who exercise the right may be "well regulated."

In neither *Heller* nor *Bruen* did the parties argue that the operative clause of the Second Amendment was ambiguous, thereby warranting reference to the preamble. In *Heller*, the District argued that the text unambiguously conferred no individual right, claiming that the Second Amendment's "two clauses permit only a militia-related reading." Brief of Petitioners at 9, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). In *Bruen*, New York made no claim of textual ambiguity, and instead discussed only its view of the history and tradition of firearms regulation, claiming that the Second Amendment prohibits only regulations that amount to an "extreme outlier." Brief for Respondents at 21, *New York St. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

The Solicitor General similarly made no claim of textual ambiguity and placed no reliance on the preamble in either case. *See* Brief of the United States as Amicus Curiae 10-19, *District of Columbia v. Heller*,

554 U.S. 570 (2008) (No. 07-290); Brief for the United States as Amicus Curiae Supporting Respondents 5-15, *New York St. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

Thus, we press an argument neither advanced by neither the parties nor the Solicitor General, nor reached by the Court, in either *Heller* or *Bruen*. Our submission is that the acknowledged ambiguity in the operative clause of the Second Amendment warrants reference to its preamble to assess the scope of Second Amendment rights.

B. Laws Imposing Proper Discipline On Those Who Keep and Bear Arms Comport With the Second Amendment.

The preamble sheds important light on the meaning of the Second Amendment—those who "keep and bear arms" do so not merely as individuals, but as part of a militia, even if unorganized, necessary to the security of a free state, and subject to regulation.

The understanding that reconciles the preamble and the operative clause is that the right to keep and bear arms is exercised by individuals subject to regulatory authority over "the Militia," both organized and unorganized. This use of the preamble satisfies the "requirement of logical connection," which, *Heller* explained, "may cause a prefatory clause to resolve an ambiguity in an operative clause." 554 U.S. at 577.

Beyond that, if the Second Amendment's operative clause were unambiguous and reflected an unqualified "right of the people to keep and bear arms" not subject to regulation, it would be difficult to explain the history of firearms regulation.

In the framing era, large classes of individuals such as slaves, freed blacks, and people of mixed race were frequently prohibited from owning or carrying guns, and some states extended this bar to Catholics or whites unwilling to swear allegiance to the Revolution.[5] Indeed, it was widely believed that only loyalists possessed a right to bear arms, with others facing sanctions including disarmament. *See* Patrick J. Charles, *The Constitutional Significance of a "Well-Regulated Militia" Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 Ne. U. L.J. 1, 59–61, 97–98 (2011).

Additional regulation of those who "keep and bear" arms appeared soon after the framing:

> In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. As we recognized in *Heller*, "the majority of the 19th-century courts to consider the question held that [these] prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."

Bruen, 142 S. Ct. at 2146 (quoting *Heller*, 544 U.S. at 626).

During Reconstruction, in the wake of violence in the southern states, the same Congress that framed the Fourteenth Amendment enacted legislation abol-

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[5] *See, e.g.*, Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 113–17 (2011); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 159–65 (2007); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506–12 (2004).

ishing the militia in most southern states and prohibiting any effort to arm militias in those states. Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487. The measure's sponsors dismissed Second Amendment objections, arguing that the prohibition was justified by the prevalence of armed groups in the South, in the wake of the Civil War, "dangerous to the public peace and to the security of Union citizens in those States." Cong. Globe, 39th Cong., 2d Sess. 1849 (1867) (Sen. Lane); *accord, e.g.*, *id.* at 1848–49 (Sen. Wilson).

This legislation was one in a series of firearms-regulation measures undertaken at the time in an effort to suppress what was seen as unacceptable levels of violence. *See, e.g.*, Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 621 (2006) ("The disarming of freedmen was indeed troubling, but the federal government was not beyond disarming those whom it deemed a threat to public safety."); Robert Leider, *Our Non-Originalist Right To Bear Arms*, 89 Ind. L.J. 1587, 1650 (2014) ("After the Civil War, courts curtailed the right to have guns in public . . . . The courts thus altered their understanding of the purpose of the right to justify altering the dimensions of the right—dimensions that comported with the popular conceptions of the right's scope and their demand for legislative solutions for the criminal use of weapons.").

Prohibitions on the possession of firearms by convicted felons subsequently emerged early in the twentieth century in response to a crime wave following the First World War. *E.g.*, Joseph S.G. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Firearms*, 20 Wyo. L. Rev. 249, 272-73 (2020); C. Kevin Marshall, *Why Can't*

Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 698–728 (2009).

None of these regulations amount to an identical historical twin of § 922(g)(8). Indeed, many of them would not be properly directed at the objective of a "well regulated Militia" under contemporary circumstances. History demonstrates, however, that the Second Amendment's operative clause has long been understood to permit regulation of the "Militia," organized or unorganized, that exercises the right to keep and bear arms.

Regulatory authority, moreover, can evolve. After all, the Second Amendment contemplates a "well regulated Militia," not a militia subject to only regulations extant in the framing era. In this respect, the Second Amendment's text contrasts to the Seventh, which was crafted to preserve framing-era civil-jury-right practice: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Given its textual formulation, the Seventh Amendment has been interpreted to require adherence to framing-era practice when it comes to both common-law actions extant in the framing era and their contemporary analogs. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) ("[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was . . . . [W]e then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." (citations and internal quotations omitted)).

It would surely be anomalous to construe the very different textual formulation in the Second Amendment to require the same adherence to framing-era practice commanded by the Seventh Amendment.

Indeed, the Second Amendment's tolerance of regulatory innovation since the framing era explains why, in *Bruen*, the Court could write that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes," 142 S. Ct. at 2138 n.9 (2022), and Justice Kavanaugh could add that "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." *Id.* at 2162 (Kavanaugh, J., concurring). These shall-issue permitting regimes, notably, emerged only in the latter part of the twentieth century. *See, e.g.*, Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 Tex. Rev. L. & Pol. 103, 143 (2021).

As the Court observed in *Bruen*: "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." 142 S. Ct. at 2132. Thus, the test for whether a challenged regulation produces "a well regulated Militia" is not tied to framing-era practice; it is instead sensitive to historical context. After all, the militia could hardly be "well regulated" if regulation were insensitive to historical context.

Justice Scalia, the author of *Heller*, illustrated this point when considering the permissibility of a police officer's stop-and-frisk under the Fourth Amendment's prohibition on unreasonable search and seizure when an officer reasonably suspects that a suspect is engaged in criminal activity and may be armed, even absent

probable cause to arrest, explaining that although a frisk in such circumstances was likely regarded as unlawful in the framing era, it may have become constitutionally reasonable once "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard." *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

To be sure, a "well regulated Militia" is not subject to unbounded regulatory authority. As Professor Nelson Lund has observed, "something can only be 'well regulated' when it is not overly regulated or inappropriately regulated." Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157, 175 (1999) (emphasis deleted). The standard of a "well regulated" militia accordingly requires that regulation not be unduly onerous.

Thus, a regulation that imposes an undue burden on Second Amendment rights in light of legitimate regulatory objectives cannot be sustained by reference to the "well regulated Militia" contemplated by the Second Amendment's preamble.

This focus on the magnitude of and justification for the burden imposed by a challenged regulation, moreover, is suggested by the guidance *Bruen* offered for inquiry into whether a historical regulation constitutes a fair analog for a challenged contemporary regulation:

> [W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is compa-

> rably justified are *central* considerations when engaging in an analogical inquiry.

Bruen, 142 S. Ct. at 2133 (emphasis in original) (internal quotations and citations omitted).

Accordingly, the militia, organized or unorganized, may be "well regulated," but those regulations cannot impose undue burdens on the right to keep and bear arms.

II. SECTION 922(g)(8) IS AN APPROPRIATE REGULATION OF THOSE WHO "KEEP AND BEAR ARMS"

The court of appeals concluded the government had "fail[ed] to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." Pet. App. 27a. That conclusion is a function of the reality that, until relatively recently, our legal tradition reflected relative indifference to domestic violence. That indifference, fortunately, has given way. It is now evident that, given the dangers posed by armed domestic abusers, authority to "well regulate[]" the militia includes disarming those whom a judge has found pose an immediate danger to an intimate partner.

A. The Law Has Come To Recognize the Dangers Posed By Armed Domestic Abusers.

It should be unsurprising that the court of appeals could identify no longstanding tradition, traceable to the framing era, of disarming domestic abusers. That is because framing-era law reflected far less concern about domestic violence than contemporary law.

In St. George Tucker's American edition of Blackstone's *Commentaries*, framing-era law's tolerance for domestic

violence, if perhaps reluctant and embarrassed, is nevertheless unmistakable:

> The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds . . . . The civil law gave the husband the same, or a larger, authority over his wife . . . . [I]n the politer reign of Charles the second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband or, in return, a husband against his wife. *Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.*

2 St. George Tucker, Blackstone's Commentaries 444-45 (1803) (emphasis supplied and footnotes omitted).

Accordingly, as one scholar observed, "nineteenth-century judges developed a body of divorce law premised on the assumption that a wife was obliged to endure various kinds of violence as a normal—and sometimes deserved—part of married life." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2133-34 (1996).[6]

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[6] For a helpful review of the gradual evolution of the law of domestic violence since the framing era, see Elizabeth Pleck,

This legal regime was largely constructed by men. Notably, until the ratification of the Nineteenth Amendment, women had no right to vote and, accordingly, no direct influence on public policy. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("[A]lthough blacks were granted the right to vote in 1870, women were denied even that right—which is itself preservative of basic civil and political rights—until the adoption of the Nineteenth Amendment half a century later." (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (footnote and internal quotations omitted)).

Even after the Nineteenth Amendment, reform was gradual:

> Until the legal reforms of the late 1970's, women could not obtain a restraining order against a violent husband unless they were willing to file for divorce at the same time. When protective orders were available, enforcement was weak, penalties for violations were minor, and use in emergencies was not possible.

Jeffrey Fagan, The Criminalization of Domestic Violence: Promises and Limits 8 (Nat'l Instit. Just., Jan. 1996) (citation omitted).

Federal and state statutes prohibiting the possession of firearms by persons under domestic-violence restraining orders are of relatively recent origin, not appearing until the 1990s. *See* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access To Firearms By Domestic Violence Offenders Prevent*

Wife-Beating in Nineteenth-Century America, *in* 2 History of Women in the United States: Household Constitution and Family Relationships (Nancy F. Cott ed., 1992).

Intimate-Partner Homicide?, 30 Eval. Rev. 313, 316-20 & tlb.3 (2006).

Thus, only in recent decades has the relative indifference of framing-era law to domestic violence against women fully given way. The political and legal context has changed as well, both because of the ability of women to vote, and because this Court has concluded that the Fourteenth Amendment's guarantee that no person may be denied "equal protection of the law," U.S. Const. amend. XIV, § 1, demands that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Mississippi University Women v. Hogan*, 458 U.S. 718, 724 (1982)).

B. Section 922(g)(8) "Well Regulate[s]" the Militia.

Section 922(g)(8), like its state-law analogs, places no undue burden on Second Amendment rights. They are, instead, appropriate means of "well-regulat[ing]" the militia. These laws address the serious danger of firearms violence faced by victims of domestic abuse.

The magnitude of the problem is distressing; more than half of all women murdered in the United States are killed by current or former intimate partners, and the majority of these homicides are by firearm. *See* Neil Websdale et al., *The Domestic Violence Fatality Review Clearinghouse: Introduction to a New National Data System with a Focus on Firearms*, 6 Injury Epidemiology 1, 1 (2019).

Moreover, an abused partner is five times more likely to be killed when there is a firearm in the house. *See* 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 (2019).

Domestic abusers also represent a danger to law-enforcement officers called to the scene of a domestic disturbance. An analysis of law-enforcement fatalities from 2010 to 2016, funded by the United States Department of Justice, concluded: "[C]alls related to domestic disputes and domestic-related incidents represented the highest number of fatal types of calls for service . . . ." Nick Bruel & Desiree Luongo, U.S. Dep't of Just., Making It Safer: A Study of Law Enforcement Fatalities Between 2010-16, at 7 (Dec. 2017).[7]

Another review of law-enforcement fatalities from 1996 to 2010 found 116 officers were killed while responding to domestic disturbance calls, 95% of the officers were killed with a firearm, domestic-violence victims were also killed in 21% of these cases, and 85% of the domestic-violence victims were also killed with a firearm. Cassandra Kercher et al., *Homicides of Law Enforcement Officers Responding to Domestic Disturbance Calls*, 19 Injury Prev. 331, 333-34 (2013).

To similar effect, the United States Department of Justice's *Law Enforcement Officers Killed and Assaulted Annual Reports*, indicated that for the period 2013-2022, 61 officers were killed while responding to a "domestic disturbance" or "domestic violence," and, when combined, this constitutes the single largest circumstance producing officer fatalities, followed by

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[7] The most recent data available again shows that the leading circumstance in which law-enforcement officers were shot and killed involved domestic dispute. *See* Nat'l Law Enf. Mem. & Museum, 2023 Mid-Year Preliminary Law Enforcement Officers Fatalities Report 4-5 (July 11, 2023).

a "traffic violation stop," which produced 47 officer-fatalities in the same period. *See* FBI, Crime Data Explorer, *Law Enforcement Officers Killed and Assaulted Annual Reports*: Law Enforcement Officers Feloniously Killed, tbl. 23, https://cde.ucr.cjis.gov/LATEST/webapp/#.

The available empirical work, moreover, powerfully suggests that statutes prohibiting the possession of firearms by those subject to domestic-violence restraining orders have a material effect on rates of lethal domestic violence.

A number of studies have examined state-level data on domestic violence restraining orders, finding that in states in which abusers are required to relinquish their firearms under state law, there were, when compared to other states without such laws, statistically significant reductions in overall rates of domestic-violence homicide. *See* Vigdor & Mercy, *supra*, at 337 (state laws that prohibit the possession and purchase of firearms by persons under restraining orders reduced intimate-partner homicide by 8%); Carolina Diez et al., *State Intimate Partner Violence-Related Firearms Laws and Intimate Parter Homicide Rates, 1991 to 2015*, 167 Ann. Internal Med. 537, 539 (2017) (state laws requiring those under restraining orders to relinquish firearms and refrain from possessing them reduced intimate-partner homicide by 10.8%); April M. Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide*, 187 Am. J. of Epidemiology 2365, 2367-68 & tbl.1 (finding a 12% reduction associated with firearms-relinquishment requirements), *retracted in*

part on other grounds, 187 Am. J. Epidemiology 2491 (2018).[8]

Another study examined the effect of the federal statute, finding that it "was associated with a 27% reduction in state-level IPH [intimate partner homicide] and a 28% reduction in firearm IPH in the Black population, but had no measurable association with IPH in the White population." Mikaela A. Wallin et al., *The Association of Federal and State-Level Firearm Restriction Policies with Intimate Partner Homicide: A Re-Analysis by Race of the Victim*, 37 J. Interpersonal Violence NP16509, NP16524 (2022). Conversely, state-law firearms-relinquishment requirements for those under domestic-violence restraining orders were associated with "11% reduction in total IPH for White victims and a 16% reduction in firearm IPH for White victims" but no association "for Black victims." *Id.* The authors suggested that this disparity could be attributable to the impact of the federal law "in states that lack (or lacked) other domestic violence resources or firearm restriction policies for an already vulnerable population." *Id.* at NP16525.

Given the many variables that drive homicide rates, these findings are remarkable. Doubtless jurisdictions that take care to alert victims to the availability of restraining orders, support them in obtaining such orders, and then devote the resources necessary to

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[8] *See also* Tiara C. Willie et al., *Associations Between State Intimate Partner Violence-Related Firearm Policies and Injuries Among Women and Men Who Experience Intimate Partner Violence*, Injury Epidemiology, at 5, 7 tbl.3 (2021), https://pubmed.ncbi.nlm.nih.gov/33612117/ (finding a statistically significant relationship between prohibitions on firearms possession by persons under domestic-violence restraining orders and reductions in rates of nonfatal domestic violence).

achieving compliance with firearm-relinquishment requirements, experience especially large reductions in domestic-violence-related homicides.

To be sure, those who commit crimes involving domestic violence are liable for their criminal conduct. Criminal liability for completed acts of violence, however, comes too late for the victim. Moreover, the data we canvas above demonstrate that prophylactic measures, such as § 922(g)(8) and its state-law analogs, offer more effective deterrence than the threat of criminal liability alone. Removing firearms from individuals who present elevated risks of domestic violence is an effective way to prevent domestic violence, rather than only punishing offenders only after the fact.

In short, § 922(g)(8) and its state-law analogs do not eliminate the interpersonal dynamics that produce domestic violence, but by removing a firearm from the possession of an abuser, they reduce the likelihood that domestic violence will escalate to lethality.

There have been no statistical analyses that assess whether these statutes reduce rates of law-enforcement fatalities while responding to domestic-violence-related calls for service. Given how dangerous domestic-violence calls are for police, however, it is likely that these statutes, if effectively utilized, reduce risks faced by law-enforcement officials no less than those faced by domestic-abuse victims.

Accordingly, there is ample reason to believe that § 922(g)(8) and its state-law analogs reduce the risk that domestic disputes will escalate to lethal violence.

At the same time, § 922(g)(8)'s reach is narrow. It applies only to those subject to a restraining order issued on "actual notice," after a proceeding "at which such person had an opportunity to participate," and

after a judge has made "a finding that such person represents a credible threat to the physical safety of such intimate partner or child" or issued an order that "prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." 18 U.S.C. § 922(g)(8)(A), (C). Thus, it reaches only those who have had notice, opportunity for hearing, and requires an individualized adjudication of dangerousness.

The Texas statute under which the restraining order against Rahimi issued is even more restrictive, requiring the court to find that "family violence has occurred and is likely to occur in the future." Tex. Fam. Code § 85.001(b).[9] Accordingly, the restraining order at issue in this case was issued on a finding that violence was probable.

Thus, § 922(g)(8) is tailored to address a discrete but important threat of firearms violence in a context in which there is demonstrable evidence of a seriously elevated and unacceptably high risk of lethal confrontation.

Individuals who have been adjudicated to present an ongoing threat to an intimate partner sufficient to justify a restraining order are surely no part of a

[9] "Family violence" is defined as "(1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; (2) abuse, . . . by a member of a family or household toward a child of the family or household; or (3) dating violence . . . ." Tex. Fam. Code § 71.04.

"well regulated Militia." As long as they are subject to the order, they are appropriately deprived of access to firearms. There is, as we explain above, substantial evidence of the efficacy of this type of regulation.

The Second Amendment, as this Court has explained, protects "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, and "ordinary, law-abiding citizens," *Bruen*, 142 S. Ct. at 2122. Rahimi is none of those. At least as long as he remained subject to the domestic-violence restraining order, he had no place in a "well regulated Militia." Rahimi's flagrant violation of the restraining order, evidenced by the sensational spasm of violence reflected in his subsequent shooting spree, only confirms that conclusion.

Section 922(g)(8) and its state-law analogs accordingly impose no undue burden on the right to keep and bear arms. To the contrary, these are precisely the type of regulations to which a "well regulated Militia" is appropriately held.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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