No. 22-915

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ZACKEY RAHIMI

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

REPLY BRIEF FOR THE UNITED STATES

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In 18 U.S.C. 922(g)(8), Congress determined that a person subject to a protective order based on a judicial finding that he poses a credible threat of domestic violence should be temporarily prohibited from possessing firearms. The overwhelming majority of States have similar laws. Rahimi asserts that the Second Amendment bars that widespread, sensible response to the deadly toll of domestic violence, but he offers no historical evidence to support his position, which contradicts this Court's precedent, the Second Amendment's original meaning, and our Nation's tradition of firearms regulation. And Rahimi's insistence (Br. 1) that *NYSRPA* v. *Bruen*, 142 S. Ct. 2111 (2022), "makes this an easy case" for facially invalidating Section 922(g)(8) only confirms the dangerous and destabilizing implications of the Fifth Circuit's misreading of *Bruen*. This Court should correct that misreading and reverse.

A. Rahimi Misconstrues *Bruen*'s Analytical Framework

Rahimi asserts (Br. 31) that, by invoking the principle that Congress may disarm persons who are not law-abiding, responsible citizens, the government proceeds "outside *Bruen*'s analytical framework." In his view (Br. 17, 33), *Bruen* allows "only one way" to defend modern firearms laws: by identifying "firearm regulations adopted near the time of ratification" that mirror the challenged laws. And he infers (Br. 12) that, because the Founders did not address domestic violence by "banning possession of weapons," *Bruen* bars Congress from disarming domestic abusers today. Those arguments profoundly distort *Bruen*.

Bruen used the term "law-abiding, responsible citizen" and its variants more than a dozen times. Gov't Br. 12 n.1. In the opinion's first two sentences, the Court reiterated its holding in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), and *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), that the Second Amendment protects "the right of an ordinary, law-abiding citizen to possess a handgun in the home" and recognized that "ordinary, law-abiding citizens have a similar right to carry handguns publicly" for self-defense. *Bruen*, 142 S. Ct. at 2122. The Court also approved background checks on the ground that they ensure "that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* at 2138 n.9 (citation omitted). And it incorporated the "law-abiding, responsible citizen" principle into its analytical framework, explaining that courts must judge modern regulations' consistency with historical precursors by asking "how and why the regulations burden *a law-abiding citizen's* right to armed self-defense." *Id.* at 2133 (emphasis added). It

is thus Rahimi, not the government, who proceeds outside *Bruen*'s framework.

More fundamentally, *Bruen* does not reduce the interpretation of the Second Amendment to a rote archival search for Founding-era laws that match the challenged statute. Rather, consistent with this Court's usual methods of constitutional interpretation, it directs courts to use text, history, and tradition to discern the "constitutional *principles*" that delimit Congress's power to regulate firearms. *Bruen*, 142 S. Ct. at 2134 (emphasis added; citation omitted). Put another way, courts must ask whether the challenged statute fits within a "historic and traditional *category*" of firearms regulation. *Id.* at 2130 (emphasis added; brackets and citation omitted). The Court has recognized, for example, that Congress may prohibit "dangerous and unusual weapons," *Heller*, 554 U.S. at 627, and may exclude weapons from "sensitive places," *Bruen*, 142 S. Ct. at 2133. This case involves another constitutional principle that is likewise grounded in the Court's decisions and the Second Amendment's history: Congress may disarm persons who are not "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635.

Nor does *Bruen* require courts to discern applicable Second Amendment principles "*exclusively* using * * * firearm regulations." Resp. Br. 33 (emphasis added). Traditional firearms regulations are an important form of historical evidence, but they are not the only form. As in interpreting other constitutional provisions, this Court has consulted "a variety of legal and other sources" in assessing the Second Amendment's original meaning, *Heller*, 554 U.S. at 605, including English history, *id.* at 598-600; analogous provisions in state constitutions, *id.* at 600-603; Second Amendment precur-

sors, *id.* at 604-605; commentary, *id.* at 605-610, 616-619; case law, *id.* at 610-614; and legislative debates, *id.* at 614-616. Rahimi gives no reason to ignore those historical sources here, and such an artificial limit would make the Second Amendment a constitutional outlier.

Bruen also does not limit courts to historical evidence from "near the time of ratification." Resp. Br. 33. The Second Amendment codified a "venerable, widely understood" right that was "'inherited from our English ancestors.'" *Heller*, 554 U.S. at 599, 605 (citation omitted). And the Court has consulted post-ratification evidence—extending "through the end of the 19th century"—"to determine *the public understanding* of" the Amendment. *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 605). Evidence from before and after the Founding can thus illuminate the Amendment's original and enduring meaning.

Rahimi's approach would effectively limit modern legislatures to the specific types of firearms regulations that existed at the Founding. But *Bruen* made clear that modern firearms laws can comply with the Second Amendment even if they lack "historical twin[s]." 142 S. Ct. at 2133 (emphasis omitted). And in no other context has the Court suggested that a modern law's constitutionality depends on whether a similar law happened to exist at the time of ratification. "[T]o hold that such a characteristic is essential * * * would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." *Hurtado* v. *California*, 110 U.S. 516, 529 (1884).

Some district courts have adopted Rahimi's misreading of *Bruen*, and their decisions show the alarming consequences of that approach. One court held that Congress may not disarm an armed career criminal with

four convictions for trafficking heroin and cocaine, *United States* v. *Quailes*, No. 21-CR-176, 2023 WL 5401733, at *1-*2 (M.D. Pa. Aug. 22, 2023), or an armed career criminal with "thirteen prior felony and eight misdemeanor convictions," including for "armed robberies and drug trafficking," *United States* v. *Harper*, No. 21-CR-236, 2023 WL 5672311, at *1 (M.D. Pa. Sept. 1, 2023). Another court held that Congress may not disarm a felon with convictions for manslaughter, aggravated assault, fleeing law enforcement, and attempted aggravated assault of a law-enforcement officer. See *United States* v. *Bullock*, No. 18-CR-165, 2023 WL 4232309, at *2 & n.2 (S.D. Miss. June 28, 2023). A third court held that Congress may not disarm drug addicts who abuse crack cocaine and mushrooms. See *United States* v. *Connelly*, No. 22-CR-229, 2023 WL 2806324, at *1, 14-*15 (W.D. Tex. Apr. 6, 2023). Like Rahimi, all of those decisions relied on the absence of precise historical matches for the challenged restrictions—and they show that Rahimi's understanding of *Bruen* would create the very sort of "regulatory straitjacket" that this Court rejected. 142 S. Ct. at 2133.

Bruen's discussion of the types of weapons protected by the Second Amendment illustrates the appropriate analytical approach. Examining history and tradition, this Court discerned the principle that legislatures may prohibit "dangerous and unusual weapons." *Bruen*, 142 S. Ct. at 2128 (citation omitted). But in applying that principle, the Court focused on whether particular weapons are dangerous and unusual today, not on whether they were lawful at the Founding. See *id.* at 2143 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-

defense today.") (citation omitted). So too, history and tradition show that legislatures may disarm persons who are not law-abiding, responsible citizens. That principle allows legislatures to disarm categories of persons who pose a danger of misusing firearms *today*, regardless of whether laws disarming those particular categories happened to exist at the Founding.

B. Congress May Disarm Individuals Who Are Not Law-Abiding, Responsible Citizens

Precedent, history, and tradition support the constitutional principle on which the government relies here: Congress may disarm persons who are not law-abiding, responsible citizens. See Gov't Br. 10-27. Rahimi's contrary reading of this Court's cases and the historical record is wrong.

1. Rahimi acknowledges that this Court has often described the right to keep and bear arms as a right of "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, but he dismisses (Br. 8, 33) those descriptions as "*dicta*," "assumptions," and "offhand and tentative statements." That is incorrect. This Court's Second Amendment decisions have repeatedly invoked the "law-abiding, responsible citizens" principle and incorporated that concept into the analytical framework for evaluating firearms restrictions. See p. 2, *supra*. And Rahimi's suggestion (Br. 34) that the principle applies only to the "*actions*" and "*type* of weapons" that may be restricted ignores *Bruen*'s approval of background-check laws designed to confirm an individual's *status* as a law-abiding, responsible citizen entitled to possess firearms in the first place. 142 S. Ct. at 2138 n.9.

Rahimi also reads the term "law-abiding, responsible citizen" as "shorthand for 'non-felon, non-mentally ill,'" and he insists that "'felons and the mentally ill'" are

"the *only* categories" Congress may disarm. Br. 33-35 (citations omitted). But as this case illustrates, the class of persons who are not law-abiding, responsible citizens extends beyond felons and the mentally ill. And in approving laws disarming such individuals, *Heller* emphasized that its list of "presumptively lawful" regulations "does not purport to be exhaustive." 554 U.S. at 626-627 & n.26.

2. As the government's opening brief shows (at 13-22), historical sources from England, the Founding Era, and the 19th century all reflected the understanding that legislatures could disarm persons who are not law-abiding, responsible citizens. Rahimi does not meaningfully dispute the government's account of English practice, instead dismissing it (Br. 19-21) as irrelevant. But the provision of the English Bill of Rights securing the right to bear arms "has long been understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. English practice thus provides a starting point for analysis of the Second Amendment. See *id.* at 592-595. To be sure, courts should accord little weight to English practices that had become "obsolete" by the Founding and were never "acted upon or accepted in the colonies." *Bruen*, 142 S. Ct. at 2136 (citation omitted). But the tradition of disarming irresponsible persons continued in England through American Independence, see Gov't Br. 13-16, and was adopted in the United States, see *id.* at 16-27.

Rahimi also discounts (Br. 36-38) Second Amendment precursors that reinforce the government's reading on the ground that their text differs from the Amendment's. But the Amendment was "widely understood to codify a pre-existing right, rather than to fashion a new one." *Heller*, 554 U.S. at 603. And this Court

has found it unlikely that "different people of the founding period had vastly different conceptions" of that right. *Ibid.* Second Amendment precursors thus provide insight into the Amendment's meaning despite differences in their texts. See *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1396 (2020) (reading the Sixth Amendment in light of differently worded precursors that explicitly required jury unanimity).

Rahimi's response also fails to account for the details of the precursors cited by the government. One of them, proposed by Williamsburg, Massachusetts, would have provided that "the people have a right to keep and bear Arms for their Own and the Common defence." Gov't Br. 17 (citation omitted). Even though the proposed text lacked express limiting language, the town understood it to extend only to "honest and Lawfull Subjects"—suggesting that such a limitation was recognized to be implicit in the right. *Ibid.* (citation and emphasis omitted). In addition, Pennsylvania Anti-Federalists proposed a provision allowing Congress to disarm persons who had committed "crimes" or posed a "real danger of public injury," and Samuel Adams, a leading Anti-Federalist, proposed a provision recognizing that the right to bear arms belongs only to "peaceable" citizens. *Ibid.* (citations and emphases omitted). The Anti-Federalists vociferously opposed federal power and strongly advocated protections for individual rights. It is implausible that they would have had a *narrower* conception of the right to keep and bear arms than the people in general. Cf. *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 664 (2013) (Thomas, J., concurring) ("Given the Anti-Federalists' vehement opposition" to federal power, their views are "revealing.").

Rahimi observes that a precursor proposed in New Hampshire would have specified that Congress may disarm only citizens who had been in "actual rebellion." Br. 36 (citation omitted). But that example illustrates the importance of examining historical evidence in context. No one could reasonably contend that a legislature may disarm *only* rebels—a rule that would conflict with this Court's cases, English practice, other Founding-era evidence, post-ratification commentary, and the Nation's tradition of firearms regulation. See Gov't Br. 10-27. And a contemporary writer criticized the New Hampshire proposal on the ground that, if it were understood as Rahimi suggests, it would have prevented Congress from disarming a "suspected person" who was likely to "commit many horrid murders," but who had not "been in actual rebellion." Nicholas Collin, *Remarks on the Amendments to the Federal Constitution . . . by a Foreign Spectator*, No. 11 (Nov. 28, 1788), *in Three Neglected Pieces of the Documentary History of the Constitution and Bill of Rights* 40 (Stanton D. Krauss ed., 2019) (*Foreign Spectator*). In contrast, the precursors the government has invoked reflect the same conception of the right to bear arms as surrounding historical sources.

Turning to post-ratification sources, Rahimi objects (Br. 38) that the commentators cited by the government were not "prominent constitutional expositors." But the Constitution "was written to be understood by the voters." *Heller*, 554 U.S. at 576 (citation omitted). It is thus entirely appropriate to consider how the Second Amendment has been understood by "ordinary citizens" and in public discourse, not just by the legal elite. *Id.* at 577. This Court has relied on many of the same sources. Compare Gov't Br. 15 (1780 House of Lords

debate), with *Heller*, 554 U.S. at 591-592 (same); compare Gov't Br. 17-18 (proposals by Pennsylvania Anti-Federalists and Samuel Adams), with *Heller*, 554 U.S. at 604 (same); compare Gov't Br. 19-20 (congressional debates over the Bleeding Kansas conflict), with *Heller*, 554 U.S. at 609 (same); compare Gov't Br. 20 (Senator Henry Wilson's remarks during 1866 congressional debate), with *McDonald*, 561 U.S. at 772 (same); compare Gov't Br. 21 (Freedmen's Bureau circulars), with *Bruen*, 142 S. Ct. at 2152 (same).

3. Although the government has cited (Br. 22-27) a host of historical status-based limits on the right to keep and bear arms, Rahimi argues (Br. 12) that none can justify Section 922(g)(8). He emphasizes (Br. 12, 19) that Section 922(g)(8) restricts the possession of firearms, while many laws cited by the government restricted the carrying or sale of firearms. But a historical law supports a modern law if both impose "a *comparable* burden on the right of armed self-defense." *Bruen*, 142 S. Ct. at 2133 (emphasis added). The burdens imposed by bans on keeping, bearing, and obtaining arms are all comparable; thus, in *Heller*, this Court determined that "the historical tradition of prohibiting the *carrying* of 'dangerous and unusual weapons'" supports modern bans on *possessing* machineguns. 554 U.S. at 627 (emphasis added). And it is hardly surprising that a law that seeks to prevent armed *domestic* violence would restrict firearm possession in the home.

Rahimi also argues that legislatures have traditionally restricted the possession of arms only by persons who were "excluded from the political community—*i.e.*, written out of 'the people' altogether." Br. 22 (citation omitted). That is incorrect. Our Nation has a long tradition of imposing firearms restrictions even upon per-

sons who are among "the people"—including loyalists, see Gov't Br. 22; individuals who have misused firearms, see *id.* at 23 & nn.13-15; individuals whose conduct gave reasonable cause to fear a breach of the peace, see *id.* at 24; vagrants, see *id.* at 25 & n.18; and intoxicated persons, see *id.* at 25-26 & n.19. And state courts have long recognized that legislatures may disarm "vicious persons," *State* v. *Hogan*, 58 N.E. 572, 575 (Ohio 1900), or persons who are apt to cause "mischief" by "going abroad with fire-arms," *State* v. *Shelby*, 2 S.W. 468, 469 (Mo. 1886).

Rahimi next objects (Br. 29-30) to the government's reliance on 19th-century surety statutes, under which potentially irresponsible persons could be required to post bond in order to carry firearms. But those laws illustrate the principle that legislatures may keep firearms away from those who are apt to misuse them. Representative Benjamin Howard—who would later serve as a reporter of decisions for this Court—remarked in a congressional debate that a "citizen had a right to bear arms, but if from his conduct there was a manifest danger of a violation of the peace, they might be taken away from him, until he should enter into a recognizance to preserve it." *House of Representatives*, New-York American (Feb. 21, 1838).

Finally, Rahimi discusses (Br. 21-23) historical laws, cited in some of the amicus briefs, disarming individuals based on race, religion, or condition of servitude. The government has not relied on those laws here because they illustrate legislatures' authority to disarm persons who were not considered part of "the people" rather than their authority to disarm persons based on danger. Those laws are therefore not as directly relevant to the issues in this case. In criticizing those historical laws,

however, Rahimi ignores that past lawmakers' *failure* to enact firearms laws can likewise reflect prejudice. For example, past generations' failure to disarm domestic abusers may have reflected greater tolerance of domestic abuse, the belief that state intervention would undermine marital harmony, or women's inability to vote before the Nineteenth Amendment.

4. Rahimi not only fails to undermine the government's historical showing, but also musters no affirmative support for his contrary view. In *Bruen*, this Court concluded that commentators and antebellum judicial decisions "reveal[ed] a consensus that States could *not* ban public carry altogether." 142 S. Ct. at 2146. Here, in contrast, Rahimi cites *no* historical sources or judicial decisions—literally nothing—suggesting that legislatures lack authority to disarm dangerous individuals.

Rahimi invokes (Br. 27) Founding Era statutes exempting militia members' firearms from distress sales to pay debts and taxes. See, *e.g.*, Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271-272. But those statutes applied only to militiamen, not to the people in general. They protected the public interest in a well-armed militia, not the individual interest in self-defense. And although they exempted firearms from sales to pay debts or taxes, they did not preclude States from disarming individuals who had committed crimes or whose conduct revealed their unfitness to bear arms.

Rahimi also notes (Br. 40) that the Reconstruction Congress rejected a proposal to disarm all members of the militia in the former Confederacy. See S.J. Res. 32, 39th Cong., 1st Sess. (Feb. 19, 1866). But the rejection of that sweeping proposal shows only that Congress lacks the power to disarm wide swaths of the public. It does not suggest that Congress lacks the power to dis-

arm discrete categories of persons based on the risk that they will misuse firearms.

5. Contrary to Rahimi's suggestion (Br. 35), the government's argument would not grant Congress the type of "regulatory blank check" that this Court rejected in *Bruen*. 142 S. Ct. at 2133. Although this case presents no occasion to adopt a comprehensive definition of "law-abiding, responsible citizens," that principle is subject to meaningful, judicially enforceable limits.

First, courts may properly review a disqualification's breadth. In adopting the Second Amendment, the Founders rejected abuses such as the Stuart Kings' "general disarmaments" of whole "regions." *Heller*, 554 U.S. at 593. American commentators also condemned status-based disqualifications that confined the right to keep and bear arms to a "very small proportion of the people." William Rawle, *A View of the Constitution of the United States of America* 122 (1825). That history confirms that, although the "law-abiding, responsible citizens" principle can justify laws disarming discrete groups such as felons or domestic abusers, it would not support disqualifications applicable to the ordinary citizenry at large. Cf. *Bruen*, 142 S. Ct. at 2134 (explaining that New York may not deem the entire "island of Manhattan a 'sensitive place'").

Second, just as courts may review a legislature's judgment that a particular weapon is "dangerous and unusual," or that a particular place is "sensitive," courts may properly review a legislature's judgment that a category of persons would pose a danger if armed. Courts may ask, for example, whether that judgment is supported by evidence, common sense, or the judgments of other American legislatures today or over time.

Finally, this case concerns *a legislature's* power to disarm persons who are not law-abiding, responsible citizens. Although judgments about irresponsibility were historically made by executive officials in England, see Gov't Br. 14-15, similar judgments in the United States have traditionally been made by legislatures or (under surety statutes) by courts applying well-defined legal standards, see *id.* at 22-27. The "law-abiding, responsible citizens" principle thus would not support a hypothetical statute granting executive officials "open-ended" and "unchanneled" discretion to disarm anyone they deem unfit to bear arms. *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

Rahimi's reading of the Second Amendment, in stark contrast, lacks meaningful limits. On his interpretation (Br. 12), legislatures are powerless to disarm persons based on "violent history," "dangerousness," "irresponsibility," "or any other character trait." That interpretation would not only invalidate the statute at issue here, but also cast doubt on many other statutes, including those disarming fugitives, 18 U.S.C. 922(g)(2); drug addicts, 18 U.S.C. 922(g)(3); persons who have been committed to mental institutions, 18 U.S.C. 922(g)(4); and persons convicted of certain domestic-violence crimes, 18 U.S.C. 922(g)(9). The Second Amendment does not require that deeply destabilizing and dangerous result.

C. Section 922(g)(8) Disarms Persons Who Are Not Law-Abiding, Responsible Citizens

Section 922(g)(8) fits squarely within the principle that Congress may disarm persons who are not law-abiding, responsible citizens. Rahimi argues (Br. 45-48) that the persons disarmed by Section 922(g)(8) would

not necessarily endanger their partners or society if allowed to possess guns, but his arguments lack merit.

Rahimi first asserts (Br. 46) that Section 922(g)(8) "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." That ignores one of the three conditions that an order must satisfy to trigger Section 922(g)(8): It must either include a judicial finding that the person "represents a credible threat to the physical safety" of a partner or child, 18 U.S.C. 922(g)(8)(C)(i), or explicitly prohibit "the use, attempted use, or threatened use of physical force," 18 U.S.C. 922(g)(8)(C)(ii). If a court has expressly found that a person poses a "credible threat" to another's "physical safety," his possession of arms would by definition endanger others. And even absent such an explicit finding, a court order specifically forbidding "physical force" necessarily reflects a determination that the person poses a danger of violence. Cf. *State* v. *Morales*, 869 S.W.2d 941, 946 (Tex. 1994) ("An injunction will not issue unless it is shown that the respondent will engage in the activity enjoined."); see also Gov't Br. 33.*

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* Amici Professors of Second Amendment Law accept (Br. 28-29) the validity of Section 922(g)(8)(C)(i) because it "requires a judicial finding of dangerousness" but reject Section 922(g)(8)(C)(ii) because it does not require a specific finding. That is wrong. History and tradition establish legislatures' authority to disarm dangerous or irresponsible categories of persons, and the category of individuals subject to protective orders specifically prohibiting the use of force against partners or children surely qualifies. In any event, any defect in subparagraph (C)(ii) would not assist Rahimi because his order included the finding required in subparagraph (C)(i). Gov't Br. 4-5.

Rahimi also argues (Br. 2-5, 46-47) that state courts rubber-stamp applications for protective orders. But that argument ignores the "presumption of regularity" that traditionally attaches to judicial orders. *Parke* v. *Raley*, 506 U.S. 20, 29 (1992) (citation omitted). It also ignores the reality that individuals who have sought protective orders often fail to obtain them. See Illinois Amicus Br. 13-14 (citing studies showing that "Kentucky courts granted only 5,014 of the 21,085 domestic violence restraining orders sought" in 2022 and that "43% of final protective orders are denied in New Hampshire"). According to Rahimi's own count (Br. 3 n.2), the family court that issued his order issued "final decisions in 522 [civil protective order] cases filed between July 1, 2019, and June 30, 2020," but granted only "289 final protective orders."

Rahimi asserts (Br. 46) that, in many States, "simply filing an application almost inevitably results in an *ex parte* or temporary order," and (Br. 47) that during the COVID-19 pandemic, a county court in Texas issued a blanket protective order applicable to "*every party* to a divorce proceeding." But *ex parte* orders and blanket orders would not trigger Section 922(g)(8), which applies only to orders issued "after a hearing of which [the] person received actual notice, and at which such person had the opportunity to participate." 18 U.S.C. 922(g)(8)(A).

Rahimi next objects (Br. 46) that Section 922(g)(8) can apply to a person who has not previously engaged in violence. But a person can pose a serious danger of armed domestic violence even if he has not engaged in such violence in the past. For example, a court might issue a protective order against a person who has threatened but not yet committed violence. And in the

case Rahimi cites (*ibid.*), a court issued a protective order against a man who had serious "mental health issues" and whose "behavior and statements" suggested that he "'could strike out violently'" against his ex-wife "'during an episode of psychosis.'" *United States* v. *Boyd*, 999 F.3d 171, 176 (3d Cir.) (brackets and citation omitted), cert. denied, 142 S. Ct. 511 (2021).

Rahimi emphasizes (Br. 47) that Section 922(g)(8) applies regardless of whether the domestic abuser and the partner "live in the same house." But armed domestic abusers can endanger their partners no matter where they live. Here, for example, Rahimi approached C.M.'s house in the middle of the night in violation of his protective order. See Gov't Br. 3. The danger posed by armed domestic abusers also extends beyond their partners. As the government has shown (Br. 31-32) and as Rahimi does not deny, persons subject to domestic-violence protective orders often move on to new victims and endanger the public at large. After C.M. obtained the protective order in this case, for instance, Rahimi used a gun against another woman and went on a spree of five shootings. See Gov't Br. 3-4.

In all events, Section 922(g)(8)'s constitutionality does not depend on whether every single person it covers would pose a danger if armed. Legislatures throughout American history have imposed categorical firearms restrictions, see Gov't Br. 22-27, and this Court has approved categorical bans on the possession of firearms by felons and persons with mental illnesses, see *Heller*, 554 U.S. at 626. Those laws show that Congress may disarm a dangerous category of persons even if particular members of the category would not necessarily be dangerous if armed.

Moreover, Rahimi brought, and the Fifth Circuit sustained, a *facial* challenge to Section 922(g)(8). See Pet. App. 2a. On such a challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Objections to applying Section 922(g)(8) to other factual scenarios, see Resp. Br. 46-47, cannot justify invalidating the statute on its face or as applied to Rahimi. Facial invalidation would be particularly inappropriate given that Section 922(g)(8) is subject to a severability clause, which states that the invalidation of one of the statute's applications does not affect "the application of such provision to other persons not similarly situated or to other circumstances." 18 U.S.C. 928.

D. Rahimi's Remaining Arguments Lack Merit

1. Rahimi questions (Br. 46-47) Section 922(g)(8)'s procedural protections. But such procedural objections are the province of the Due Process Clause, not the Second Amendment. Rahimi has not raised a due-process challenge to Section 922(g)(8). The statute in any event satisfies the central requirement of due process: "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Rahimi errs in arguing (Br. 26-27) that the Second Amendment requires the government to invoke the criminal process in order to disarm dangerous persons. English law allowed local officials to disarm dangerous persons outside the criminal process, see Gov't Br. 14-15; 18th-century American legislatures disarmed loyalists outside the criminal process, see *id.* at 22; 19th-century surety laws invoked the civil process, see *id.* at

24; and this Court has approved bans on the possession of firearms by "the mentally ill," even though our legal system adjudicates mental illness through civil proceedings, *Heller*, 554 U.S. at 626.

2. Rahimi also argues (Br. 1, 31, 48-49) that Section 922(g)(8) raises special constitutional concerns because it applies nationwide, and that comparable state laws might comply with the Constitution even if Section 922(g)(8) does not. That contradicts *McDonald*'s holding that the Fourteenth Amendment makes the Second Amendment "fully applicable" to the States. 561 U.S. at 750 (plurality opinion); see *id.* at 803 (Thomas, J., concurring in part and concurring in the judgment). The *McDonald* plurality expressly rejected a "two-track approach" under which the Second Amendment would apply differently to the States than to the federal government. *Id.* at 784. And the Court has since reiterated its disapproval of "the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government." *Ramos*, 140 S. Ct. at 1398.

Relatedly, Rahimi argues (Br. 40-41) that Section 922(g)(8) exceeds Congress's enumerated powers. That contention is not properly before this Court because it was not raised in the lower courts, see Br. in Opp. 35; was not considered by those courts, see Cert. Reply Br. 9; and goes beyond the question presented, see Pet. I. Even if this Court departed from its ordinary practice by considering Rahimi's forfeited contention in the first instance, review would be only for plain error—a standard that Rahimi does not even try to satisfy. See Fed. R. Crim. P. 52(b). Rahimi's argument in any event fails on the merits. Section 922(g) applies only to firearm possession "in or affecting commerce," 18 U.S.C. 922(g),

and thus reaches only as far as the Commerce Clause permits, see *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977); see also Cert. Reply Br. 10-11.

3. Rahimi objects (Br. 1, 11) that a violation of Section 922(g)(8) carries "severe criminal penalties"—up to 10 years of imprisonment when Rahimi committed his crime, and up to 15 years today. But the Second Amendment addresses the types of conduct that Congress may regulate, not the punishments that it may impose. Limits on the severity of criminal penalties come from the Eighth Amendment, not the Second.

Rahimi also notes (Br. 48) that, instead of granting judges the discretion to restrict firearm possession, Section 922(g)(8) "automatic[ally]" applies to protective orders that satisfy stated criteria. But those objective standards are a virtue, not a vice. In *Bruen*, this Court approved "objective shall-issue licensing regimes," while disapproving "may-issue" regimes that granted government officials "open-ended discretion" to withhold firearms licenses. 142 S. Ct. at 2162 (Kavanaugh, J., concurring); see *id.* at 2138 n.9 (majority opinion).

Rahimi objects (Br. 50) that Congress has exempted firearms used by the government from most federal firearms laws, including most of Section 922. See 18 U.S.C. 925(a)(1). But the Second Amendment does not require parity between the government and the public. Congress may, for example, allow the police but not private citizens to carry firearms in sensitive places such as government buildings. And the fact that the military has "bombers," "tanks," and "M-16 rifles" does not mean that ordinary citizens get to own them as well. *Heller*, 554 U.S. at 627.

4. Rahimi seeks (Br. 50) to minimize Section 922(g)(8)'s importance by citing statistics about the

number of criminal prosecutions that are brought under the statute. Rahimi, however, ignores the background-check system that Congress has created to prevent the sale of firearms to prohibited persons. See 34 U.S.C. 40901. Congress has instructed the federal government to take steps to ensure that domestic-violence protective orders are promptly incorporated into that system, and it has provided funding to allow States to include such orders in the databases used for background checks. See 34 U.S.C. 40903(1), 40913(b)(5), 40941(a); 34 U.S.C. 40911(b)(3)(C)(i) (Supp. III 2021). The federal background-check system has resulted in more than 76,000 denials based on domestic-violence protective orders since the system's creation in 1998 and more than 3800 such denials in 2021 alone (the most recent year for which statistics are available). See Cert. Reply Br. 5. On Rahimi's reading, that system could no longer stop persons subject to domestic-violence protective orders from obtaining firearms—even if a court has found that those persons pose "a credible threat to the physical safety" of others. 18 U.S.C. 922(g)(8)(C)(i).

Rahimi argues (Br. 50) that Congress could address domestic violence in other ways, such as "prosecut[ing] and jail[ing] people who commit violence." But our legal system has always sought both to "prevent crime" in the first place and to punish crimes "after they have been committed." *In re Neagle*, 135 U.S. 1, 58 (1890). And the right to keep and bear arms has always been understood to allow legislatures to prevent crime through certain well-defined types of weapons restrictions. For example, state courts in the 19th century held that legislatures could prevent "lawless aggression and violence" by banning concealed carry. *Nunn* v. *State*, 1 Ga. 243, 249 (1846); see *Bruen*, 142 S. Ct. at 2146-2147. So too,

legislatures may "prevent * * * crimes and misery" by "disarming" persons who pose a "real danger of public injury." *Foreign Spectator* 40 (emphases omitted).

5. Finally, Rahimi disputes (Br. 5-6) the government's account of the facts, which rests on the presentence investigation report. But the district court adopted that report, and the Fifth Circuit relied on it in the decision below. This case therefore comes to this Court on the premise that the report accurately states the facts.

Rahimi likewise denies (Br. 4) that the state court held a hearing before issuing the protective order against him. But Rahimi stipulated in connection with his guilty plea that the "order was issued after a hearing." J.A. 17. Rahimi now points to the order's statement that a "hearing was not held," J.A. 1, but that statement indicates only that the court did not need to hold an *evidentiary* hearing, given Rahimi's agreement to the findings and terms of the protective order at the court proceeding at which he appeared. Indeed, the order notes that Rahimi had "an opportunity to participate and to be heard" at "the hearing," J.A. 2, and that he "received a copy of this protective order in open court at the close of the hearing," J.A. 11. Ultimately, Rahimi's "binding and conclusive" stipulation makes it unnecessary to resolve any factual issue about the hearing. *Christian Legal Society* v. *Martinez*, 561 U.S. 661, 677 (2010) (citation omitted).

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"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order." *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941). Since the Founding, legislatures have sought to maintain public order by restricting the possession of

firearms by those who are not law-abiding or who pose a danger of armed violence. Section 922(g)(8)—which addresses the acute threat of domestic violence by disarming individuals who have been found by a court to pose a "credible threat" to an intimate partner's "physical safety," 18 U.S.C. 922(g)(8)(C)(i)—is consistent with that tradition. Rahimi's contrary view—under which legislatures are powerless to restrict firearm possession by domestic abusers and other categories of dangerous individuals—defies precedent, history, and common sense.

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This Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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Solicitor General

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