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 FIREARMS POLICY COALITION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

BRADLEY A. BENBROOK
*Counsel of Record*
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
701 University Ave., Ste. 106
Sacramento, California 95825
(916) 447-4900
brad@benbrooklawgroup.com
*Counsel for Amicus Curiae*

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## INTEREST OF *AMICUS CURIAE*[1]

Plaintiff Firearms Policy Coalition, Inc. ("FPC") is a nonprofit membership organization. FPC works to create a world of maximal human liberty and freedom and to promote and protect individual liberty, private property, and economic freedoms. It seeks to protect, defend, and advance the People's rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms. FPC serves its members and the public through legislative advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs.

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

## SUMMARY OF ARGUMENT

*Amicus* agrees with Respondent that 18 U.S.C. § 922(g)(8) violates the Second Amendment. This brief focuses on Respondent's alternative argument that Congress has no authority to enact a ban on firearm possession by individuals subject to family law restraining orders. The Court can and should address this argument, which disposes of the need to decide the Second Amendment issue.

This Court has stressed repeatedly in its recent Commerce Clause cases the fundamental principle—inherent in the delegation of limited and enumerated powers by the People and the States to the federal government—that Congress does not have a police power to legislate on any subject it wishes. Rather, every exercise of congressional authority must be authorized by an enumerated power in the Constitution. Here, as with the ban on firearm possession within 100 feet of a school in *United States v. Lopez*, 514 U.S. 549 (1995), one searches in vain for congressional power to ban the possession of firearms by persons subject to a family law restraining order.

The power to ban such possessions cannot be found in the Militia Organizing Clause, U.S. CONST., Art. I, § 8, cl. 16. Indeed, the Organizing Clause gives Congress the "Power To . . . provide for organizing [and] *arming* . . . the Militia," not to *disarm* would-be members of the militia. *Id.* (emphasis added). The Organizing Clause thus stands with the Second Amendment as important structural counterweights to the assertion of boundless authority to disarm citizens under the Commerce Clause.

After *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), however, there can be no argument that the Commerce Clause authorized Congress to enact § 922(g)(8). Among other things, § 922(g)(8): (1) does not regulate economic activity; (2) cannot be transformed into the regulation of interstate commerce by "aggregating" the effects of all the violence the law hopes to avoid; and (3) does not regulate any smaller part of a comprehensive economic program. Moreover, § 922(g)(8)'s intrusion into the family law of the States, nearly all of whom have already enacted similar limitations, further dooms § 922(g)(8) for violating important federalism principles. *Lopez*, 514 U.S. at 569–83 (Kennedy, J., concurring).

The only question under the Commerce Clause, then, is whether the addition of a once-traveled-in-interstate-commerce jurisdictional element can salvage this law. But a requirement that can be satisfied by virtually every single firearm in the Nation does not make this legislation any less of an attempted exercise of a police power than the law in *Lopez*. As Justice Thomas explained in *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. 700, 702 (2011) (Thomas, J., dissenting from denial of cert.), allowing the "mere identification of a jurisdictional hook" to undermine *Lopez* arises from the incorrect application of *Scarborough v. United States*, 431 U.S. 563 (1977). The lower courts' struggle with this dilemma underscores the importance of addressing Respondent's Commerce Clause argument.

While § 922(g)(8) cannot be justified under the permissive "substantial effects on interstate commerce" line of cases culminating in *Lopez*, *Morrison*, and *Jones v. United*

*States*, 529 U.S. 848, 854–57 (2000), it falls far outside the scope of the original public meaning of the Commerce Clause. As Justice Thomas and scholars have explained, the Constitution uses the term "Commerce . . . among the several States" to mean "selling, buying, and bartering, as well as transporting for these purposes" across state lines. *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). It manifestly did not mean to cover, as it has been allowed to cover, all "productive activities such as manufacturing and agriculture," not to mention countless other activities purported to have a "substantial effect" on interstate commerce. *Id.* at 586. The Court should conform its analysis to that meaning in this and future cases, and doing so need not result in upheaval.

Finally, if the Court does analyze whether the government can meet its burden of justifying § 922(g)(8) under *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), *amicus* urges the Court to resolve, in favor of the founding era, the "scholarly debate" over which time period's historical references should control. *Id.* at 2138. Contrary to the claims of those favoring predominance of the period at and around adoption of the Fourteenth Amendment, that adoption did not, and could not, transform the original public meaning of the Second Amendment.

The Court should affirm the Fifth Circuit's judgment on the grounds set out below.

## ARGUMENT

### I. This Court Can And Should Consider Respondent's Alternative Argument.

Respondent's alternative argument under the Commerce Clause is important, dispositive, and should be considered despite his failure to raise the argument in the lower courts. In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), petitioner was allowed to raise an argument that he not only failed to press in the lower courts, he expressly disavowed it. "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to precise arguments they made below.'" *Id.* at 379 (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Thus, in *Lebron*, the petitioner's new argument fit within his broader claim that "Amtrak did not accord him the rights it was obliged to provide by the First Amendment," 513 U.S. at 374; here, Respondent is likewise arguing that the Constitution did not authorize Congress to enact § 922(g)(8).

Here, moreover, Rahimi's status as respondent further supports his ability to raise new arguments in support of the judgment: "Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, *see*, *e.g.*, *U.S. v. Romani*, 523 U.S. 517, 526 n.11 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at

least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

As set out below, after *Lopez* and *Morrison*, there can be no argument that § 922(g)(8) is a valid exercise of Congress' authority under the Commerce Clause. The only remaining question is whether the addition of a traveled-once-in-interstate-commerce element somehow changes that. It would be a charade, however, to conclude that this element brings the statute within the commerce power, since nearly every single firearm in the Nation has crossed a state line at some point. *See* § III.B.2, *infra*.

And that very important question, to be sure, has generated significant attention in the lower courts: Multiple lower courts have observed the tension between *Scarborough* and *Lopez*. *See*, *e.g.*, *United States v. Kuban*, 94 F.3d 971, 977–78 (5th Cir. 1996) (DeMoss, J., dissenting); *United States v. Chesney*, 86 F.3d 564, 577–82 (6th Cir. 1996) (Batchelder, J., concurring); *United States v. Lemons*, 302 F.3d 769, 773 (7th Cir. 2002); *United States v. Alderman*, 565 F.3d 641, 648–50 (9th Cir. 2009) (Paez, J., dissenting); *United States v. Patton*, 451 F.3d 615, 634–36 (10th Cir. 2006). This long-brewing uncertainty is all the more reason to address Respondent's alternative argument.

## II. The Federal Government Has No General Police Power To Restrict The Public's Keeping And Bearing Of Arms.

The Constitution "withold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566. Madison

stressed that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

"[T]he principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *Morrison*, 529 U.S. at 618 n.8 (quoting *New York v. United States*, 505 U.S. 144, 155 (1992)) (cleaned up). Because Congress has no police power to address whatever societal problem it wishes, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607.

The *amicus* brief submitted by Sen. Blumenthal and other members of Congress conspicuously fails to identify the Article I power they believe authorizes § 922(g)(8). They do, however, identify the *reason* for the law's ban on possession by persons subject to a domestic violence restraining order: "It was Congress's well-founded concern that firearms threatened the lives of the abused that motivated its passage." Am. Br. of Sen. Blumenthal, et al., at 6 (Congressional *Amicus* Brief). "Congress determined that 'individuals with a history of domestic abuse should not have easy access to firearms,'" by which they could inflict further harm. *Id.* at 7 (citation omitted).

A similar motivation to protect women from harm gave rise to the Violence Against Women Act, which created a federal civil remedy to female victims of a crime

of violence motivated by gender. 42 U.S.C. § 13981 ("VAWA"). In *Morrison*, the Court required Congress to justify VAWA as a valid exercise of an enumerated power; rejecting the argument that the law was authorized by the Commerce Clause, the Court concluded "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." 529 U.S. at 618.

The same is true here: The United States confirms that 48 states, including Respondent's state of Texas, "restrict gun possession by persons subject to protective orders or permit courts to impose such restrictions." Br. for the United States, at 35. The states have already exercised their police powers to accomplish precisely what § 922(g)(8) aims to accomplish. *Lopez* explained how this overlap undermines federalism:

> Under our federal system, the States possess primary authority for defining and enforcing the criminal law. When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction.

*Lopez*, 514 U.S. at 561 n.3 (internal quotation marks and citations omitted).

The Congressional *Amicus* Brief protests that the need to assure "the public is kept safe from the scourge of gun violence" "is particularly acute in the context of domestic violence." Cong. Am. Br. at 2. But the power to enact § 922(g)(8), like any federal law, must be conferred by Article I. Here it is not.

## III. Article I Does Not Confer Authority To Restrict Mere Possession Of Arms By Private Citizens.

The government cannot point to an Article I power to justify § 922(g)(8).

### A. The Militia Organizing Clause Does Not Delegate To Congress The Power To Restrict The Keeping Of Arms By Private Individuals.

The only express reference to arms in Article I appears in section 8, clause 16, which states that "[t]he Congress shall have Power To . . . provide for organizing, arming, and disciplining the Militia. . . ." The government has not asserted that § 922(g) is an exercise of Congress' militia power, nor could it. By its terms, the Militia Clause directs that Congress shall "provide for . . . *arming*" the citizens, not *disarming* them. *Id.* (emphasis added); *see*, *e.g.*, *Abbott v. Biden*, 70 F.4th 817, 830 (5th Cir. 2023) (Organizing Clause not only "authorizes Congress to furnish weapons and other military equipment," but "it also gives Congress authority to require that the militia be armed in other ways"). Participating in the militia service could not remotely serve as "the best possible security against" the threat of tyranny if the Organizing Clause gave Congress the power to ban possession of arms. THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

George Mason expressed an Anti-Federalist worry that Congress could "disarm" the militia, but not by literally taking arms away or banning possession; rather, he objected that Congress could "neglect to provide for

arming" "in order to have a pretense of establishing a standing army." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 379 (Jonathan Elliot ed., 2d. ed. 1836). But the worry was overblown in any event, as both "[t]he Federalists and Anti-Federalists feared that a standing army would lead ineluctably to tyranny." *Abbott*, 70 F.4th at 821. And the first Militia Act required each and every able-bodied man to "provide himself" with "arms, ammunition and accoutrements" necessary for militia service. Act of May 8, 1792, § 1, 1 Stat. at 271.

Nor was the power to "discipline" the militia understood to authorize disarming a citizen for conduct the Congress might believe justifies disarming. As explained in *Abbott*, "the Organizing Clause uses 'discipline' to mean instruction and not punishment." 70 F.4th at 832; *see also* 1 Samuel Johnson, A Dictionary of the English Language 601 (6th ed. 1785) (defining "discipline" first as "Education; instruction; the act of cultivating the mind"). On the other hand, the power to "govern" the militia "naturally entail[ed] the power to punish," but that federal authority attaches only "after the militia has successfully been called forth." *Abbott*, 70 F.4th at 831–32. In other words, there is no freestanding grant of congressional authority to discipline or punish would-be members of the militia—by disarming them or otherwise—outside the scope of active federal service.

Finally, as a matter of constitutional structure, the very presence of the Organizing Clause's "arming"

requirement—not to mention the Second Amendment—should temper any argument that Congress has expansive authority under the Commerce Clause to disarm citizens. The Founders did not establish a federal government to take the People's weapons.

### B. The Commerce Clause Does Not Authorize Congress To Enact Criminal Laws Banning Mere Possession Of Arms.

The government can be expected to claim that § 922(g)(8) is a valid exercise of its Article I power to "regulate Commerce . . . among the several States." U.S. CONST., Art. I, § 8, cl. 3. *Lopez* and *Morrison* demonstrate that it is not.

#### 1. *Lopez* and *Morrison* foreclose any argument that § 922(g)(8) is a valid exercise of the Commerce Clause Power.

Criminalizing the intrastate possession of a firearm by an individual subject to a family law restraining order is outside of Congress' Commerce Clause power.

a. Section 922(g), just like Section 922(q) in *Lopez*, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. In *Morrison*, this Court explained that "*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611. That essential connection is absent here; intrastate

"possession" of a firearm is indisputably noneconomic activity. *Lopez*, 514 U.S. at 560–61. And domestic violence—just like gender-motivated violence more generally—is "not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613.

b. *Lopez* and *Morrison* doom any effort by the government to aggregate the impacts of domestic violence to justify congressional action. Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617–18; *see also Lopez*, 514 U.S. at 567 ("The possession of a gun . . . is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). And in both cases the Court highlighted the expansive threat to federalism posed by permitting Congress to regulate criminal activity that has only a tenuous relationship to interstate commerce. *Lopez*, 514 U.S. at 563–64; *Morrison*, 529 U.S. at 612–13.

But that is precisely what the Court faces—again—here: The House Conference Report accompanying § 922(g)(8)'s passage recites that "firearms are used by the abuser in 7 percent of domestic violence incidents and produces an adverse effect on interstate commerce" and that, therefore, "individuals with a history of domestic abuse should not have easy access to firearms." H.R. Conf. Rep. No. 103-711, at 391 (1994). Importantly, *Lopez* and *Morrison* affirm that "simply because Congress may conclude that a particular activity substantially affects

interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2 (further citations omitted and cleaned up)).

Moreover, if only 7% of domestic violence "produces an adverse effect on interstate commerce," then it should follow that the other 93% *really* affects interstate commerce—after all, there is nothing unique about using a firearm that alters the nexus between the violence and interstate commerce. But any suggestion that domestic violence generally could properly be made a federal crime is untenable under *Morrison*. As a result, it cannot possibly be that regulating the 7% of domestic violence accomplished with a gun is a valid exercise of the Commerce Clause power. *Cf Morrison*, 529 U.S. at 615 ("[I]f Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.").

At bottom, this is just Congress trying to wield a police power that "completely obliterate[s] the Constitution's distinction between national and local authority." *Id.* *Morrison* explained that the aggregation theory cannot transform local conduct into activity subject to Congressional regulation. 529 U.S. at 614–19.

c. Section 922(g)(8), like § 922(q) in *Lopez*, "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561. Accordingly, § 922(g)(8) "cannot . . . be sustained under [the Court's] cases upholding regulations of activities that

arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.*; *see also id.* at 560 (noting the Agricultural Adjustment Act of 1938 at issue in *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), "perhaps the most far-reaching example of Commerce Clause authority," was at least "designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages").

Just as "the noneconomic, criminal nature of the conduct at issue was central to [the Court's] decision in" *Lopez*, *Morrison*, 529 U.S. at 610, so too here. The goal of § 922(g) is simply and only the restriction of firearm possession one person at a time; there is no greater economic program that depends on these individual disarmaments. Just like § 922(q) in *Lopez*, § 922(g)(8) is not connected (let alone necessary) to a larger congressional effort to regulate the firearms trade or control any other economic activity—it is a criminal statute, pure and simple. Regulating the intrastate possession of firearms by persons subject to family law restraining orders is not "essential to a comprehensive regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring).[2]

d. That § 922(g) seeks to regulate family law strongly underscores its invalidity on federalism grounds. In

[2] To be sure, *amicus* is not arguing that either *Wickard* or *Raich* were correctly decided. Rather, this discussion demonstrates that § 922(g)(8) cannot be justified even under these outliers.

*Lopez*, Justice Kennedy wrote separately to emphasize that, if the federal government were to "take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political accountability would become illusory." 514 U.S. at 577 (Kennedy, J., concurring) (citations omitted). Those boundaries were crossed in § 922(q)'s regulation of noneconomic activity in proximity to schools, because "it is well established that education is a traditional concern of the States." *Id.* at 580 (citations omitted); *id.* at 581 ("The proximity to schools . . . is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed.").

The Court has long recognized that family law is likewise traditionally the province of state law. *In re Burrus*, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations . . . belongs to the laws of the States, and not to the laws of the United States."); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.")). Indeed, *Morrison* observed that VAWA *carved out* from its reach instances of violence "in the family law context," since including family-law violence would have made it even more obviously beyond the Commerce Clause power: "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez,* be applied equally as well to family law and other areas of

traditional state regulation . . . . Congress may have recognized this specter when it expressly precluded [VAWA] from being used in the family law context." 529 U.S. at 615–16.

Here, just as Justice Kennedy cautioned in *Lopez*, "[i]f a State or municipality determines that harsh criminal sanctions are necessary and wise to deter [domestic violence with a firearm], the reserved powers of the States are sufficient to enact those measures." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (noting further that "over 40 states already have criminal laws outlawing the possession of firearms on or near school grounds"). As noted above, 48 states, including Texas, "restrict gun possession by persons subject to protective orders or permit courts to impose such restrictions." Br. for the United States, at 35. Indeed, since Respondent violated the express terms of the state court restraining order preventing him from possessing a firearm after determining he was likely to commit violence, J.A. 5, the Texas judiciary has a separate and independent interest in disciplining him. Concluding that § 922(g)(8) exceeds Congress' commerce power would affirm Texas' traditional state law authority.

**2. Section 922(g)(8)'s inclusion of a "jurisdictional hook" does not salvage the law as a proper exercise of the Commerce Clause power.**

The only question here is whether the mere inclusion of a jurisdictional element to the crime in § 922(g)(8)—prohibiting the possession of a firearm "in or affecting

commerce"—suffices transform § 922(g)(8) into a proper exercise of Commerce Clause authority. It does not.

The government will doubtless argue that *Scarborough v. United States* controls here. *Scarborough* involved a federal statute making it a crime for a felon to receive, possess, or transport any firearm "in commerce or affecting commerce." 431 U.S. at 564 (quoting 18 U.S.C. § 1202(a) (1970 ed.)). The facts of Scarborough's case illustrate the Court's limited holding. A year after pleading guilty to a felony narcotics charge, Scarborough was arrested with nearly 300 doses of LSD. *United States v. Scarborough*, 539 F.2d 331, 332 (4th Cir. 1976). A search also turned up four firearms, and Scarborough was convicted of "possessing" the guns under the felon-in-possession statute. *Id.* at 332–33; *Scarborough*, 431 U.S. at 564–65. This Court granted certiorari to resolve a circuit split over whether the government was required to prove a connection between a defendant's "possession" of a firearm and interstate commerce, or if it was sufficient for the government to prove only that the firearm had "previously traveled" in interstate commerce. *Id.* at 566–67.

*Scarborough* thus resolved a limited question of statutory interpretation: "[W]hether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce." *Id.* at 564. The Court did not consider whether the statute's jurisdictional hook rendered the law a proper exercise of the commerce power.

But as Justice Thomas (joined by Justice Scalia) has explained, the lower courts' interpretation of *Scarborough* to bless a federal prosecution whenever a firearm has ever crossed state lines nullifies the essential holding of *Lopez*. Such "logic threatens the proper limits on Congress' commerce power and may allow Congress to exercise police powers that our Constitution reserves to the States." *Alderman v. United States*, 562 U.S. 1163, 131 S. Ct. 700 (2011) (Thomas, J., dissenting from denial of cert.). There are several reasons for the Court to clarify that *Scarborough* does not give the government free rein to make a federal case out of the mere possession of an item that once traveled in interstate commerce.

a. First, *Scarborough* is a "statutory interpretation opinion" not a constitutional holding. *Alderman*, 131 S. Ct. at 700 (Thomas, J., dissenting from denial of cert.). This counsels against giving *Scarborough* any weight in the Commerce Clause context and highlights the need to clarify its continued application after *Lopez*. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018) (distinguishing case that was "decided as a matter of statutory construction, and so did not reach any constitutional issue").

b. Second, if *Scarborough* could be considered a constitutional holding,[3] that mistake should be corrected: It

[3] Some lower courts have acknowledged that *Scarborough* only resolved a statutory question yet found that the Court "assumed" or "implicitly" acknowledged the constitutionality of the statute. *See, e.g.*, *Patton*, 451 F.3d at 634; *Alderman*, 565 F.3d at 645.

is wrong and in fundamental discord with *Lopez*. "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook." *Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from denial of cert.); *see also United States v. Seekins*, 52 F.4th 988, 991 (5th Cir. 2022) (Ho, J., dissenting from denial of rehearing en banc) ("A number of circuit judges nationwide have noted the fundamental inconsistency between *Lopez* and *Scarborough*.") (collecting cases). As Justice Thomas explained, adhering to *Scarborough* "could very well remove any limit on the commerce power" by "permit[ting] Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines." *Alderman*, 131 S. Ct. at 703 (Thomas, J., dissenting from denial of cert.).

*Lopez* did not need to mention *Scarborough* since § 922(q) did not have a jurisdictional element. And while *Lopez* observed that § 922(q)'s lack of jurisdictional element was one of several reasons showing why § 922(q) was not authorized by the Commerce Clause, 514 U.S. at 561, it never said that adding such an element, by itself, would automatically suffice to establish that § 922(q) was a valid exercise of the Commerce Clause power. Nor could it: "A jurisdictional hook is not . . . a talisman that wards off constitutional challenges." *Patton*, 451 F.3d at 632.

Indeed, the surrounding language in *Lopez* demonstrates that, even if the statute had a jurisdictional requirement, the actual circumstances of future applications would still matter: Such a requirement "would ensure, through case-by-case inquiry, that the firearm possession

in question *affects* interstate commerce." 514 U.S. at 561 (emphasis added); *see also Patton*, 451 F.3d at 632 (noting the "ultimate inquiry is whether the prohibited activity has a substantial effect on interstate commerce").

And it cannot be the case that mere possession of a gun that once crossed state lines would suffice, given *Lopez*'s additional statement that a jurisdictional requirement "might limit [the statute's] reach to a *discrete set* of firearm possessions that additionally have *an explicit connection with or effect on* interstate commerce." 514 U.S. at 562 (emphasis added). No such "discrete set" of a greater whole, in fact, exists if crossing state lines once is all it takes: The government has proffered testimony that 95% of all guns in the United States have crossed state lines. Newton, *Felons, Firearms, and Federalism: Reconsidering* Scarborough *in Light of* Lopez, 3 J. APP. PRAC. & PROCESS 671, 682 & n.53 (2001). President Clinton inadvertently exposed the charade when he proposed the post-*Lopez* amendment to the Gun-Free School Zones Act: He announced that the Attorney General had assured him that adding this new jurisdictional element "would have little, if any, impact on the ability of prosecutors to charge this offense, for the vast majority of firearms have 'moved in . . . commerce' before reaching their eventual possessor." President's Message to the Congress Transmitting Proposed Legislation to Amend the Gun-Free School Zones Act of 1990 (May 10, 1995).

c. All of this theory risks missing the forest for the trees when it comes to § 922(g)(8): It is nearly impossible to conceive how possession of a single gun by an individual subject to a domestic violence restraining order could

*ever* affect interstate commerce, substantially or otherwise. All the more so considering the noneconomic act of possession cannot be aggregated with others' possessions to conjure up a "substantial effect" on interstate commerce. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 615–18. The fact that the gun may have crossed state lines long before the § 922(g)(8) defendant ever gained possession of it only underscores the fiction that this statute has anything to do with "commerce." *See*, *e.g.*, *Kuban*, 94 F.3d at 977–78 (5th Cir. 1996) (DeMoss, J., dissenting) ("[T]he precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale [in] *Lopez*[.] . . . The mere fact that a felon possesses a firearm which was transported in interstate commerce years before the current possession cannot rationally be determined to have a substantial impact on interstate commerce as of the time of current possession.") (quotation marks omitted).

The Court has been wary long after *Scarborough* of using expansive jurisdictional hooks to extend congressional authority beyond proper constitutional limits. Most notably, in *Jones v. United States*, the Court held that the federal arson statute (covering property "used in . . . any activity affecting . . . commerce") did not reach a private residence that had been torched by a Molotov cocktail in a family dispute. 529 U.S. at 854–57. The federal government claimed jurisdiction because the home was "used" to secure a home loan and home insurance from out-of-state businesses, and the owner "used" the home to receive natural gas from out-of-state sources. *Id.* at 855. The Court rejected this gambit: If the statute applied to every building that "bears some . . . trace of interstate commerce,"

then "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857. Moreover, "grave and doubtful constitutional questions arise" under *Lopez* where a statute "render[s] . . . 'traditionally local criminal conduct' . . . 'a matter for federal enforcement.'" *Id.* at 857, 858 (citations omitted). These same risks exist here.

* * *

If any possession of any gun that has ever crossed a state line suffices to bring § 922(g)(8) within the commerce power, then *Lopez* has been gutted and § 922(g)(8) operates as an exercise of the police power. That *Scarborough* has been misunderstood this long underscores the need to restore order to the Court's Commerce Clause doctrine.

## IV. In All Events, The Court Should Restore The Original Public Meaning Of The Commerce Clause.

As Justice Thomas explained in *Lopez*, the Court has strayed from the original public meaning of the Commerce Clause by accepting that Congress may regulate not only "Commerce . . . among the several States," U.S. CONST., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life." *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

At the founding, "commerce" had a limited and distinct meaning: It referred to "trade," in the sense of "selling, buying, and bartering, as well as transporting for these purposes." *Id.* at 585 (citing, *e.g.*, 1 Samuel Johnson, A Dictionary of the English Language 361 (4th ed. 1783) (defining commerce as "Intercour[s]e; exchange of one

thing for another; interchange of any thing; trade; traffick")). It manifestly did not refer to or include manufacturing or agriculture, as the Founders used the word "commerce" in "contradistinction" to those "productive activities." *Id.* at 586. For example, whereas regulation of "[c]ommerce" was "lodged in the national" government, Hamilton assured that "the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." THE FEDERALIST NO. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 21 (Alexander Hamilton), *id.* at 141 (Alexander Hamilton) ("The wealth of nations depends on an infinite variety of causes[, including] climate, the nature of the productions, the nature of the government, the genius of the citizens, . . . the state of commerce, of arts, of industry. . . .").

By slowly expanding the definition of "commerce" to reach all such economically "productive activities" (like manufacturing and agriculture), the Court has "interject[ed] a modern sense of commerce into the Constitution." *Lopez*, 514 U.S. at 586–87 (Thomas, J., concurring). This expansion, Justice Thomas explained, "generates significant textual and structural problems." *Id.* at 587. It makes no sense to say, for example, that Congress can regulate "manufacturing among the several States" or "manufacturing with a foreign nation," because "commerce encompasses traffic" rather than activity that "takes place at a discrete site." *Id.* And by compounding this interpretive error with the "substantial effects" test,

the "Commerce Clause has virtually no limits" now. *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

Professor Barnett has conducted exhaustive reviews of original sources to confirm Justice Thomas' position. In *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001), Barnett surveyed founding era sources and analyzed every use of the word "commerce" in the drafting and ratification process and found that it was uniformly meant to convey a narrow meaning, consistent with Justice Thomas' concurrence in *Lopez* (*i.e.*, commerce in the sense of "trade or exchange of goods," as opposed to any "gainful activity"). *Id.* at 111–25. In *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003), Barnett extended his research to every mention of the word "commerce" in the Pennsylvania Gazette between 1728 and 1800, which only fortified his original findings. In his analysis of nearly 1,600 uses of the word, Barnett concluded "that outside as well as inside the process of drafting and ratifying the Constitution, the normal, conventional, and commonplace public meaning of commerce from . . . was 'trade and exchange,' as well as transportation for this purpose." *Id.* at 862.

Nor does the Necessary and Proper Clause provide a side-door basis for expanding the meaning of the Commerce Clause. That Clause does not empower Congress to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012) (op. of Roberts, C.J.). Instead, Congress' authority under the Necessary

and Proper Clause is "derivative of, and in service to, [its] granted power" such that Congress is "limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation." *Id.*; *see also Lopez*, 514 U.S. at 588–89 (Thomas, J., concurring) (rejecting the notion that the Necessary and Proper Clause provided authority for the "substantial effects" test).

Finally, adhering to the original meaning of the Commerce Clause in this and future cases need not result in undue upheaval. In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), for instance, the Court recounted how it corrected course in Establishment Clause cases after the "ambitious" and "ahistorical" test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), had "'invited chaos' in lower courts." 142 S. Ct. at 2427–28 (citations omitted). Beginning with *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014), the Court returned to "instruct[ing] that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece*, 572 U.S. at 576) (cleaned up). There, as here, "the line that courts . . . must draw between the permissible and the impermissible has to accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers." *Id.* (citation omitted) (cleaned up).

There is no reason the same type of course correction cannot occur here. The Court should decide this and future cases based on the original meaning of the Commerce Clause.

## V. If The Court Addresses The Second Amendment Issue Here, It Should Likewise Focus Its Historical Analysis At And Around The Founding In 1791.

The limitations imposed by the Second Amendment—like the powers conferred by Article I—must be applied today in accordance with its meaning at the founding. In *Bruen*, this Court "[f]ollow[ed] the course charted by *Heller*," and "consider[ed] whether 'historical precedent' from before, during, and even after the founding evince[d] a comparable tradition of regulation" to New York's special-need carry restriction. 142 S. Ct. at 2131–32 (citing *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008)). In doing so, the Court cautioned that "not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.'" *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634–35) (emphasis in *Bruen*).

So while the Court "acknowledge[d] that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)," 142 S. Ct. at 2138,[4] multiple signs show that this "debate" must be settled in favor of 1791. That this question has nevertheless

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[4] Citing Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998), and Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation*, now published 97 INDIANA L. J. 1439, 1441 (2022).

divided lower courts underscores the importance of this Court's guidance.[5]

### A. The Founding-Era Scope Of Incorporated Rights Must Control Because Such Rights Have The Same Meaning As To The States That They Do As To The Federal Government.

Some commentators have argued that, since individual amendments are incorporated against the States through the Fourteenth Amendment, the public understanding as of 1868 about the scope of protected rights should control. Lash, *Re-Speaking the Bill of Rights*, 97 INDIANA L. J. at 1441 ("When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings."); Amicus Br. of Everytown for Gun Safety at 10. The notion that incorporation could "invest" the Second Amendment with "new 1868 meanings" inconsistent with

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[5] *See, e.g.*, *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1323 (11th Cir. 2023) ("[T]he right's contours turn on the understanding that prevailed at the time of the later ratification—that is, when the Fourteenth Amendment was ratified."), *reh'g en banc granted*, *op. vacated*, 72 F.4th 1346 (2023); *United States v. Daniels*, 77 F.4th 337, 348 (5th Cir. 2023) ("Even if the public understanding of the right to bear arms *did* evolve, it could not change the meaning of the Second Amendment, which was fixed when it first applied to the federal government in 1791.").

the founding era understanding of the Second Amendment is nonsense.

Despite purporting to leave open the 1791 vs. 1868 "debate," *Bruen* itself stressed that "we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment *have the same scope* as against the Federal Government." 142 S. Ct. at 2137 (emphasis added). After all, "incorporation" simply asks the question whether, long after the passage of the Fourteenth Amendment, a particular limitation on the *federal* government in the Bill of Rights should also apply to state and local governments. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) ("It would be incongruous to have different standards determine the validity of a claim of privilege [against self-incrimination under the Fifth Amendment] depending on whether the claim was asserted in a state or federal court."); *McDonald v. City of Chicago*, 561 U.S. 742, 788 (2010) (the "relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle"). And as Prof. Smith observes, "[t]he Court does not apply two different versions of the Second Amendment, or two versions of other incorporated provisions of the first eight amendments in the Bill of Rights."[6]

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[6] Smith, *"Not all History is Created Equal": In the Post-Bruen World, the Critical Period for Historical Analogues is when the Second Amendment was Ratified in 1791, and not 1868*, manuscript at 7 (posted Nov. 4, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4248297).

The Court partially demonstrated this point through the precedents it cited for the practice of "generally assum[ing] that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 142 S. Ct. at 2137–38 (citing *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004) (scope of Sixth Amendment right to confrontation governed by "founding generation's" understanding); *Virginia v. Moore*, 553 U.S. 164, 168–69, 172 (2008) (scope of Fourth Amendment determined in "founding era") (citation omitted); and *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122–23 (2011) (founding era treatment "dispositive" on scope of First Amendment)). These are not the only examples to reinforce that the founding era understanding determines the meaning and scope of the Bill of Rights. *See*, *e.g.*, *United States v. Jones*, 565 U.S. 400, 411 (2012) (explaining that the Court "appl[ies] an 18th-century guarantee against unreasonable searches" based "the degree of protection [the Fourth Amendment] afforded when it was adopted").

In short, the Founders' understanding is the interpretive lodestar when considering the Bill of Rights. This methodology is essential to ensure parity of protection against federal or state action: "[I]ncorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). So "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indiana*, 139 S.

Ct. 682, 687 (2019). Accordingly, the understanding of the Second Amendment in and around 1791 controls.

### B. Post-Founding-Era Regulations Are Relevant Only To The Extent They Confirm Traditions From The Founding.

*Bruen* also stressed that courts "must . . . guard against giving postenactment history more weight than it can rightly bear." 142 S.Ct. at 2136. And *Bruen* affirms that, while it is *permissible* for courts to consider post-founding-era historical regulations, that review is limited to determining whether such regulations *confirm* a founding era tradition. *Id.* at 2137. Put simply, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id.* (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)) (emphasis in original). As Prof. Smith explains: "No Supreme Court case has ever looked to 1868 as the principal period for determining the meaning of an individual right in the Bill of Rights. If periods after 1791 are consulted at all, it is only to confirm that subsequent authorities, generally very shortly after the founding, remained consistent with the public understanding in 1791." Smith, *supra*, manuscript at 4–5.

The Court has taken this approach in multiple cases. In *Gamble v. United States*, 139 S. Ct. 1960 (2019), the petitioner pointed to *Heller*'s examination of 19th-century sources to argue that similar-vintaged treatises supported a different interpretation of the Double Jeopardy Clause than the one at the founding. The Court rejected

this approach and observed that *Heller* "turned to these later treatises only after surveying what it regarded as a wealth of authority [from the founding era]. The 19th-century treatises were treated as mere *confirmation* of what the Court thought had already been established." *Id.* at 1975–76 (emphasis added); *see also, e.g.*, *Crawford*, 541 U.S. at 47, 50 (citing 19th-century treatises that "confirm[ed]" founding-era rule).

*Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), illustrates that these principles overcome even *widespread* 19th-century practices inconsistent with the founding-era understanding. In *Espinoza*, the state took the position that a tuition-assistance bill generally applicable to private schools had to exclude religious schools in light of the Montana state constitution's prohibition on "aid" to such schools. To support its claim that Montana's discrimination didn't violate the Religion Clauses, the state "argue[d] that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions." *Id.* at 2258 (emphasis in original). But the Court rejected the notion that the 19th-century adoption of such laws by even a *majority* of states could "by itself establish an early American tradition." *Id.* at 2259. The Court stressed that, "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Id.* at 2258. Given that foundation, the "no-aid provisions of the 19th-century hardly evidence a tradition that should inform our understanding of the Free Exercise Clause." *Id.* at 2259.

Thus, when confronted with even fewer late-19th-century outliers in *Bruen*, the Court had no trouble similarly concluding that "late-19th-century [and] 20th-century evidence . . . *does not provide insight* into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154 n.28 (emphasis added); *see also id.* at 2163 (Barrett, J., concurring) (the Court's ruling "should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."). Later history that contradicts the text and founding understanding of the constitution cannot control the Court's Second Amendment analysis.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

BRADLEY A. BENBROOK
*Counsel of Record*
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
701 University Ave., Ste. 106
Sacramento, California 95825
(916) 447-4900
brad@benbrooklawgroup.com

*Counsel for Amicus Curiae*

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