No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioners,

v.

ZACKEY RAHIMI,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JESSICA STENGEL
SARAH GANNETT
JUDITH MIZNER
Amicus Committee Members
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

TIMOTHY SHEPHERD
CARMEN SMARANDOIU
Assistant Federal Public Defenders

VINCENT J. BRUNKOW
Counsel of Record
KATIE HURRELBRINK
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, STE. 900
SAN DIEGO, CA 92101
(619) 234-8467
vince_brunkow@fd.org

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization comprised of attorneys working for federal public and community defender organizations authorized under the Criminal Justice Act. A guiding principle of NAFD is to promote the fair administration of justice by appearing as amicus curiae in litigation relating to criminal law issues affecting indigent defendants in federal court. Federal Defender organizations represent the majority of indigent defendants charged under 18 U.S.C. § 922(g)(8) and more broadly represent those charged with firearms-related offenses, so amicus has particular expertise and interest in the issues before this Court.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus made such a monetary contribution.

SUMMARY OF ARGUMENT

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2138 (2022), this Court announced a "text-and-history" test for analyzing Second Amendment challenges. First, courts must consider whether the Second Amendment's "plain text" applies to the defendant's conduct, including whether the defendant is among "the people" whom the Second Amendment protects. If so, the government must affirmatively prove that the statute in question is "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2126-27, 2129-30.

Mr. Rahimi is an American citizen and part of our national community. He is therefore among "the people," and his right to bear arms is presumptively protected. Petitioner has not rebutted that presumption by proving that § 922(g)(8) falls within our regulatory traditions. Among other failures, Petitioner misconstrues *Bruen*'s second step, rendering the Second Amendment toothless and unduly deferring to legislatures the power to disarm whomever they please. Moreover, § 922(g)(8) is more restrictive and less individualized than Petitioner's historical comparators.

ARGUMENT

I. The Second Amendment presumptively guarantees the right of "the people"—namely, all members of the national community, not just "law-abiding, responsible" individuals—to keep and bear arms.

"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. Like the First and Fourth Amendments, the Second Amendment does not circumscribe "the people" whose rights it presumptively guarantees, and which the Court described as encompassing all members of our "national community," and "not an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

To circumvent this basic premise, Petitioner argues that there is a historical tradition of legislatures disarming those they deem "not law-abiding, responsible citizens, *regardless of whether they are among 'the people*.'" Pet.Br. 37 (emphasis added). This purported historical tradition, it claims, "exclude[s] only criminals and individuals whose possession of firearms would endanger themselves or others[.]" *Id.*

To the extent Petitioner is arguing that citizens who are not law-abiding and responsible are not among "the people" afforded Second Amendment rights, that position contravenes the constitutional mandate and this Court's jurisprudence, namely *Heller* and *Bruen*. It "devolves authority to legislatures to decide whom to exclude from 'the people,'" *Range v. Att'y Gen.*, 69 F.4th 96, 102 (3d Cir. 2023) (en banc), and relieves the government of its burden to demonstrate that a law regulating presumptively protected conduct is consistent with this Nation's historical tradition of firearm regulation. *Bruen*, 142 S. Ct. at 2126, 2130. The Court should reaffirm what it knew to be true in *Heller*, that "the people" in the Second Amendment, as in the First and Fourth Amendments, includes *all* members of the national community.

A. Under *Heller*, the Second Amendment secures "the right of the people," who are all members of the national community.

More than two centuries after the Bill of Rights was ratified, *Heller* held that the Second Amendment codified a pre-existing "individual right to possess and carry weapons in case of confrontation" that does not depend on service in the militia. 554 U.S. at 592, 624. Central to the Court's decision was the Amendment's command that "the right of the people" not be infringed.

Heller began with a "textual analysis" of "the right of the people." *Id.* at 578. It first noted that the phrase "the right of the people" also appears in the First Amendment's Assembly-and-Petition Clause and the Fourth Amendment's Search-and-Seizure Clause. *Id.* at 579. Similarly, the Ninth Amendment provides that non-enumerated "rights" are "retained by the people." *Id*. "All three of these instances unambiguously refer to individual rights, not 'collective' rights[.]" *Id*. at 579-80.[2] Further, these provisions "refer to all members of the political community, not an unspecified subset." *Id*. at 580.

Indeed, in *Heller,* the Court noted that it had already held in the Fourth Amendment context that "the people" is "a term of art employed in select parts of the Constitution." *Id*. (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990)

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[2] While three other constitutional provisions—the preamble, Section 2 of Article I, and the Tenth Amendment—"arguably" refer to "the people" acting collectively, these provisions deal with the exercise or reservation of powers, not rights. *Heller*, 554 U.S. at 579-80.

(alterations omitted)). Its use in the Bill of Rights "'refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.'" *Id.* (quoting *Verdugo–Urquidez*, 494 U.S. at 265). Although the Second Amendment's prefatory clause references the "Militia," which "in colonial America consisted of a subset of 'the people'—those who were male, able bodied, and within a certain age range," *id.* —this tension confirmed that the prefatory clause did not limit the operative clause, but merely announced the purpose for which the right was codified. *Id.* at 578-81, 598-600.

The phrase "the people," then, created "a strong presumption that the Second Amendment right is exercised individually," and at minimum "belongs to *all* Americans." *Id.* (emphasis added). Combined with the common meaning of the phrase "keep and bear arms," which includes possessing and using arms for personal purposes, the operative clause "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. This meaning was "confirmed" by the Second Amendment's historical background, which informed the analysis because "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." *Id.*

Heller's discussion of "the people" was integral to its reasoning and ultimate holding. And *Heller* unambiguously held that "the people" in the Second Amendment, like "the people" in the First and the Fourth Amendments, includes all members of our national community, "not an unspecified subset." *Heller*, 554 U.S. at 580. Consistent with *Heller*,

appellate courts, as well as dozens of district courts around the country, have recognized that "the people" is not an unidentified subset of the national community. *See*, *e.g.*, *United States v. Daniels*, 77 F.4th 337, 342 (5th Cir. 2023); *Range*, 69 F.4th at 101-03; *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1044-45 (11th Cir. 2022); *United States v. Meza-Rodriguez*, 798 F.3d 664, 670-71 (7th Cir. 2015); *United States v. Rowson*, ___ F. Supp. 3d ___, 2023 WL 431037, at *17-19 (S.D.N.Y. Jan. 26, 2023) (collecting cases).

Any other view would be contrary to long-standing precedent and would redefine fundamental rights across the board. *See Range*, 69 F.4th at 102 ("Unless the meaning of the phrase 'the people' varies from provision to provision—and the Supreme Court in *Heller* suggested it does not—to conclude that Range is not among 'the people' for Second Amendment purposes would exclude him from those rights as well. . . . And we see no reason to adopt an inconsistent reading of 'the people.'"); *Jimenez-Shilon*, 34 F.4th at 1045 ("[W]e don't see any textual, contextual, or historical reason to think that the Framers understood the meaning of the phrase to vary from one provision of the Bill of Rights to another.").

B. The Court's prior decisions do not limit "the people" to "law-abiding, responsible citizens."

Notwithstanding its holding that "the people" in the Second Amendment encompasses all members of our national community, *Heller* also remarked that the Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635.

Similarly, *Bruen* also repeatedly references "law-abiding, responsible citizens." *See*, *e.g.*, 142 S. Ct. at 2122, 2134, 2156. But those references merely reflect the plaintiffs' uncontested status as "law-abiding, responsible citizens," and are not considered pronouncements about the scope of "the people." *See Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.").[3]

Bruen confirms the narrow import of *Heller*'s "law-abiding" references. Otherwise, *Heller*'s affirmance of "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635, would impliedly render the right inoperative *outside* of the home. *Bruen*, of course, held the opposite, reasoning that "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms." *Id.* at 2134-35. Critically, *Bruen* explained that *Heller* had not passed on the issue, and that its "remark[s]" about the

[3] Circuit courts have also recognized the limits of the Court's "law-abiding" references. *See, e.g.*, *Daniels*, 77 F.4th at 342 ("[W]e cannot read too much into the Supreme Court's chosen [law-abiding] epithet."); *Range*, 69 F.4th at 101 ("[T]he criminal histories of the plaintiffs in *Heller* . . . and *Bruen* were not at issue in those cases. So their references to 'law-abiding, responsible citizens' were dicta."); *Stimmel v. Sessions*, 879 F.3d 198, 204-05 (6th Cir. 2018) (holding that "*Heller* conclusively established" that "the Second Amendment applies to law-abiding and peaceable citizens at the very least," but "the Amendment's core does not necessarily demarcate its outer limit."); *Meza-Rodriguez*, 798 F.3d at 669 (holding *Heller*'s "law-abiding" references "did not reflect an attempt to define the term 'people.' We are reluctant to place more weight on these passing references than the Court itself did.").

preeminence of the need for self-defense in the home "did not suggest that the need was insignificant elsewhere.'" *Id.* at 2135 (citation omitted).

Similarly, in affirming the self-defense needs of the "law-abiding" individuals before it, *Bruen* specifically cited *Heller*'s "national community" holding. *See id.* at 2134 (citing *Heller*, 554 U.S. at 580); *see also id.* at 2156 (holding that "[t]he Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions.") (citing *Heller*, 554 U.S. at 581).

That *Heller* and *Bruen* did not specifically define "law-abiding," let alone provide any textual or historical justification for the purported narrowing of "the people" the Petitioner suggests, confirms that the Court's references to "law-abiding" people were not meant to narrow the scope of the Second Amendment. It is inconceivable that the Court would exclude, in such summary fashion, an entire, yet undefined, class of people from the purview of a long-neglected fundamental constitutional guarantee that it insisted not be treated "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). Yet that is precisely the result that would follow under a truncated view of "the people."

The view that non-law-abiding people "fall entirely outside the Second Amendment's scope" is not only "at odds with *Heller* itself," but also "an unusual way of thinking about rights." *Kanter v. Barr*, 919 F.3d 437, 452-53 (7th Cir. 2019) (Barrett, J., dissenting). Typically, a deprivation of rights "occurs because of

state action, and state action determines the scope of the loss (subject, of course, to any applicable constitutional constraints)." *Id*. Limiting "the people" to law-abiding individuals, by contrast, would strip the right "as a self-executing consequence of [a person's] new status," regardless of any legislative determination regarding the appropriate deprivation. *Id*. at 452. And it would deprive the person of standing to assert a constitutional claim because his status automatically removes him from the Second Amendment's scope. *Id*. The correct inquiry is "whether the government has the power to disable the exercise of a right that [the people] otherwise possess, rather than whether they possess the right at all." *Id*. at 453; *see also Range*, 69 F.4th at 102 (agreeing with then-Judge Barrett's dissent in *Kanter*).

The Second Amendment presumptively guarantees "the people" the right to keep and bear arms. "The people" are all members of our national community, and a regulation that excludes any members of that community, like Respondent, from the exercise of the right is presumptively unconstitutional.

II. Petitioner's analysis of § 922(g)(8) does not comport with *Bruen*'s methodology for establishing a consistent historical tradition.

Bruen's second step places the burden of proof on the government to establish that a challenged law "is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. at 2135. The government cannot meet this burden by "simply posit[ing] that the regulation promotes an important interest." *Id*. at 2126. It is incumbent on the government to establish a historical tradition. *See id*.

at 2130 n.6, 2150. *Bruen* set out several metrics by which the sufficiency of the historical precedent should be analyzed: (1) the historical regulations' temporal proximity to the founding era, (2) their scope and prevalence, and (3) their similarity to the challenged restriction. *Bruen*, 142 S. Ct. at 2130–34, 2136, 2138.

Petitioner misunderstands *Bruen*'s second step. Petitioner argues that § 922(g)(8) is consistent with a purported tradition of disarming "persons who are not law-abiding, responsible citizens"—which, "[i]n this context," includes supposedly "dangerous individuals" such as the subjects of domestic violence protection orders (DVPOs). Pet.Br. 6, 27-28. This broad-brush effort to defend the statute is inconsistent with the methodology this Court articulated in *Bruen* for three distinct reasons. First, it ignores *Bruen*'s demand that statutes addressing longstanding problems be supported by "distinctly similar" historical regulations. Second, it relies on sources unconnected to "this Nation's historical tradition of firearm *regulation*." And third, it conducts its analysis at an impermissibly high level of generality, relying on vague, boundless descriptors like "law-abiding" and "responsible" that invite manipulation by legislatures and threaten to plunge courts back into the means-ends scrutiny *Bruen* rejected.

A. *Bruen* held that statutes addressing longstanding societal problems, like domestic violence, require a tradition of "distinctly similar" historical regulations.

Bruen established two different frameworks for comparing historical evidence. How similar a challenged law must be to historical restrictions depends on whether the challenged law addresses an old or new problem. Where "a challenged regulation addresses a general societal problem that has persisted since the 18th century," the inquiry is "fairly straightforward" and "relatively simple." *Bruen*, 142 S. Ct. at 2131. To show that such a statute is constitutional, the government must point to "distinctly similar historical regulation[s] addressing that problem." *Id.*

But a "more nuanced approach" may be required when a challenged statute "implicat[es] unprecedented societal concerns or dramatic technological changes," or is geared toward "unprecedented" problems that "were unimaginable at the founding." *Id.* at 2132. Rather than asking whether the challenged law and historical precursors are "*distinctly* similar," courts ask only whether they are "*relevantly* similar." *Id.* (emphasis added). The "central considerations" in this "relevantly similar" inquiry involve what *Bruen* called the "how and why": "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133.

This dichotomy is logical. Because the Second Amendment codifies a preexisting right, the

Founding generation's "approval or disapproval" of firearms regulations is compelling evidence of the scope of permissible regulation. *See Daniels*, 77 F.4th at 344. When the Founders faced the same problem that a modern regulation addresses, we need not speculate regarding the permissible ways to address that problem. *See Bruen*, 142 S. Ct. at 2131. But when legislatures enact statutes to address problems "that were unimaginable at the founding," the historical record will not provide as clear or definitive an answer. *Id*. at 2132. In those cases, the permissibility of modern laws targeting "unprecedented societal concerns" may be adduced only by analogy to historical restrictions. *Id*.

Petitioner argues that § 922(g)(8) and various historical regulations "'impose a comparable burden' and are 'comparably justified'"—i.e., are relevantly similar. Pet.Br. 42. But domestic abuse is a longstanding societal problem. *See, e.g.*, Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 Penn St. L. Rev. 337, 343-49 (2015) (discussing colonial laws against spouse beating and noting that "[i]n colonial New England, domestic violence offenders might be brought before a magistrate, bound over, and sentenced to a variety of punishments that often included public shaming."). Therefore, the "distinctly similar" approach applies to § 922(g)(8). *See* Resp.Br. 12–17.

Bruen is clear that the "distinctly similar" approach requires a tighter fit between a challenged law and historical regulations, than the "relevantly similar" test. It identified one historical regulation that "support[ed] New York's proper-cause requirement": an 1871 Texas public carry

statute, *id.* at 2153, which was nearly identical to New York's proper-cause requirement but held it failed to establish a regulatory *tradition*. *Id.* at 2153. Here, the government has identified no historical regulations that approach this level of similarity. Under *Bruen*, that is enough to decide this case.

B. Petitioner attempts to redefine its burden under *Bruen* by relying on the public "understanding" of the Second Amendment.

Lacking a record of historical regulation of the use and possession of firearms by domestic abusers, Petitioner relies on the following: a town's proposal to amend the state constitution; proposed but *rejected* amendments to the U.S. Constitution[4]

[4] Petitioner notes that the Court has deemed one of these unsuccessful proposals, from Pennsylvania, "'highly influential.'" Pet.Br. 17 (quoting *Heller*, 554 U.S. at 604). But the Court admonished that "the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress"—is a "dubious" source for Second Amendment interpretation. *Heller*, 554 U.S. at 603. That is because the Second Amendment was "widely understood to codify a pre-existing right, rather than to fashion a new one." *Id.*; *see also Daniels*, 77 F.4th at 352 ("The predecessors of the Second Amendment gave concrete language to possible limits on the right to bear arms. Yet that language was not adopted. Instead, the People ratified the unqualified directive: 'shall not be infringed.' U.S. CONST. amend. II."). The Court referenced Pennsylvania's minority proposal only "in the context of concluding that the Amendment codified an individual right not limited to militia service" and did not mention its limiting language, which "did not find its way into the Second Amendment." *United States v. Skoien*, 614 F.3d 638, 648 (7th Cir. 2010) (Sykes, J., dissenting).

and a private letter describing those proposals; statements from "Antebellum commentators," like "a legal scholar from Maine" and the mayor of a single city; a petition published in a newspaper; a "war memoir"; a Freedmen's Bureau report; and three newspaper articles. Pet.Br. 16-21.

These are not the kind of historical evidence required by *Bruen*. *See Bruen* 142 S. Ct. at 2126 (requiring a showing that the statute "is consistent with this Nation's historical tradition of firearm regulation"). The Court linked constitutionality to positive law, laid out in statute books or judicial decisions, that affirmatively prohibited particular conduct. *See, e.g.*, *id.* at 2126, 2130, 2131-32, 2135.

At no point did *Bruen* suggest the government can carry its burden by pointing to an unparticularized "understanding" of the right to keep and bear arms, as reflected in the sources Petitioner cites. The Court trained its focus only on actual historical *regulation*—i.e., "restrictions," "prohibiti[ons]," and "limit[ations]" embodied in law. *Id.* at 2138; *see, e.g.*, *id.* at 2139 ("medieval English regulations"); *id.* at 2140-41 (17th-century English "proscri[ptions]"); *id.* at 2142 (colonial and early American "practice of regulating public carry"); *id.* at 2145 (early American "public-carry restrictions"); *id.* at 2146 (mid-19th-century "statutory prohibitions"); *id.* at 2152 ("Reconstruction-era state regulations"); *id.* at 2153-54 ("gun regulation during the late-19th century"). This is the only kind of "historical evidence," *id.* at 2136, that *Bruen* treats as capable of rebutting the presumption of unconstitutionality.

Under *Bruen*, America's tradition of firearm regulation is the sole source on which the government can rely to justify a presumptively unconstitutional law. Since it cannot cite any, Petitioner fails to carry its burden.

C. Petitioner's "tradition" argument operates at too high a level of generality.

When Petitioner does cite historical evidence, it improperly connects wholly disparate laws to manufacture a broad convention of "disarming those who are not law-abiding, responsible citizens." Pet.Br. 45. And among those who are irresponsible, Petitioner claims, are "dangerous individuals," which it suggests should include DVPO subjects. Pet.Br. 27-28. By relying on indeterminate and manipulable labels like "law-abiding," "responsible," and "dangerous," the argument operates at too high a level of generality and unconstitutionally excludes many "people" entitled to Second Amendment rights.

Bruen cautions that exceptions to "the Second Amendment's unqualified command," should be as narrow and concrete as possible. 142 S. Ct. at 2126. There, in support of its proper-cause requirement, New York had relied on a number of English and early American firearms regulations—ranging from affray laws to public carry surety statutes—that it asserted demonstrated a general governmental power to regulate the public carrying of firearms. *Id*. at 2139-45, 2146-47, 2148-50. In New York's view, these various regulations, considered together, added up to a "sweeping" power to enact "broad prohibitions on *all* forms of public carry,"

including "ban[ning] public carry altogether." *Id.* at 2139, 2145-46 (emphasis added).

But this Court refused to treat New York's cited regulations as more than the sum of their parts, instead interpreting each regulation narrowly. Affray laws like the Statute of Northampton prohibited nothing more than "bearing arms to terrorize the people," *id.* at 2143; 19th-century concealed-carry bans "were constitutional only if they did not similarly prohibit *open* carry," *id.* at 2146 (emphasis in original); and the cited surety statutes merely "provide[d] financial incentives for responsible arms carrying," *id.* at 2150. The Court's survey of "Anglo-American history" confirmed those "well-defined" restrictions on public carry. *Id.* at 2156. But New York could not extrapolate, from these specifics, a general power to regulate public carry more broadly, in whatever way a legislature chooses.

Here, Petitioner repeats New York's mistake, and in a more egregious manner. It aggregates discrete examples—laws disarming loyalists, minors, tramps, etc.—and derives the much broader principle that non-law-abiding, irresponsible, or dangerous groups, in general, do not enjoy the right to keep and bear arms, even if a particular group was never disarmed at the founding. This impressionistic interpretation of the historical record is not only wrong, but also dangerous, because it leaves unclear who and what might be swept under Petitioner's standard. *Cf. Johnson v. United States*, 576 U.S. 591, 595, 599, 605-06 (2015) (holding that "the Government violates [the Due Process] guarantee by taking away someone's life, liberty, or property under a criminal law so vague

that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" and overruling its precedent regarding the Armed Career Criminal Act's residual clause as "hopeless[ly] indetermina[te]" and "unworkable").

The "phrase 'law-abiding, responsible citizens' is as expansive as it is vague." *Range*, 69 F.4th at 102.[5] "It cannot mean that every American who gets a traffic ticket loses her Second Amendment rights." *United States v. Bullock*, ___ F. Supp. 3d ___, 2023 WL 4232309, at *29 (S.D. Miss. June 28, 2023). But if traffic tickets do not separate the law-abiding from the non-law-abiding, or the responsible from the irresponsible, what does? There is no principled way to decide.

The word "dangerous," too, "ha[s] no true limiting principle." *Daniels*, 77 F.4th at 353. That designation is "far too broad" to guide courts in

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[5] Petitioner offers that the phrase "law-abiding, responsible citizens," does have a "limiting principle," and excludes only "criminals and individuals whose possession of firearms would endanger themselves or others[.]" Pet.Br. 37. But to say that the non-"law-abiding" are "criminals," or that the ir-"responsible" are those who "endanger" is just to formulate in the negative the same vague concepts.

Petitioner does not explain, for instance, whether a "criminal" is "one who has committed a criminal offense" or one "who has been convicted of a crime." *Criminal*, Black's Law Dictionary (11th ed. 2019). Nor does Petitioner explain whether the term encompasses all who have ever committed, been charged with, or been convicted of, any criminal offense, no matter the nature or age of their offense. Petitioner's alternative formulations are therefore no more definite, and no less vulnerable to abuse, than its primary ones.

comparing groups disarmed today to groups disarmed at the founding. *Baird v. Bonta*, ___ F.4th ___, 2023 WL 5763345, at *8 (9th Cir. 2023); *see also United States v. Quailes*, ___ F. Supp. 3d ___, 2023 WL 5401733, at *12 (M.D. Pa. Aug. 22, 2023) (noting that the term's "obvious interpretive complexity" creates "uncertainty" and raises "concerns [about] the application of that standard").

A vague, malleable standard like "law-abiding," "responsible," or "dangerous" suffers from two additional shortcomings. First, it delegates to legislatures the authority to decide who is sufficiently law-breaking, irresponsible, or dangerous to be stripped of their Second Amendment rights. *See Bruen*, 142 S. Ct. at 2131 (rejecting deference to legislative interest balancing). The perils of that route are obvious. "Congress could claim that immigrants, the indigent, or the politically unpopular were presumptively 'dangerous' and eliminate their Second Amendment rights without judicial review," thereby "render[ing] the Second Amendment a dead letter." *Daniels*, 77 F.4th at 353. It was this danger that prompted the Court in *Bruen* to warn that "judicial deference" to legislatures is not "appropriate" in the Second Amendment context. 142 S. Ct. at 2131.

Second, it would require courts to scrutinize legislative classifications to determine whether they are reasonable, providing at least a limited constitutional backstop to protect against the worst abuses. Petitioner's brief invites the Court to engage in exactly this kind of analysis. It cites numerous statistics and social-science studies meant to substantiate the congressional judgment

that DVPO subjects are dangerous, Pet.Br. 29-32, and it repeatedly stresses that § 922(g)(8) is narrowly tailored to achieve Congress' goal, *see, e.g.*, Pet.Br. 32. But this is the precise "judge-empowering interest-balancing inquiry" this Court repudiated in *Bruen*. 142 S. Ct. at 2129. Indeed, it mirrors the reasoning lower courts used to uphold § 922(g)(8) under pre-*Bruen* means-ends balancing. *See, e.g.*, *United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012).

Petitioner's proposed "limitation" on the Second Amendment—"law-abiding, responsible citizens"—is therefore indeterminate, unworkable, and, at bottom, no limitation at all. Accepting it will inevitably devolve into means-ends scrutiny all over again. *Cf. Johnson*, 576 U.S. at 598-602 (recounting "nine years' experience trying to derive meaning from the [Armed Career Criminal Act's] residual clause," deeming the effort a "failed enterprise" involving "at best . . . only guesswork").

III. Several metrics distinguish § 922(g)(8) from historical firearm laws, even under the "relevantly similar standard."

Section 922(g)(8) is inconsistent with the Nation's historical tradition of firearm regulation under both the "distinctly similar" and "relevantly similar" frameworks. *See Bruen*, 142 S. Ct. at 2131. Respondent examines in depth the ways in which § 922(g)(8) and historical firearm laws are not comparably burdensome and "comparably justified"—the *how* and *why* of the "relevantly similar" analysis. Resp.Br. 19–31. Amicus will therefore highlight just two of § 922(g)(8)'s many, fatal departures from

tradition in "how" it operates: it is more restrictive and much less individualized than historical precursors.

A. Section 922(g)(8)'s blanket ban on firearm possession is unlike less burdensome historical restrictions.

Section 922(g)(8) imposes a categorical ban on all firearm possession by those under certain protective orders. While under an order, a person cannot possess a firearm anywhere, including in the home, for any purpose. This is unlike many of the historical laws relied on by Petitioner and its amici, which less onerously limited public carry or otherwise impaired the central right. "How" § 922(g)(8) functions is entirely dissimilar to historical laws that impose more limited restrictions on firearm rights. *See Bruen*, 142 S. Ct. at 2133.

Many historical firearm restrictions impaired only public carry. For example, laws targeting enslaved persons often forbade only unlicensed public carry of firearms, rather than possession more broadly.[6] *See* Leaming & Spicer, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 341 (2d ed. 1881); 1715 Md. Laws 117, ch, 26,

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[6] Though Petitioner's amici rely on these class-based restrictions disarming racial or religious groups, they are notably (and commendably) absent from Petitioner's briefing. When these regulations passed, these groups were not members of "the people" and did not have a right to bear arms, so the regulations do not illuminate the right's scope. *See Jimenez-Shilon*, 34 F.4th at 1047-48.

Furthermore, these discriminatory restrictions would be unconstitutional today under the First or Fourteenth Amendments, *Range*, 69 F.4th at 104, so they are no part of any "enduring American tradition." *Bruen*, 142 S. Ct. at 2154.

§ 32; 1740 S.C. Acts 168, § 23. So too with the 1836 Massachusetts surety of the peace law cited by Petitioner, Pet.Br. 24, which conditioned public carry under certain limited circumstances on the posting of a surety. *See Bruen*, 142 S. Ct. at 2148 (citing Mass. Rev. Stat., ch. 134 § 16 (1836)).[7]

Many of Petitioner's cited laws included other limiting principles preventing them from operating as a complete ban. *See* Pet.Br. 22-27. Laws disarming so-called disloyal people could be overcome by pledging loyalty to the country. *See, e.g.*, Act of Mar. 14, 1776, ch. VII, 1775–1776 Mass. Acts 31–35; 1776 Penn. Laws 11, § 2; *see also* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 268 (2020) (describing Connecticut practice to disarm "'inimical' persons only 'until such time as he could prove his friendliness to the liberal cause'"). Similarly, the aforementioned surety of the peace laws returned a person's firearms upon obtaining a surety. *See* Mass. Rev. Stat., ch. 134 § 16 (1836). And other restrictions imposed a duty not to *sell* to restricted persons, but did not affirmatively disarm anybody, particularly not in their homes. *See, e.g.*, 1631 Va. Acts 173, Act. 46.

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[7] The Court also already suggested that this law is of little historical value for Second Amendment purposes. Noting the absence of evidence that such laws were ever enforced, except pretextually against Black defendants, the Court concluded it was "surely too slender a reed on which to hang a historical tradition of restricting the right to public carry." *Bruen*, 142 S. Ct. at 2149. These statutes are inapposite for the reasons explained in Respondent's brief. Resp.Br. 24–27. As noted above, Petitioner rightly avoids relying on discriminatory historical laws, targeting racial and religious groups.

Section 922(g)(8) also entails the possibility of lengthy prison terms and the additional collateral consequence of permanent disarmament upon conviction. Violators face up to 15 years in prison. *See* 18 U.S.C. § 924(a)(8). And because § 922(g)(8) is a felony, a person who is convicted under this law is not only imprisoned but after serving the sentence is forever foreclosed from possessing any firearm for any purpose, even if the DVPO was only temporary. *See* 18 U.S.C. § 922(g)(1). Permanent disarmament is particularly burdensome when compared to historical practices. The laws discussed above were generally just temporary restrictions on firearm possession. Even the violent participants in Shays' Rebellion, who were able to secure pardons upon taking an oath of allegiance, surrendering their firearms, and keeping the peace for three years, had their firearms returned after a period of three years. *See* Act of Feb. 17, 1787, ch. VI, 1787 Mass. Acts. 555–56. As the *Heller* Court explained, these kinds of differences matter. "[S]ignificant criminal penalties" such as "a year in prison" are constitutionally distinguishable from less burdensome historical sanctions like fines or weapon forfeiture. 554 U.S. at 633–34.

In short, the historical regulations Petitioner cites did not impose a comparable burden to § 922(g)(8)'s complete—and often permanent—ban on firearm possession.

B. Section 922(g)(8)'s blanket ban is distinct from historical laws targeting individualized risk of firearms misuse.

Finally, almost all of Petitioner's proffered comparators required a more individualized showing of risk than the class-based prohibition in § 922(g)(8).

With the exception of Revolutionary-era loyalty-oath statutes,[8] Petitioner does not cite to any class-based firearms bans enacted prior to Reconstruction. Nearly all the government's pre-Reconstruction comparators individualized in one of two ways: They permitted firearms restrictions only (1) after firearms misuse, or (2) upon finding likely danger with firearms.

Most fall in the first category. Colonial affray laws, modeled on the Statute of Northampton, imposed forfeiture penalties for using arms to terrorize the people. *Bruen*, 142 S. Ct. at 2141, 2144-45. The confiscations after Shays' Rebellion and London's Gordon riots responded to armed uprisings. *See* Act of Feb. 16, 1787, §§ 1-3, 1 *Private and Special Statutes of the Commonwealth of Massachusetts* 145-147 (1805); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 130-131 (1994). And colonial firearms-storage laws forfeited arms for violations of gun-safety regulations. *See, e.g.*, Act of Mar. 1, 1783, ch. 46, 1782-83 Mass. Acts 120 (1890). Each law thus targeted past acts involving violent or unsafe firearms use.

Additionally, two sets of restrictions flowed from individualized risk assessments regarding firearms. First, the English Militia Act of 1662—though not a part of our historical tradition and therefore of questionable relevance, *see Daniels*, 77 F.4th at 351-52—permitted disarmament only with a warrant and a finding that the individual was a "danger[] to the

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[8] These statutes are inapposite for the reasons explained in Respondent's brief. Resp.Br. 24–27. As noted above, Petitioner rightly avoids relying on discriminatory historical laws, targeting racial and religious groups.

Peace of the Kingdom." 13 & 14 Car. 2, c.3, § 13 (1662). Second, 19th-century laws conditioning public carry on posting a surety applied only if "circumstances g[ave] just reason to fear that [the individual] purposes to make an unlawful use of [arms]." *Bruen*, 142 S. Ct. at 2148 (quoting William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (2d ed. 1829)). That is, only a "reasonable cause to fear that a person would cause an injury or breach of the peace *with a firearm*" triggered these statutes. *United States v. Stambaugh*, 641 F. Supp. 3d 1185, 1192 (W.D. Okla. 2022).

Not until the mid-19th century did legislatures begin to disarm people on a class-wide basis. But even then, Petitioner identifies just five class-based laws passed between 1850 and the end of Reconstruction in 1877, all governing possession of firearms by minors, whose constitutional rights are different than adults'. Pet.Br. 24–26.[9] By contrast, every cited class-based ban applicable to adults dates to the late 19th century—too late to "provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *See Bruen*, 142 S. Ct. at 2154.

Section 922(g)(8) requires neither form of individualization. Individuals targeted need not have

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[9] There are at least "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). All three differences explain "why" legislatures limited class-based restrictions to children.

misused firearms. Nor must a judge find past or likely future violence *with firearms* under either § 922(g)(8)(C)(i) or (C)(ii). And notably, under § 922(g)(8)(C)(ii), it is sufficient if the judge orders the person to refrain from 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. As long as the DVPO includes one of these prohibitions, § 922(g)(8) bars all firearms possession for the order's duration. It is therefore not comparable to individualized historical precursors.

CONCLUSION

Last Term, the Court held unequivocally that there is "only" one way to validate a gun regulation: by showing that it accords with the Second Amendment's text and history. *Bruen*, 142 S. Ct. at 2126, 2130, 2135. Petitioner, however, eschews *Bruen*'s framework and urges a deeply flawed approach that would reinstate judicial deference to legislative interest balancing and relegate the Second Amendment, yet again, to "second-class right" status. *McDonald*, 561 U.S. at 780. The Court should reject Petitioner's invitation to rewrite *Bruen* and hold that, under a faithful application of its precedent, § 922(g)(8) is unconstitutional.

Respectfully submitted,

JESSICA STENGEL
SARAH GANNETT
JUDITH MIZNER
Amicus Committee Members
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

TIMOTHY SHEPHERD
CARMEN SMARANDOIU
Assistant Federal Public Defenders

VINCENT J. BRUNKOW
Counsel of Record
KATIE HURRELBRINK
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 BROADWAY, STE. 900
SAN DIEGO, CA 92101
(619) 234-8467
vince_brunkow@fd.org

Counsel for Amicus Curiae

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