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 FOR RESPONDENT

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1757 Va. Laws ch. 3, ¶ 15, in 7 Hening's Statutes at Large 100 26

1883 Wisc. Sess. Laws, vol. I, ch. 329 30

Treatises

Joel Prentice Bishop, *Commentaries on Criminal Law* (2d ed. 1858) 27

William Blackstone, *Commentaries* (St. George Tucker ed., 1803) 14, 23

Thomas M. Cooley, *Treatise on Constitutional Limitations* (2d ed. 1871) 29

William Hawkins, *A Treatise of the Pleas of the Crown* (1716) 20

William Rawle *A View of the Constitution of the United States* (2d ed. 1829) 9, 40

Tapping Reeve, *The Law of Baron and Femme* (1816) 14

Other Authorities

Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 Early American Studies 221 (2007)......................... 13–17

Samuel Chipman, *Report of an Examination of Poor-Houses, Jails, &c., in the State of New York* (1836).................... 15

Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139 (2007) 18, 24, 27

Stephanie Cole, *Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore*, in *Over the Threshold: Intimate Violence in Early America* (Christine Daniels & Michael V. Kennedy, eds., 1999) 15

The Complete Bill of Rights: Drafts, Debates, Sources, and Origins (Neil H. Cogan, ed. 2015) 35

Documentary History of the Ratification of the Constitution (John P. Kaminski & Gaspare J. Saladino eds., 2001) 36

Laura F. Edwards, *Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (2009) 15, 16

Joseph Greenleaf, *An Abridgement of Burn's Justice of the Peace and Parish Officer* (1773) 20

William Waller Hening, *The New Virginia Justice* (1795) 20

4 Journals of the Continental Congress 1774–1789 (Worthington Chauncey Ford ed., 1906) 23

Henry Ansgar Kelly, *"Rule of Thumb" and the Folklaw of the Husband's Stick*, 44 J. Legal Educ. 341 (1994) 14

Carlton F.W. Larson, *The Trial of Allegiance: Treason, Juries, and the American Revolution* (2019) 43

Thomas Jefferson, Letter to George Hammond (May 29, 1792), in 3 *Works of Thomas Jefferson* (H.A. Washington, ed. 1884) 23, 24

Brendan McConville, *The Rise of Rough Music: Reflections on an Ancient New Custom in Eighteenth-Century New Jersey*, in *Riot and Revelry in Early America* (William Pencak et al. eds., 2002) 16

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Popular Sources of Political Authority (Oscar & Mary Handlin, eds. 1966) 38

15 Public Records of the Colony of Connecticut (Charles J. Hoadley, ed. 1890) 24

Randolph Roth, *American Homicide* (2009) 15, 16

Kelly A. Ryan, *"The Spirit of Contradiction": Wife Abuse in New England, 1780-1820*, 13 Early Am. Studies 586 (2015) 15, 16

John Gilmary Shea, *The Catholic Church in Colonial Days* (1886) 23

O.H. Smith, *Early Indiana Trials* (1858) 38

Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800–1880* (1989) 15

Steven J. Stewart, *Skimmington in the Middle and New England Colonies*, in *Riot and Revelry in Early America* (William Pencak et al. eds., 2002) 16

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INTRODUCTION

This Court should affirm the decision below because it faithfully applied the holdings and reasoning of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). The Government does not ask the Court to overrule or limit *Heller* or *Bruen*, and *Bruen* makes this an easy case.

Five features of 18 U.S.C. § 922(g)(8) conspire to make the statute facially unconstitutional under the Second Amendment. *First*, the law is a total ban on possession of any type of firearm or ammunition, even in the home. *Second*, the ban is enforced with severe criminal penalties of up to ten or fifteen years in federal prison. *Third*, the ban applies to United States citizens who retain all their political and civic rights. *Fourth*, the ban is not triggered by conviction of an infamous crime; it arises automatically and unavoidably from a civil state-court order, often after a one-sided proceeding, regardless of whether the order itself addresses firearms. *Fifth*, § 922(g)(8) is a federal, nationwide ban. Whatever the founding generation believed about state and local legislatures' power to restrict firearm ownership, they would have resisted a *federal* law purporting to say which citizens could, and which citizens could not, keep firearms.

The Government attacks the outcome below but refuses to engage in *Bruen*'s process. The Second Amendment protects a U.S. citizen's right to keep firearms within the home for self-defense and defense of others. Section 922(g)(8) severely punishes any exercise of that right. Because there is no historical tradition of any similar restriction, the law is unconstitutional on its face.

STATEMENT

A. Relevant Facts

Respondent Zackey Rahimi's federal conviction under § 922(g)(8) depends on two events: the issuance of an "Agreed Protective Order" on February 5, 2020, J.A. 1–11, and the subsequent discovery of a handgun and a rifle "in Rahimi's room" on January 14, 2021. J.A. 17–18. Everything else is disputed and irrelevant to his guilt or innocence under the law.

1. The federal record is silent about the specific proceedings leading to the February 2020 order. The order was appended to the Government's post-arrest complaint, but no other records from state court were included. 5th Cir. ROA 12–18.

In Texas, as in most other states, civil protective order ("CPO") procedures are streamlined and one-sided. The applicant apparently alleged that Mr. Rahimi had committed family violence, and that family violence was likely to continue.[1] *See* Tex. Family Code §§ 81.001 & 85.001. Like all provisions of Texas's CPO statutes, "family violence" is broadly construed. *Boyd v. Palmore*, 425 S.W.3d 425, 430 (Tex. App. 2011) (Respondent committed "family violence" when he stood in front of the applicant's parked car and then laid on the hood as she tried to slowly drive away.). "Family violence" even includes using drugs in the presence of a child if it causes "physical, mental,

[1] Effective September 1, 2023, an applicant no longer needs to show a likelihood of future family violence. Proof of past family violence is now sufficient. 2023 Tex. Sess. Law Serv., § 1 (H.B. 1432).

or emotional injury to a child." *See* Tex. Fam. Code § 261.001(1)(I) & § 71.004.

The applicant would have initiated the case by filing an "Application for a Protective Order" with the Tarrant County, Texas, District Clerk. § 82.001. The court would normally set the final hearing within two weeks. § 84.001. If Mr. Rahimi was served at least 48 hours before the hearing, he had no right to a continuance. § 84.003.

When he arrived at the courthouse on the appointed day, Mr. Rahimi—like most respondents in his county—was unrepresented.[2] Indigent respondents have no right to appointed counsel. *See* § 82.041(b) ("You may employ an attorney to defend you against this allegation."). The applicant, however,

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[2] According to records maintained by the Tarrant County, Texas, District Clerk, family courts entered final decisions in 522 CPO cases filed between July 1, 2019, and June 30, 2020. These include cases where applicants alleged family violence, stalking, or violation of another protective order.

Courts granted 289 final protective orders. Of those, the District Attorney successfully represented 242 applicants. In 155 cases, respondents did not appear, and courts entered default judgments. Of the 134 remaining cases, 82 respondents were *pro se*.

Only 10 applications were denied after a bench trial, and one of those resulted in a permanent injunction nearly identical to a CPO. Only one *pro se* respondent prevailed in a contested case; in that case, the DA withdrew so the applicant was also *pro se*.

Of the original 522 cases, 127 were dismissed for lack of prosecution, and 96 additional cases were dismissed or non-suited. Many of the dismissals followed the issuance of a temporary *ex parte* order.

was represented by a prosecutor at the state's expense. § 81.007. J.A. 10.

In the petition for certiorari, the Government explained that the Texas court issued the CPO "after giving Rahimi notice and *an opportunity for a hearing*." Pet. 2 (emphasis added). The Government now claims that the state court actually "conduct[ed] a hearing in which Rahimi participated." U.S. Br. 2. But Mr. Rahimi did not "participate" in any "hearing." The order plainly recites that a "hearing was not held." J.A. 1–2.[3] Instead, he and the prosecutor "agree[d] in writing to the terms of a protective order" that would otherwise require a hearing and family-violence findings. Tex. Fam. Code § 85.005(b) (eff. until Aug. 31, 2021). The agreed order contains boilerplate family violence findings, but the order would be enforceable even without them. *See* Tex. Fam. Code § 85.005(b) (eff. Sept. 1, 2021) & Tex. Senate Research Center, Bill Analysis, C.S.H.B. 39 (May 13, 2021) (clarifying that the findings are superfluous if the respondent agrees to the order of protection).

The prosecutor had powerful leverage to avoid a contested hearing. Texas law provides for an award of attorney fees, but only for the applicant's attorneys. § 81.005. For Tarrant County protective-order cases filed between July 2019 and June 2020, attorney-fee awards ranged from $500 up to $7,000. If respondents

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[3] The Government may have shifted its description to account for 18 U.S.C. § 922(g)(8)(A), which reaches only orders "issued after a hearing." As explained below, the lower courts agree that this element is satisfied if the court entered an agreed order. *United States v. Banks*, 339 F.3d 267, 270 (5th Cir. 2003).

do not resist, prosecutors can waive the fees.[4] The February 2020 order reflects that Mr. Rahimi agreed to the order, and the prosecutor waived attorney fees. J.A. 3, 6.

The prosecutor prepared the order. J.A. 10. As in many other Tarrant County CPOs, the prosecutor added boilerplate "findings" that bore no significance under Texas family law: that Mr. Rahimi "represents a credible threat to the physical safety of the Applicant or other members of the family or household who are affected by this suit," and "the terms of this order explicitly prohibit the use, attempted use, or threatened use of physical force against Applicant that would reasonably be expected to cause bodily injury." J.A. 2–3. Those same findings appear in most Tarrant County CPOs—even those that would never trigger § 922(g)(8).[5] Yet they are absent from the statewide form CPO approved by the Texas Supreme Court. *See* Order Approving Revised Protective Order Forms, Misc. Docket No. 12-9078 (Tex. May 8, 2012).

2. The Government emphasizes several other allegations of wrongdoing against Mr. Rahimi that gave rise to serious charges in Texas state court. U.S.

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[4] In 81 cases, the Tarrant County Criminal District Attorney and a respondent agreed to the entry of an order. Only four respondents were ordered to pay attorney's fees in an agreed order.

[5] Of the 289 protective orders entered in Tarrant County cases filed between July 2019 and June 2020, the self-referential "terms of this order" finding appears in 249 orders. A "credible threat" finding appears in 184 orders; 175 refer to "the safety of the Applicant *or other members of the family or household*." J.A. 2–3 (emphasis added).

Br. 2–3. But those are: (1) disputed;[6] (2) the subject of pending prosecutions; and (3) irrelevant to his guilt or innocence under § 922(g)(8) and to the constitutionality of the statute. U.S. Br. 2–3; *see Descamps v. United States*, 570 U.S. 254, 270 (2013) ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to.").

3. On January 14, 2021, while executing a state search warrant at Mr. Rahimi's residence, police found a .45 caliber pistol and a .308 caliber rifle "in Rahimi's room." J.A. 17–18. The applicant did not live in that house (or even, apparently, in the same city). 5th Cir. ROA 218.

B. Proceedings Below

1. A grand jury indicted Mr. Rahimi under 18 U.S.C. § 922(g)(8). J.A. 12–14.

Mr. Rahimi moved to dismiss the indictment because § 922(g)(8) violates the Second Amendment. 5th Cir. ROA 41–59. The district court denied the motion because, at the time, his challenge was foreclosed by *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020). Pet. App. 78a–80a. The court then

[6] Mr. Rahimi objected to the Presentence Report's allegations of misconduct underlying his "pending state charges," explaining that those paragraphs parroted "police reports" which were not shown to be reliable. 5th Cir. ROA 181–83. The district court overruled the objection because Fifth Circuit precedent puts the defendant to the burden of producing evidence rebutting PSR allegations. 5th Cir. ROA 183–84.

accepted his guilty plea,[7] later sentencing him to 73 months of imprisonment, followed by three years of supervised release. 5th Cir. ROA 5 (entry 28), 201–02.

2. The Fifth Circuit ultimately vacated Mr. Rahimi's conviction, holding that *Bruen* "fundamentally change[d]" Second Amendment analysis. Pet. App. 7a–28a. The court also recognized that a facial analysis was appropriate because the elements of § 922(g)(8) prohibit conduct that is presumptively protected by the Second Amendment, and the text of the statute "is inconsistent with the Second Amendment's text and historical understanding." Pet. App. 12a.

SUMMARY OF THE ARGUMENT

Following the process laid out by *Bruen*, the outcome here is "straightforward." 142 S. Ct. at 2131. Section 922(g)(8) severely punishes conduct protected by the plain text of the Second Amendment. That makes the law presumptively unconstitutional. The Government could (hypothetically) defend § 922(g)(8) if it could "affirmatively prove" that the ban "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. at 2127. But the Government's exhaustive survey turned up nothing like § 922(g)(8) in the American tradition. Although a "historical twin" is not necessary, the Government cannot point to a close relative, a distant

[7] The plea admitted "that he did what the indictment alleged," but he continued to "challenge the Government's power to criminalize [his] (admitted) conduct." *Class v. United States*, 138 S. Ct. 798, 804–05 (2018).

cousin, or anything bearing even a passing resemblance.

Instead, the Government sidesteps *Bruen*'s process entirely. It never grapples with the distinctly American features of the Amendment's text or history. It cannot shoulder the burden of *Bruen*'s presumption, so it does not even try. It conflates every type of firearm restriction, regulation, confiscation, and ban under the all-purpose umbrella of "disarmament," without acknowledging when laws targeted people outside the political community. And it repeatedly describes offhanded and tentative statements in this Court's opinions as "precedent." The result of this unsanctioned approach is a government-magnifying, rights-minimizing rule allowing Congress *carte blanche* to disarm and punish the exercise of a fundamental, enumerated right.

ARGUMENT

I. The possession prong of § 922(g)(8) prohibits and severely punishes conduct protected by the plain text of the Second Amendment.

When the "plain text" of the Second Amendment covers an individual's conduct, "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129–30. The Fifth Circuit held that Mr. Rahimi is one of "the people" entitled to the Second Amendment's guarantees, and that the conduct for which he was indicted and convicted—possession of a rifle and a pistol in his own bedroom—"easily falls within the purview of the Second Amendment." Pet. App. 14a. The Government does not challenge the court's textual interpretation and thus waives any

contrary argument. Section 922(g)(8) is presumptively unconstitutional.

A. "Right of the People"

The Second Amendment—like every other right of "the people"—"is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581. The Amendment protects "all members of the political community, not an unspecified subset." *Id.* at 580. That means the right belongs to Mr. Rahimi, who is an American citizen. 5th Cir. ROA 207.

"The people" was originally understood to include every citizen who held civil and political rights, *e.g.*, the rights to vote, hold public office, testify in court, and own property. *See*, *e.g.*, William Rawle, *A View of the Constitution of the United States* 85–86 (2d ed. 1829); accord, U.S. Const. amends. I, IV; *McDonald v. City of Chicago*, 561 U.S. 742, 815 (2010) (Thomas, J., concurring). Nothing in the text of the Constitution suggests that "the people" means something different in the Second Amendment than in other constitutional provisions. *Heller*, 554 U.S. at 580.

B. "Keep and Bear Arms"

Section 922(g)(8) criminalizes and punishes the exact conduct protected by the Second Amendment: possessing firearms. *Heller*, 554 U.S. at 583 ("'Keep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*."). Because the types of firearms found in Mr. Rahimi's bedroom are "in common use," "Rahimi's possession of a pistol and a rifle easily falls within the purview of the Second Amendment." Pet. App. 14a; J.A. 13.

C. "Shall Not Be Infringed"

Section 922(g)(8) does not merely "regulate," "restrict," or "burden" the Second Amendment right. U.S. Br. 11, 24, 42. It even goes beyond "disarming" citizens in the literal sense, *i.e.*, physically confiscating their weapons. Section 922(g)(8) is a *total ban*, with no exceptions, applying to every kind of firearm. *See* 18 U.S.C. § 921(a)(3), (17).

Like the handgun bans enacted by the District of Columbia, Chicago, and Oak Park, § 922(g)(8)'s possession ban extends to the home, where "the need for defense of self, family, and property is most acute[.]" *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 628). And Section 922(g)(8) is actually broader than those citywide laws because it bans possession of *any and every* kind of firearm, using more severe penalties.

Section 922(g)(8)'s firearm ban is also unavoidable, at least for CPO respondents who are not employed by police or other government agency. 18 U.S.C. § 925(a). A respondent cannot recover the right to keep arms by moving to a different city or even a different state—the ban applies nationwide. *See United States v. Wilkey*, No. 6:20-CR-05, 2020 WL 4464668, at *1 (D. Mont. Aug. 4, 2020) (Respondent did not contest a permanent Florida protection order because he was moving to Montana "a few days" after the hearing; four years later, he was arrested and ultimately convicted under § 922(g)(8)).

Even if a protective-order respondent has an atypically severe need to defend herself from unlawful violence, there is no way for the respondent *nor even the state judge* to avoid the federal ban while leaving

in place an admonition forbidding abuse or violence. *United States v. Bayles*, 310 F.3d 1302, 1304–05 (10th Cir. 2002) (affirming § 922(g)(8) conviction where state court decided not to "impose restrictions … on possession of firearms"); Transcript of Sentencing at 43, *United States v. Harroz*, No. 5:19-cr-325 (W.D. Okla. Apr. 23, 2021) (convicting and sentencing a defendant under § 922(g)(8) even though the defendant had first moved for protection, a state judge entered temporary orders against both parties, and the court later explicitly allowed her to possess weapons because she feared abuse). An order can satisfy § 922(g)(8)(C)(ii) even if it does not use the same words. *United States v. Sanchez*, 639 F.3d 1201, 1204–05 (9th Cir. 2011).

The infringing nature of § 922(g)(8) is confirmed by its severe criminal penalties. This is no public-safety infraction enforced by "a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail)." *Heller*, 554 U.S. at 633; *Bruen*, 142 S. Ct. at 2149. In January 2021, the ban carried up to *a decade* in federal prison, 18 U.S.C. § 924(a)(2) (2018), and a fine of up to a quarter of a million dollars. 18 U.S.C. § 3571(b)(3). Today, the penalty can be *fifteen* years in prison. 18 U.S.C. § 924(a)(8).

The Government even prosecutes prohibited persons who *briefly* possess *someone else's* gun in self-defense. *United States v. Penn*, 969 F.3d 450, 458 (5th Cir. 2020). Courts routinely reject self-defense, defense-of-others, and necessity defenses, and they exclude evidence that a prohibited person had a credible fear of imminent violence because it is "irrelevant" and "would only inspire jury nullification." *Id.*

Because § 922(g)(8)'s possession prong prohibits conduct protected by the plain text of the Second Amendment, the statute is presumptively unconstitutional.

II. Nothing in the history of American firearm regulation remotely resembles § 922(g)(8).

To overcome the presumption of non-constitutionality, the Government "must demonstrate that" § 922(g)(8) "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. It has not done so.

Despite casting an incredibly broad net, the Government has yet to find even a single American jurisdiction that adopted a similar ban while the founding generation walked the earth. The Government cites no laws punishing members of the American political community for possessing firearms in their own homes based on dangerousness, irresponsibility, crime prevention, violent history or inclination, or any other character trait or legislative goal. Put simply, § 922(g)(8) is an "outlie[r] that our ancestors would never have accepted." *Bruen*, 142 S. Ct. at 2133.

A. The founding generation responded to interpersonal and domestic violence in numerous ways, but never by banning possession of weapons.

If "earlier generations" addressed a longstanding social problem "but did so through materially different means," then that tends to prove "that a modern regulation is unconstitutional." 142 S. Ct. at 2131. In the 17th, 18th, and early 19th centuries, Americans recognized the scourge of domestic violence and

utilized a variety of legal and extra-legal mechanisms to punish, prevent, and deter it. None of those mechanisms involved disarmament or firearm bans.

The Government wants more latitude to defend § 922(g)(8) than D.C., Chicago, or New York were given to defend their respective bans, for three reasons: (1) "the common-law doctrine of interspousal tort immunity precluded courts from hearing abused wives' civil suits against their husbands"; (2) CPOs did not exist before the 1970s; and (3) some state-court judges in the 1860s and 1870s, some Supreme Court Justices in the 1910s, and some police manuals in the 1960s, discouraged legal intervention in abusive marriages. U.S. Br. 40–41.

If late-17th- or early-18th-century American society had condoned domestic violence, the Government might have a point. Alternatively, if American jurisdictions had a long tradition of totally banning weapon possession by people suspected or accused of assaulting strangers, *but not partners*, then perhaps a cultural shift in the way society thinks and talks about *domestic* violence might justify a uniquely modern firearm ban against a longstanding societal problem. Neither of those things is true. *See* Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 Early Am. Studies 221, 235–36 (2007) ("Affrays, Assaults, Battery, Fighting, Quarreling, and Riot" were "to be treated in the same way as violence by husbands against wives." (cleaned up)).

The Government is correct that wives could not sue their husbands (or anyone else) in tort at the time of ratification. But the Government and its amici are incorrect when they suggest that society did not

recognize domestic violence as a problem until very recently. Giffords Br. 7 (asserting that domestic abuse "was legally authorized or at least largely tolerated"); Cal. Legislative Br. 19 ("18th century laws often permitted wife-beating and threats of physical violence."). The government's arguments take the views of some benighted thinkers from the late 19th and early 20th centuries and project those views back to the founders—a recurring theme in the Government's brief.

In fact, "the dominant trajectory of legal opinion in the seventeenth and eighteenth centuries ran against the right of husbands to punish their wives by beating them." Bloch, *supra*, 231. Blackstone observed that the common-law "power of correction began to be doubted" as early as "the reign of Charles the second," that is, 1660–1685. 2 William Blackstone, *Commentaries* 444 (St. George Tucker ed., 1803).[8] America's first treatise on family law acknowledged both the reality and condemnation of domestic abuse: "[T]he right of chastising a wife is not claimed by any man; neither is any such right recognized by our law." Tapping Reeve, *The Law of Baron and Femme* 65 (1816). And contrary to popular belief, there was never a "rule of thumb" in England or America. The first appellate decision to suggest otherwise was based on

[8] St. George Tucker divided Blackstone's first volume into two books, but he preserved Blackstone's pagination. Citations to Tucker's Blackstone in this brief utilize Tucker's book numbers and Blackstone's pagination.

mistaken remembrance of a joke or legend, and even *that* court affirmed a domestic abuse conviction.[9]

Historians, moreover, have documented "hundreds" of cases where men were jailed for spousal abuse in every part of the new nation. *See*, *e.g.*, Kelly A. Ryan, *"The Spirit of Contradiction": Wife Abuse in New England, 1780-1820*, 13 Early Am. Studies 586, 591 (2015) (describing 100 indictments for men assaulting their wives in New York City between 1800–1810); Stephanie Cole, *Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore*, in *Over the Threshold: Intimate Violence in Early America* 148–149 & 163 n.1 (Christine Daniels & Michael V. Kennedy, eds., 1999) (describing a study of 215 domestic assault cases in antebellum Baltimore, 1827–1832); Laura F. Edwards, *Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* 181 (2009) (describing domestic violence prosecutions "throughout" North and South Carolina "from 1787 into the 1840s"); Samuel Chipman, *Report of an Examination of Poor-Houses, Jails, in the State of New York* (1836) (identifying men incarcerated for assaulting wives in nearly every jail or prison in the state); Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800–1880* 46–48

[9] Bloch, *supra*, 245 (discussing *Bradley v. State*, 1 Miss. 156 (1824)); *see also* Henry Ansgar Kelly, *"Rule of Thumb" and the Folklaw of the Husband's Stick*, 44 J. Legal Educ. 341, 365 (1994) ("But we must all guard against unfairly accusing others of harboring beliefs or engaging in practices for which there is no evidence, and we should be concerned to give due credit to those who in the past tried to mitigate the harsh customs and practices of others.").

(1989) (describing private prosecutions of domestic assault cases in aldermen's courtrooms).

Surety of the peace (or of good behavior) was the most common legal remedy for domestic violence: "a wife's own informal testimony to the local justice of the peace could be sufficient for him to require her husband to put up a bond or stake pledges from his associates to guarantee his good behavior." Bloch, *supra*, 223; *see also* Randolph Roth, *American Homicide* 116–17 (2009). Men who could not secure the money or support would be jailed. Twenty-five years before he wrote his treatise, Tapping Reeve presided over a high-profile surety suit by Susannah Wyllys Strong against her husband Jedediah, "a Connecticut judge, state representative, and member of the Governor's Council." Ryan, *supra*, 602. "Newspapers across Connecticut, Massachusetts, and New York reported on the incident" and on her accusations of physical abuse. *Ibid.* Newspaper and court records also reveal an increase in "romance homicides" committed with handguns in "the 1830s and 1840s." Roth, *supra*, 286.

In addition to surety proceedings and prosecutions (both public and private), courts also intervened through granting divorce or legal separation. "Between the 1790s and 1830s many states passed laws permitting absolute divorce on the grounds of cruelty." Bloch, *supra*, 238; *see also* Roth, *supra*, 119 ("The ability of abused spouses to dissolve violent marriages may well have become a deterrent to violence and may even have been the primary reason that the spouse murder rate fell by half in New England after the Revolution.").

When legal responses proved inadequate, neighbors, family members, and others in the community took matters into their own hands. Sometimes, it was as simple as sheltering the victim or confronting the abuser. Edwards, *supra*, 180; Roth, *supra*, 119. Other times, it bordered on riot: abusers would be paraded through the streets in public shaming rituals called "rough music." Brendan McConville, *The Rise of Rough Music: Reflections on an Ancient New Custom in Eighteenth-Century New Jersey*, in *Riot and Revelry in Early America* 90–100 (William Pencak et al. eds., 2002); *see also* Steven J. Stewart, *Skimmington in the Middle and New England Colonies*, in *id.* 45–47, 62; Bloch, *supra*, 235. This is hardly the picture of a society that tolerated domestic violence.

All these responses differed materially from § 922(g)(8) because none banned or even restricted firearm possession. As explained below, American jurisdictions simply did not ban firearm possession for citizens who retained their position in the political community.

B. None of the Government's hodgepodge of firearm laws banned and punished a rights-retaining citizen's possession of firearms in the home.

Bruen identified only one way to rebut the presumption of constitutional protection: "the Government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. at 2127. If the Government showed that similar laws were "open, widespread, and unchallenged since the early days of the Republic,"

that would suggest that they were consistent with the original understanding of the right. *Id.* at 2137 (quotation omitted). On the other hand, "the lack of a distinctly similar historical regulation" tends to confirm the obvious: the novel law violates the Second Amendment. *Id.* at 2131. Similarity is judged on two metrics: "first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified." *Id.* at 2118.

Bruen shows how to proceed. After carefully examining each of the historical laws cited by New York, the Court discerned three "well-defined restrictions" on "the right to keep and bear arms in public" that persisted throughout "modern Anglo-American history": laws "governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." *Id.* at 2138. Notwithstanding "a handful of late-19th-century jurisdictions," the Court found no tradition of "broadly prohibiting the public carry of commonly used firearms for self-defense." *Id.* at 2138.

In this case, the Government has less evidence than New York had in *Bruen*. It has failed to identify even a single pre-20th-century law banning and punishing all firearm possession, even at home, for any subset of the political community. "In essence, American law recognized a zone of immunity surrounding the privately owned guns of citizens." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. &

Hist. Rev. 139, 142 (2007) (reviewing the first fourteen states' codes from 1607 to 1815). As will be shown, many laws disarming non-citizen outsiders made exceptions for keeping guns at home.

Before examining the laws cited by the Government and its *amici*, it is worth distinguishing among the various actions the Government lumps together and labels "disarming." Sometimes the Government uses that label for physical confiscation of weapons. U.S. Br. 13–16, 20–21. Other times it seems to mean passing a law authorizing or demanding confiscation. *Id.* 19, 22–23. The same term is also used for restrictions on *sale* or *provision* of firearms to specified groups, though this is outside the normal meaning of "disarm." *Id.* 24, 26. In the Government's usage, "to disarm" also means "to pass a law banning public carry," *id.* at 25, "to authorize a judicial order banning possession," and "to suspend a public carry license." U.S. Br. 34–35. And, of course, when it comes to § 922(g), "to disarm" also means "to ban and severely punish even the mere possession of firearms." The Government's artful labeling cannot paper-over the differences between its historical laws and § 922(g)(8). None of them burdened a citizen's right to keep firearms for self-defense to the same extent, and for the same reasons, as § 922(g)(8).

1. English laws and practices have limited relevance to this question. The *conduct* protected by the Second Amendment—"to keep and bear arms"—may well have been influenced by English understanding. But the American amendment codified a broader right. *See Heller*, 554 U.S. at 593 (The English right was "not available to the whole population," "was held only against the Crown, not

Parliament," and extended *only* to the extent "allowed by Law" and "suitable to" the subjects' "conditions."). Unlike the English, the American people codified an unqualified right that extends to all members of the political community, binds the legislature and the courts, and contains no written exceptions. Americans would not tolerate a law granting "local officials" broad authority to declare someone "dangerous to the Peace of the Kingdome" and then disarm them. U.S. Br. 14 (quoting 14 Car. 2, c.3, § 13). If the Government's interpretation of the right to keep arms would authorize seizure of the colonists' arms in Massachusetts, the Government is operating from the English perspective, not the American one. Cf. *Heller*, 554 U.S. at 594–95.

One important part of English perspective did carry over to its colonies: allowing people (even outsiders) to possess weapons *in the home*. Under English common-law, only "Persons of Quality" could move about in public with armed "Attendants." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 136 § 9 (1716). But anyone could gather his friends to defend himself at his own home, "because a Man's House is his Castle." *Id.* § 8.

Bruen explained that the Middle Ages understanding of the Statute of Northampton "has little bearing on the Second Amendment adopted in 1791." 142 S. Ct. at 2139. The Government claims that Northampton's weapon-forfeiture provisions were widely incorporated into American common law, citing early justice manuals. U.S. Br. 23 & n.13. Some of those same manuals express doubt on that point. *See* Joseph Greenleaf, *Abridgement of Burn's Justice of the Peace*, Preface (1773) ("[A]cts of the British

parliament … can never have any relation to this colony …"); cf. William Waller Hening, *The New Virginia Justice* 25 (1795) ("As it is probable there will seldom be occasion to enforce this act, I shall add no other precedents founded on it …").

2. Opinions and briefs asserting an American tradition of disarming "dangerous" people often rely on bigoted laws punishing firearm possession by, *e.g.*, enslaved and free blacks, multiracial people, and Catholics. The Government previously did so here and elsewhere. U.S. 5th Cir. Supp. Br. 23 ("slaves" and "native Americans"); *see also Range v. Att'y Gen.*, 69 F.4th 96, 115 (3d Cir. 2023) (Shwartz, J., dissenting) ("Native Americans, Blacks, Catholics, Quakers, loyalists").

To its credit, the Government has abandoned its earlier reliance on openly bigoted laws.[10] As the party who bears the burden, that should make those laws irrelevant. But its amici have made a different choice. *E.g.*, Nat'l League of Cities Br. 15; Pub. Health Researchers Br. 14, Prof. History & Law Br. 9–11. While all acknowledge that these discriminatory laws are repugnant, they are advanced here in a misguided attempt to show that laws like § 922(g)(8) are consistent with the right to keep arms.

[10] The expressly bigoted history of gun control is never far from the surface. For example, the Government cites an 1855 California vagrancy law, as amended in 1856. U.S. Br. 26 n.21. As originally enacted, that statute authorized arresting and jailing vagrants, but only permitted disarmament of vagrants "who are commonly known as 'Greasers' or the issue of Spanish and Indian blood." 1855 Cal. Stat. ch. 175, p. 217.

The Government and its *amici* overlook the most significant point: laws banning firearm possession by disfavored categories of people have invariably attended a broader effort to deny the political and civil rights of the affected class. As the Fifth Circuit recognized, these bigoted laws were "targeted at groups excluded from the political community—*i.e.*, written out of 'the people' altogether." Pet. App. 19a. This Court's own detestable decision in *Dred Scott v. Sanford*, 60. U.S. (19 How.) 393 (1857), makes the same point: if free blacks were "citizens," that would necessarily mean they could travel freely, speak freely, gather freely, "hold public meetings upon political affairs," and "keep and carry arms wherever they went." *Id.* at 417; *but see McDonald*, 561 U.S. at 822 (Thomas, J., concurring); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring).

Consider the Kentucky law cited on page 15 of the Public Health Researchers and Lawyers' Amicus Brief, which banned every "negro, mulatto, [and] Indian whatsoever" from keeping any gun, club, or other "offensive or defensive" weapon. 1 Laws of Ky., ch. 54, § 5, p. 106 (1799). The person who reported the crime got to keep the weapons as bounty; the victim could be sentenced to whipping. *Ibid.* That law was not based on a "theory that those individuals were dangerous and that firearms regulations were needed to prevent violent attacks." Pub. H. Researchers Br. 14. It was based on bigotry and oppression, full stop.

This type of law says nothing about "the right to keep and bear arms." Enslaved people and free blacks were, at that time and place, entirely excluded from the political community. The same legislation forbade

free blacks and multiracial people from exercising other rights of citizenship: giving testimony in any case involving at least one white party; meeting, in groups of "five or more" at someone else's plantation or quarters; and "lifting his or her hand in opposition to" any white person, on pain of "thirty lashes." 1 Laws of Ky., ch. 54, §§ 2, 8, 13, pp. 106–08. Even in *that* world—a brutal and unforgivable system of torture and exploitation—Kentucky's "no firearms" law authorized exceptions for "house keeper[s]" and others who lived on "frontier plantations." *Id.* § 6, p. 106.

The same is true of martial laws authorizing the confiscation of Catholic residents' arms during the French-Indian War. In the 17th and 18th centuries, anti-Catholic hostility was not only religious, but also political and violent. Cf. *Heller*, 554 U.S. at 582, 593. Before ratification, Catholic worship was a crime and gave rise to pervasive civil disabilities on both sides of the Atlantic. 5 Tucker's Blackstone 54–59; 1 Tucker's Blackstone app. 394–96; John Gilmary Shea, *The Catholic Church in Colonial Days* 409–12 (1886) (describing Virginia laws criminalizing Catholic worship and disqualifying them from voting, holding office, testifying as a witness). In the throes of a multi-continent war between Catholic France and Anglican England, Virginia passed an additional law requiring every "Papist, or reputed Papist" to sign an oath denying the truth of transubstantiation, and anyone who refused would have to surrender his arms "other than such necessary weapons as shall be allowed to him … *for the defence of his house or person*." 1756 Va. Laws ch. 4, in 7 Hening's Stat. at Large 36 (1802) (emphasis added).

3. Revolution-era laws and practices targeting loyalists are also unreliable analogues. Loyalists were not members of the new American political community; they were traitors (or enemy aliens) and potential combatants. The Continental Congress was more concerned with *giving* the guns to its soldiers than with *taking* the guns from its enemies. It directed committees on safety to redistribute the weapons "in the first place, to the arming of the continental troops raised in said colony, in the next, to the arming such troops as are raised by the colony for its own defence, and the residue to be applied to the arming the associators." 4 Journals of the Continental Congress 1774–1789 205 (Worthington Chauncey Ford ed., 1906). After the war, as Secretary of State, Thomas Jefferson defended confiscation of loyalist property—including not just arms, but entire estates—to British envoy George Hammond: "It cannot be denied that the state of war strictly permits a nation to seize the property of its enemies found within its own limits, or taken in war." Letter (May 29, 1792), in 3 Works of Thomas Jefferson 365, 369 (H.A. Washington, ed. 1884).

Jefferson's letter confirms that the "why" of these martial confiscation laws differed from the "why" of § 922(g)(8). Because the new nation was "excluded from all commerce, even with neutral nations, without arms, money, or the means of getting them abroad, we were obliged to avail ourselves of such resources as we found at home." *Ibid.*; *see Bruen*, 142 S. Ct. at 2133. State governments also impressed arms from patriots who had volunteered for militia service. Churchill, *supra*, 153–54. That practice was controversial, and almost all states repealed laws allowing impressment when the revolution ended. *Id.* at 154.

The "how" was different too. Most laws cited in Government footnote 11 imposed pervasive disabilities. U.S. Br. 22; *see*, *e.g.*, 15 Pub. Records of the Colony of Conn. (May 1775–June 1776) 193 (1890) (disenfranchisement and loss of right to hold or serve in public office); 1777 N.C. Laws ch. 6, § 9, in 24 State Records of N.C. 89 (1905) (rights to hold or run for office, vote, sue, receive, convey, or inherit title to land, or leave the state without permission); 1775–1776 Mass. Acts & Resolves ch. 21, § 4 p. 481 (rights to hold public office, vote, receive a minister's or teacher's salary unless … "restored … to the privile[d]ges of a good and free member of this community"). And, unlike § 922(g)(8), these laws nonetheless offered a person accused of disloyalty a way to restore his fundamental right to armed self-defense: by pledging loyalty to the new government, thus re-joining the local political community. Churchill, *supra*, 159–60.

4. The Government also tries to find a historical analogue for § 922(g)(8) in Massachusetts's amnesty and disqualification law for the defeated participants in Shays's rebellion. U.S. Br. 22–23 & n.12. That law—passed February 16, 1787—offered a complete pardon to most of the defeated, but conditioned relief on physically surrendering arms and a three-year loss of rights like serving on a jury, voting, holding public office, teaching, keeping an inn, or selling liquor. 1786–1787 Mass. Acts & Laws ch. 56, p. 177. That proved too harsh for the people's liking. On March 10, the government created a commission who could release rebels from these conditions or offer unconditional pardons on a case-by-case basis. *Id.* ch. 145, pp. 515–16. Yet even this proved too harsh for the people of Massachusetts. They voted out Governor James Bowdoin (and his legislative allies) and voted

in John Hancock. On June 15, the disqualification act was repealed; full pardon was granted for "any act of treason" committed during the rebellion by anyone other than the nine leaders, and state officials were required to *return* the arms to their rightful citizen owners. *Id.* ch. 21, pp. 678–79.

5. Rather than embracing the colonists' *ad hoc* pre-constitutional practices for denying rights of people deemed disaffected, disloyal, or dangerous, the Constitution and Bill of Rights *restricted* the new government's power to categorically disqualify its citizens from exercising their rights. The Bill of Attainder Clauses ended the "doctrine of disqualification, disfranchisement, and banishment by acts of the legislature." *United States v. Brown*, 381 U.S. 437, 444 (1965) (internal quotation omitted); *see* U.S. Const. art. I, §§ 9–10. Article III, § 2 guaranteed a jury trial for "all Crimes," and § 3 limited both the definition of "Treason" and its historical disqualification penalties. The Fifth Amendment required prosecution by indictment for any "infamous" crime, with all the attendant guarantees of a full criminal trial. At common law, "infamy" implied incompetence to testify, but this Court's decisions strongly suggest that the Indictment Clause would come in to play whenever Congress passes a categorical rights-disqualification law. *See*, *e.g.*, *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377–81 (1866) (Exclusion from practice of law based on prior disloyalty is punishment.); *United States v. Waddell*, 112 U.S. 76, 82 (1884) (recognizing, but declining to decide, a "very serious question"—whether disqualification from federal office is an infamous punishment); *Ex parte Wilson*, 114 U.S. 417, 423, 426 (1885) (describing incompetence to testify and

disqualification from federal office as infamous penalties); *see also Ullman v. United States*, 350 U.S. 422, 451 n.5 (1956) (Black, J., dissenting) ("The guarantee of jury trial and the prohibition of Bills of Attainder place beyond the pale the imposition of infamy or outlawry by either the Executive or the Congress.").

We do not know for certain that the Founders would have insisted on an indictment and jury trial for conduct that would disqualify a citizen from possessing arms, because the founding generation did not adopt firearm-disqualification laws for citizens. But that does seem to be the only method they found acceptable for other rights of citizenship.

6. Congress and the states passed several laws *protecting* privately owned firearms from distress sales—thus *preserving* continued gun possession by irresponsible and law-breaking citizens. 1 Stat. 272 (1792); *see also* 1715 Md. Acts ch. 40, ¶ 5, in 1 Kilty's Laws 1799; 1757 Va. Laws ch. 3, ¶ 15, in 7 Hening's Stat. at Large 100; 1784–1785 Mass. Acts & Resolves ch. 46, p. 516; 1703 Del. Acts ch. 36, § 4 in 2 Del. Laws 1137 (1797); 1807 Pa. Acts ch. 2,854, § 15 in 18 Pa. Stat. at Large 595–96 (1915); 1821 Conn. Pub. Stat. Laws 56.

7. After ratification, even as states began to regulate firearms misuse and the manner of public carry, *Bruen*, 142 S. Ct. at 2145, American governments continued to observe a "zone of immunity" surrounding citizens' private ownership and possession of firearms *in the home*. Churchill, *supra*, 142. States also enacted detailed criminal codes that punished a variety of dangerous but non-capital crimes, including assault, battery, maiming, dueling,

and robbery. Violent offenders were punished with fines, imprisonment, shaming, corporal punishment, and, sometimes, with forfeiture of an item used to commit the crime. Many others were required to post surety. But the Government has not cited, and Respondent's counsel has not found, any founding-era laws imposing upon criminal convicts a complete disqualification from keeping arms at home.

8. The common-law doctrines of deodand and total-estate-forfeiture for felons and traitors never "took hold in the United States," *Austin v. United States*, 509 U.S. 602, 613 (1993), so there was no "general practice of sentencing prisoners to forfeit particular articles of property instead of, or in addition to, a fine of a specified sum of money." 1 Joel Prentiss Bishop, *Commentaries on Criminal Law* § 629 (2d ed. 1858). Some statutes specifically authorized forfeiture of a wrongfully used item, either as a component of a criminal sentence or in a proceeding against the item itself. *Id.* §§ 629, 693. The Texas Court of Appeals explicitly held that a legislature's power to outlaw concealed carry of pistols did not authorize forfeiture of the wrongfully concealed weapon, and that the (state) constitutional right to "keep" arms continued to protect a citizen after he violated a valid restriction on manner-of-carry. *Jennings v. State*, 5 Tex. App. 298, 300–01 (1878).

Heller expressly rejected the Government's comparison (U.S. Br. 23 nn.14–15) between historical laws punished by "forfeiture of the weapon" and modern bans backed by significant criminal penalties "for even obtaining a gun in the first place." 554 U.S. at 633–34.

To the extent that forfeiture provisions of the 17th- and 18th-century going-armed laws are relevant to the time of ratification,[11] they only punished the public *misuse* of a weapon by forfeiting that specific item. U.S. Br. 23 n.14. Section 922(g)(8) carries a ten- or fifteen-year term of imprisonment for keeping a gun, regardless of whether the defendant ever misused one.

9. A few states in the mid-19th century expanded the grounds on which a private plaintiff could seek surety of the peace from a defendant. As noted, sureties were among the most familiar ways the legal system intervened to prevent interpersonal violence. In 1836, Massachusetts maintained the traditional grounds for seeking surety, *i.e.*, that the defendant "has threatened to commit an offence against the [plaintiff's] person or property." Mass. Rev. Stat. ch. 134, § 2 (1836). But the legislature also provided a new alternative ground focused on the plaintiff's reasonable fear combined with the defendant's public carry of a weapon. *Id.* § 16; *see Bruen*, 142 S. Ct. at 2148. "Between 1838 and 1871, nine other jurisdictions adopted variants of the Massachusetts law." *Ibid.*

To whatever extent they are relevant here, these expanded surety laws do not carry the Government's burden. They were not similar enough to sustain New York's public carry law in *Bruen*, and that analogy was

[11] The Government provides no data about how often the going-armed/forfeiture provisions were enforced. New Hampshire and Massachusetts repealed or replaced their going-armed laws shortly after ratification, which suggests they are not "part of an enduring American tradition of state regulation." *Bruen*, 142 S. Ct. at 2155; *see* 1792 N.H. Acts 28–29; 1794–1795 Mass. Acts & Laws 66–67.

a much closer fit than this one. The expanded surety laws placed *no* burden on the right to keep arms at home for self-defense. The laws did not even prohibit public carry. They simply required an accused defendant to prove that he had reasonable cause to fear an attack, or to post a bond. *Bruen*, 142 S. Ct. at 2148. Finally, the bond required only that the defendant keep the peace or maintain good behavior. The Government has yet to cite even a single instance of someone who was required to post a surety and thereby lost his right to possess guns *at home*.

10. The Government next cites a litany of late-19th-century laws that imposed restrictions on transferring weapons to, or public carry by, other disfavored groups: minors, people of "unsound mind," and "tramps." U.S. Br. 23–26. But these groups also fell outside "the people." *See* Thomas M. Cooley, *Treatise on Constitutional Limitations* *28–29 (2d ed. 1871) ("The People" means "those persons who are permitted by the constitution of the State to exercise the elective franchise," which have historically excluded certain categories such as "the infant," "the lunatic, and the felon.").

These late-19th-century laws fail as analogues "for the independent reason that this evidence is simply too late (in addition to too little)." *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring). Most of the laws aimed at minors criminalized transfer, not possession. *See* 1875 Ind. Laws ch. 40, p. 59. Other age-restriction laws (and all the laws targeting "tramps") were actually prohibitions on carrying weapons. 1883 Wis. Sess. Laws, vol. I, ch. 329, p. 290. Still others addressed all concealable weapons, not just firearms. 1885 Nev. Stat. ch. 51. None of the laws after

ratification but before the 20th century were *federal* or *nationwide* laws. They do not carry the Government's burden.

What is most "striking" about the Government's research is "the paucity of precedent sustaining"—or commentary praising—"bans comparable to those at issue here and in *Heller*." *McDonald*, 561 U.S. at 786 (plurality opinion). People *outside* the political community were sometimes treated as though they had no rights, including the right to possess firearms. No member of the body politic was punished for keeping arms.

III. The Government's efforts to defend § 922(g)(8) outside *Bruen*'s framework are incompatible with the Second Amendment and the Constitution as a whole.

The people of the founding generation understood that the Second Amendment guaranteed the right to keep firearms at home without risking the ire of the national government. According to the Government, this constitutional assurance was subject to an unwritten caveat: Congress *can* severely punish possession of firearms, even in an American's own bedroom, because Congress gets to decide "who may possess weapons in the first place." U.S. Br. 11. According to the Government, this unenumerated, arrogated power allows it to "remove 'unordinary' or 'irresponsible' or 'non-law-abiding' people—however expediently defined—from the scope of the Second Amendment." Pet. App. 11a. So too may it punish firearm possession by "criminals," the "disaffected," those who are not "peaceable," not "quiet," not "well-disposed," not "honest and lawful," anyone "whose possession of a firearm would pose a danger of harm

to himself or others," and anyone else who falls into any other "categories of individuals legislatures 'considered to be dangerous.'" U.S. Br. 14, 16–21, 26, 27.

The Government and its *amici* cannot justify this power using the tools approved by *Bruen*—constitutional text and historical regulations—so they focus on *dictum*, abstract assertions, drafting history, congressional debates, and implicit (by the Government) or explicit (by "171 members of Congress") requests to return to the halcyon days when federal courts gave Congress "considerable deference" to pass whatever firearm laws "it sees fit." Blumenthal Br. 2; cf. U.S. Br. 39 (suggesting that Congress passed no law like § 922(g)(8) in the first 238 years because it was "unnecessary, impractical, or politically inexpedient").

But the Constitution's "enshrinement" of the right to keep arms "necessarily takes certain policy choices off the table," including "the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636. *McDonald* restored that right to its proper place among the other fundamental individual rights of citizenship. And *Bruen* demanded that courts enforce that right by adhering to the plain text of the Amendment as historically understood.

A. Precedent does not support § 922(g)(8).

1. The Government cannot meet its burden by pointing to *Heller*'s "felon" *dictum* or to other bans that first appeared in the 20th century. U.S. Br. 11–13, 26–27. *Bruen* didn't even discuss New York's "20th-century historical evidence" in its analysis because those laws came too late to "provide insight into the

meaning of the Second Amendment" and they "contradict[ed] earlier evidence." 142 S. Ct. at 2154 n.28.

Heller tentatively described a few categories of firearm laws, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill" as "presumptively lawful." 554 U.S. at 626 & n.26. Other tentative exceptions included laws banning concealed carry and sensitive-place restrictions. *Id.* at 625–26.

Before *Bruen*, the "scope" of the four carve-outs was "unclear." *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). Some courts took *Heller*'s tentative exception for "felons" as a given and compared other bans to § 922(g)(1). *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (assuming that categorical possession bans "are proper" and "part of the original meaning" of the Second Amendment); *but see id.* at 648 (Sykes, J., dissenting) ("There are several problems with this analysis.").

Bruen put a stop to this. The original meaning of the Second Amendment must be determined exclusively using the text and the historical tradition of firearm regulations adopted near the time of ratification—not with assumptions or *dicta*. Said another way, *Heller*'s tentative "presumptively lawful" categories are not valid bases for constitutional comparison. *Bruen* rejected New York's attempt to compare its proper-cause concealed-carry restriction with *Heller*'s exception for "sensitive-place" laws. 142 S. Ct. at 2118. *Bruen* then took a detailed look at historical laws proffered by New York, ignoring those laws enacted too late "to provide insight into the

meaning" of the Amendment when ratified. 142 S. Ct. at 2137 (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting)).

If the tentative exceptions were valid bases for analogy, New York would have prevailed in *Bruen*. Long before *Heller*, this Court described laws against concealed carry as lawful under the Second Amendment. *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897). *Heller* reiterated that view. 554 U.S. at 626. New York's law *allowed* concealed carry for those who showed a heightened need for self-defense and banned concealed carry for everyone else. *Bruen*, 142 S. Ct. at 2156. This Court nonetheless overturned the New York law, confirming that the tentative exceptions are not "precedent." *Contra* U.S. Br. 11.

Even if the "felon" and "mentally ill" exceptions *were* precedent, *Heller* suggested that these were the *only* categories of people "disqualified" from keeping guns at home: D.C. officials said Dick Heller could "obtain a license" absent the ban, "assuming he is not otherwise disqualified"—which this Court took to mean "if he is not a felon and is not insane." 554 U.S. at 631. Mr. Rahimi was not a felon in January 2021, and the Government does not argue that he was insane.

2. The Government also attempts to constitutionalize this Court's references to "ordinary," "law-abiding," and "responsible" citizens when describing various aspects of the Second Amendment right. U.S. Br. 11. Those terms denote important limitations on both the *actions* protected (*i.e.*, no menacing or unlawful violence) and on the *type* of weapons protected (*i.e.*, no bombs, bazookas, or short-

barrel shotguns). The Fifth Circuit believed the terms might also serve as shorthand for "non-felon, non-mentally-ill." Pet. App. 9a. The decision below is fully consistent with these principles.

The Government wants more. Because the Court described the right as belonging to "law-abiding, responsible citizens," the Government infers that "legislatures may adopt categorical prohibitions on the possession of arms by those who are not law-abiding and responsible." U.S. Br. 11. As the Fifth Circuit observed, this argument "admits to no true limiting principle" and "risks swallowing the text of the amendment." Pet. App. 11a; accord, *Kanter*, 919 F.3d at 465 (Barrett, J., dissenting) ("The government could quickly swallow the right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun."). Anyone's possession of a firearm "pose[s]" at least some "danger of harm to himself or others," U.S. Br. 27, especially under the Government's (and many of its *amici*'s) view that the "guns" themselves cause violence to "escalate to homicide." U.S. Br. 7. If the Second Amendment allows the Government to disarm anyone who might misuse firearms, the Amendment would not prevent what "George III had tried to do to the colonists." *Heller*, 554 U.S. at 594. After all, from the perspective of the English government, the patriot militias and their sympathizers "could not be trusted to use arms lawfully and responsibly." U.S. Br. 16.

B. Rejected constitutional proposals from Pennsylvania and Massachusetts do not inform the interpretation of the Second Amendment or support § 922(g)(8).

Heller cautioned that it would be "dubious" to read too much into "the various proposals in the state conventions and debates in Congress" that preceded the Second Amendment. 554 U.S. at 603. Undeterred, the Government magnifies (and misinterprets) limiting language from two unsuccessful proposals, while ignoring all the others. U.S. Br. 17–18.

Eight proposals for an amendment safeguarding the right to keep arms emerged from the state ratifying conventions. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 275–76 (Neil H. Cogan, ed. 2015) (quoting Maryland Minority, Massachusetts Minority, New Hampshire, New York, North Carolina, Pennsylvania Minority, Rhode Island, & Virginia). Only three—offered in New Hampshire, Pennsylvania, and Massachusetts—would have allowed categorical limitations on who could keep arms. *Kanter*, 919 F.3d at 454–48 (Barrett, J., dissenting). "[N]one of the relevant limiting language made its way into the Second Amendment," and "only New Hampshire's proposal—the least restrictive of the three" (and the one the Government ignores here)—"even carried a majority of its convention." *Id.* at 455.

New Hampshire's convention voted in favor of a guarantee that would only exclude citizens who "are or have been in actual rebellion." *Complete Bill of Rights*, *supra*, 275. Because that limitation would not help the Government, it ignores the New Hampshire amendment.

The Government instead relies on a dissent from Pennsylvania Antifederalists: "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*." U.S. Br. 17. In Foreign Spectator's Essay 11—a contemporaneous source relied on by the Government, *ibid.*—the "danger" these Pennsylvanians had in mind was "rebellion or invasion." *Three Neglected Pieces of the Documentary History of the Constitution and Bill of Rights* 40 (Stanton D. Krauss ed., 2019) (quoting U.S. Const. art. I, § 9).

In Massachusetts, Samuel Adams submitted, then withdrew, and ultimately voted against, an amendment that would have protected the right of "peaceable citizens" to keep arms. U.S. Br. 17–18. Citing a Jeremy Belknap letter, the Government claims the convention only rejected the proposal because it was tardy. U.S. Br. 18. But Belknap's letter contradicts this view. In fact, according to Belknap, Adams withdrew the proposal amid fears that it would confirm a broad view of congressional power. 7 *Documentary History of the Ratification of the Constitution* 1583–84 (John P. Kaminski & Gaspare J. Saladino eds., 2001).

When analyzing the Founders' conception of the right to keep arms, *Heller* also considered "state constitutional provisions written in the 18th century or the first two decades of the 19th." 554 U.S. at 584. Of those, seven states used "the people,"[12] seven used

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[12] Pa. Const. of 1776, Declaration of Rights art. XIII; Vt. Const. of 1777, Declaration of Rights art. XV; Vt. Const. of 1786,

"citizens"[13] or "every citizen,"[14] one used "freemen,"[15] and one used "free white men."[16] None of those states limited the scope of the right to "peaceable," "law-abiding," or any-other-adjective citizens. Congress ultimately adopted, and the people ratified, an unqualified right that included all "the people."

C. Cherry-picked rhetorical fragments spanning centuries cannot alter the original meaning.

The Government looks for support among a wide variety of post-ratification comments and debates. U.S. Br. 15–22. Post-ratification commentary is only relevant within limits—"to the extent later history contradicts what the text says, the text controls." *Bruen*, 142 S. Ct. at 2136–37.

After analyzing the plain meaning of the Second Amendment's operative clause, *Heller* examined the views of prominent constitutional expositors, including St. George Tucker, William Rawle, Joseph Story, and James Wilson, to confirm the original public meaning. *See Heller*, 554 U.S. at 583, 585, 593,

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ch. 1, art. XVIII; Vt. Const. of 1793, ch. 1, art. XVI; Ohio Const. of 1802, art. VIII, § 20; Ind. Const. of 1816, art. I, § 20; Mo. Const. of 1820, art. XIII, § 3; N.C. Const. of 1776, Declaration of Rights art. XVII; Mass. Const. of 1780, pt. I, art. 17.

[13] Pa. Const. of 1790, art. IX, § 21; Ky. Const. of 1792, art. XII, § 23; Ky. Const. of 1799, art. X, § 23.

[14] Miss. Const. of 1817, art. I, § 23; Conn. Const. of 1818, art. I, § 17; Ala. Const. of 1819, art. I, § 2; Me. Const. of 1819, art. I, § 16.

[15] Tenn. Const. of 1796, art. XI, § 26.

[16] La. Const. of 1812, art. III, § 22.

597, 605–09, 627, and *McDonald*, 561 U.S. at 769–70, 819, 842–43. Here, the Government cites more than 68 "miscellaneous" authorities in its brief, but these four core expositors are missing. In their place: torn-from-context quotations from, *e.g.*, one side of a debate in the English House of Lords in 1780; the explanation for a *suggested* amendment to the Massachusetts state constitution submitted by the sixty-five voters at a single "Town Meeting" in 1780;[17] a sour-grapes screed from a "convention" of failed insurrectionists in Rhode Island, 1842; a self-aggrandizing secondhand story of a Unionist in Civil War Mississippi;[18] and an editorial written by a "political controversialist" complaining about "extravagant notions of personal rights and personal independence," "the laxity of parental discipline," "rabble youth," and Americans' public carry of firearms for self-defense.[19] U.S. Br. 19–20.

The Government cannot claim that its curated collection of stray comments illuminates the original public meaning of the Second Amendment. Some of the "debates" concerned disarmament of armed rebels or insurrectionists. U.S. Br. 18–21; *see*, *e.g.*, *Luther v. Borden*, 48 U.S. 1, 8–11 (1849) (describing suffragists' armed rebellion against the charter government); R.W. Surby, *Grierson Raids* 251–53 (1865) (describing Union loyalists in Mississippi who refused to surrender their weapons to confederates). The very fact that these proposals triggered *debate* shows that the meaning of the Second Amendment never fixed in

[17] *Popular Sources of Political Authority* 624 (Oscar & Mary Handlin, eds. 1966)

[18] R.W. Surby, *Grierson Raids* 251–53 (1865).

[19] O.H. Smith, *Early Indiana Trials* 464–66 (1858).

the way the Government claims—*i.e.*, disarming "dangerous" people was never "open, widespread, and unchallenged." *Bruen*, 142 S. Ct. at 2137. Congress also debated disarming abusive southern militias but ultimately "balked" because that "would violate the members' right to bear arms." *McDonald*, 561 U.S. at 780. When combined with Massachusetts's law requiring officials to *return* the arms of Shays's rebels, the "liquidation" evidence of debates, discussions, and practices reinforces the conclusion that America *rejected* a broad disarmament power for legislatures.

D. The Founders never intended to grant Congress the power to say who could keep arms.

The Founders' purpose in codifying the Second Amendment was to prevent "elimination of the militia." *Heller*, 554 U.S. at 599. Federalists believed that the Amendment was unnecessary because the new Government would have only limited powers. *Ibid.* Antifederalists worried that those limits might not hold, and the Government would later disarm citizens in favor of a standing army or organized militia. The Second Amendment was designed to allay those fears. *Id.* at 598–600. After the Bill of Rights, Americans understood that their right to keep arms had twofold protection: "No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. … But if in any blind pursuit of inordinate power," Congress *did* attempt it, "this amendment may be appealed to as a restraint." Rawle, *supra*, 125–26.

Section 922(g)(8) violates the Second Amendment, and that is all the Court needs to decide. But if that were not the case, Mr. Rahimi would ask the Court to

affirm for the alternative reason that Congress has no affirmative power to enact § 922(g)(8). Mr. Rahimi "did not make" a Commerce Clause challenge below, but it was "set forth in [his] response to the petition for certiorari. *Dahda v. United States*, 138 S. Ct. 1491, 1498 (2018). He may defend the judgment below on any ground supported by the law and the record. *Ibid.*; *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

Under the statutory reasoning of *Scarborough v. United States*, 431 U.S. 563 (1977), Mr. Rahimi's possession of the two guns in his bedroom affected commerce because they "were not manufactured in Texas," J.A. 18, and therefore moved in commerce at some unknown point in the past. *United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from denial of reh'g). But Congress's power to regulate "Commerce with foreign Nations, and among the several States," U.S. Const. art. I, § 8, does not include regulation of a purely local, non-economic activity like firearm possession, even in a sensitive place like a school. *United States v. Lopez*, 514 U.S. 549, 560 (1995). The movement of a durable item like a firearm from one state to another may be "commerce," but the item does not remain "in commerce" forever. There is "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." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

E. The Government's approach would not work for any other constitutional right.

The protections of the Second Amendment must be guarded with the same vigor as "other constitutional rights." *Bruen*, 142 S. Ct. at 2130. The right to keep arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). Yet that is exactly what the Government advocates in this case.

The Second Amendment does not protect possession of dangerous and unusual weapons, and the Court has tentatively approved laws banning carriage of firearms in sensitive places. *Heller*, 554 U.S. at 626–27. Taking those as affirmative grants of power (rather than absence of prohibition), the Government infers that it must also have authority to "regulate who may possess weapons in the first place." U.S. Br. 11. In other words, the Government views the existence of historically unprotected *conduct* to imply a legislative power to unprotect *persons*.

That logic doesn't work for other constitutional rights: the power to ban obscenity and libel does not imply a power to decide who may speak in the first place; the power to ban riot and unlawful assembly does not imply a power over who may assemble in the first place. Although some individual rights are curtailed after a criminal conviction, that does not mean Congress may *eliminate* or *punish* the exercise of that right by others. *See Samson v. California*, 547 U.S. 843, 857 (2006); *United States v. Knights*, 534 U.S. 112, 122 (2001).

The Government also relies on practices and laws that are plainly unconstitutional to illuminate the meaning of the Constitution. *Bruen* explained that the "historical tradition" of firearm regulation "delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. at 2127. That does not mean that anything goes. Any diligent student of American history can find examples of morally degraded laws punishing people for protected conduct. This is especially true when the oppressor denied the victim's status as a rights-holder. No one would think that colonial Virginia's prohibition on Catholic worship delimits the outer boundaries of the Free Exercise Clause. No one would think Kentucky's ban on free blacks meeting in groups of five or more in 1798 delimits the boundaries of the Assembly Clause. No one would think the vaguely defined and arbitrarily enforced state criminal laws against "vagrants" in the late 19th century delimit the boundaries of the right to travel[20] or the Due Process Clause.[21] And no one would think that the Pennsylvania Committee on Safety's show trials and prison sentences, sometimes without "pen, ink, or paper," for (*e.g.*) criticizing Benjamin Franklin or singing "God Save the King," would delimit the boundaries of the First, Fifth, Sixth, or Eighth Amendments. Carlton F.W. Larson, *The Trial of Allegiance: Treason, Juries, and the American Revolution* 46–47 (2019) (cleaned up). Yet that is exactly what the Government advocates here for the

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[20] *Edwards v. California*; 314 U.S. 160, 176–77 (1941); *Shapiro v. Thompson*, 394 U.S. 618, 629–30 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

[21] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972).

Second Amendment—treating it as a second-class right.

Under this Court's precedents, the right to keep arms stands on the same footing as other cherished, fundamental, enumerated individual rights. Congress cannot completely ban protective-order respondents from speaking, assembling, petitioning, going to church, traveling to other states, voting, holding public office, filing a lawsuit, giving testimony, or voting. That means Congress cannot completely ban them from keeping weapons either.

IV. Section 922(g)(8) violates the Second Amendment on its face.

Section 922(g)(8) prohibits and severely punishes conduct protected by the Second Amendment (and held sacred by the founding generation): the possession of weapons in the home to use in defense of self or others. The words of the statute cannot "bear a construction rendering it free from constitutional defects." *Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964). The elements are the only facts the Government needed to prove to imprison Mr. Rahimi and the only facts he could have contested in front of a jury. *Descamps*, 570 U.S. at 270.

The Government argues that the elements comply with the Second Amendment because: (1) § 922(g)(8) reaches only "the most dangerous domestic abusers"; (2) a decision against § 922(g)(8) would cast many state laws into doubt; and (3) armed domestic violence is a serious problem. U.S. Br. 29–36, 44–45. These interest-balancing arguments are unrelated to text or history and irrelevant under *Bruen*.

A. Section 922(g)(8) is a blunt instrument entitled to no deference.

In the 20th century, courts effectively gave Congress a "regulatory blank check" for firearm laws. *Bruen*, 142 S. Ct. at 2133. After *McDonald*, federal courts continued to "defer to the determinations of legislatures," even where the law banned conduct protected by the Amendment's plain text. *Id.* at 2131. One hundred seventy-one members of Congress urge the Court to return to this pre-*Bruen* system of "deference" for gun laws aimed at reducing violence. Blumenthal Br. 2–7. "[I]t is not deference that the Constitution demands here." *Bruen*, 142 S. Ct. at 2131. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

The Government claims that § 922(g)(8) imposes "stringent requirements" that reach only "the most dangerous domestic abusers and guard against the risk of inadvertently disarming law-abiding, responsible citizens." U.S. Br. 32. This is wrong and irrelevant. *Bruen*, *Heller*, and *McDonald* all "expressly rejected … any 'judge-empowering interest-balancing inquiry'" *Bruen*, 142 S. Ct. at 2129; *Heller*, 554 U.S. at 634; *McDonald*, 561 U.S. at 785 (plurality opinion); Pet. App. 27a–28a.

Aside from that, the Government's narrow-tailoring argument is wrong. Section 922(g)(8) will never reach most domestic abusers, but not because it is narrow. Most abusers are never subjected to a CPO. On the other hand, § 922(g)(8) covers many people who don't fit the stereotype of a domestic abuser. The ban

applies to *any* order prohibiting abuse, so long as the movant and respondent are, or were, "intimate partners," and the respondent had at least an opportunity for a hearing. § 922(g)(8)(A), (C)(ii). Thus, it reaches orders with *no* finding of threat or violence, including orders where the movant admitted the respondent had never been violent. *See United States v. Boyd*, 999 F.3d 171, 176–77 (3d Cir. 2021) ("We know by Jennifer's admission that Boyd had never physically injured her, nor could she recall his ever threatening her with physical injury."), *cert. denied*, 142 S. Ct. 511 (2021).

The risk of error is high. Pet. App. 36a–38a (Ho, J., concurring). Because the primary relief requested (an order forbidding abuse) does not implicate any constitutionally protected interests, there are few safeguards against erroneous findings. Acquittal of the allegations underlying a CPO is no defense to a subsequent prosecution under § 922(g)(8). *United States v. Arledge*, 220 F. App'x 864, 867 (10th Cir. 2007).

In many states, including Texas, simply filing an application almost inevitably results in an *ex parte* or temporary order that either forbids firearm possession or triggers a state-law ban.[22] As the Government notes, § 922(g)(8)(A) excludes those temporary orders because they do not follow "notice" and a "hearing." But the "notice," "hearing," and "opportunity" element are broadly construed. If the respondent had *an*

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[22] *See* Order Approving Revised Protective Order Forms, Misc. Docket No.12-9078 (Tex. May 8, 2012) (automatically requesting an *ex parte* order and pre-selecting the no-firearm condition on both the temporary and final orders).

opportunity to ask the court not to issue a CPO, § 922(g)(8) deems that a "hearing." *See Banks*, 339 F.3d at 270 (agreed order). In *United States v. Calor*, 340 F.3d 428 (6th Cir. 2003), deputies served an *ex parte* order and notice of a Monday-morning hearing on Friday evening. *Id.* at 429. Calor asked for and received a continuance until February 21. *Id.* The Government convicted Calor for possessing a firearm on February 14, because he *could have* had a hearing February 12. *Id.* at 430–31.

"Opportunity to be heard" does not mean resolution of disputed facts or dangerousness. *See United States v. Lippman*, 369 F.3d 1039, 1041–42 (8th Cir. 2004) (Respondent disputed facts but did not object to protection.); *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir. 1998) ("Hearing" consisted of a judge asking an unrepresented respondent, in chambers, whether "he could live by those terms.").

As this case demonstrates, the movant and respondent need not live in the same house or even the same city. *See also United States v. Miles*, 238 F. Supp. 2d 297, 298–99 (D. Me. 2002) (Defendant in Lewiston, Maine, was served with notice of a March 19 hearing in Texas on March 16); *Wilkey*, 2020 WL 4464668, at *1, *3 (Defendant did not contest permanent protection order in Florida because he was moving to Montana). In fact, § 922(g)(8)(C)(ii) is broad enough to reach preliminary orders that "in uncontested boilerplate" forbid the parties from abusing each other during run-of-the-mill divorce proceedings. *United States v. Emerson*, 270 F.3d 203, 215 (5th Cir. 2001). The same terms that gave rise to § 922(g)(8) in *Emerson* were imposed on *every party* to a divorce proceeding in Tarrant County in May 2020. Temp.

Emergency Standing Order ¶¶ 3.2, 3.4, 3.5 (Tarrant Cty., Tex., Family Dist. Ct. May 30, 2020), https://perma.cc/3U2S-JT76.

Section 922(g)(8) burdens the right to possess firearms in the home, for self-defense, without adequate safeguards to reliably show the defendant's dangerousness. The text of the statute provides no way to distinguish between orders motivated by true fear, mutual combat, misunderstanding, or tactical advantage. Pet. App. 36a–37a (Ho, J., concurring).

B. This Court can hold § 922(g)(8) facially unconstitutional without opining on the diverse approaches taken in the states.

The Government and its *amici* worry about the decision's effect on various state laws. U.S. Br. 34–35. But the Fifth Circuit recognized that the federal ban violates the Second Amendment without opining on a CPO court's authority to limit or even forbid firearm possession in any particular case. *See* Pet. App. 3a n.2.

Before 1994, only a few states allowed CPO judges to impose weapon-related conditions, and none required them.[23] After Congress enacted the automatic ban in § 922(g)(8), states responded by adopting various criminal and civil laws connecting firearm restrictions to CPOs. Most state laws were enacted before *Heller*, *McDonald*, and *Bruen*. No single regime has achieved "ubiquity." U.S. Br. 35. Some laws are

[23] Del. Code Ann. tit. 10, § 949(a)(8) (1993 Interim Supp.); N.H. Rev. Stat. Ann. § 173-B:6 (Michie 1990); N.J. Stat. Ann. § 2C:25-29(b)(16) (West eff. 1991); Pa. Cons. Stat. § 6108(a)(7) (1991); S.D. Codified Laws § 25-10-24 (eff. 1989).

more expansive than § 922(g)(8); many are narrower. Many states authorize (but do not require) a CPO judge to restrict firearm possession.[24] Some of those same states have a criminal ban like § 922(g)(8).[25] Some allow firearm restrictions if the court specifically finds a danger that the respondent will misuse firearms.[26] Georgia, Mississippi, Missouri, Oklahoma,[27] Oregon, South Carolina, and Wyoming do not criminalize (or authorize prohibition of) weapon possession based on a CPO, but may allow for narrow restrictions, *e.g.*, when "exchanging the children." *Moore v. Moore-McKinney*, 678 S.E.2d 152, 160 (Ga. App. 2009).

This case focuses solely on the text of § 922(g)(8). That statute imposes a total nationwide ban on a citizen's possession of firearms, even at home, based on the terms of a CPO that might not even address firearms. The elements of § 922(g)(8) are what matter, because those are the only facts the Government needed to prove to imprison Mr. Rahimi, and they are the only facts he would have a right to contest in front of a jury. *Descamps*, 570 U.S. at 270.

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[24] *E.g.* Tex. Fam. Code § 85.022(b)(6); Nev. Rev. Stat § 33.031(1)–(2).

[25] *E.g.* Kan. Stat. Ann. § 21-6301(a)(17); Tex. Pen. Code § 46.04(c).

[26] N.D. Cent. Code Ann. § 14-07.1-02.

[27] Oklahoma bans public carry if the defendant was previously convicted of violating a CPO. Okla. Stat. Ann., tit. 21, § 1272(A), (e).

C. State and federal governments can fight armed domestic violence without § 922(g)(8).

The "enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. The Court held the D.C. ban unconstitutional while fully "aware of the problem of handgun violence in this country." *Ibid.* State legislatures and Congress possess "a variety of tools for combating that problem, including some measures regulating handguns," but § 922(g)(8) isn't one of them. *Ibid.* Chiefly, they may prosecute and jail people who commit violence. Pet. App. 35a–36a (Ho, J., concurring). Texas has charged Mr. Rahimi with multiple offenses.

To the extent that the Government or its *amici* argue that § 922(g)(8) is critical to combatting armed domestic violence, the Government's own prosecutorial habits belie the rhetoric. During fiscal years 2018 through 2022, the Government secured sentences for 167 people under § 922(g)(8)—and 19 of those were also convicted under (g)(1). U.S. Sentencing Commission, *Individual Offender Datafiles*, FY2018-2022, https://perma.cc/2VR7-AE3Z. And as the examples above show, many of those people fall outside the stereotype of a domestic abuser.

Congress *recognizes* that there are people subject to § 922(g)(8) who can be trusted to possess firearms without misusing them: unlike a domestic violence *conviction* under § 922(g)(9), a CPO does not stop the respondent from carrying a firearm on duty as a police officer. 18 U.S.C. § 925(a)(1). The statutory scheme provides more protection for a government job than a citizen's fundamental right to defend self and family.

After *Heller*, *McDonald*, and *Bruen*, any lawful deprivation regime must begin with the assumption that all Americans have a fundamental right to keep arms in their homes for purposes of self-defense. Any law diminishing that right must adhere to the nation's historical tradition of firearm regulation. Section 922(g)(8)'s automatic and categorical ban criminalizes and severely punishes constitutionally protected conduct. It is a historical outlier.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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