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 AMERICANS AGAINST GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Americans Against Gun Violence ("AAGunV") is a nonprofit organization founded on the belief that the citizens of the United States have not only the ability, but also the moral obligation to reduce rates of firearm related deaths and injuries in our country to levels at or below the rates in the other high-income countries of the world. AAGunV engages in educating the public and policymakers regarding the causes of our country's extraordinarily high rate of firearm related deaths and injuries and the definitive measures needed to stop this epidemic. AAGunV offers this brief to highlight just some of the flaws with the Court's current Second Amendment framework, which compels the conclusion that the Court should overturn its decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), and reverse the outcome of the current case at issue, *United States vs. Rahimi*.[1]

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

SUMMARY OF ARGUMENT

In ruling that Respondent Zackey Rahimi's conviction for possessing firearms violated his rights under the Second Amendment, the Fifth Circuit cited the following facts in this case: (1) Rahimi was under a domestic violence restraining order ("DVRO"); (2) Rahimi possessed a rifle and a pistol in violation of 18 U.S.C. Section 922(g)(8) ("Section 922(g)(8)") which prohibits certain individuals under a DVRO from owning firearms; (3) Rahimi had engaged in selling narcotics; (4) Rahimi was involved in five shootings in and around Arlington, Texas, between December 2020 and January 2021; and (5) Rahimi was indicted for illegally possessing firearms and pled guilty. *United States v. Rahimi*, 61 F. 4th 443, 448-49 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023). Rahimi subsequently appealed his conviction on the basis that Section 922(g)(8) was unconstitutional. *Id.* at 448. Rahimi's appeal was initially denied by the Fifth Circuit. *Id.* Rahimi sought rehearing en banc, and following the Supreme Court's 2022 *Bruen* decision, the Fifth Circuit panel withdrew its decision. *Id.* A new Fifth Circuit panel, relying on the new "text and history" test set by *Bruen*, concluded that Section 922(g)(8) was unconstitutional. *Id.*

This Court granted certiorari on the question of "whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face." *United States v. Rahimi*, No. 22-915, 2023 WL 2600091 (5th Cir. Mar. 17, 2023) (petition for writ of certiorari); *United States v. Rahimi*, 143 S. Ct. 2688 (2023) (granting petition for writ of certiorari).

This Court should hold that Section 922(g)(8) is valid and does not violate the Second Amendment. In addition, as discussed below, AAGunV submits that this Court's prior rulings in *Heller* and *Bruen*—which were construed by the Fifth Circuit as conferring a constitutional right to gun ownership for an individual with a record such as Zackey Rahimi—are seriously flawed and should be overturned.

Specifically, the "text and history" test set forth by *Bruen* relied on (1) the false premise that the text and history of the Second Amendment provide for an individual right to gun ownership unrelated to service in the militia and (2) a false premise that gun ownership is necessary for individuals' safety and self-defense. The test did not and will not provide the opportunity to fairly consider evidence to the contrary, including that gun possession causes more deaths and injuries than it prevents.

With these two seriously flawed pillars of analysis underlying its discussion, *Bruen's* new "text and history" test renders it extremely difficult, if not impossible, for the government to regulate gun ownership in a reasonable and commonsense manner. The Fifth Circuit's decision in *Rahimi* demonstrates the flaws and dangers of the framework established in *Heller* and *Bruen*. The notion that the government cannot limit the right of an individual with a DVRO to possess a firearm is nonsensical and threatens the safety of Americans. The Court should take this opportunity to overturn *Heller* and *Bruen*, and reverse *Rahimi*.

ARGUMENT

I. *Bruen's* "text and history" test, applied in *Rahimi*, relied on two deeply flawed assumptions.

Prior to this Court's decision in *Heller* in 2008, courts—including this Court—had made clear the Second Amendment provided for only a limited, collective right to possess firearms to the extent necessary to maintain effective militias. *See, e.g.*, *United States v. Miller*, 307 U.S. 174, 178 (1939). Despite this consensus, in 2008, for the first time, *Heller* rejected the collective rights view and held that the Second Amendment protects an individual right to possess firearms in the home for self-defense, unrelated to service in a well-regulated militia. *Heller*, 554 U.S. at 635-36.

Following the creation of such an individual right in *Heller*, in 2022, this Court in *Bruen* again departed from the relevant precedent to create a new test applicable to determining the constitutionality of a governmental gun regulation. In *Bruen*, this Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, … the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126.

But *Heller*, and in turn *Bruen* (which relies extensively on the analysis of *Heller)*, are both incompatible with the actual text and history of the Second Amendment, and with the relevant precedent. Because *Bruen* has no credible legal basis, its framework and holding—including

its test applied in *Rahimi*—should be overturned. A proper interpretation of the Second Amendment or a traditional means-end analysis dictates that Section 922(g)(8) is clearly constitutional and good policy.

A. Both *Bruen* and *Heller* are based on the false premise that the text and history of the Second Amendment established an individual right to own a gun.

Heller, and by extension *Bruen*, ignored or mischaracterized the overwhelming evidence, support, and precedent that establishes that the Second Amendment was drafted to protect only the right to possess a firearm in the context of militia service. *Heller* and *Bruen's* conclusion that "the Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation" is incompatible with the text and history of the Second Amendment. *Bruen*, 142 S. Ct. at 2135 (citing *Heller*, 554 U.S. at 592).

1. The "well regulated militia" clause refers to the right to possess and use firearms in connection with militia service.

The Second Amendment states, in its entirety, "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.

Bruen cited *Heller* for the claim that "the right of the people to keep and bear Arms shall not be infringed—guarantee[s] the individual right to possess and carry weapons in case of confrontation that does not depend on

service in the militia." *Bruen*, 142 S. Ct. at 2127 (citing *Heller*, 554 U.S. at 592). But, in reaching this conclusion, *Heller* treated the phrase "well regulated Militia" as mere surplusage. This cannot be the case. *Marbury v. Madison*, 5 U.S. 137, 174 (1803); *see also Myers v. United States*, 272 U.S. 52, 151 (1926) ("[R]eal effect should be given to all the words [the Constitution] uses.").

The Court's reasoning in *Heller*, claiming that the preamble clarified the purpose of the Arms Clause but did not limit it, is nonsensical. *Heller*, 554 U.S. at 577-78. The Court explained that "while we begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose." *Id.* at 578. But the Court did just the opposite. It disconnected the prefatory clause from the remainder of the Amendment. In the end, the Court's interpretation read out the Militia Clause from the Second Amendment, failing to give it any effect whatsoever.

As the Professors of Linguistics and English noted in their *amicus* brief in *Heller*:

> Under longstanding linguistic principles that were well understood and recognized at the time that the Second Amendment was adopted, the "well regulated Militia" clause necessarily adds meaning to the "keep and bear Arms" clause by furnishing the reason for the latter's existence....On its face, the language of the Amendment tells us that the reason why the right of the people to keep and bear arms shall not be infringed is because a well regulated

> militia is necessary to the security of a free State. The purpose of the Second Amendment, therefore, is to perpetuate "a well regulated Militia."[2]

Indeed, this Court in *Miller*, 307 U.S. at 176, appropriately recognized an inextricable relationship between the "right of the people to keep and bear Arms" ("Arms Clause"), described in the second half of the Second Amendment, and the need for a "well regulated Militia," described in the first half of the Amendment. *Heller*, too, recognized this relationship between the preamble and the later Arms Clause. "Logic demands that there be a link between the stated purpose and the command." *Heller*, 554 U.S. at 577. Nonetheless, *Heller* failed to apply this logic when it held that "[t]he Second Amendment protects an individual right to possess a firearm unconnected with service in the militia. . . ." *Id.* at 570.

2. The "keep and bear arms" clause refers to a right to possess firearms if needed for and in relation to military activities.

Heller and *Bruen* both failed to interpret "keep and bear arms" in accordance with how it would have been understood during the founding era. "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from their technical meaning." *Heller*, 554 U.S. at 576 (citing *United States v. Sprague*, 282 U.S. 716,

2. *See* Br. for Professors of Linguistics & English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. & Jeffrey P. Kaplan, Ph.D. in Supp. of Pet'rs at 2-3, No. 07-290, *District of Columbia v. Heller* (S. Ct. Jan. 11, 2008).

731 (1931)). Although *Heller* recognized this principle, it did not faithfully apply it.

Historical research confirms that "bear arms" was generally associated with carrying arms in military service. James Madison, who wrote the original draft of what would eventually become the Second Amendment, made clear that he was using the term "bear arms" to refer to carrying weapons in the setting of military service for the common defense. Madison's original draft read:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[3]

In 1840, the Tennessee Supreme Court rejected the non-military interpretation of the phrase and concluded that "bear arms" did not encompass personal use for, for example, hunting. *Aymette v. State*, 21 Tenn. 154, 161 (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 of him that he had borne arms; much less could it be said that a private citizen bears arms because he had a dirk or pistol concealed under his clothes, or a spear in a cane.").

Other courts in the 19th century, too, understood "bear arms" to be associated with the militia. *See English*

3. *See* 1 Annals of Cong. 451-52 (1789) (Joseph Gales ed., 1834), http://memory.loc.gov/cgibin/ampage?collId=llac&fileName=001/llac001.db&recNum=227.

v. State, 35 Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or solider, and the word is used in its military sense."); *State v. Workman*, 35 W. Va. 367, 14 S.E. 9, 11 (1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia . . . ").

Heller also recognized the idiomatic meaning of "bear arms": "to serve as a soldier, do military service, fight." *Heller*, 554 U.S. at 586. But *Heller* ignored or disregarded these authorities.

In the interval between *Heller* and *Bruen,* even more evidence was amassed in support of the fact that "to keep and bear arms" had a military meaning. In particular, computerized searches of databases compiled by Brigham Young University that included 40,000 texts and nearly 1.3 billion words from sources demonstrated that at the time the Second Amendment was written, the use of the term "keep and bear arms" was understood to refer to possessing and carrying weapons of war in the setting of military service.[4] An examination of these instances in context revealed that "roughly 900 separate occurrences of *bear arms* before and during the founding era refer to war, soldiering, or other forms of armed action by a group rather than an individual."[5]

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4. Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L. Q. 3, art. 1 (Spring 2019), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2086&context=hastings_constitutional_law_quaterly.

5. *Id.* (emphasis in original).

Although the *Bruen* majority opinion made approximately twenty-two references to the right to "keep and bear arms," each reference implied that the phrase referred to individual citizens possessing firearms for personal use. *See, e.g.*, *Bruen*, 142 S. Ct. at 2128. *Bruen*, however, relied heavily on *Heller*. *See id.* at 2138-42. *Bruen* offered no response to the extensive evidence that Justice Breyer presented in his dissenting opinion documenting that at the time that the Second Amendment was written, the term, "bear arms" was used almost exclusively "to refer to 'war, soldiering, or other forms of armed action by a group rather than an individual." *Id.* at 2178.

It was not until the 1970s when the gun lobby started systematically arguing for an individual right to bear arms that the literature began to noticeably change. The late Supreme Court Justice Douglas stated in his dissent in the 1972 case of *Adams v. Williams*, 407 U.S. 143, 150 (1972):

> A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment….There is no reason why all pistols should not be barred to everyone except the police.

The late Supreme Court Chief Justice Warren Burger stated on the PBS NewsHour in 1991:

> If I were writing the Bill of Rights now, there wouldn't be any such thing as the Second Amendment…. This has been the subject of one of the greatest pieces of fraud - I repeat the word 'fraud' - on the American public by

> special interest groups that I have ever seen in my lifetime.[6]

3. The Second Amendment did not codify any right inherited by English ancestors because no such individual right to own firearms ever existed.

While *Heller* asserted that the Second Amendment was intended to "codif[y] a right 'inherited from our English ancestors'" (*Heller*, 554 U.S. at 599 (citation omitted)), that finding is belied by the historical record. Indeed, the English never had such a broad right to own guns. *See id.* at 593 (recognizing that the right to possess firearms was a "right not available to the whole population, given that it was restricted to Protestants, and like all English rights it was held only against the Crown, not Parliament.").

Specifically, the 1689 English Bill of Rights provided: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by law."[7]

Heller puts a great deal of weight on the alleged right purportedly enshrined in the English Bill of Rights, but that argument is misplaced for at least three reasons. *First*, the 1689 Bill of Rights did not grant a universal

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6. Nina Totenberg, *From 'Fraud' To Individual Right, Where Does The Supreme Court Stand On Guns?* NPR KQED (Mar. 5, 2018), https://www.npr.org/2018/03/05/590920670/from-fraud-to-individual-right-where-does-the-supreme-court-stand-on-guns.

7. Bill of Rights 1689 (Eng.).

right to bear arms. The very text of the Bill of Rights shows that any such right was limited.

Although both *Heller* and *Bruen* refer to "St. George Tucker" as one of three "'important founding-era legal scholars'" (*Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 605)) and *Heller* quotes Tucker as writing that the Second Amendment was the "true palladium of liberty" (*Heller*, 554 U.S. at 606), neither *Heller* nor *Bruen* mention that in the same paragraph from which their quoted phrase was taken, Tucker also wrote, with regard to the 1689 English Bill of Rights:

> [T]he right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other persons not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.[8]

Second, the Bill of Rights includes the language "for their defence," which is notably absent from the language of the Second Amendment. To the extent that the English Bill of Rights provided for an individual right to possess firearms for "defence," that right was not reflected in the language the drafters selected to use in the Second Amendment.

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8. St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* at 300 (1803), *reprinted in* Rothman Reprints (1969), https://press-pubs.uchicago.edu/founders/documents/amendIIs7.html.

Third, although the 1689 English Bill of Rights has never been repealed and English common law remains in effect, Great Britian currently has some of the most stringent gun control laws of any high-income country in the world, including a ban on civilian ownership of all handguns and all automatic and semi-automatic long guns. Specifically, in 1988, the Great Britian banned all self-loading and pump-action rifles (except .22 rim-fire cartridges).[9] In 1997, Great Britian banned civilian ownership of handguns almost completely following the 1996 Dunblane Primary School shooting.[10]

Following the school shooting, an official governmental investigation ensued, carried out by Lord Douglas Cullen.[11] Lord Cullen's 193-page report makes no mention by name to the 1689 English Bill of Rights.[12] If the English Bill of Rights had granted an unalienable right to possess firearms as *Heller* asserts, it would be hard to reconcile the subsequent passing of two laws effectively banning all handguns and automatic and semi-automatic long guns.

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9. Firearms (Amendment) Act 1988, c. 45 (UK), https://www.legislation.gov.uk/ukpga/1988/45/contents.

10. Firearms (Amendment) Act 1997. c. 5 (UK), https://www.legislation.gov.uk/ukpga/1997/5/contents.

11. The Hon. Lord Cullen, The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996 (Sept. 30, 1996), https://www.gov.uk/government/publications/public-inquiry-into-the-shootings-at-dunblane-primary-school.

12. *Id.*

4. The drafters of the Second Amendment knowingly did not include language to provide for an individual right to possess firearms for self-defense.

The drafters of the Second Amendment had available to them language from state proposals and previously adopted state constitutions providing use of firearms for defense, yet the drafters chose not to include such a broad right and instead limited the text of the Second Amendment to the right of firearms in the context of the militia.

Ignoring the intentional word choice of the drafters, *Heller* relied on state constitutions, claiming that they support the Court's individual rights view. The Court cited Pennsylvania and Vermont as the states that "adopted individual rights unconnected to militia service." 554 U.S. at 601. For example, *Heller* quotes a portion of Clause XIII of the Pennsylvania Declaration of Rights of 1776 as stating the following: "That the people have a right to bear arms *for the defence of themselves* and the state ...." *Id.* (emphasis in original).

In addition to demonstrating that the drafters of the U.S. Constitution chose different and more narrow language, *Heller* also fails to reflect the full passage. The full Clause XIII of the Pennsylvania Declaration of Rights of 1776, including the portion that the Court eliminated with an ellipsis, provides:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept

> up; And that the military should be kept under strict subordination to, and governed by, the civil power.[13]

Heller's claim that this clause of the Pennsylvania Declaration of Rights confers an individual right to bear arms "unconnected to militia service" is wrong. *Heller*, 554 U.S. at 601. To the contrary, the full clause is clearly intended to confer a collective "right to bear arms" in order that a military body "kept under strict subordination to, and governed by, the civil power"—in other words, a well-regulated militia—might be used as a substitute for a standing army as a means of providing for the common defense.

5. *Heller* and *Bruen* improperly departed from this Court's interpretation of the Second Amendment.

In 2008, *Heller* reversed over two centuries of legal precedent interpreting the Second Amendment. The decision in *Heller* is inconsistent with four prior Supreme Court decisions and ignores its own bedrock principle of *stare decisis*. *Vasquez v. Hillery,* 474 U.S. 254, 265-66 (1986). This discussion will focus on the key prior precedent of *Miller*, 307 U.S. 174 (1939), which *Heller* and *Bruen* most clearly departed from.

Miller held that the "guarantee of the Second Amendment [was] made" with the "obvious purpose to assure the continuation and render possible the effectiveness of [the Militia]," and thus, the Second

13. Pa. Const. Decl. of Rights art. XIII (1776), https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss5.html.

Amendment did not protect possession or use of firearms that did not further the stated purpose. *Id.* at 178. In that case, Jack Miller and Frank Layton were arrested for transporting an unregistered shotgun across state lines between Oklahoma and Arkansas in violation of the 1934 National Firearms Act ("NFA"). *Id.* at 175. An Arkansas district court judge dismissed the charges, ruling that the NFA violated the Second Amendment. *Id.* at 176-77. The case was directly appealed to the Supreme Court, which reversed the ruling of the district court judge, remanding the case for further proceedings. *Id.*

The Supreme Court's ruling in *Miller* stood as the definitive interpretation of the scope and application of the Second Amendment from 1939 until the *Heller* decision 2008. *Miller* made clear that the purpose of the Second Amendment was for arming a militia. In *Miller,* the Court quoted the part of the Constitution that described the power of Congress: "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." *Miller*, 307 U.S. at 178. The Court stated:

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

Id. The Court further explained:

> In the absence of any evidence tending to show that possession or use of [the prohibited gun at issue] at this time has some reasonable relationship to the preservation or efficiency of

> a well regulate militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

Id.

Heller, nonetheless, initially claimed that its principal holding, that "[t]he Second Amendment protects an individual right to possess a firearm unconnected with service in a militia," was not only consistent with, but supported by *Miller*. *Heller*, 554 U.S. 570. Presumably aware of its inconsistencies with *Miller*, *Heller* then later purported to reject *Miller* by stating that it was not a "thorough examination of the Second Amendment." *Id.* at 623.

But *Miller* examined the history and significance of the term "Militia" at some length. *See, e.g.*, *Miller*, 307 U.S. at 178. As Justice Stevens noted in his dissent in *Heller*, the *Heller* majority itself gave "short shrift" to the drafting history of the Second Amendment and did not introduce any new evidence discovered since 1939 that would provide a basis for overruling *Miller*. 554 U.S. at 662. As Justice Stevens aptly summarized:

> The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

Id. at 679.

Heller also attempted to claim that the holding in *Miller* rested on the type of weapon at issue. *Id.* at 621-22. This conclusion is incorrect. Although articulating a distinction based on the type of firearms, *Heller* appeared to recognize the fallacy in its reasoning. *Heller* explained:

> We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939.

Id. at 624 (emphasis in original).

Following *Miller*, in 1980 this Court again reaffirmed this principle that the Second Amendment does not protect the right to possess a firearm outside the context of the militia. The Court in *Lewis v. United States*, 445 U.S. 55, 66 n.8 (1980) wrote: "These legislative restrictions on the use of firearms are neither based on constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." The Court cited *Miller*, noting that *Miller* stands for the principle that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.*

Both *Heller* and *Bruen* are incompatible with the text, history, and precedent of the Second Amendment, and *Bruen's* framework at issue in *Rahimi* must be overturned for these reasons.

B. *Bruen's* framework is also improper because it compels a foregone conclusion and perpetuates the myth that gun ownership is important for individuals' safety and self-defense.

Heller's and *Bruen's* analyses also rest on the false premise that gun ownership is necessary and important to individuals' safety and self-defense. Both Courts use this false premise to support the conclusion that self-defense is a key reason for the Second Amendment. *Bruen*, 142 S. Ct. at 2135 ("The Second Amendment's plain text thus presumptively guarantees [petitioners] a right to "bear" arms in public for self-defense."); *see also id.* at 2133 ("individual self-defense is 'the central component' of the Second Amendment right."); *see also id.* at 2135 (the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation.") (citing *Heller*, 554 U.S. at 592).

Heller and *Bruen* perpetuate a premise that individual gun ownership is necessary for self-defense, with no analysis of the harm of private gun ownership or risk to benefit ratio. The majority opinions in *Heller* and *Bruen* together make approximately 80 references to "self-defense" but never acknowledge or address the overwhelming evidence that private gun ownership in a high-income society confers far greater risk than benefit to gun owners, their families, and their communities. *See infra*, Section II.

Instead, support for the statement that handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family" relied on a statement in the case of *Parker v. Dist. of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), which in turn relied on a single study that suggested a handgun in the home confers net protective value. *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a* Gun, 86 J. Crim. L. & Criminology 150, 182-183 (1995). The authors of this study claim that there are 2.2 to 2.5 million defensive gun uses annually in the United States, with approximately 1.5 to 1.9 million of those situations involving use of a handgun. *Id.* at 164. This claim is based on an extrapolation from a survey in which 66 persons (weighted) out of a sample size of 4,977 reported over the telephone defensive gun uses in the past year. *Id.* at 164, 184 (Table 2).

Bruen's rejection of a means-ends analysis for the larger question of whether a governmental regulation violates the Second Amendment also ensures that *Bruen's* false premise—that gun ownership is the necessary and critical means to the end of self-defense—is never challenged or fairly evaluated. *See Bruen*, 142 S. Ct. at 2127-29 (repeatedly rejecting application of means-end scrutiny); *Rahimi*, 61 F. 4th at 461 ("we previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights. But *Bruen* forecloses any such analysis in favor of a historical analogical inquiry…").

Heller and *Bruen* effectively mandate a conclusion that any regulation that impacts an individual's right to possess a gun for self-defense will run afoul of the Second

Amendment unless it can survive the similarly doomed "historical analogue" review set forth in *Bruen's* second, and dominant, prong. This brief will not summarize all of the flaws with the "historical analogue" aspect of the test, which were aptly summarized in Justice Breyer's dissent in *Bruen*:

> [T]he Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history's crowd. At worst, they create a one-way ratchet that will disqualify virtually any "representative historical analogue" and make it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security.

Bruen, 142 S. Ct. at 2180. Justice Breyer went on to conclude:

> In each instance, the 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 impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here.

> But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

Id. at 2190.

The Fifth Circuit's decision in *Rahimi* demonstrates the significant implications of *Bruen's* flawed test. The *Rahimi* court, relying on *Bruen*, was forced to ignore the fact that Section 922(g)(8) "embodies salutary policy goals meant to protect vulnerable people in our society." *Rahimi*, 61 F.4th at 461. As *Rahimi* explained, "*Bruen* forecloses any such analysis in favor of a historical analogical inquiry into the scope of allowable burden on the Second Amendment right. Through that lens, we conclude that § 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *Id.*

Heller's and *Bruen's* deeply flawed analysis and predetermined outcomes render impossible reasonable and effective gun control laws, as illustrated in *Rahimi*, and this framework should not stand.

II. *Heller* and its progeny "threaten the breakdown of law and order" as Justice Breyer warned in the *Heller* dissent.

Because of the essentially impenetrable walls *Heller* and *Bruen* have now built around the right created in *Heller* for an individual to own a gun for self-defense, governments face nearly an impossible burden to maintain effective gun laws. The data reflects that this will continue

to be a death sentence for tens of thousands of Americans annually.

A. Gun related deaths have been significantly increasing since *Heller*.

Data of homicides and suicides from 1968 to 1987 in the District of Columbia show that following the adoption of the District of Columbia's restrictive handgun licensing law (in 1976), which *Heller* ultimately struck down, there was a 25% reduction in homicides by firearm and a 23% reduction in suicides by firearm in the District of Columbia, with no similar decline in gun related deaths in surrounding communities and no similar reduction in homicides or suicides committed by other means.[14]

Since *Heller*, however, the number of Americans killed annually with guns has been steadily increasing. In 2008, 31,593 individuals died in the United States of gunshot wounds.[15] By comparison, in 2021, the most recent year

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14. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New Eng. J. Med. 23, 1615-20 (Dec. 5, 1991).

15. CDC, *WISQARS Data Visualization Database* (2008), https://wisqars.cdc.gov/data/explore-data/explore/selected-years?ex=eyJ0YmkiOlsiMCJdLCJpbnRlbnRzIjpbIjAiXSwibWVjaHMiOlsiMjA4OTAiXSwic3RhdGUiOlsiMDEiLCIwMiIsIjA0IiwiMDUiLCIwNiIsIjA4IiwiMDkiLCIxMCIsIjExIiwiMTIiLCIxMyIsIjE1IiwiMTYiLCIxNyIsIjE4IiwiMTkiLCIyMCIsIjIxIiwiMjIiLCIyMyIsIjI0IiwiMjUiLCIyNiIsIjI3IiwiMjgiLCIyOSIsIjMwIiwiMzEiLCIzMiIsIjMzIiwiMzQiLCIzNSIsIjM2IiwiMzciLCIzOCIsIjM5IiwiNDAiLCI0MSIsIjQyIiwiNDQiLCI0NSIsIjQ2IiwiNDciLCI0OCIsIjQ5IiwiNTAiLCI1MSIsIjUzIiwiNTQiLCI1NSIsIjU2Il0sInJhY2UiOlsiMSIsIjIiLCIzIiwiNCJdLCJldGhuaWN0eSI6WyI

for which fatal injury data are currently available from the Centers for Disease Control, a record high number of 48,830 deaths occurred from gunshot wounds in the United States.[16] More than half of all suicides in 2021 (55%) involved a gun.[17] This is the highest percentage in twenty years.[18]

In 2020, firearm related injuries became the leading cause of death for children and youth ages one through nineteen in the United States.[19] Firearm-related injuries were one of the five leading cause of deaths in the United States for people ages one through forty-four years old.[20] In 2020, approximately 124 people died each day from a firearm-related injury.[21]

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16. CDC, *All Injuries, Mortality,* Nat. Ctr. for Health Stat. (July 28, 2023), https://www.cdc.gov/nchs/fastats/injury.htm.

17. *Id.*

18. *Id.*

19. Jason E. Goldstick et al., *Current Causes of Death in Children and Adolescents in the United States*, 326 New Eng. J. Med. 20, 1955-56 (May 19, 2022), https://doi.org/10.1056/NEJMc2201761.

20. CDC, *Violence Prevention, Fast Facts* (May 4, 2022), https://www.cdc.gov/violenceprevention/firearms/fastfact.html.

21. *Id.*

B. Gun ownership conveys a greater risk than benefit.

Gun possession perpetuates gun violence—homicides and suicides. Indeed, at the time this Court decided *Heller*, there was evidence available documenting that guns in U.S. homes were far more likely to be involved in the death of a member of the household rather than to protect against a home invader: "For every case of self-protection homicide involving a firearm kept in the home, there were 1.3 accidental deaths, 4.6 criminal homicides, and 37 suicides involving firearms."[22] There was also evidence that the presence of a gun in the home was a risk factor for the occurrence of a homicide or suicide in the home.[23]

In the interval between *Heller* (2008) and *Bruen* (2022), an even larger body of evidence was amassed showing that civilian gun ownership confers a far greater risk than benefit. For example, a study published in 2009 of assault victims in Philadelphia showed that someone carrying a gun at the time of an assault was 4.46 times more likely to be shot in an assault and 4.23 times more likely to be fatally shot in an assault than someone not

22. *See*, for example: Arthur L. Kellermann et al., P*rotection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 New Eng. J. of Med. 24, 1557-60 (June 12, 1986), https://doi.org/10.1056/NEJM198606123142406.xxx.

23. *See*, for example: Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 Annals of Emergency Med. 6, 771-82 (2003); Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide across the 50 United States*, 62 J. of Trauma and Acute Care Surgery 4, 1029-35 (2007).

carrying a gun.[24] A meta-analysis published in 2014 gathered "[a]ll study types that assessed firearm access and outcomes between participants with and without firearm access."[25] It found that all but one of the fifteen studies identified in the review found that access to firearms significantly increased the risk of becoming a victim of suicide or homicide.[26] And an analysis of FBI and National Crime Victimization Survey Data showed that from 2011 to 2015, for every justifiable homicide (i.e., where a civilian kills a felon during the commission of a felony) involving a firearm, guns were used in thirty-five criminal homicides.[27]

As discussed above, however, under *Heller* and *Bruen*, neither legislatures nor courts can take these grim facts into account in deciding whether gun regulations can stand in this country.

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24. Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. of Pub. Health 11, 2034-10 (Nov. 1, 2009), https://doi.org/10.2105/AJPH.2008.143099.

25. Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis*, 160 Annals of Internal Med. 2, 105 (Jan. 21, 2014), https://doi.org/10.7326/M13-1301.

26. *Id.*

27. Violence Policy Center, *Firearm Justifiable Homicides and Non-Fatal Self Defense Gun Use: An Analysis of Federal Bureau of Investigation and National Crime Victimization Survey Data*, 2 (Sept. 2018), http://vpc.org/studies/justifiable18.pdf.

C. Gun related deaths in the United States far exceed those of any other high-income country.

A study of 2010 mortality data showed that the rate of gun related deaths in the United States is ten times higher than the average rate for other high-income countries of the world.[28] The rate of homicide overall in the United States was seven times higher than the average rate in these other countries, driven by a gun homicide rate that was twenty-five times higher; the rate of gun suicide was eight times higher.[29] For youth aged fifteen to twenty-four, the rate of gun related homicide in the United States was forty-nine times higher.[30]

Indeed, international comparisons show a direct relationship between per capita gun ownership and rates of gun related deaths, with the United States being an extreme outlier in both categories. The graph below shows rates of gun deaths plotted against estimated per capita gun ownership for the United States and fifteen other high-income countries.[31]

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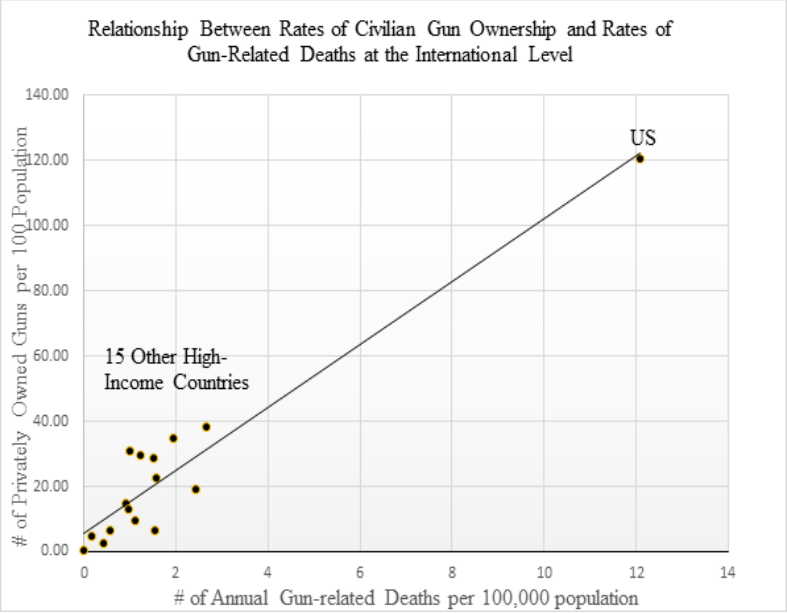
28. Erin Grinshteyn et al, *Violent Death Rates: The US Compared with Other High Income OECD Countries, 2010*, 129 Am. J. of Med. 3, 266-73 (2016).

29. *Id.*

30. *Id*

31. AAGunV created this graph using the most recently available data (2015 or later) posted on the website, GunPolicy.org, hosted by the University of Sydney School of Public Health. *See* Gun Law and Policy: Firearms and Armed Violence, Country by Country," GunPolicy.org, accessed August 15, 2023, http://www.gunpolicy.org/. AAGunV then added a computer generated best fit line. Given the data available, in some cases this means the years



The discrepancy between gun-related deaths in the United States and elsewhere can be best explained by the differences in gun regulation. In the United States, virtually anyone can legally obtain a gun, provided that he or she is not listed in a federal database of prohibited persons. Indeed, according to the Fifth Circuit's decision in *Rahimi*, even those with DVROs can legally possess firearms.

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utilized were different for certain countries. For example, for Belgium, the rate of gun ownership is from 2022 while the rate of gun deaths is from 2016. Where the data included a range, the mean was used in generating this graph. The 15 other high-income countries represented by points on the graph are, in order from the lowest to highest rates of gun-related deaths, Japan, United Kingdom, Netherlands, Spain, Australia, Italy, Germany, Denmark, New Zealand, Norway, Belgium, Sweden, Canada, France, and Finland.

The need to overturn *Heller* and *Bruen* cannot be overstated. If the United States were to adopt gun control laws comparable to the laws in other high-income countries, there is no reason to believe that the United States could not, too, reduce its rates of gun-related deaths to comparable levels. But such regulations cannot stand until *Heller* and *Bruen* are overturned.

CONCLUSION

For the foregoing reasons, AAGunV respectfully requests that this Court overrule its prior decisions in *Heller* and *Bruen* and reverse the Fifth Circuit's decision in *Rahimi*.

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