No. 22-915

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR HUMAN LIBERTY IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Center for Human Liberty is a nonprofit organization dedicated to defending and advancing individual liberty and freedom, including the rights and liberties protected by the Constitution. Consistent with this purpose, the Center for Human Liberty engages in legal efforts, including the submission of amicus briefs, to promote the protection of liberty. Amicus is interested in this case to ensure that federal regulation of firearms is consistent with the original meaning of the Second Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). All constitutional provisions involve a balancing of important and competing values, but the promise of government under a written constitution is that once the People have struck the balance and inscribed it in their fundamental charter, that act of higher lawmaking must be respected unless and until the People themselves decide to revisit the matter.

In *Heller* and *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111 (2022), this Court

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[1] Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

adopted a doctrinal framework for implementing the balance struck by the People when they ratified the Second Amendment. An individual challenging a restriction touching that right must first show that "the Second Amendment's plain text covers [his] conduct." *Id.* at 2126. If it does, the burden then shifts to the government to "justify its regulation" by demonstrating that it "is consistent with this Nation's historical tradition of firearm regulation." *Id.*

Respondent has satisfied *Bruen*'s first, text-focused inquiry. The challenged law disarms individuals subject to domestic-violence restraining orders issued after notice and a hearing, so long as the order either "includes a finding that such person represents a credible threat to the physical safety" of others, or simply "prohibits the use, attempted use, or threatened use of physical force" to "cause bodily injury." 18 U.S.C. § 922(g)(8). There can be no question that the text of the Second Amendment "presumptively protects" the *conduct* restricted by this statute—carrying arms and keeping them in the home for lawful purposes like self-defense. *Bruen*, 142 S.Ct. at 2126. And the plain text also protects *the people* whom the statute restricts. For the Second Amendment on its face presumptively protects "all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. And while our historical tradition might allow the government "to strip certain groups of that right," *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting), under *Bruen* that is a matter that *the government must prove* as a matter of history, not a conclusion that follows from the Constitution's "bare text," 142 S.Ct. at 2141 n.11.

Petitioner has not satisfied that burden. Since the goal of *Bruen*'s historical inquiry is to understand the scope the Second Amendment had when the People adopted it in 1791, the government must come forward with "well-established and representative historical analogue[s]" from that period. *Id.* at 2133 (emphasis omitted). Yet none of the Founding-Era regulations Petitioner has identified are truly analogous to the law challenged here. (1) Founding-Era laws (patterned after the Statute of Northampton) that criminalized affrays without violence could result in seizure of the arms used in the crime, but only after arrest or conviction for the underlying crime—attendant with all the familiar procedural protections—which involved a finding that the defendant was highly likely to use his firearms to commit violence. (2) "Surety-style" laws requiring some people to provide bonds in order to continue to carry arms in public did target a similar problem as Section 922(g)(8)—preventing violence before it occurred—but they did so through a materially different means: requiring sureties, not total disarmament. And (3) laws disarming certain disfavored groups, such as British loyalists or slaves, tell us nothing about the scope of the Second Amendment *when it applies*, since the whole justification for these laws when they were enacted was that the individuals in the groups they covered *had no constitutional rights to begin with*.

"History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). But at the very least, history shows that such a prohibition cannot be imposed absent a bona fide judicial

determination that the person in question *actually poses an acute risk of misusing his arms to cause physical violence*. Section 922(g)(8)'s blunt restriction requires no such determination. It disarms people who have been ordered *not to use* physical force against others—a boilerplate condition that is almost tautologically included in *every* restraining order—without *any finding* that there is *any likelihood whatsoever* that the person would actually use a firearm to commit such violence. That is facially inconsistent with the Second Amendment, and the court below was right to strike it down. The state or federal governments may be able to disarm Respondent, consistent with the Second Amendment's text and history, but they cannot do so through a blunderbuss provision like this one.

ARGUMENT

I. Section 922(g)(8) Is Facially Unconstitutional under the Second Amendment.

A. The Plain Text of the Second Amendment Covers Respondent's Conduct.

Respondent has carried his burden under the first part of the *Bruen* inquiry. The conduct for which Respondent was arrested and prosecuted was possession of firearms in the home. Pet.App.3a. And as *Heller* squarely holds, the plain text of "the right … to keep and bear Arms," U.S. CONST. amend. II, presumptively "guarantee[s] the individual right to possess" "instruments that constitute bearable arms," 554 U.S. at 582, 592.

As the court below held, Respondent is also one of "the people" who can assert that right. Under "this Nation's historical tradition of firearm regulation,"

Bruen, 142 S.Ct. 2126, the government may prevent actually dangerous people from having firearms, and we discuss that historical tradition below. But these individuals remain part of "the people" who fall within the Second Amendment's presumptive scope. As *Heller* holds, "the people" is something of a constitutional phrase-of-art, that "unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580. The Second Amendment right thus presumptively extends, *Heller* further explains, "to all Americans." *Id.* at 581. And dangerous Americans, as well as convicted American felons, remain Americans. *See* Pet.App.8a; *Range v. Attorney General*, 69 F.4th 96, 102 (3d Cir. 2023); *Kanter*, 919 F.3d at 453 (Barrett, J., dissenting).

Viewing a person's status as "dangerous" as placing him outside the Second Amendment's presumptive textual scope would also lead to peculiar results and inconsistencies. Under that understanding, "a person could be in one day and out the next" the "moment he was convicted of a violent crime or suffered the onset of mental illness." *Id.* at 452. Moreover, since the constitutional phrase "the people" also delimits the scope of the "rights to assemble peaceably, to petition the government for redress, and to be protected against unreasonable searches and seizures," excluding a dangerous individual from "the people" protected by the Second Amendment would presumably "exclude him from those rights as well." *Range*, 69 F.4th at 101-02. "That is an unusual way of thinking about rights." *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting).

B. The Government Has Failed To Identify a Historical Analogue Justifying Section 922(g)(8)'s Restriction of Second Amendment Rights.

Because the text of the Second Amendment presumptively protects the conduct for which Respondent was prosecuted, the burden shifts to the government to "identify … well-established and representative historical analogue[s]" that justify Section 922(g)(8)'s ban on that conduct. *Bruen*, 142 S.Ct. at 2133 (emphasis omitted). Such an analogue must be "relevantly similar" *both* in terms of "whether [they] impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* And the government may not rely on "outliers that our ancestors would never have accepted." *Id.* (cleaned up). That means that the government must come forward with "representative" historical laws, not a handful of *un*representative restrictions that were "short-lived," were in place only in "a few … outlier jurisdictions," or were limited to "exceptional" circumstances and thus do not reflect "the Constitution's usual application." *Id.* at 2133, 2135, 2152 n.26, 2154-56. And for problems like domestic violence that have persisted since the Founding, "a distinctly similar historical regulation" is required. *Id.* at 2131.

1. Pre-Founding English History

The government begins its search for representative historical analogues in fourteenth-century England. But while the English "historical background of the Second Amendment" can be instructive, *Heller*, 554 U.S. at 592, medieval English constitutional understandings are "not to be taken in all respects to be

that of America," *Bruen*, 142 S.Ct. at 2139. Indeed, this Court has already rejected the attempt to overinterpret Petitioner's first piece of historical evidence: the 1328 Statute of Northampton. "[A]t least as it was understood during the Middle Ages," *Bruen* explained, that statute "has little bearing on the Second Amendment adopted in 1791." *Id.*

Even setting aside its antiquity, the Statute of Northampton provides no support for Section 922(g)(8). Petitioner notes that offenders under Northampton were "punishable by forfeiture of the[ir] 'armor,' " Pet.Br.15, but such forfeiture could occur only upon conviction of violating the statute's substantive prohibitions (or upon arrest and imprisonment until trial). *See* 2 Edw. 3, c. 3 (1328) (Eng.); 2 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 21 (1795). The government's authority to disarm a criminal defendant while imprisoned, or upon conviction, is hardly "relevantly similar," *Bruen*, 142 S.Ct. at 2133, to the power claimed by Petitioner under Section 922(g)(8): to disarm individuals outside of the criminal process, and without any judicial determination that they pose a significant risk of physical violence.

Petitioner's next piece of evidence—the Militia Act of 1662—even more starkly illustrates the danger of relying on snippets of English history. The 1662 Act was originally adopted to disarm the "Fifth Monarchists," a fanatical, insurrectionist Protestant sect that had attempted to take control of London in

January of 1661.[2] In the ensuing decades, the Act was also sporadically invoked to disarm other insurrectionists—often, Roman Catholics.[3] The 1662 Act thus, at most, suggests that the government (in seventeenth-century England) could disarm actual insurrectionists, during a period of extraordinary violent political upheaval. It hardly shows that our Second Amendment allows the government to disarm people, based on its say-so that they are dangerous, under "the Constitution's usual application during times of peace." *Bruen*, 142 S.Ct. at 2152 n.26.

Indeed, when the English government began to use the 1662 Militia Act to disarm Protestants outside of the narrow context of its origins, it resulted in the 1689 Declaration of Right's guarantee "[t]hat the subjects which are Protestants, may have arms for their defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7. It is *this* enactment—designed to *curb* over-zealous use of the Militia Act—that is "the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. And that history severely curtails "any utility of the Militia Act of 1662 as a historical analogue for § 922(g)(8)." Pet.App.19a.

To be sure, the 1689 Declaration of Right reflected to some extent the same religious strife and discrimination that had prompted the disarmament efforts it was enacted to curb: the right to have arms was limited to Protestants. But Petitioner cannot rely on this limitation—or on the occasional disarmaments

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[2] Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions* 15-16, 16 DREXEL L. REV. (forthcoming 2023), https://bit.ly/3EYbJZQ.

[3] *Id.* at 19-20, 23-24.

that took place in England during the early eighteenth-century—since the Founders widely understood the Second Amendment to *repudiate* these deficiencies in its English predecessor. In introducing the Bill of Rights in Congress, for example, James Madison condemned the limited scope of the "English Decln. of Rts" in protecting only "arms to Protestts."[4] In "the most important early American edition of Blackstone's Commentaries," "the law professor and former Antifederalist St. George Tucker," *Heller*, 554 U.S. at 594, emphasized that Americans enjoyed the right to keep and bear arms "without any qualification as to their condition or degree, as is the case in the British government," where "the right of bearing arms is confined to protestants," and "the people have been disarmed, generally, under the specious pretext of preserving the game."[5] And William Rawles's "influential treatise," *Heller*, 554 U.S. at 607, lamented that "[i]n England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, 'suitable to their conditions, and as allowed by law.' "[6]

2. Founding-Era History

Petitioner and its amici rely on three categories of laws from the Founding period: Northampton-style

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[4] James Madison, *Notes for Speech in Congress Supporting Amendments* (June 8, 1789), https://bit.ly/46feYYO.

[5] ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES Book 1, Part 1, App., at 300 (1803) ("TUCKER'S BLACKSTONE"); *id.* at Book 1, Part 2, 143 n.40.

[6] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (1829).

laws against affrays, surety-style laws governing the carrying of firearms, and laws disarming certain groups that historically suffered from discrimination. None justify Section 922(g)(8).

i. The American colonies, and then States, enforced analogues to the Statute of Northampton—which, as discussed above, made it a crime to carry arms "in a manner that spread fear or terror," Pet.Br.23, punishable by forfeiture of the firearms used in the crime (though not any other arms the defendant might have possessed). The crime codified by these laws was a species of "affray," or violence committed publicly to the terror of the people. TUCKER'S BLACKSTONE at Vol. 5, Book 4, *145. The offense—which *Heller* relied upon in discerning the scope of the Second Amendment, 554 U.S. at 627—was essentially an assault upon the public. And the justification of the Northampton-style offense—sometimes known as an "affray, where there is no actual violence"—was that carrying dangerous and unusual weapons "will naturally diffuse a terrour among the people" in much the same way as actual public displays of violence. 3 BIRD WILSON, WORKS OF THE HONOURABLE JAMES WILSON 79 (1804).

State v. Huntly—relied upon by this Court in both *Bruen*, 142 S.Ct. at 2145, and *Heller*, 554 U.S. at 601—provides an instructive example. Huntly was prosecuted for "arm[ing] himself" and then "openly and publicly declar[ing] a purpose and intent … to beat, wound, kill and murder" others. 25 N.C. 418, 418 (N.C. 1843). The court held that this conduct violated the common-law of affray, because such threatening conduct "attack[s] directly th[e] public order and sense of security" and "lead[s] almost necessarily to actual

violen[c]e." *Id.* at 421-22. And it further held that convicting Huntly for this offence was consistent with the right to keep and bear arms because that right did not encompass the use of arms "to the annoyance and terror and danger of its citizens." *Id.* at 422.

These Founding-Era sources thus suggest that Northampton-style laws may have served a comparable purpose as Section 922(g)(8): preventing the carrying of firearms in circumstances that will "lead almost necessarily to actual violen[c]e," *id.*, before it takes place. But that is where these laws' utility to the government as potential historical analogues ends. For these Founding-Era laws did not impose anything close to a comparable burden on the Second Amendment right as the law challenged here. As noted above, disarmament could occur under Northampton-style laws, but only upon conviction after trial (or while in custody). They thus in no way allowed the government to seize an individual's arms without *first proving*, through a fulsome judicial process, that they were *highly likely to use those arms in a way that was physically dangerous to others*.

ii. Nineteenth-century "surety statutes that required certain potentially irresponsible individuals who carried firearms to post bond," Pet.Br.24, are even further from the mark.

These laws were a statutory refinement of the "surety system" that existed long before the Revolution and served as the Founding generation's standard mechanism for protecting against anticipated future wrongdoing. As Blackstone explained, the "requisition of sureties" required a person to "find[ ] pledges and securities for keeping the peace," and thereby

"oblig[ed] those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen." TUCKER'S BLACKSTONE at Vol. 5, Book 4, 251. The surety could take the form of a bond posted by the potential wrongdoer himself or the requirement that he find one or more third-parties who would post sureties on his behalf. *See id.* at 252-53; JAMES PARKER, CONDUCTOR GENERALIS 395 (1803). The statutes cited by Petitioner clarified that one type of apprehended misbehavior this surety system could be used to address was the carrying of arms in a way that gave "reasonable cause to fear an assault or other injury" to another. MASS. GEN. LAWS, ch. 134, § 16 (1836).

Like the Northampton-style laws, then, the surety system addressed a "comparable" problem as Section 922(g)(8). But once again, surety laws addressed this danger in a materially different way. This Court has already explained in *Bruen* the "insignificant" burden these laws imposed on the right to self-defense. 142 S.Ct. at 2149. Rather than seizing anyone's arms, the surety system (1) provided an individualized judicial process to determine whether the person in question posed a real risk of danger, and (2) even upon such finding, only required him to "post[ ] money 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.* at 2148.

Indeed, the Founding-Era surety system is powerful evidence that the law challenged here *does not* accord with our historical tradition, because it constituted the Founders' principal ways of protecting against the very danger addressed by Section

922(g)(8): domestic violence. The Founding generation was not blind to the harm caused by intimate-partner abuse. To the contrary, "[p]hysical violence of a husband toward a wife was universally condemned." DOROTHY A. MAYS, WOMEN IN EARLY AMERICA 116 (2004). The Founders' legal mechanism for preventing that violence was the surety system: women who feared physical violence could "demand [sureties] against their husbands" by way of a request to a justice of the peace or by seeking a writ of supplicavit from a court. TUCKER'S BLACKSTONE at Vol. 5, Book 4, *253-54.

The early-American case books are full of examples where courts granted women such legal protection. In 1687, a Pennsylvania court required Thomas Tunneclif to give sureties of good behavior towards his wife Hannah, who attested that he had abused her and their children.[7] In 1809, a South Carolina court granted a writ of supplicavit to Mrs. Prather, who alleged that her husband abused her and forced her out of the house, binding Mr. Prather to sureties as well requiring alimony of $100 per year while they lived separately. *Prather v. Prather*, 4 S.C. Eq. 33, 42-44 (1809). And in 1816, a New York court declined to grant Mrs. Codd a writ of supplicavit, but only because the abuse she alleged had taken place eight years earlier—and it ordered that she be given custody of the children and that her husband be forbidden from having personal contact with them "except under the direction of one of the masters of this Court." *Codd v. Codd*, 2 Johns Ch. 141, 143 (N.Y. Ch. 1816).

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[7] RECORDS OF THE COURTS OF QUARTER SESSIONS AND COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA, 1684-1700, at 80-81 (1943), https://bit.ly/3ZGgnoJ.

The surety system thus illustrates that the social problem addressed by Section 922(g)(8) "has persisted since the 18th century," but that the Founders addressed that problem "through materially different means." *Bruen*, 142 S.Ct. at 2131. That "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.*

iii. Firearm restrictions imposed on certain disfavored groups—such as British loyalists, slaves or freedmen, or Native Americans—do not provide any insight into our historical tradition of firearm regulation at all, because these groups were understood as falling *outside* of the rights-holding political community.

Bruen's discussion of this Court's long-repudiated decision in *Dred Scott v. Sanford* captures the reciprocal relationship at the Founding between citizenship and the enjoyment of Second Amendment rights. "[R]ecognizing that free blacks were citizens of the United States," *Dred Scott* explained, would mean that they "would be entitled to the privileges and immunities of citizens, including the right 'to keep and carry arms wherever they went.' " *Bruen*, 142 S.Ct. at 2150-51 (quoting *Dred Scott v. Sanford*, 60 U.S. 393, 417 (1857) (emphasis omitted)). Conversely, it was only because black Americans *were not* accepted as citizens that they could be freely excluded from the enjoyment of Second Amendment rights. And *Dred Scott* shows that it was the same logic that justified, in the minds of the Founders, the firearms restrictions that applied to Native Americans. *See* 60 U.S. at 420.

Some of Petitioner's amici also cite colonial-era laws disarming Catholics, *see* Profs. of Hist. & Law

Amicus Br. 10, but they, in fact, serve to illustrate the danger of relying on these types of restrictions. For these pre-Founding laws were enacted at a time when the right to keep and bear arms (as then codified by the 1689 Declaration of Right) was understood to protect only Protestants. The American Second Amendment, by contrast, was meant in part to repudiate that discriminatory restriction, *see supra*, pp. 8-9—which is why laws disarming Catholics *do not appear* in the historical record after 1791.

The same principles suffice to dispose of the Founding-Era disarmament of people who were understood to have forfeited their rights of citizenship by taking up arms against their Nation. Most States disarmed loyalists during the Revolutionary War, and it is not difficult to understand why: after siding with the British invaders during the very war by which the American States sought to achieve political independence, these loyalists could scarcely then lay claim to the rights of citizens of those new States. The mass disarmament of "non-associators" (those who refused to swear allegiance and give military support to the patriot cause) was justified on similar grounds—and for the additional reason that the measure provided the Continental Army with a source of much-needed armament.[8] *See also Bruen*, 142 S.Ct. at 2152 n.26 (dangerous to rely on "military dictates" not "designed to align with the Constitution's usual application during times of peace.") And the early disarmament of

[8] *Letter from George Washington to the Penn. Council of Safety* (Dec. 15, 1776), https://bit.ly/3EZbKN5. The impressment of arms from Quakers by some States during this period was justified on similar grounds.

actual rebels and insurrectionists—such as those who participated in Shays' Rebellion—was cut from the same cloth.

Indeed, in all of these cases, the groups whose arms were seized were *also* stripped of many other fundamental constitutional rights, such as the right to vote or hold office.[9] That conclusively shows that the justification for all of these laws was that the groups in question *were understood to have no constitutional rights in the first place*—not that the Second Amendment somehow gives the government a blank check to "disarm those who were not law-abiding, responsible citizens." Pet.Br.22.

By contrast, when the Founders believed it necessary to disarm those who *did* fall within the Second Amendment's protections, they did so only after a bona-fide judicial determination—following full due process—that such a measure was truly necessary to prevent a clear danger that the arms would be misused. As Joseph Story explained, for example, early American law provided that the mentally ill could be declared "lunatics" by a court of chancery and committed to the custody of a guardian—but only after a full trial by jury.[10] That proceeding provided the allegedly disabled person with the full panoply of procedural

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[9] *See, e.g.*, 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 479-84 (Wright & Potter 1886), https://bit.ly/3PXtVZQ (loyalists and non-associators); Act of Feb. 16, 1787, §§ 1-3, *in* 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 145-47 (1805) (Shays' Rebels).

[10] 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 365 (1839).

protections, including the right to be present at the trial, to know in advance the nature of the charges and evidence against him, to call witnesses and present evidence, and to appeal.[11]

Importantly, moreover, the mentally ill during this period could be committed to *government* custody—and consequently disarmed—only if they were "dangerously insane," or "so furiously mad as to render them] dangerous to the peace or safety of the good people."[12] The Founders' treatment of the mentally ill thus strongly confirms the conclusion reached above: our historical tradition of firearms regulation simply does not cede the government the power to disarm people based on the Government's assertion that they are dangerous—and without an individualized judicial determination, reached after due process, that they are dangerous and likely to use their firearms to physically harm others.

iv. In addition to laws and regulations actually in force during the Founding Era, Petitioner and its amici invoke three failed proposals from state ratifying conventions. The right to keep and bear arms proposed in Massachusetts would have barred Congress from "prevent[ing] the people of the United States, *who are peaceable citizens*, from keeping their own arms." *See* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS:

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[11] 1 GEORGE DALE COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOTES MENTIS 129-30, 160-62 (1812).

[12] *See, e.g.*, An Act vesting Justices of the Peace with certain powers in Criminal Cases (1798, 1813, 1822), *in* THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE 147, 149-50 (1822), https://bit.ly/3LGOEib.

A DOCUMENTARY HISTORY 675, 681 (1971) (emphasis added). The Pennsylvania Minority would have provided that "no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals*." *Id.* at 662, 665 (emphasis added). And New Hampshire's convention recommended an amendment establishing that "Congress shall never disarm any citizen, *unless such as are or have been in actual rebellion*." *See* 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (1836) (emphasis added).

Heller already described these failed proposals as "dubious" evidence, 554 U.S. at 603, and in fact they can tell us little about "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S.Ct. at 2126, because they *are not firearm regulations*. This Court repeatedly indicated in *Bruen* that the inquiry into history and tradition must focus on *actual laws or common-law rules*—not unenacted proposals or other types of secondary sources. It tasked the government with putting forward "a distinctly similar historical regulation" and indicated that the rejection of proposed "analogous regulations" would be "probative evidence. *Id.* at 2131. It examined whether New York had established "a comparable tradition of regulation" justifying its restrictions on carrying firearms. *Id.* at 2132. And it set forth a framework for analogical reasoning that revolves entirely around the assessment of "historical regulations," by asking "how and why th[ose] regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133.

Even setting this threshold point aside, the evidence provided by these three ratifying-convention

proposals is meagre indeed. They come from only three of the original 13 States. The proposals in Massachusetts and Pennsylvania were not even adopted by their respective conventions. And the version of the Second Amendment actually proposed by Madison, and ultimately adopted by the People, did not include the qualifications Petitioner relies upon—an omission that could naturally be viewed as a *rejection* of them. At most, then, these proposals might be said to reflect some general Founding-Era concern "about threatened violence and the risk of public injury," *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting); they tell us little about what *means for addressing that concern* the Founders accepted as consistent with the Second Amendment.

3. Antebellum and Reconstruction-Era History

i. Failing to find any support in the Founding Era, Petitioner moves later into the nineteenth century. But as historical evidence becomes further removed from Ratification, its probative value diminishes to the vanishing point. After all, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. 634-35, and thus the whole point of *Bruen*'s historical inquiry is to determine the original understanding of the Second Amendment *when it was adopted by the People in 1791*. While evidence that arises after the Founders had passed from public life may still be of some minimal value, it is difficult to see how laws that date from, say, 1830 or later could justify a modern law where, as here, that evidence does not reinforce a tradition of regulation dating back to 1791. *See Espinoza v. Montana Dep't of Revenue*, 140

S.Ct. 2246, 2258-59 (2020) (evidence from "the second half of the 19th century" "cannot by itself establish an early American tradition").

One of Petitioner's amici resists this conclusion, arguing at length that the touchstone for *Bruen*'s historical inquiry should instead be the Fourteenth Amendment's ratification (and incorporation of the Bill of Rights against the States) in 1868. That is contrary to precedent, history, legal theory, and common sense. *See generally* Mark W. Smith, *Attention Originalists: The Second Amendment was adopted in 1791, not 1868*, HARV. J. L. & PUB. POL'Y PER CURIAM (Dec. 7, 2022).

Two principles long established by this Court's unequivocal precedent necessitate the conclusion that 1791 is the critical year, not 1868. First, incorporated Bill of Rights provisions have the same meaning applied to the States as to the federal government. *See McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010). It has been a bedrock principle of Bill of Rights jurisprudence *for over five decades* that while it is the Fourteenth Amendment that *incorporates* the Bill of Rights' guarantees against the States, once incorporated, those rights have *exactly the same meaning against the States* as they do against the federal government. *See Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

Second, as *Bruen* also makes clear, the Court has always treated the ratification of the Bill of Rights as the key period for understanding the scope of the rights enumerated therein. *Id.* Almost a century ago, the Court explained that the First Congress of 1789, is "a Congress whose constitutional decisions have

always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument," *Myers v. United States*, 272 U.S. 52, 174-75 (1926), and this practice is no less true in the context of the Bill of Rights, *see, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) ("The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's [reasoning in *Myers*].").

To be sure, *Bruen* "acknowledge[d] that there is an ongoing scholarly debate" over whether 1791 or 1868 is the appropriate touchstone, and it stated that it did not "need [to] address this issue." 142 S.Ct. at 2138. But this Court's decision not to wade into a "scholarly debate" cannot be read as changing or casting doubt on the longstanding precedent described above.

This conclusion also makes sense as a matter of constitutional history and theory. The justification for originalism is that it enforces the choices made and compromises struck by the People when they considered, debated, and enacted the constitutional provision at issue. And for the Bill of Rights, the significant discussion and debate over the *substance* of those rights occurred in 1791 when they were first adopted. To be sure, there was a robust debate in 1868 over *whether the Second Amendment should be applied against the States*. *See McDonald*, 561 U.S. at 826-35 (Thomas, J., concurring). But that debate centered not on the *substantive meaning* of the Second Amendment (or the other Bill of Rights provisions), but rather on whether the same right that had always protected against federal action should be extended to state action as well.

ii. In any event, none of the post-Founding nineteenth-century restrictions invoked by Petitioner are sufficiently analogous to Section 922(g)(8) to justify that restriction. Most of Petitioner's laws from this era merely regulated the *carrying* of firearms—by vagrants, for example, or people who were intoxicated. Pet.Br.24-26. These laws did not disarm anyone. Indeed, the Ohio case Petitioner cites from the turn of the century indicates that the vagrant laws were merely understood as extensions of the Northampton-style prohibition on "go[ing] about with [a gun] or any other dangerous weapon to terrify and alarm a peaceful people," and that they did not bar one from "carry[ing] a gun for any lawful purpose, for business or amusement." *State v. Hogan*, 63 Ohio St. 202, 219 (1900).

Other of Petitioner's laws from this period were restrictions on the *sale* of firearms—to minors, or to the mentally ill. These laws likewise did not prevent the individuals in question from keeping or carrying any arms they lawfully obtained.

Petitioner and its amici also invoke the carry licensing laws that began to appear in the late nineteenth century. Profs. of Hist. & Law Amicus Br. 16. These also did not burden the Second Amendment right in any way that is comparable to Section 922(g)(8). And while Petitioner seizes on this Court's statement in *Bruen* that those laws "ensure that those who carry guns 'are, in fact, 'law-abiding, responsible citizens,' " Pet.Br.12-13 (quoting *Bruen*, 142 S.Ct. at 2138 n.9), that proposition says nothing about which people can be prevented from carrying arms, what justifies disarmament, or what process the government must follow to trigger the disability. No one

reasonably disputes that the government can prevent *some* subset of people from having or carrying firearms; this passage from *Bruen* merely explained that background checks help to enforce those limitations, whatever they are.

iii. Finally, Petitioner again turns to unenacted proposals and commentary—this time, from the period immediately before the Civil War. Secondary material of this vintage is no more able to constitute a "historical tradition of firearm *regulation*," *Bruen*, 142 S.Ct. at 2126 (emphasis added), then Founding-Era commentary. And Petitioner's evidence also misses on the substance.

The government quotes an 1858 newspaper article by District of Columbia Mayor Joseph Gales as suggesting that "the lawless ruffian" should "be disarmed and deprived of the power of executing the promptings of his depraved passions." Joseph Gales, *Prevention of Crime*, *in* OLIVER HAMPTON SMITH, EARLY INDIANA TRIALS AND SKETCHES 466-67 (1858). But Mayor Gales was defending not the *disarmament* of "lawless ruffians," but rather a restriction on *carrying concealed* firearms. Several States enacted such restrictions during this period, but as *Bruen* holds, these laws in fact "reveal[ ] a consensus that States could *not* ban public carry altogether." Much less can these laws be used to justify *disarming* anyone.

The snippets of legislative history surrounding an 1856 congressional proposal relating to the Bleeding Kansas episode get Petitioner no further. The government quotes two Senators as advocating "disarm[ing] any armed bands" who entered the territory of Kansas "for unlawful purposes," Pet.Br.19, but the

example backfires. For both Senators were calling for the seizure of *government-provided* arms—furnished to members of the neighboring state militia *by the federal government itself*. Indeed, both Senators voted in favor of a motion to clarify that the measure under consideration was limited to federally-provided arms, "to prevent any misconstruction … that it was the intention of the proviso to disarm the militia … of their own arms, or of any arms which have been furnished by the Territory [rather than by the federal government]."[13]

4. Twentieth-Century History

Finally, Petitioner seeks support for the challenged law in the twentieth century. On any understanding of the historical inquiry called for by *Bruen*, this evidence is plainly far too late. It is also far too little. Petitioner cites a 1930 federal statute disarming those convicted of violent crimes, Pet.Br.26, but whatever the scope of the government's authority to take firearms away from criminals who have both been convicted and found to be actually violent, *see infra*, pp. 25-27, that is a far cry from what Section 922(g)(8) allows.

Petitioner next cites firearm restrictions—dating to the 1980s, or nearly two centuries after the Second Amendment's ratification—on "noncitizens who are unlawfully present in the United States" and "persons who have been dishonorably discharged from the Armed Forces." Pet.Br.27. The former limitation tells us little about the scope of the Second Amendment, given that it (like many other Bill of Rights

[13] CONG. GLOBE, 34th Cong., 1st Sess. 1090 (1856).

guarantees) protects only those "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Heller*, 554 U.S. at 580. The latter—restricting those who have been dishonorably discharged—is of course not before the Court here. But to the extent that law authorizes disarmament without any finding of present dangerousness, it is no more justified by the historical evidence compiled in *this case* than Section 922(g)(8) itself.

C. While Section 922(g)(8) Is Facially Unconstitutional, Federal and State Governments Possess Other Tools for Preventing Dangerous Individuals from Committing Violent Crimes.

While Petitioner has failed to justify disarming Respondent under Section 922(9)(8), "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). If Respondent is indeed found to pose a present, acute danger that he will likely use his firearms in a dangerous and violent way, federal or state authorities retain other means of preventing that danger.

First and most obviously, "[t]hose who commit violence, including domestic violence, … should be detained, prosecuted, convicted, and incarcerated." Pet.App.34a (Ho, J., concurring). The touchstone of the inquiry is a risk of physical violence. From Petitioner's account of Respondent's background, he has committed any number of violent crimes for which he could be incarcerated. *See* Pet.Br.2-4. And it has

always been understood that the authority to incarcerate someone obviously includes the authority to disarm them while they are in custody. *See* MICHAEL DALTON, THE COUNTRY JUSTICE 38 (1690).

The Founding-Era firearm regulations discussed above could also be read as supporting authority to disarm specific individuals who the government actually proves, following fulsome due process, pose an acute and present threat of using firearms to commit violent crime. As noted, that was the basic function of the Northampton-style affray without violence. But as these Founding-Era laws also demonstrate, that authority was strictly limited in two crucial ways: (1) disarmament could occur only following fulsome procedural protections, and (2) only upon a showing that the defendant's use of arms would "lead almost necessarily to actual violen[c]e," *Huntly*, 25 N.C. at 422. It did not include the power to strip groups of people of their right to keep and bear arms based on the government's say-so that the people, as a group, pose a risk of dangerousness. *See Range*, 69 F.4th at 103-06; *Kanter*, 919 F.3d at 454-64 (Barrett, J., dissenting).

Section 922(g)(8), by contrast, is not limited in these ways. It is far from clear that the statutory requirement of a "hearing" with "actual notice" and "an opportunity to participate," 18 U.S.C. § 922(g)(8)(A), ensures sufficient procedural safeguards, at least in practice. As recounted by Judge Ho's concurrence below, it appears that many courts grant restraining orders essentially "automatically," as a matter of routine or litigation tactics, with little or no real inquiry. Pet.App.36a-39a. And even if the process required by Section 922(g)(8) does suffice, it remains the case that disarmament can occur under the challenged

provision *without* any showing that the defendant is likely to misuse his firearms.[14]

II. *Bruen*'s Text-and-History Framework Faithfully Interprets and Applies the Second Amendment.

Recognizing that Section 922(g)(8) cannot be squared with the Second Amendment under *Bruen*'s text and history framework, several of Petitioner's *amici* ask the Court to repudiate its recent decision in *Bruen* altogether. But *Bruen* is a triumph of originalist reasoning that faithfully interprets and applies the Second Amendment's text and original meaning, and none of the criticisms levelled by *amici* is persuasive.

A. Several *amici* essentially argue that the Second Amendment's text and original meaning is not

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[14] For all these reasons, Section 922(g)(8) violates the Second Amendment and this Court should affirm. If the Court disagrees, however, it should narrowly limit any such decision by:

> (1) holding that Section 922(g)(8)(C)(i) was validly applied to Petitioner in this instance, given that (a) he consented to the entry of the underling restraining order, obviating any concerns about the process employed, and (b) that order in fact found him to pose a serious danger of physical violence, in accord with the historical tradition represented by the common law of affray; and
>
> (2) holding that Section 922(g)(8)(C)(i) is severable from Section 922(g)(8)(C)(ii).

That narrow holding should make clear that subsection (C)(ii) is plainly *not* in accord with our Nation's history, and that those prosecuted under subsection (C)(i) may challenge it on an as-applied basis if they were not afforded appropriate process or the underlying order does not find the level of dangerousness, *i.e.*, risk of physical violence, that is required by our historical tradition.

worthy of our continued respect because the Founding generation purportedly "affirmatively permitted" men to physically abuse their wives and children. Ctr. for Reprod. Rts. Amicus Br. 19. But as explained above, spouse and child abuse was universally condemned in early America (unsurprisingly, in a predominantly Christian society), and the law provided a remedy for the abuse that did take place: a writ of supplicavit, resulting in the requirement of sureties and ensuing judicial supervision of the abuser. *See supra*, pp. 12-14. Accordingly, even if it had legal significance (and it does not), *amici*'s suggestion that adhering to the Second Amendment's original meaning will somehow bless domestic violence is completely unfounded.

B. Others have criticized *Bruen* more directly, contending that its text-and-history framework is unworkable or unsound. One *amicus* argues that *Bruen*'s requirement that the government justify modern regulations by identifying historical analogues is "wholly inadequate" because the Court "fails to provide clear guidance on how to apply such reasoning." Glob. Action on Gun Violence Amicus Br. 27. Another maintains that this has resulted in "inconsistent conclusions" in the lower courts "about what the test requires and how it works in practice." Prof. Franks Amicus Br. 29. *Bruen* itself answers this line of criticism. As that decision explained, "reasoning by analogy" is "a commonplace task for any lawyer or judge," 142 S.Ct. at 2132, that occurs *throughout* the law. The same is true of the modern-day application of Founding-Era history. *See, e.g.*, *Espinoza*, 140 S.Ct. 2246; *United States v. Stevens*, 559 U.S. 460 (2010); *Crawford v. Washington*, 541 U.S. 36 (2004). And pointing out that the lower-court decisions since *Bruen* have

not been fully consistent hardly has any persuasive value, given that *Bruen* was only this Court's third modern decision applying the Second Amendment in an argued case. Lower-court inconsistencies remain in areas of the law that this Court has addressed *scores or hundreds* of times, and the Court will have plenty of opportunities to provide further guidance on how *Bruen*'s text-and-history methodology is to be applied in specific contexts.

Other of Petitioner's *amici* object that "requiring analogous laws from past centuries leads to absurd results today," Glob. Action on Gun Violence Amicus Br. 32, or that the enterprise is incomprehensible because there is no "single, final version of what happened in the past," Prof. Franks Amicus Br. 30. These arguments are in fact objections to *any* form of written constitutionalism—and ultimately, to law itself, since the premise of *all* written law is that we must generally follow the laws our ancestors wrote, until they are validly changed, even if we disagree with the result. If the Second Amendment really leads to results that are intolerably absurd, the People retain the means of amending or repealing it.

Others legal scholars have aired similar objections, arguing that *Bruen*'s framework "will frequently provide insufficient guidance, particularly for novel gun control laws that address modern problems," because firearms "regulations were uncommon before the mid-nineteenth century." Randy E. Barnett & Nelson Lund, *Implementing* Bruen, LAW & LIBERTY (Feb. 6, 2023), https://bit.ly/3tp4Ca8. As an initial matter, the premise of this objection—that adhering to the Second Amendment's original meaning will result in too few firearm regulations—assumes a

baseline of *appropriate* firearm regulation that has not been established. And in any event, this critique simply ignores *Bruen*'s explanation that the Second Amendment "can, and must, apply to circumstances beyond those the Founders specifically anticipated," and that the text-and-history methodology requires "a well-established and representative historical *analogue*, not a historical *twin*." 142 S.Ct. at 2132, 2133.

Even if *Bruen*'s approach is not perfectly determinate in every case, it is still far superior to the alternatives. The decade of lower court decisions between *McDonald* and *Bruen* conclusively established that the "tiers-of-scrutiny" framework repudiated by *Bruen* was completely unworkable. *See id.* at 2131; Amicus Br. of J. Joel Alicea at 21-27, *Bruen*, No. 20-843. And the alternative offered by Barnett and Lund—asking judges to "distinguish regulations that reasonably regulate this fundamental right from those that unreasonably obstruct it," Barnett & Lund, *Implementing* Bruen, *supra*, is even more obviously an invitation to the very type of untethered judicial policymaking rejected in *Heller* and *Bruen*.

C. Finally, Professors Barnett and Lund criticize *Bruen*'s own application of the text-and-history methodology. They argue that *Bruen* "reaffirmed *Heller*'s approval of bans on guns in 'sensitive places' " even though it identifies "no tradition of such bans in America during the Founding Era." *Id.* But *Bruen* merely "assume[d]" that "sensitive place" laws were historically justified. 142 S.Ct. at 2133. It plainly did not settle the scope or justification for these laws for all time.

And in any event, *the Court's assumption was well founded*. In addition to the historical examples of

laws banning guns from "legislative assemblies, polling places, and courthouses" identified in *Bruen* itself, *id.*, for example, the historical record also shows that at or near the time of Ratification, nearly every State undertook to comprehensively secure legislative chambers, polls, and courthouses.[15] That strongly confirms that banning firearms in these specific locations comports with the Founding-Era history of firearm regulation. It both explains why there were apparently "no disputes regarding the lawfulness" of these prohibitions, and it shows how they are consistent with the Second Amendment's core purpose of protecting "individual self-defense," *Bruen*, 142 S.Ct. at 2133: for the necessity of armed self-defense is diminished where the government takes real, concrete, and meaningful steps to prevent any violence in a location by providing its own comprehensive security.

In short, none of the criticisms that have been lobbed at *Bruen* holds any persuasive value.

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[15] *See, e.g.*, 1790 S.C. Acts 426, 427 (legislatures); 1803 Va. Acts 69-71 (courthouses); 1800 Ga. Laws 611 (polls). *See generally* Br. for Ctr. for Hum. Liberty, *Antonyuk v. Hochul*, No. 22-2908 (2d Cir. Feb. 9, 2023), ECF No. 313.

CONCLUSION

The Court should affirm.

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Respectfully submitted,

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