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 EVERYTOWN FOR GUN SAFETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with nearly ten million supporters across the country. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after a gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws, as well as a national movement of high school and college students working to end gun violence.

Over the past several years, Everytown has devoted substantial resources to researching and developing expertise in historical firearms legislation. Everytown has drawn on that expertise to file more than 90 amicus briefs in Second Amendment and other firearms cases, offering historical and doctrinal analysis, as well as social science and public policy research, that might otherwise be overlooked.

INTRODUCTION AND SUMMARY OF ARGUMENT

Gun regulations that protect victims of domestic violence are among the most important and foundational public safety laws in our country. Every month, an average of 70 women are shot and killed by an intimate partner.

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

Guns and Violence Against Women, Everytown Research & Policy (October 17, 2019; updated as of Apr. 10, 2023). And access to a gun makes it five times more likely that a woman will die at the hands of her abuser. *Id.* Regulations like those at issue in this case reflect the commonsense, bipartisan, historically grounded proposition that people who pose a risk to others should not be able to access a deadly weapon. Affirmance of the Fifth Circuit's aberrant decision below would enable domestic abusers subject to restraining orders—individuals who have very recently harmed or threatened their partners—to instantly access firearms. The impact would be deadly for many domestic violence survivors across the country.

Our Constitution has long reflected the obvious wisdom—shared by every generation of Americans—of keeping guns away from individuals found to be dangerous and irresponsible. In turn, and for the reasons discussed in the United States' brief, section 922(g)(8) is constitutional under the analysis for Second Amendment claims this Court articulated in *New York State Rifle & Pistol Association* v. *Bruen*, 142 S. Ct. 2111 (2022). Everytown submits this amicus brief to expand on three points pertaining to *Bruen*'s historical inquiry.

First, and at the outset, this case does not require deciding whether to center the historical inquiry on the Reconstruction era and the ratification of the Fourteenth Amendment in 1868, or the Founding era and the ratification of the Second Amendment in 1791. Just as this Court left that question open in *Bruen*, *see* 142 S. Ct. at 2138, it should do so again here because both historical periods reflect a public understanding of the right to keep and bear arms that confirms the constitutionality of section 922(g)(8). *See* U.S. Br. 13-27.

Second, if the Court believes it necessary to further clarify the parameters of *Bruen*'s historical inquiry, it should decide that the public understanding of the right around 1868 is the proper focal point of originalist analysis. The case for looking to Reconstruction rather than the Founding in a challenge to a state law should be obvious: the Second Amendment right to keep and bear arms did not apply to the states until ratification of the Fourteenth Amendment in 1868. This view has been embraced by many prominent originalist scholars and lawyers. Furthermore, because this Court in *Bruen* indicated that the scope and content of the right should be uniform across all levels of government—and, according to the two scholars the Court pointed to in *Bruen*, 142 S. Ct. at 2138, ratification of the Fourteenth Amendment updated the meaning of the original Bill of Rights—it follows that the public understanding as of 1868 should likewise serve as the lodestar of the historical analysis for federal challenges.

Third, even if this Court were to address the 1791-versus-1868 question and hold that 1791 is the appropriate focus of analysis in federal challenges, post-1791 (and, indeed, post-1868) evidence would still supply important historical evidence of earlier understanding—including because, as this Court and many leading originalist scholars have recognized, later historical practice can "liquidate" and thereby confirm the meaning of disputed constitutional terms and phrases. *See Bruen*, 142 S. Ct. at 2136-2137.

ARGUMENT

I. SECOND AMENDMENT HISTORICAL ANALYSIS SHOULD FOCUS ON THE RECONSTRUCTION ERA RATHER THAN THE FOUNDING ERA

Bruen instructs courts to analyze Second Amendment claims by asking whether "the Second

Amendment's plain text covers an individual's conduct," and, if so, whether the government has shown that its regulation is "consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2129-2130. With respect to that second, historical inquiry, this Court noted, but explicitly left open, the question of whether the inquiry should center on 1791 or 1868. *See id.* at 2138 (pointing to "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)"). Here, too, this Court need not address—much less resolve—that choice, considering the substantial historical evidence of 922(g)(8)'s constitutionality spanning both periods. *See* U.S. Br. 13-27. But if this Court believed otherwise, it should recognize that the historical inquiry for purposes of challenges to state laws should be centered on 1868. And because *Bruen* indicated that the Second Amendment right as applied against the States is the same as the right against the federal government, it follows that the historical inquiry in federal challenges should likewise center on Reconstruction-era evidence of history and tradition.

A. For Cases Challenging The Constitutionality Of A State Law, Focusing On 1868 Is Necessary To Answer The Originalist Question

As this Court observed in *Bruen*, a State "is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." 142 S. Ct. at 2137. Originalist analysis of the constitutionality of a state law is thus controlled by the people's choice to extend the Bill of Rights to the States in 1868. To elevate

a Founding-era understanding of the right over the Reconstruction-era understanding would reject what the people understood the right to be at the time they gave it effect. That mistake would, in turn, undermine this Court's pronouncement in *Heller* and *Bruen* that "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.'" *Id.* at 2136 (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 634-635 (2008) (emphasis added)).

Indeed, centering the inquiry on 1868 is consistent with the passage in *Bruen* instructing the lower courts on historical methodology through the example of sensitive-places restrictions. The passage indicated that historical evidence from the "18th- *and 19th-century*" justified the State's restrictions on gun possession in legislative assemblies, polling places, and courthouses. 142 S. Ct. at 2133 (emphasis added). Moreover, insisting that the 1791 understanding should define the right to be applied against the States is in tension with this Court's lengthy analysis in *McDonald* pertaining to the 1868 understanding of the right to keep and bear arms. *See McDonald* v. *City of Chicago*, 561 U.S. 742, 770-778 (2010) (plurality op.); *id.* at 826-838 (Thomas, J., concurring in part and concurring in the judgment). It would be nonsensical for the 1868 public understanding of the right to control *whether* the right was incorporated against the States, but to have nothing to say about the *scope* or *content* of that incorporated right.

This is why, prior to *Bruen*, several courts of appeals looked to an 1868 understanding when analyzing historical traditions of firearm regulation in cases challenging state laws. For instance, the Seventh Circuit read *McDonald* to have "confirm[ed] that when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the

Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified." *Ezell* v. *City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011). Other circuits followed suit. *See Gould* v. *Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868 … ."), *criticized by Bruen*, 142 S. Ct. at 2124, 2126-2127; *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (following *Ezell*).

The view that the 1868 understanding should frame the historical analysis in a case against a State has been embraced by prominent practitioners and originalist scholars alike. Notably, former Solicitor General Paul Clement articulated this position during oral argument in *Bruen* when he served as counsel for the petitioners:

> JUSTICE THOMAS: [Y]ou mentioned the founding and you mentioned post-Reconstruction. But, if we are to analyze this based upon the history or tradition, should we look at the founding, or should we look at the time of the adoption of the Fourteenth Amendment, which then, of course, applies it to the states?
>
> MR. CLEMENT: So, Justice Thomas, I suppose, if there were a case where there was a contradiction between those two, you know, and the case arose in the states, I would think there would be a decent argument for looking at the history at the time of Reconstruction … and giving preference to that over the founding.

Tr. of Oral Arg. at 8:2-17, *Bruen* (No. 20-843).

Clement's view accords with that of many leading originalist scholars. A panel of the Eleventh Circuit

recently observed that "[m]any prominent judges and scholars—across the political spectrum—agree that, at a minimum, 'the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified,'" and cited—among others—Josh Blackman, Ilya Shapiro, Steven Calabresi, and Sarah Agudo. *NRA* v. *Bondi*, 61 F.4th 1317, 1322 n.9 (11th Cir. 2023) (quoting *Ezell*, 651 F.3d at 702), *vacated on grant of reh'g en banc*, No. 21-12314, 2023 WL 4542153 (July 14, 2023). Professors Calabresi and Agudo have argued that "the question is controlled not by the original meaning of the first ten Amendments in 1791 but instead by the meaning those texts and the Fourteenth Amendment had in 1868." *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 115-116 & n.485 (2008). Professors Blackman and Shapiro have similarly argued that "1868 is thus the proper temporal location for applying a whole host of rights to the states, including the right that had earlier been codified as the Second Amendment," and that "[i]nterpreting the right to keep and bear arms as instantiated by the Fourteenth Amendment—based on the original public meaning in 1791—thus yields an inaccurate analysis." *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 Geo. J.L. & Pub. Pol'y 1, 52 (2010).

Other scholars who have endorsed this 1868 view include Professors Evan Bernick, David Bernstein, Michael Rappaport, and Stephen Siegel. *See* Bernick, *Fourteenth Amendment Confrontation*, 51 Hofstra L. Rev. 1, 23 (2022) ("The view is ascendant among

originalists who hold that the Fourteenth Amendment requires states to respect some or all of the individual rights listed in the first eight amendments that those rights ought to be understood *as they were understood in 1868*. It is conceivable that the Fourteenth Amendment 'incorporated' the first eight amendments as *they were understood in 1791*. But it does seem unlikely."); Bernstein, "*Incorporation," Originalism, and the Confrontation Clause*, Volokh Conspiracy (July 6, 2009), https://volokh.com/2009/07/06/incorporation-originalism-and-the-confrontation-clause ("When a right protected by the Bill of Rights is applied to the states via the 14th Amendment, it has to be the 1868 understanding of that right, not the 1791 understanding, that governs."); Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 San Diego L. Rev. 728, 748 (2008) ("If the rights in the original Bill had developed a new meaning in the years leading up to Reconstruction, and if the enactors of the Amendment had used those new meanings, the incorporated Bill would have a different meaning than the original Bill."); Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 Buff. L. Rev. 655, 662 n.32 (2008) ("I am unaware of any discussion by an originalist asserting, as a matter of theory, that the meaning of the Bill of Rights in 1789 should be preferred to its meaning in 1868 when the subject is the limitations the Fourteenth Amendment imposes on the states. In addition, I am unable to conceive of a persuasive originalist argument asserting the view that, with regard to the states, the meaning of the Bill in 1789 is to be preferred to its meaning in 1868.").

This is not to say that each of these scholars believes that 1868 is the appropriate historical lodestar in cases

against the *federal* government. *See, e.g.*, Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 52 (arguing that 1868 is the correct focus for cases against a State and 1791 is correct for cases against the federal government). But, as explained below, this Court has rejected the possibility of diverging Bills of Rights between state and federal levels of government. And, as further explained below, to the extent there is only one Second Amendment standard applicable to all levels of government, that standard must be focused on 1868.

B. Because The Right As Applied Through The Fourteenth Amendment Is Invested With 1868 Meaning, Focusing On 1868 In Federal Challenges Is In Keeping With *Bruen*'s Commitment To Equivalent State and Federal Standards

Though this Court in *Bruen* did not resolve the choice between 1791 and 1868, it did reject the possibility of different standards for state and federal challenges: "[W]e have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." 142 S. Ct. at 2137. It follows that the Second Amendment test—including the contours of the historical inquiry—should not vary between state and federal challenges. And because courts assessing challenges to state laws should consult history around the time of the Fourteenth Amendment, so too should courts examine Reconstruction-era history in challenges to federal laws.

Specifically, the passage in *Bruen* establishing the need for state-federal congruity marked the path for keying the historical inquiry in *both* instances to 1868. After leaving open the 1791-versus-1868 question but explaining that the state and federal standards should be

the same, the Court cited two scholars, Professors Akhil Amar and Kurt Lash, who argue that the 1868 ratification of the Fourteenth Amendment updated the meaning of the original Bill of Rights. *See* 142 S. Ct. at 2138 (citing Amar, *The Bill of Rights: Creation and Reconstruction*, at *xiv*, 223, 243 (1998), and Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439 (2022)). According to Professor Lash, "When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings." Lash, 97 Ind. L.J. at 1441 (2022); *see Bruen*, 142 S. Ct. at 2138 (quoting this excerpt). And on Professor Amar's account, "in the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill may be subtly but importantly transformed." Amar, *The Bill of Rights* 223. In turn, "the Fourteenth Amendment has a doctrinal 'feedback effect' against the federal government" such that "words inserted into the Constitution in 1791 must be read afresh after 1866." *Id.* at 243, 283. Thus, according to both of the scholars the Court chose to cite, the 1868 understanding should control in cases against the States *and* the federal government.

This Court's constitutional jurisprudence has frequently, if implicitly, tracked such an understanding of the relationship between the original Constitution and subsequent amendments. For instance, the original Freedom of Speech and Press Clauses may well have involved little more than freedom from prior restraint on publishing, *see* Levy, Origins *of the Bill of Rights* 123 (1999), and largely focused on "protect[ing] people who are saying *relatively popular things* against perhaps an unrepresentative or unpopular [federal] government," Amar, *The Creation and Reconstruction of the Bill of*

Rights, 16 S. Ill. U. L.J. 337, 343 (1992) (emphasis added). Of course, the modern Speech and Press Clauses extend more broadly and at their core protect *unpopular* speech. *See, e.g.*, *United States* v. *Alvarez*, 567 U.S. 709 (2012) (holding that the Stolen Valor Act constituted a content-based restriction on free speech); *United States* v. *Stevens*, 559 U.S. 460 (2010) (holding that a federal statute criminalizing the commercial use of depictions of animal cruelty was facially invalid). This is not to say that the modern First Amendment is unmoored from originalist precepts; it instead simply reflects an original public understanding keyed to Reconstruction and the Fourteenth Amendment, which imbued the Speech and Press Clauses with concepts of individual freedom and liberty. As Amar views it, "the very meaning of freedom of speech, press, petition, and assembly was subtly redefined in the process of being incorporated," with the "paradigmatic speaker" moving from "a relatively popular publisher" in the eighteenth century "to the Unionist, the abolitionist, and the freedman" by the mid-nineteenth century. Amar, *The Bill of Rights* 236.

Similarly, the public meaning of the right to keep and bear arms around 1868 should figure centrally into *Bruen*'s historical inquiry for state and federal challenges alike. In this case, as in *Bruen*, the evidence in both the Founding and Reconstruction eras confirms the constitutionality of the challenged law. But in cases where the two periods offer contradictory answers, a court should prioritize evidence from the latter period.

II. EVEN IF 1791 WERE THE APPROPRIATE LODESTAR OF SECOND AMENDMENT MEANING IN FEDERAL CHALLENGES, LATER EVIDENCE CONTINUES TO BE RELEVANT IN ELUCIDATING THE 1791 PUBLIC UNDERSTANDING

If this Court were to take up the timing question and conclude, despite the foregoing, that 1791 is the crux of the historical inquiry in challenges to federal laws, it should still make clear that later historical evidence can help inform the parameters of the Second Amendment right. This flows directly from *Heller* and *Bruen*'s instruction that "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" remains "a critical tool of constitutional interpretation." *Bruen*, 142 S. Ct. at 2127-2128 (quoting *Heller*, 554 U.S. at 605) (second emphasis added).[2] This Court has made clear that "we must also guard against giving postenactment history more weight than it can rightly bear"—thus, "'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'" *Id.* at 2136-2137 (quoting *Heller* v. *District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); *see id.* at 2154 & n.28 (declining to consider late-nineteenth- and early-twentieth-century historical evidence "when it contradicts earlier evidence").[3] But short of that untenable use,

[2] Sources examined in *Heller* included "19th-century cases that interpreted the Second Amendment," "'discussion of the Second Amendment in Congress and in public discourse' after the Civil War," and "how post-Civil War commentators understood the right." *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 610, 614).

[3] Consideration of later historical evidence, continuing into the late-nineteenth and twentieth centuries, makes particular sense in

Reconstruction-era and later evidence offers valuable insight into the original public understanding as of the Founding and should be embraced accordingly.

The reasons why post-Founding and other later historical evidence can solidify—or "liquidate"—a legal text's original meaning are well-known to this Court. As explained in *Bruen*, "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution." 142 S. Ct. at 2136 (cleaned up, quoting decision quoting James Madison). Indeed, originalist scholars in recent years have sought to claim a greater role for later historical practice precisely because original meaning as of 1791 can be opaque or unknowable. *See, e.g.*, Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 59-60 (2019) ("Privileging early practice through liquidation is tempting but wrong" because "[i]ndeterminate provisions remain open to liquidation for as long as their meanings remain contested."); Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 10-21 (2001) (identifying Madisonian liquidation with post-Founding evidence); *accord Bruen*, 142 S. Ct. at 2136-2137 (citing Professors Baude and Nelson in its discussion of liquidation). Originalist scholars have also endorsed liquidation to explain why originalism does not "self-destruct" in the face of evidence that the Founders themselves expected constitutional meaning to be settled over time. *See* Bradley & Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*,

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this case where, as the United States explains, important and relevant developments in "legal, social, and technological factors that have nothing to do with the Second Amendment" have occurred. U.S. Br. 40-41; *see Bruen*, 142 S. Ct. at 2132 (recognizing that new technologies or new societal concerns may "require a more nuanced approach" to the historical inquiry).

106 Va. L. Rev. 1, 40-44 & n.165 (2020) (canvassing Professor Nelson's and other originalist scholars' arguments in this vein).

Moreover, appeal to nineteenth-century and later evidence is particularly warranted for purposes of rounding out *Bruen*'s historical inquiry. As should be obvious, it cannot always be assumed that an earlier legislature's inaction—whether it be inaction pertaining to firearms or to anything else—was driven by concerns about constitutionality rather than any number of other practical or policy considerations. *See*, *e.g.*, *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2255 (2022) (explaining that "the fact that many States in the late 18th and early 19th century did not criminalize" certain conduct "does not mean that anyone thought the States lacked the authority to do so"); U.S. Br. 39; *cf.* Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 69-70 (1988) (arguing, in the statutory interpretation context, that "legislative inaction should rarely be given much, or any, weight" as a sign of "the actual collective will or desire of the enacting legislature"). And as *Bruen*'s discussion of the sensitive-places doctrine indicates, the absence of regulation at or immediately after the Founding does not, in and of itself, indicate constitutional doubt: "Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions." *Bruen*, 142 S. Ct. at 2133.

Looking to nineteenth-century and later evidence—particularly when the Founding era yields neither analogous regulations nor "disputes regarding the lawfulness of such [regulations]," *Bruen*, 142 S. Ct. at 2133—

can thus help contextualize earlier legislative inaction. For instance, if a regulation passed in the decades around Reconstruction—*within the lifetimes* of some who were alive at the Founding—did not raise a constitutional challenge at the time of its passage, and there is no separate historical evidence showing that the regulation would have raised constitutional concern in the decades prior, then it can be inferred that the regulation comports with the Founding-era public understanding of the right.

To put the point another way, *Bruen*'s recognition of the interpretative significance of post-ratification evidence fits hand-in-glove with the following presumption for purposes of federal challenges: if at *Bruen*'s second step the government presents no evidence of a Founding-era regulatory tradition but does present evidence of an adequate Reconstruction-era or later regulatory tradition, a court should presume that the regulation is constitutional unless the challenger supplies affirmative evidence that the regulation was or would have been considered unconstitutional in 1791. In assuming that the public understanding of the right remains consistent between 1791 and 1868 absent evidence from the challenger to the contrary, this presumption also reflects this Court's longstanding position, as elaborated in Part II above, that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Bruen*, 142 S. Ct. at 2137.

In turn, even if this Court were to reach the 1791-versus-1868 question and decide on 1791 for purposes of federal challenges, it should continue to countenance the instrumental value of nineteenth-century historical evidence. Similarly, this Court should make clear that the

absence of an analogous regulation at the Founding does not necessarily indicate that the regulation would have been viewed by the Founding-era public with constitutional suspicion.

CONCLUSION

This Court should reverse the judgment of the court below.

Respectfully submitted.

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