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 *AMICUS CURIAE* ANGUS KIRK MCCLELLAN, PHD. IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*[1]

Angus Kirk McClellan is a former visiting assistant professor of government and foreign affairs at Hampden-Sydney College in Virginia. He also taught government at California State University in San Bernardino and at Crafton Hills College in California. Earlier in his career he studied and wrote on firearms in history while working as a writer and editor for *American Rifleman* magazine. His dissertation wholly examined the legal thought of Judge Thomas M. Cooley, author of *Constitutional Limitations* and other legal treatises, who was arguably the most influential legal thinker on state constitutional law during the latter half of the 19th century. Since then, Dr. McClellan has pursued a career primarily in researching Anglo-American legal history, first as a postdoctoral research associate in the James Madison Program at Princeton University and now as an independent scholar in Virginia. McClellan has a strong interest in this case because of the Court's reliance upon 18th- and 19th-century legal history for determining the scopes of firearm rights. His familiarity with these topics and eras should help to provide the Court with greater insight into how, why, and whether certain categories of dangerous people had their firearm rights restricted.

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[1] Besides *amicus* and its counsel, no party or their counsel authored this brief in any way and no other party or their counsel made a monetary contribution intended to fund its preparation or submission. Such a monetary contribution was made by the California Gun Rights Foundation.

## SUMMARY OF THE ARGUMENT

The history and tradition of American peace sureties do not support Section 922(g)(8). The "why" for these laws was similar, but their "how" was not. Their modes of operation differed fundamentally. They were not "distinctly similar," as is required for problems like domestic violence that have persisted since the founding. Even laws governing lunatics provided more protections than Section 922(g)(8). The founders never approved of any law like Section 922(g)(8). It fails *Bruen*'s test of history and tradition.

1. Section 922(g)(8)'s supporters say that founding era peace sureties support it. Not so. For history and tradition to justify a modern regulation, the analog must entail both consistent *ends* and *means*. Section 922(g)(8) seeks similar ends as founding era spousal peace sureties, but fails to use similar means. Whereas Section 922(g)(8) totally annihilates citizens' constitutional firearm rights as a condition attached to protective orders, founding era sureties taken out by spouses carried only moderate conditions, and consequences for violation were limited to monetary payments. This fundamental disparity prohibits peace sureties from supporting Section 922(g)(8).

2. This history and tradition cannot be ignored with the excuse that domestic violence is new. At the founding, domestic violence was widespread, did involve misuse of firearms, and was condemned. The nation has a long history and tradition of working to solve this very problem—just not by way of Section 922(g)(8)'s extraordinary means.

3. Section 922(g)(8) also contradicts the history and tradition of laws regarding lunatics. Though lunatics' rights were subject to substantial regulation prior to the commitment of violence, even the insane enjoyed procedural protections that far exceeded what normal people get from Section 922(g)(8).

## ARGUMENT

### I. Founding era peace sureties do not support Section 922(g)(8).

Section 922(g)(8)'s supporters argue that founding era surety laws supply the support of history and tradition required by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). *See e.g.*, Br. for the United States at 24, 43. But their point is incomplete. They assert consistent ends without also showing consistent means.

To satisfy *Bruen*, government analogies must show that firearm regulations have "relevantly similar" ends *and* means. *Bruen*, 142 S. Ct. at 2133. In other words, the requisite consistency must exist as to "*how and why* the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* (emphasis added). The "justification" must be comparable, and so must the "burden" itself. *Id.* For problems that have persisted since the founding, the need is for a "distinctly similar" history and tradition. *Id.*

The end or "why" of Section 922(g)(8) is to prevent domestic gun violence, and the end of spousal peace sureties similarly was to prevent domestic violence

generally. Indeed, spousal peace or behavior sureties bear a striking resemblance to modern restraining orders and were the primary protective legal tools used by real or potential victims of domestic abuse during the founding era.[2] And yet spousal peace sureties never burdened gun rights in any way. In this sense, there was no "how" gun rights were burdened under peace sureties at all. While peace sureties and Section 922(g)(8) had similar *ends*, they did *not* have the "distinctly similar" means that *Bruen* requires.

### A. Peace sureties imposed only moderate conditions and only economic consequences—not a total annihilation of any rights.

Founding era surety laws do *not* support the constitutionality of Section 922(g)(8) because they entail materially different modes of operation. Whereas Section 922(g)(8) totally eliminates the right to keep and bear arms, peace sureties imposed only moderate conditions—unrelated to firearms—and they carried only economic consequences for violating the terms of the surety.

Section 922(g)(8) pursues its aims by *totally removing* the citizen's right to keep and bear arms. 18 U.S.C. § 922(g)(8); *see* Rahimi Br. at 10-11. The annihilation applies to all arms and all places, without limitation. *Id.*

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[2] *See* Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 Early American Studies: An Interdisciplinary Journal 223, 233-234 (2007).

Founding era peace or good behavior sureties pursued similar aims,[3] but with totally different modes of operation. They eliminated no rights altogether and did not restrict the right to arms directly or indirectly. This is how they worked: If person A believed person B would likely cause her harm, she could demand a peace security from a justice of the peace or from a court through a writ of supplicavit. Generally, A had to swear, under oath, there was a "just cause" to fear death or bodily harm by reason of B's actual "menaces" or "attempts" to inflict bodily harm.[4] One New York judge wrote that "danger to personal safety must appear to be serious and imminent" to grant the writ to a threatened wife.[5]

There were two general forms of the peace security: under the first, the suspected dangerous person—the "principal"—was alone bound to the conditional debt, called a "recognizance."[6] Should he violate one or

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[3] Other types of sureties unrelated to peace or good behavior could have other conditions. For example, a cattle herder could be bound by surety for a period of six months, during which time he promised to obey the laws respecting confining and controlling cattle to prevent the spread of disease. Should he violate the law, he was both subject to the loss of the surety amount, and also subject to punishments under the cattle law itself. See the Quarter Sessions records for more. *See* "Cattle, plague, bound by recognizance." Quarter Sessions Records, vol. IX, at 290 (The North Riding Record Society 1892), https://bit.ly/3rCNtJH.

[4] *See* 4 William Blackstone, Commentaries on the Law of England 252 (1770), https://bit.ly/3PEGEzt

[5] *Codd v. Codd*, 2 Johns. Ch. 141, 141–43 (N.Y. Chan. 1816).

[6] *See* A New Conductor Generalis: Being a Summary of the Law Relative to the Duty and Office of Justices of the Peace, Sheriffs,

more of the conditions of the security, he "forfeited" or became obligated to pay to the government the debt dictated in the security. Under the second form, both the principal and third-parties—such as friends—similarly bound themselves to a debt or "surety," subject to either forfeiture or discharge depending on whether the principal fulfilled the conditions of the security. (Sometimes the "recognizance" was referred to as a "surety" as well.) The amounts of money could be extremely high.[7] Records appear to indicate that the first form was typically used for spouses.

For spousal peace sureties, the conditions were typically limited and moderate: refrain from spousal abuse, appear in person at the next quarter sessions to answer for any crimes or determinations on the continuance of the security, and (sometimes) pay alimony to the wife as incident to any separation.

There was no direct burden placed on the rights of the suspected dangerous spouse upon his signing such a personal recognizance. The forms, treatises, and the following examples appear to indicate he paid no money up front, but rather he simply bound himself to

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Coroners, Constables, Jurymen, Overseers of the Poor, &c. … 395 (By a Gentleman of the Law 1803), https://bit.ly/3PYez7n.

[7] Peace sureties could be extremely expensive. For example, Ebenezer Ballard et al. were bound by £6000 and £3000 sureties to keep the peace in Massachusetts in 1780. *See* Minutes, at the Court of General Sessions of the Peace begun and held at Boston in and for the County of Suffolk, October 2, 1780, https://bit.ly/3rzVlM0.

a debt that became void upon meeting the conditions.[8] Payment of that debt was the only consequence attached directly to that peace surety. Imprisonment—and with it, the incidental loss of rights generally—was simply a consequence of failing to "find sureties" or sign onto the recognizance in the first place. Justices of the peace likely considered any person's refusal to bind himself to a no-cost peace security an indication of intent to breach the peace, which would arguably justify such initial detentions.

### B. Treatises show the difference.

Proof that peace sureties worked this way comes from Blackstone,[9] Hawkins,[10] and other leading authorities.[11] Each shows that restrictions on arms were neither a condition nor a consequence attached directly to peace securities. Blackstone affirmed that violators merely "forfeited" the funds.[12] And this was

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[8] *See* 4 Blackstone, *supra* note 4, at 250.

[9] *See* 4 Blackstone, *supra* note 4, at 250-51.

[10] 1 William Hawkins, A Treatise of the Pleas of the Crown 126-131 (1762), https://bit.ly/46aqRiF

[11] A New Conductor Generalis: Being a Summary of the Law Relative to the Duty and Office of Justices of the Peace, Sheriffs, Coroners, Constables, Jurymen, Overseers of the Poor, &c. … 395 (By a Gentleman of the Law 1803), https://bit.ly/3PYez7n.

[12] 4 Blackstone, *supra* note 4, at 250-251 ("This security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required; (for instance 100 l.) with condition to be void and of none effect, if the

true even if the person's violation entailed acts of "actual violence."[13] The understanding was shared publicly too, as newspapers show.[14] All affirm that founding era peace sureties imposed only moderate, non-firearm conditions and only economic consequences—without destroying any firearm rights.

### C. Quarter session records show the difference.

English and colonial quarter sessions records further illustrate how these instruments generally worked. The early (1687) case of Thomas Tunneclif is exemplary. His wife Hannah Overton attested that Thomas was abusive toward her and that she was afraid for her life and those of her children. Thomas was ordered to appear before the court to give a good-behavior surety, which he did, and he acknowledged that the £20 surety could be levied against his lands, goods, and chattels. The surety was subject to

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party shall appear in court on such a day, and in the mean tie shall keep the peace: either generally, towards the king, and all his liege people; or particularly also, with regard to the person who craves the security.").

[13] *Id.* Note, however, that engaging in certain violent crimes, such as affrays, could indeed result in confiscation of the arms in one's immediate possession. But again, arms were not confiscated as a result of violating the terms of spousal peace sureties.

[14] *See, e.g.*, PERCY A. BRIDGHAM, ONE THOUSAND Legal Questions Answered by the "People's Lawyer" of the Boston Daily Globe 129 (1891) ("[t]here is no statute in this State which expressly forbids the carrying of weapons, but there is a statute that provides that a person so carrying may be required to give bonds to keep the peace.").

discharge if Thomas met the conditions of appearing at the next session and in the meantime be of good behavior toward all of the king's subjects, including his wife. The proud Thomas challenged the court by saying, "I care not a pin for none of you, you have abused me and wronged me, and I bid you to do your worst." The court then levied the £20 sum against his lands, goods, and chattels, *and nothing more*.[15]

Also illustrative is the 1687 case of Philip Conway. He was already bound with a £40 surety for his appearance in the next court and for good behavior in the meantime. At this time, Conway was imprisoned in a jail underneath the court building for other misdemeanors. He was very unruly in words and actions to the great disturbance of the king's peace and to the court, disrupting them in their duties by cursing the justices and other officers and kicking his legs against the door to his cell. The court ordered the £40 forfeited.[16]

In 1739, Robert Thompson was fined £5 for being found guilty of assaulting a constable, and he was ordered to find sureties for his good behavior for one year, or be sent to prison.[17]

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[15] *See* Records of the Courts of Quarter Sessions and Common Pleas of Bucks County, Pennsylvania, 1684-1700, 80-81 (1943), https://bit.ly/46hSiar.

[16] *Id.* at 81.

[17] Quarter Sessions Records, vol. VIII, at 229 (The North Riding Record Society 1890), https://bit.ly/45novMs.

In 1748, Robert was indicted for assault and battery against George Pinckney. He was fined £20, ordered to be committed to prison until he paid the fine, and until he found sufficient sureties for his good behavior.[18]

In 1749, John George Featherston was ordered to remain in the house of corrections until the next sessions because he was indicted for assaulting a constable and for not finding sufficient sureties.[19]

In 1751, John Langstaffe was committed to the house of corrections at Richmond for want of sureties for his personal appearance at the sessions, and the court was of the opinion that he was involved in the murder of John Patrick. The court ordered he continue to remain in corrections until next assizes.[20]

In 1780, Caleb Swan of Boston "on oath declaring that he is in fear of Bodily harm from George Tyler of Boston Goldsmith and prays that the said George might be held to Enter into Recognizance with Surety's to keep the Peace towards the said Caleb until next Term. The Court ordered accordingly—The said George thereupon became Bound himself as Principal in the sum of Four thousand Pounds, Edward Grear and Thomas Russel as sureties in Two thousand Pounds each, conditional that the said

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[18] *Id.* at 271.

[19] *Id.* at 281.

[20] *Id.* at 216.

George appear at the next Term, keep the Peace especially towards the said Caleb and not depart without license."[21]

### D. Statutes and cases show the difference.

Massachusetts' statute typified the norm that developed later.[22] It made the remedy available to those with "reasonable cause to fear" that a person bearing arms would cause "an injury, or breach of the peace."[23] If the petitioner made the requisite showing, the judge could require the person bearing arms "to find sureties for keeping the peace" as a condition of continuing to "go armed."[24]

Annihilation of rights did not occur under these statutes. So long as the person met the condition, he could continue to carry.[25] It is also worth noting that

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[21] *See* Minutes, at the Court of General Sessions of the Peace begun and held at Boston in and for the County of Suffolk, on July 11, 1780, https://bit.ly/3ZJk8Kq.

[22] Several states had similar statutes. 1838 Wis. Laws 378, 381 § 16; 1841 Me. Laws 707, 709 ch. 169, § 16; 1846 Mich. Laws 690, 692 ch. 162, § 16; 1847 Va. Laws 127, ch. 14, § 16; 1851 Minn. Laws 526, ch. 112, § 18; 1853 Or. Laws 220, ch. 16, § 17; 1861 Pa. Laws 248, 250 § 6.

[23] 1836 Mass. Laws 748, 750, ch. 134, § 16.

[24] *Id.* There was an exception for cases in which the person bearing arms had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." *Id.* In that case, the person could continue to carry arms without posting the surety.

[25] *Id.*

this law also carried procedural protections for suspected dangerous persons. The applicant bore a high burden of proof and the person bearing arms had a right to be heard in his defense.[26]

*Wrenn v. D.C.*, 864 F.3d 650, 661 (D.C. Cir. 2017), understands this history essentially correctly. *Id.* at 661 ("But surety laws did not deny a responsible person carrying rights unless he showed a special need for self-defense. They only burdened someone reasonably accused of posing a threat. And even he could go on carrying without criminal penalty. He simply had to post money[27] that would be forfeited if he breached the peace or injured others—a requirement from which he was exempt if *he* needed self-defense."). So does *Atkinson v. Garland*, 70 F.4th 1018, 1021 (7th Cir. 2023) ("Surety statutes—which forced some individuals to post bond before carrying weapons publicly—applied only to individuals likely to pose a threat, yet even those individuals could carry weapons publicly after posting bond.").

Indeed, *Bruen* itself recognized most if not all of the characteristics that control the instant inquiry. "As William Rawle explained in an influential treatise, an

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[26] *Id.*

[27] Technically, no money had to actually be paid or "posted"; what mattered was legal acceptance of the conditional debt. The forms and treatises and examples appear to indicate only that the debt commenced upon violation of one or more of the conditions. That makes sense, because the examples indicate that peace sureties could reach into the many-thousands of pounds, which equates to hundreds of thousands of modern dollars.

individual's carrying of arms was 'sufficient cause to require him to give surety of the peace' only when 'attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them.'" *Bruen*, 142 S. Ct. at 2148 (quoting A View of the Constitution of the United States of America 126 (2d ed. 1829)). "Then, even on such a showing, the surety laws did not prohibit public carry in locations frequented by the general community." *Id.* "Rather, an accused arms-bearer 'could go on carrying without criminal penalty' so long as he 'post[ed] money[28] that would be forfeited if he breached the peace or injured others—a requirement from which he was exempt if he needed self-defense.'" *Id.*

Founding era authorities contain no evidence that the conditions or consequences attached to spousal peace sureties ever included restrictions on the right to arms. Both Section 922(g)(8) and spousal peace sureties are preventive measures, but only the former annihilates a constitutional right or punishes the offender prior to any actual abuse or violence. Because of this material disparity, the history and tradition of founding era peace sureties does not support Section 922(g)(8).

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[28] *See supra* note 27.

## II. Domestic violence in the founding era was a serious problem, involved misuse of firearms, and was condemned.

Section 922(g)(8)'s supporters seek special leeway by deeming domestic gun violence a novel problem about which the founding generation cared little. *E.g.*, Br. for the United States at 41. But domestic violence was a serious problem at the founding. And it involved firearms. And it was condemned in law, religion, and custom. At issue here is a "general societal problem that has persisted since the 18th century," not an "unprecedented societal concern," and likely not the result of "dramatic technological changes." *Bruen*, 142 S. Ct. at 2131-32.

### A. The problem is not new.

1. Domestic violence was a serious social problem at the founding and throughout the nineteenth century. Violence generally at the founding was far worse than today. The colonies had a 17th century murder rate that was 10 to 50 times current rates,[29] and firearms were often involved. From 1770-1787, firearms were used in 46% of homicides among European American adults in New England, more than any other weapon.[30] So just as the founding era's overall violence was markedly higher than now,

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[29] *See* Randolph Roth, American Homicide 27 (2009), https://bit.ly/3Zz5K7r.

[30] *See* Randolph Roth, American Homicide Supplemental Volume (AHSV), Figure W 20 (2009), https://bit.ly/3rx4oxg.

domestic violence was likely higher too.[31] Indeed, whereas New York's 1800-1820 marital homicide rate was .7 per 100,00, its modern rate for intimate partner murder is approximately *half* that.[32]

In post-revolutionary South Carolina, for example, there was a "never-ending stream of complaints to magistrates and grand juries" about crimes and behavior running from gambling to domestic violence.[33] Local courts in the antebellum South routinely tried cases of domestic violence; the husbands were variously bound by peace sureties or prosecuted for assault.[34]

Domestic *firearm* violence in particular was a key part of the founding era problem. Supporters of Section 922(g)(8) cite the low number of colonial-era spousal *murders* with firearms—garnered from spotty records from a handful of the more peaceful colonies with low population numbers—as grounds to claim there was a low statistical prevalence of domestic firearm violence generally in founding-era America. *E.g.*, Amicus Br. of History Professors at 24. That is a

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[31] *See* Emily C.K. Romeo, The Virtuous and Violent Women of Seventeenth-Century Massachusetts 18-23 (2020).

[32] *Compare* Roth, *supra* note 29, at 255, Figure 6.1, *with* New York State Division of Criminal Justice Services, Criminal Justice Research Report at 3 (2020), https://on.ny.gov/3F5APWR.

[33] *See* Laura Edwards, The People and their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South 90 (2009), https://bit.ly/46a43zP.

[34] *See id.* at 103.

bold statement, particularly given the high rates of firearm ownership at that time, the extremely high violent crime rate generally, and the near-pitch-black void of local domestic firearm violence records, or at least the absence of studies on that topic, particularly for non-fatal firearm domestic violence.

Still, despite this dearth in the records, terrible examples abound. Hector McNeil shot at his wife on two occasions, and on the third occasion, shot and wounded her (1772).[35] Sarah Butler claimed her husband shot at her, trying to kill her (1824).[36] Robert Bush shot and killed his wife (1828).[37] William Enoch shot and killed his wife in cold blood (1833).[38] Alfred Anthony was found guilty of murdering his wife with a pistol (1838).[39] Bradbury Ferguson shot and killed his wife (1840).[40] George Allen shot at his wife, missing, after beating her in a neighbor's yard

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[35] *See* G.S. Rowe and Jack D. Marietta, "*Personal Violence in a "Peaceable Kingdom' Pennsylvania 1682-1801"*, *in* Christine Daniels & Michael V Kennedy, Over the Threshold : Intimate Violence in Early America 32 (1999), https://bit.ly/3RHhwKX.

[36] *See* Edwards, *supra* note 33, at 182.

[37] *See From the Boston Weekly Messenger. Capital Trial,* The Vermont Patriot and State Gazette at 1 (Oct 21, 1828).

[38] *See "Murder."* The Philadelphia Inquirer at 2 (Oct. 15, 1833).

[39] *See Anthony v. State*, 19 Tenn. 265, 1 Meigs 265 (Tennessee Supreme Court 1838).

[40] *See* Christine Daniels & Michael V Kennedy, Over the Threshold : Intimate Violence in Early America 81-82 (1999), https://bit.ly/3RLSJ8J.

(1850).[41] Jonathan Tebbetts shot his wife and child with a shotgun, wounding them both (1853).[42] Sandy Cavanaugh tried to shoot his wife; later he slit her throat, killing her (1862).[43]

2. The founding era did *not* tolerate domestic violence as Section 922(g)(8)'s supporters claim. On the contrary, domestic violence against the wife was "universally condemned" in colonial times.[44] Assault—including within the family—was the most common misdemeanor in the colonial courts of North Carolina in the 18th century.[45] In Plymouth, spousal abuse was "a very big problem."[46] In Rockingham County, New Hampshire, from 1785-1815, forty percent of female plaintiffs in divorces complained of "extreme cruelty."[47]

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[41] *See* Randolph Roth, "Spousal Murder in Northern New England, 1776-1865," *in* Christine Daniels & Michael V Kennedy, Over the Threshold : Intimate Violence in Early America 77 (1999), https://bit.ly/48B9DMZ.

[42] *See id.* at 82

[43] *See id.* at 84.

[44] *See* Dorothy Mays, Women in Early America: Struggle, Survival, and Freedom in a New World, at 116 (2004), https://bit.ly/3EWtZTx.

[45] *See* Donna Spindel, Crime and Society in North Carolina, 1663-1776, at 49 & n. 11 (Louisiana State University Press 1989), https://bit.ly/3LJDcCt.

[46] *See* Jason Jordan, "Domestic Violence in Plymouth Colony," Anth. 509 Historical Ethnography (1998).

[47] *See* Roth, *supra* note 29, at 69.

Prominent religious leaders condemned domestic violence, classifying violence against wives as a sin.[48] The famous Cotton Mather in 1694 preached that husbands should not beat their wives, that wives were taken away from abusers, and that wife-beaters were beasts.[49] Another preached in 1613 that husbands had zero biblical authority to physically correct their wives in any way,[50] and another confirmed it.[51] Southern denominations through the 1800s

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[48] *See* Elizabeth Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present 18 (1987), https://bit.ly/3ZGlBAX ("Any disturbance within the family, from verbal to physical abuse, was considered a failure to achieve domestic peace. With this view of the family, combined with advanced humanitarian ideas on the rights of women and children brought with them from England, the Puritans developed the concept of family violence as a public concern."); Elizabeth Pleck, Criminal Approaches to Family Violence, 1640-1980, 11 CRIME & Just. 19, 22 (1989) ("The Puritans classified verbal or physical assault, whether between strangers or family members, as 'wicked carriage.' Family violence was a sin; only if the Puritans maintained their watchfulness against sin would their godly experiment prosper.").

[49] *See* Cotton Mather, Ornaments for the Daughters of Zion 117 (1694), https://bit.ly/48D7y3s.

[50] *See* William Perkins, The Workes of that Famous and Worthie Minister of Christ in the Universitie of Cambridge, M.W. Perkins. The third and last volume. "A Short Survey of the Right Manner of Erecting and Ordering a Familie, According to the Scriptures, ch. XI, "Of the Husband," 669, at 691-692 (1613), https://bit.ly/3rzPRku.

[51] *See* William Gouge, Of Domesticall Duties Eight Treatises, Sect. IV "Duties of Husbands," 390 (1622), https://bit.ly/3Q1e7FK.

condemned domestic violence and relied upon church members to police each other.[52]

Founding era jurists condemned domestic violence. The "rule of thumb"—that American courts allowed the beating of one's wife if done with a stick less than that width—is a myth born from a joke.[53] Mild physical correction of wives was allowed under "old" English common law, but from the mid 1600s forward, "[T]his power of correction began to be doubted."[54] At the founding, jurists were deeming wife beating and physical chastisement illegal.[55]

The founding era's condemnation of domestic violence reached many areas of law, depending on the jurisdiction. Separations with alimony, known as divorce a mensa et thoro or "bed and board" divorces, were commonly available simply for the "ill temper" of

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[52] *See* Edwards, *supra* note 33, at 83.

[53] *See* Bloch, *supra* note 2, at 223, 245-246; Beirne Stedman, *Right of Husband to Chastise Wife*, 3 The Virginia Law Register 4 (new series), 241, 243-244 (1917); Mays, *supra* note 44, at 117; Henry Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 Journal of Legal Ed. 3, at 341-365 (1994); Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, 11 Crime & Just. 19, 32 (1989).

[54] *See* 1 William Blackstone, Commentaries on the Law of England 432 ch. 15 (1765)), https://bit.ly/3rBMyJx.

[55] *See* Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. Legal Educ. 341, at 351-354 (1994); Bloch, *supra* note 2, at 229-232.

the spouse[56]; complete divorce was sometimes available for abuse; and divorced women had a right to an abusive ex-husband's estate.[57] The presence of abuse strengthened the case for alimony.[58] Spousal abuse was considered a violation of the marital contract.[59] And as shown above, jurists were holding that, because husbands could not beat their wives under English common law, the wives could demand peace sureties and maintenance.[60] Other legal tools used against abusive husbands variously included

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[56] *See* 1 Blackstone, *supra* note 54, at 428-29.

[57] *See* Jacqueline Beatty, In Dependence: Women and the Patriarchal State in Revolutionary America 187 (2023) ("Underscoring the powerful assumptions of women's need for this protection, the state sometimes took matters into their own hands in their attempts to protect wives from profligate and abusive husbands. After Ann Gardner accused her husband of extreme cruelty, the courts decreed the Gardners divorced a mensa et thoro, compelling David to pay Ann a sum of money for her maintenance and support. The courts, however, went a step further, guaranteeing that should Ann outlive her ex-husband, she would still be entitled to her "right of Dower in the Estate of the said David," despite their being divorced.").

[58] *See id.* at 186

[59] *See id.* at 57.

[60] *See* John Walthoe, A Treatise of the Common Law Concerning Husbands and Wives, at 5 (1700), https://bit.ly/46djG9s ("Though our Law makes the Woman subject to the Husband, yet he may not kill her but it is Murder; he may not beat her, but she may pray the peace, 1 Ed. 4.1. So he may not starver her, but must provide Maintenance for her. Nay, so near is this oneness of Husband and Wife respected in the Law, that if the Husband enter into Obligation for the Duress of his Wife the Bond shall be void.").

imprisonment, fines, and whippings stemming from breaches of peace or assault and battery charges.

3. To be sure, certain authorities approved of chastisement in the 19th century.[61] But the 19th century approvals were exceptional departures from the then-settled norm.

In the founding era, colonial legal norms condemned chastisement's physical violence.[62] As of 1791, it was generally prohibited,[63] and by about 1900 the pro-chastisement view was "entirely obsolete."[64] Later temporary departures from that norm do not unsettle what the founders understood when adopting the Second Amendment.

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[61] *See* Pleck, *supra* note 48, at 32-33.

[62] *See* Bloch, *supra* note 2, at 229-230 (2007) ("Although less well known than these Puritan statutes, the English common law also contained an important provision that gave quite similar legal recourse to battered women. Most American colonies assumed the continuity of the English common law and passed statutes only when addressing novel conditions of American life not covered in English law (such as land policy and slavery. The absence of specific legislation on wife beating therefore suggests that colonists outside New England for the most part simply perpetuated the English common law. Writers of English legal manuals and treatises dating back to at least the sixteenth century regularly explained that the accepted way of dealing with violent husbands under the common law was to charge them with breach of the peace.").

[63] *See id.*

[64] *See* Stedman, *supra* note 53, at 246.

### B. The "more guns" and "better technology" explanation is wrong.

1. To whatever extent domestic gun violence may have increased since the founding, Section 922(g)(8)'s supporters fail to explain it correctly. On their view, increased domestic gun violence stems from increased gun ownership and advancements in firearm technology. *E.g.*, Amicus Br. of History Professors at 25. But that explanation cannot work because guns are *not* more common now than before, and the primary advancement in firearms technology—the reliable cartridge revolver—was nonexistent almost until the Civil War. Generally consistent rates of firearm ownership and mid-19th century advancements in technology cannot explain the rise in marital firearm deaths dating from the 1820s. *See* Amicus Br. of History Professors at 25.

Americans have always owned lots of guns. The best studies show that founding era ownership levels either matched or exceeded current levels.[65] As of 1774, "at least 50% of all wealth owners (both males and females) owned guns."[66] Inventories show that guns were "more commonly owned than cash of any kind or Bibles and religious books—and nearly as common as all books combined."[67]

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[65] *See* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 William & Mary L. Rev. 1777, 1780-1781 (2002).

[66] *See id.*

[67] *See id.*

2. What *did* change in this period was the legal system's treatment of peace sureties. Though this key dynamic could explain increased domestic violence, Section 922(g)(8)'s supporters never grapple with it.

At the founding, peace sureties were the primary legal tools that wives could use to protect themselves from potentially abusive husbands. Indeed, the mere thought of having to pay large sums of money to the government likely deterred many potentially abusive husbands from escalating domestic conflicts. But from the beginning of the nineteenth century—just as the supposed rise in domestic gun violence was occurring—changes to the court systems made domestic peace sureties *less available*. Over time, "the option of abused wives to seek warrants to secure the good behavior of their husbands gradually declined in significance."[68]

Historians now "generally agree" that blame for this decline lies not with any ineffectiveness of spousal sureties, but rather with the "gradual reorganization of the court system under the authority of supreme appellate courts," which "whittled away at" the peace sureties that used to be a mainstay remedy.[69] Thus, the changed role of peace sureties may explain a rise in domestic violence. But the supporters of Section 922(g)(8) never confront this inconvenient history.

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[68] *See* Bloch, *supra* note 2, at 239-241.

[69] *See id.*

## III. Founding era laws regarding the mentally ill do not support Section 922(g)(8).

Section 922(g)(8)'s supporters also argue that American laws about disarming the mentally ill give the requisite support of history and tradition. *See, e.g.*, Br. for the United States at 7. But here as well, the laws are not "relevantly similar" because of material disparities regarding how they operated.

Certain founding era laws treated suspected and actual lunatics as dangerous and indirectly limited their firearm rights, either incidentally via imprisonment or by the loss of control of their estates. Before the law determined them insane, however, they were considered normal members of political society. In that sense, there is at least some Section 922(g)(8) resemblance. Critically, though, the law gave citizens facing the antecedent lunacy allegations substantial procedural protections. Incidental disarmament due to institutional commitment occurred only *after* the law deemed someone a lunatic, and the procedure for making lunacy determinations typically included key protections, such as the right to a jury trial.

The exact procedure for making threshold lunacy (or "idiocy") determinations varied from state to state. Many did so by having their chancery/equity courts administer a writ of inquiry process inherited from English common law. Others used a slightly different process involving town selectmen acting essentially as judges and juries. But according to jurists nationwide, the law's threshold lunacy determinations included serious procedural protections.

Proof of this comes first from the English law's treatises. According to Blackstone, English lunacy determinations under the writs de "idiota" or "lunatico" inquirendo required a jury of twelve and other, similarly weighty procedural requirements.[70] Harrison agreed, explaining how the alleged lunatic enjoyed rights including a jury trial, the right to bring witnesses to the inquisition, the right to testify on his own behalf, and the right to appeal.[71] So does Collinson's 1812 *Treatise on the Law Concerning Idiots, Lunatics, and Others*, which outlined the accused lunatic's right to a jury trial, a right to have the trial occur in his vicinage, a right to counsel, a right to confront witnesses against him, a right to appeal, and more.[72]

Treatises on American practice at the founding are in accord. Story explained that, to establish the "idiot" or "lunatic" status that could later entail disarmament, American courts used the English

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[70] *See* 1 William Blackstone, Commentaries on the Law of England 293-294 (1765)), https://bit.ly/3rBMyJx ("By the old common law there is a writ de idiota inquirendo, to enquire whether a man be an idiot or not; which must be tried by a jury of twelve men; and if they find him purus idiota, the profits of his lands, and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them."

[71] *See* Joseph Harrison, The Accomplished Practiser in the High Court of Chancery, vol. II, ch. XII, at 533-541 (1779), https://bit.ly/46oipw6.

[72] *See* II George Dale Collinson, A Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compos Mentis, in Two Volumes 151-211 (1812), https://bit.ly/3PwCbi8.

model to conduct inquisitions with trials by juries: "The inquisition is always had, and the question tried, by a jury, whose unimpeached verdict becomes conclusive upon the fact."[73]

Highmore concurred with Story.[74] The American method of proving a person "non compos" (which included lunatics) through this approach required a petition presented to a chancellor, verified by affidavits, stating the nature of the person's conduct, with a medical opinion, showing the insanity.[75] Upon this petition a commission would be ordered to inquire into the facts under the writ of inquiry—the English writ that carried a suite of protections including the right to a jury trial.[76]

Primary authorities confirm the treatises' views. Across the nation, the procedure for lunacy determinations included key protections. In addition to the general importation of common English practice, several states gave the protections express

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[73] *See* 2 Joseph Story, Commentaries on Equity Jurisprudence, ch. XXXV, §1365.§1476 (1839), https://bit.ly/45gyaEa.

[74] *See* A. Highmore, A Treatise on the Law of Idiocy and Lunacy, First American from the Last London Edition, to which is Subjoined An Appendix, Comprising a Selection of American Cases 20-22 (1822), https://bit.ly/48vgPdP.

[75] *See id.*

[76] *See id.*

reference. Delaware,[77] North Carolina,[78] Georgia,[79] and Tennessee[80] had statutes recognizing the jury trial right. New Hampshire recognized the jury trial right in court decisions,[81] as did Massachusetts,[82] Virginia,[83] and New York.[84]

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[77] *See* An Act to vest in the Court of Chancery the care of idiots and lunatics, Sec. 2 (1793), *in* Laws of Delaware, vol II, at 1055, https://bit.ly/3PCIYGX.

[78] *See* John Haywood (improved and corrected by A Gentleman of the Profession), A Manual of The Laws of North-Carolina 273-275 (1819).

[79] *See* An Act to Authorize the Arrest and Confinement of Lunatic or Insane Persons, in Certain Cases (passed December 28, 1838); Thomas Cobb, A Digest of the Statute Laws of the State of Georgia … , at 344 (1851), https://bit.ly/469NFiP.

[80] *See* The Statute Laws of the State of Tennessee, of a Public and General Nature, Revised and Digested, vol. I, at 145 (1831), https://bit.ly/3Q0jm8A.

[81] *See H. v. S.*, 4 N.H. 606 (1827).

[82] *See Chase v. Hathaway*, 14 Mass. 221 (Supreme Court of Massachusetts 1817)

[83] *See Commonwealth v. Tyree*, 4 Va. 262, 2 Va. Cas. 262 (1821).

[84] *See In re Barker*, 2 Johns. Ch. 232 (Chancellor's Court of New York 1816); *In re Wendell*, 1 Johns. Ch. 600 (New York Court of Chancery 1815).

## CONCLUSION

The founding era law of peace sureties does not support the Constitutionality of Section 922(g)(8), and neither does the founding era law regarding lunatics.

For these reasons, *amicus* respectfully requests that this Court affirm the judgment below.

Respectfully submitted,

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