No. 24-1046

IN THE

Supreme Court of the United States

JASON WOLFORD, ET AL.,
Petitioners,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF HAWAIʻI,
Respondent.

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

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY SUPPORT FUND IN SUPPORT OF RESPONDENT

ERIC A. TIRSCHWELL
JANET CARTER
WILLIAM J. TAYLOR, JR.
PRIYANKA GUPTA SEN
ERIK P. FREDERICKSEN
EVERYTOWN LAW
450 Lexington Avenue
P.O. Box 4184
New York, NY 10163

ALLISON W. O'NEILL
COOLEY LLP
10265 Science Center Drive
San Diego, CA 92121

KATHLEEN R. HARTNETT
COUNSEL OF RECORD
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111
khartnett@cooley.com
(415) 693-2000

DANIEL GROOMS
RAYMOND P. TOLENTINO
ANNA O. MOHAN
DEV P. RANJAN
COOLEY LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004

Counsel for Amicus Curiae

December 23, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutions

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Everytown for Gun Safety Support Fund, the research, education, and litigation arm of Everytown for Gun Safety ("Everytown"), submits this brief as *amicus curiae* in support of respondent, Anne E. Lopez, in her official capacity as Hawai'i's Attorney General, and affirmance of the Ninth Circuit's decision. Everytown is the Nation's largest gun-violence-prevention organization, with nearly eleven million supporters across the country. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after a gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws, as well as a national movement of high school and college students working to end gun violence.

Over the past several years, Everytown has devoted substantial resources to researching and developing expertise in historical firearms legislation. Everytown has drawn on that expertise to file more than 100 amicus briefs in Second Amendment and other firearms cases, including in this case before the Ninth Circuit, *see Wolford v. Lopez*, No. 23-16164 (9th

---

[1] *Amicus* certifies that no counsel for any party helped author this brief and no entity or person other than *amicus* and their counsel made any monetary contribution toward this brief.

Cir. Oct. 12, 2025), Dkt. No. 12, and in recent Second Amendment cases in this Court, *see, e.g.*, *United States v. Hemani*, No. 24-1234; *United States v. Rahimi*, No 22-915; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843. These briefs offer historical and doctrinal analysis that might otherwise be overlooked.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bruen* and *Rahimi*, this Court instructed courts to look to text, history, and tradition in assessing whether a firearms regulation is consistent with the Second Amendment. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *United States v. Rahimi*, 602 U.S. 680 (2024). If the Second Amendment's text protects the regulated conduct, then courts must carefully evaluate historical evidence to understand whether the contemporary law is consistent with regulatory tradition. That inquiry includes assessing whether past regulations and practices are "relevantly similar" to a contemporary law. *Bruen*, 597 U.S. at 29. If, after conducting that inquiry, a court concludes that the "challenged regulation is consistent with the principles that underpin our regulatory tradition," that regulation comports with the Second Amendment. *Rahimi*, 602 U.S. at 691 (citing *Bruen*, 597 U.S. at 26-31).

The Ninth Circuit applied this approach in correctly upholding Hawai'i's law. The United States and petitioners now challenge that ruling based, in part, on two arguments that are flatly inconsistent

with the text- and history-focused assessment this Court's precedent demands.

First, the United States and petitioners contend that a firearms regulation is *per se* unconstitutional if it has a purportedly improper purpose to frustrate Second Amendment rights—even if the regulation is consistent with the historical tradition of firearms regulation. But neither this Court's precedents nor the Second Amendment's text or history support the use of an improper-purpose inquiry as a separate, independent means to invalidate a firearms regulation. Instead, *Bruen* and *Rahimi* emphasized the importance of this Nation's historical tradition of firearms regulation and made clear that if a regulation fits within that tradition, it is consistent with the Second Amendment.

The United States and petitioners compound this analytical error by suggesting that firearms regulations that restrict firearms are inherently hostile to the Second Amendment right and so reflect an improper purpose. But this Court has long recognized that the Second Amendment does not codify an unlimited right to keep and bear arms and instead strikes a balance that incorporates certain historically grounded limitations on that right. The United States's and petitioners' proposed approach would imperil countless public safety regulations, notwithstanding their longstanding historical pedigree, and is hopelessly circular.

Second, the United States and petitioners are wrong to argue that modern firearms regulations are consistent with the Second Amendment only if the

government can marshal some minimum number of historical regulations that mirror the contemporary law. There is no reason to adopt that rigid, mechanical approach to the historical inquiry. On the contrary, this Court has repeatedly emphasized that courts should carefully examine the full range of historical evidence in addressing Second Amendment challenges. And the historical evidence examined in this Court's precedents has extended well beyond enacted regulations to include the common law, treatises, and other evidence. The United States's and petitioners' proposed approach is also inconsistent with fundamental principles of our constitutional system, in which states adopt solutions that are tailored to their particular constituencies, and legislatures routinely decline to enact legislation for reasons unrelated to its constitutionality. This Court should reject the United States's and petitioners' proposed approach and affirm the judgment below.

ARGUMENT

I. An "Improper Purpose" Is Not an Independent Basis on Which to Invalidate a Firearms Regulation.

This Court's decisions in *Bruen* and *Rahimi* set forth the operative analytical framework for Second Amendment challenges. When a contemporary law regulates conduct that falls within the Amendment's text, this framework points courts to historical evidence to determine whether the law is consistent with tradition. *Bruen*, 597 U.S. at 26; *Rahimi*, 602 U.S. at 692. The United States and petitioners now

ask the Court to distort that methodology by arguing for *per se* invalidation of any regulations that "restrict[] firearms simply to frustrate the exercise of Second Amendment rights"—a description they incorrectly ascribe to Hawai'i's statutory scheme. Br. for the United States as Amicus Curiae in Supp. of Pet'rs at 11 (Nov. 24, 2025) ("U.S. Br."); Pet'r Br. 17-18 (Nov. 17, 2025). *But see* Resp. Br. 39-44 (Dec. 17, 2025). And they incorrectly claim that their free-floating improper-purpose test is grounded in the textual and historical understanding of the Second Amendment. Because neither precedent, text, nor history supports that novel test, the Court should reject it.

A. The Second Amendment inquiry under *Bruen* and *Rahimi* focuses on text, history, and tradition.

1. The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. "Like most rights," however, "the right secured by the Second Amendment is not unlimited" and "was never thought to sweep indiscriminately." *Rahimi*, 602 U.S. at 690-91 (internal quotation marks omitted). Rather, the historical record confirms that "[f]rom Blackstone through the 19th-century cases, . . . the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Bruen*, 597 U.S. at 21 (internal quotation marks omitted).

This Court elaborated on the scope of the right in *Bruen*. There, the Court explained that courts evaluating whether a particular regulation is

consistent with the Second Amendment should focus on "constitutional text and history." *Bruen*, 597 U.S. at 22. "To justify its regulation, the government may not simply posit that the regulation promotes an important interest." *Id.* at 17. Instead, for laws regulating conduct within the scope of the Second Amendment's text, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* The Court thus made clear that when it comes to "defining the character of the right . . . , suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation," courts must rely on "text and history"—not "any means-end test." *Id.* at 22.

The Court reaffirmed these core principles in *Rahimi*. The Court reiterated that the "historical tradition of firearm regulation . . . delineate[s] the contours of the [Second Amendment] right." *Rahimi*, 602 U.S. at 691 (internal quotation marks omitted). And the Court confirmed that text and history set the bounds of the Second Amendment analysis: When the government shows that "a challenged regulation fits" within historical tradition, "it is lawful under the Second Amendment." *Id.* at 691; *accord id.* at 737 (Barrett, J., concurring) (describing historical tradition as the "mark[er] [of] where the [Second Amendment] right stops and the State's authority to regulate begins").

2. Despite this Court's clear direction to focus on the text and historical understanding of the Second Amendment, the United States and petitioners now offer an alternative approach. U.S. Br. 11; Pet'r Br.

17-18. In their view, even if a firearms regulation fits within this Nation's regulatory tradition, it is *per se* unconstitutional if its "design, operation, or enforcement" indicates that it "seeks to frustrate the exercise of the right to keep and bear arms," as opposed to "pursu[ing] legitimate objectives." U.S. Br. 12; *see* Pet'r Br. 17-18. Under the United States's and petitioners' proposal, this improper-purpose test would be a threshold requirement that a firearms regulation must satisfy before the court even considers whether it is consistent with historical tradition.

This novel approach is inconsistent with this Court's precedents and finds no support in the textual and historical understanding of the Second Amendment or the interpretative principles that govern other areas of constitutional law.

a. The United States's and petitioners' improper-purpose inquiry is incompatible with this Court's precedents. As explained, *Bruen* and *Rahimi* held that the constitutionality of a firearms regulation hinges on whether it fits within the Second Amendment's text and this Nation's historical tradition. *Bruen*, 597 U.S. at 17; *Rahimi*, 602 U.S. at 691-92. "[I]f a challenged regulation fits within that tradition, it is lawful under the Second Amendment." *Rahimi*, 602 U.S. at 691.

That reasoning leaves no room for a separate and independent purpose-based path to invalidation. Rather, as the Court explained, purpose plays a more limited role in the Second Amendment context: as part of the historical analysis. Courts evaluating

Second Amendment questions will "often . . . reason[] by analogy" to "historical regulation[s]." *Bruen*, 597 U.S. at 28. That inquiry involves determining whether the modern law and its historical analogue are "relevantly similar under the Second Amendment." *Id.* at 29. And the reasons "why [a] regulation[] burden[s] . . . [the] right to armed self-defense" may be an integral part of that inquiry. *Id.* If "modern and historical regulations" are "comparably justified," that indicates that they are "relevantly similar," *id.*, which, in turn, is a "strong indicator that [the] contemporary laws . . . fall within a permissible category of regulations," *Rahimi*, 602 U.S. at 692.

The "why" behind a law thus may be relevant in determining whether the contemporary regulation fits within historical tradition. But *Bruen* and *Rahimi* do not ask judges to determine that some objectives are "permissible" and others are "improper." In fact, such a "judge-empowering[,] interest-balancing inquiry" is what the Court expressly rejected in *Bruen*. 597 U.S. at 22 (internal quotation marks omitted); *see also Rahimi*, 602 U.S. at 714 (Kavanaugh, J., concurring) (explaining that "the Court interprets and applies the Constitution by examining text, pre-ratification and post-ratification history, and precedent," rather than "implement[ing] its own policy judgments"). Before *Bruen*, courts routinely determined whether the ends that legislatures were seeking to achieve with firearm regulations were adequate to sustain the regulation at issue, and courts upheld regulations if they were sufficiently tailored to serving important government

purposes. *See Bruen*, 597 U.S. at 18-19. *Bruen* rejected this approach, holding that this Court's precedent "do[es] not support applying means-end scrutiny in the Second Amendment context." *Id.* at 19. In doing so, the Court determined that if a contemporary law was "relevantly similar" to a historical one, it was consistent with "an interest balancing" that had already been done "by the people," rather than by "federal judges." *Id.* at 29 & n.7.

The United States and petitioners now seek to revive what *Bruen* rejected: an inquiry that again gives judges the power to evaluate the appropriateness of government interests. In the approach posited by the United States and petitioners, a legitimate objective will not suffice to justify a firearms regulation, but an improper purpose necessarily defeats it—even if a law is consistent with historical tradition. *See* U.S. Br. 12. This Court's precedents do not allow this.

The United States and petitioners try to support their novel improper-purpose test by pulling out-of-context quotations from *Bruen* and *Rahimi*. They suggest, for example, that *Rahimi* recognized that a law's constitutionality "turns on 'why' it regulates arms-bearing" and held that "a law complies with the Second Amendment only if it 'regulates arms-bearing for a permissible reason.'" U.S. Br. 12 (quoting *Rahimi*, 602 U.S. at 692, 698); *see* Pet'r Br. 17. And they say that *Bruen* held "that a regulation is constitutional only if properly 'justified.'" U.S. Br. 12 (quoting *Bruen*, 597 U.S. at 29); *see* Pet'r Br. 18. But, as explained, *Bruen* and *Rahimi* carved out a far more

limited role for purpose as part of the inquiry into whether a law fits within historical tradition; this Court did not condone the use of purpose as an entirely separate and independent path to invalidating a regulation.

The United States's and petitioners' reliance on *Bruen*'s reference to regulations that serve "abusive ends" also fails to support their point. 597 U.S. at 38 n.9. *Bruen* cited "lengthy wait times in processing license applications or exorbitant fees" as examples of potentially problematic regulations not because their purpose provides an independent ground for invalidation, but instead because such regulations, as applied, could operate to "deny ordinary citizens their right to public carry." *Id.* Reviewing this quoted language in context—rather than as a cherry-picked excerpt—reinforces that the Court was not endorsing an improper-purpose test divorced from historical analysis. By urging an inquiry that exists outside of—and precedes—*Bruen*'s direction to look to text and history, the United States and petitioners would subvert *Bruen*'s teachings.

b. The United States and petitioners attempt to ground their novel approach in the historic tradition of firearms regulation and in the text of the Second Amendment, but their efforts fail. For their historical point, they suggest that early American courts invalidated laws "designed to frustrate the [Second Amendment] right." U.S. Br. 14; *see* Pet'r Br. 18. But the sources they rely on do not show any tradition of courts conducting a freestanding inquiry into improper legislative purpose.

In *State v. Reid*, 1 Ala. 612 (1840), for example, the court held that a statute aiming to "suppress the evil practice of carrying weapons secretly" did *not* "trench upon the constitutional rights of the citizen." *Id.* at 616. Ignoring that core holding, the United States cites *Reid* for the proposition that a law is unconstitutional if "'under the pretence of regulating,' [the law] seeks 'a destruction of the right.'" U.S. Br. 14 (quoting *Reid*, 1 Ala. at 617). But *Reid* never refers to what purpose a law "seeks"; rather, it says—and only in dicta—that a law that "under the pretence of regulating, *amounts* to a destruction of the right . . . would be . . . unconstitutional." *Reid*, 1 Ala. at 616-17 (emphasis added). In other words, *Reid* focused on a law's burden on the right—not on the validity or sensibility of the motivation that spurred its enactment.

The court in *Nunn v. State*, 1 Ga. 243 (1846), quoted this same passage from *Reid*, but that court, too, concentrated on a law's burden on self-defense when assessing its constitutionality. *See id.* at 248-49. The court explained that even a law that sought "to suppress the practice of carrying certain weapons secretly" was valid "inasmuch as it does not deprive the citizen of his natural right of self-defence or of his constitutional right to keep and bear arms." *Id.* at 251.

State v. Chandler, 5 La. Ann. 489 (1850), does not help the United States or petitioners either. The court there referenced the policy motives underpinning a statute—specifically "to prevent bloodshed and assassinations committed upon unsuspecting persons." *Id.* at 490. But nothing in

Chandler suggested that an improper policy rationale could render a law unconstitutional. Instead, as in *Reid* and *Nunn*, the court explained that it would assess whether a law infringed on constitutional rights based on the degree to which it "interfered with . . . [the] right to carry arms." *Id.*

Nor do the English game laws justify the United States's and petitioners' improper-purpose test. The United States cites scattered historical commentators supposedly suggesting that the game laws were contrary to the historical understanding of the right to bear arms because they were enacted "on the pretext of preventing poaching." U.S. Br. 12-13. But what those sources actually emphasize is that a law would violate the Second Amendment if it impermissibly prohibited the carrying of arms—even if there were some pretextual reason offered to support it.[2] None of those sources suggests that a law

---

[2] For example, St. George Tucker stated that the Second Amendment is violated whenever "the right of the people to keep and bear arms is . . . prohibited," even if there is some "colour or pretext" to justify it. 1 St. George Tucker, *Blackstone's Commentaries* App. 300 (1803). And William Rawle observed that neither Congress nor state legislatures had "a power to disarm the people," even if a law were enacted "under some general pretence." William Rawle, *A View of the Constitution of the United States of America* 125 (2d ed. 1829); *see also* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1891, at 747 (1833) (stating that "the effect of" a similar provision in the English Bill of Rights of 1688 had, "under various pretences . . . been greatly narrowed"). None of those sources claims that an otherwise permissible law might offend the Second Amendment based only on its supposedly impermissible motivation.

could be invalidated based on impermissible purpose alone. The game laws were thus considered invalid because they constituted "general disarmaments," not because they were pretextual. *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

In any event, the text-history-and-tradition analysis that *Bruen* already demands would demonstrate that laws like the game laws are impermissible. Unlike the statutory scheme at issue here, the game laws both directly banned gun possession for the majority of individuals and included forfeiture of weapons as a penalty.[3] Consequently, and as the United States acknowledges, the laws simply "disarmed most subjects." U.S. Br. 12. Our Nation does not have a historical tradition of disarming most individuals, so those laws—and laws like them—would fail constitutional scrutiny regardless of any separate inquiry into improper purpose. *See also id.* at 16 (acknowledging that game laws were impermissible based on their "sheer scale" because they "allowed general disarmament[]" (internal quotation marks omitted)); 2 William Blackstone, *Commentaries on the Laws of England* 412 (10th ed. 1787) (stating the game laws "disarm[ed] the bulk of the people"); 1

[3] *See* 4 William Blackstone, *Commentaries on the Laws of England* 176 (10th ed. 1787) (stating that the game laws prohibited "unqualified persons" from "keeping engines for [the] purpose" of killing game); 1 T. Sirrell Pritchard, *Burn's Justice of the Peace and Parish Officer* 26 (30th ed. 1869) (describing game law outlawing possession of "any gun [or] part of gun" and stating that any person violating it would "forfeit such . . . guns").

Tucker 300 (stating the game laws "confine[d] the right within the narrowest limits").[4]

The United States's cursory attempt to tie its improper-purpose inquiry to the text of the Second Amendment is also unsuccessful. *See* U.S. Br. 12. The United States's two-sentence argument relies on one article, which analyzes the historical understanding of the word "infringed." *See id.* (citing Daniel D. Slate, *Infringed*, 3 J. Am. Const. Hist. 381 (2025)). But the article bases its analysis on many of the same cases and historical commentators discussed above. *See* Slate, *supra* at 391 (discussing Tucker, Blackstone, and English game laws). And, in any event, the article ultimately concludes that laws motivated by "[c]oncern for the public good" were categorically *not* infringements. *Id.* at 387, 391, 441. By that measure, laws like Hawai'i's that are "legislation for the public interest" fall far outside the bounds of the article's definition of "infringements." *Id.* at 391; *see* Resp. Br. 7 (explaining that purpose of Hawai'i's law is to "'respect[] the right of private individuals and entities to choose for themselves whether to allow or restrict the carrying of firearms

[4] For similar reasons, Reconstruction-era commentary that laws using "subtle[] measures" to render it impossible for recently freed citizens to own guns violated the Second Amendment does not suggest the need for an improper-purpose inquiry. U.S. Br. 14. The commentary instead emphasized that these individuals' self-defense rights were "infringed" because "their arms [were] taken from them." *Heller*, 554 U.S. at 614-15. In any case, laws motivated by racial animus are unconstitutional under the Equal Protection Clause, whatever their subject matter. *See infra* at 17-18.

on their property' and to promote 'public health, safety, and welfare'" (citation omitted)).

c. Finally, interpretative principles applicable to other constitutional provisions offer no support for the United States's and petitioners' improper-purpose inquiry. *Contra* U.S. Br. 14-15. It is clear that an improper government purpose is not a universal basis for invalidating otherwise constitutional conduct. *See, e.g.*, *Scott v. United States*, 436 U.S. 128, 136 (1978) (holding that, for purposes of the Fourth Amendment, "[s]ubjective intent . . . does not make otherwise lawful conduct illegal or unconstitutional"). In many other areas of constitutional law, what governs are objective standards that attach no relevance to "court[s'] doubts about Congress' unexpressed motives." *Patchak v. Zinke*, 583 U.S. 244, 259 (2018); *see also, e.g.*, *Culley v. Marshall*, 601 U.S. 377, 387 (2024) (stating requirements of procedural due process regarding civil forfeiture); *United States v. Bajakajian*, 524 U.S. 321, 337 (1998) (stating standard for whether fine is excessive under the Eighth Amendment); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (stating standard for whether confession is compelled under the Fifth Amendment). An impermissible motive provides a basis for invalidating government action only when it makes sense in light of the substance of the constitutional right at issue. The Second Amendment is not such a provision, as underscored by the very examples the United States cites.

Consider the First Amendment, on which the United States primarily relies. The First Amendment often requires an examination of the government's

motives in enacting a particular regulation. But that is because of the Amendment's substance: It prohibits government discrimination against disfavored views or practices. The central purpose of the Speech Clause, for instance, is to "protect[] an individual's right to speak his mind regardless of whether the government considers his speech sensible." *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023). The Constitution thus prohibits the government from "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 582 U.S. 218, 234 (2017) (internal quotation marks omitted). The Free Exercise Clause likewise prohibits government action that "discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *see also Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.").

Each of these aspects of the First Amendment is centered on government neutrality. For that reason, in assessing compliance with the First Amendment, it makes sense to scrutinize government motivation because non-neutral government motives are impermissible. Even then, however, the inquiry into intent plays a limited role, coming only after the "crucial first step" of determining whether a law is "neutral on its face." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015); *see also Lukumi*, 508 U.S. at 533

(stating that determining whether a law is neutral "begin[s] with its text"). Intent plays only a secondary role—to reveal "subtle departures from neutrality" and "governmental hostility which is masked." *Id.* at 534; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

The Equal Protection Clause—under which a law can also be impermissible for its motive alone—incorporates an even more prominent focus on protecting against government discrimination. From the time of its drafting, courts have interpreted the Equal Protection Clause as operationalizing a prohibition on government hostility. As this Court historically described it, the Equal Protection Clause codified "the right to exemption from unfriendly legislation." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (stating that a law for which "no reason . . . exists except hostility to [a] race" is "illegal . . . and a violation of the fourteenth amendment of the constitution"). An impermissible government purpose is thus the primary concern when the Equal Protection Clause is implicated. Indeed, under that clause, discrimination is only illegal if it is intentional: For a law to have an "invidious quality," there must be a "discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240-41 (1976).

Unlike the First Amendment and Equal Protection Clause analyses required by this Court's precedents, the Court's Second Amendment jurisprudence has never described government neutrality as integral to the right's protection. Instead, as this Court has explained, the Second

Amendment strikes a balance between preserving the right to bear arms and allowing the government to enact reasonable public safety regulations consistent with history and tradition. *See Bruen,* 597 U.S. at 29 n.7 (stating that the Second Amendment is the "product of an interest balancing by the people" (quoting *Heller*, 554 U.S. at 635)); *see also Rahimi*, 602 U.S. at 737 (Barrett, J., concurring) ("[The Second Amendment] codified a pre-existing right, and pre-existing limits on that right are part and parcel of it."). The First Amendment and Equal Protection Clause, in contrast, impose near total prohibitions on suppressive or discriminatory purposes, reflecting that government animus is a central evil those rights seek to root out. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) ("[A]ttempts to suppress a particular point of view are presumptively unconstitutional."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) ("[G]overnmental classification based on race . . . so seldom provide[s] a relevant basis for disparate treatment." (alteration in original) (internal quotations marks omitted)).[5]

---

[5] The United States's analogy to Takings Clause jurisprudence is similarly inapt. The United States cites this Court's opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), for the proposition that a government entity is not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. But government purpose is central to the Takings Clause, which says that the government is only empowered to take private property towards a particular objective: when it is "for public use," U.S. Const. amend. V. For

Finally, any concern that an otherwise permissible firearm regulation could be motivated by racial or political animus does not counsel in favor of a separate improper-purpose inquiry under the Second Amendment. *See* U.S. Br. 14. As the Court has recognized in other contexts, the Equal Protection Clause and First Amendment provide the relevant protection in such circumstances. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."). Because those amendments apply equally when a law also implicates the Second Amendment, any constitutionally relevant invidious motivation would already be an existing ground for a law's invalidation, and there is no need or basis to graft a separate improper-purpose inquiry onto Second Amendment doctrine.

In short, the relevant question under *Bruen* and *Rahimi* is whether the right to bear arms has been preserved consistent with text and historical

---

that reason, as *Kelo* explains, the Takings Clause has been interpreted to turn on government purpose for well over a century. *See* 545 U.S. at 480 (stating that since "the close of the 19th century," the "public use" requirement has been understood to turn on "public purpose").

tradition, not whether a government actor desired to hinder it. A regulation fails Second Amendment scrutiny only if our Nation's historical tradition does not support it—and not based on a court's separate judgment that the regulation's purpose is improper.

B. An improper-purpose test would be inconsistent with the balance struck in the Second Amendment and would imperil public safety.

The improper-purpose test proposed by the United States and petitioners would upend the historical balance this Court has recognized in its recent Second Amendment cases as well as threaten to invalidate critical public safety measures that are consistent with our historical regulatory tradition.

As this Court explained in *Bruen*, the Second Amendment is the "product of an interest balancing by the people." *Bruen*, 597 U.S. at 26 (quoting *Heller*, 554 U.S. at 635). That balancing acknowledges the importance of the right to bear arms, while also recognizing that the right is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 21 (quoting *Heller*, 554 U.S. at 626). The text of the Second Amendment and the historical tradition of firearms regulation reveal how that balance was struck and "demark the limits on the exercise of th[e] right." *Id.*

Applying this analysis, this Court has recognized, for example, that measures that promote public safety—to the extent they comport with text and historical tradition—are entirely consistent with, not

hostile to, the Second Amendment. To that end, this Court has upheld regulations that "disarm individuals who present a credible threat to the physical safety of others," *Rahimi*, 602 U.S. at 700; approved regulations that "ensure . . . that those bearing arms . . . [are] law-abiding, responsible citizens," *Bruen*, 597 U.S. at 38 n.9 (quoting *Heller*, 554 U.S. at 635); and emphasized that regulations prohibiting firearms in sensitive places like "legislative assemblies, polling places, and courthouses" are supported by "longstanding" tradition, *id.* at 30 (quoting *Heller*, 554 U.S. at 626).

The improper-purpose test advanced by the United States and petitioners is fundamentally inconsistent with the "balance struck by the founding generation," *Rahimi*, 602 U.S. at 692, and jeopardizes these and other essential public safety regulations. Each of the categories of regulations described above aims to promote public safety by limiting or qualifying firearms use at least in part. *See id.* at 690. Indeed, most concededly permissible firearms regulations limit the acquisition, possession, or carrying of firearms to some degree. *See, e.g.*, *Bruen*, 597 U.S. at 38 n.9 (describing regulations that require applicants for permits to carry firearms to "undergo a background check or pass a firearms safety course"); *id.* at 21 (describing permissible regulations "prohibiting the carrying of 'dangerous and unusual weapons'" (quoting *Heller*, 554 U.S. at 627)). But that very fact would threaten such regulations under the United States's and petitioners' theory, which invites courts to presume that laws that restrict firearms are necessarily motivated by a desire to "frustrate the

exercise of Second Amendment rights," and thus are *per se* unconstitutional, regardless of the historical evidence. U.S. Br. 11. Under this approach, many valid regulations would be vulnerable, despite falling comfortably within this Nation's historical tradition and faithfully adhering to the balance struck in the Second Amendment.

The United States's attempt to apply its proposed methodology only highlights how unworkable and far-reaching the implications would be. For example, the United States says that Hawai'i's default rule demonstrates animus because it does not apply equally to "protesting" or "leafletting." U.S. Br. 8. But there is also no law banning individuals subject to domestic violence restraining orders from protesting or leafletting. Thus, under the United States's approach, there would be *prima facie* evidence that laws that ban those individuals from possessing firearms, like 18 U.S.C. § 922(g)(8), are motivated by hostility to the Second Amendment.

Nor does the United States explain how a court could determine whether the "design, operation, or enforcement" of a regulation that is consistent with history and tradition could nevertheless reveal a desire to "frustrate the exercise of Second Amendment rights." U.S. Br. 11. Indeed, such an inquiry would be inherently circular. For a legislature's intention to accomplish a particular goal to be "impermissible," the goal would need to itself constitute a violation of the Second Amendment. For that reason, the permissibility of the motivation would turn on the permissibility of the regulation.

II. The Court Should Not Require Any Threshold Number of Historical Enactments to Sustain a Regulation Under *Bruen*.

The United States and petitioners incorrectly contend that the Court should take a show of hands among historical legislatures—seemingly limited to enacted regulations—before deciding whether a contemporary regulation is constitutional. U.S. Br. 30 (arguing that "four colonial laws, one mid-19th-century law, and one law enacted in 1893" are inadequate to uphold a law); Pet'r Br. 28 (arguing that "regulations from only a handful of states" are inadequate). That approach is contrary to the analytical principles of *Bruen* and *Rahimi*. It also contradicts basic principles of constitutional construction and federalism.

A. This Court has never limited itself to enacted regulations when inquiring into constitutional meaning.

This Court's recent cases instruct courts to "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 597 U.S. at 26. In conducting that inquiry, the Court has consistently declined to limit the analysis to historical examples of affirmative prohibitory regulation. As this Court has recognized, enacted regulations inform the contemporary understanding of the historical scope of the right but are not the sole relevant source of constitutional meaning. *See, e.g.*, *id.* at 21 (relying on how historical "commentators and courts" had described the scope of the right (internal quotation marks omitted)). The

United States previously recognized the same point. *See* Br. for United States at 42, *United States v. Rahimi*, No. 22-915 (U.S. Aug. 14, 2023) (recognizing that "evidence apart from historical analogues" can elucidate historical public understanding, including, "for example, parliamentary and congressional debates, precursors to the Second Amendment, treatises, and commentaries").

For instance, both *Bruen* and *Rahimi* look to sources outside of enacted regulations in determining whether the laws at issue in those cases were consistent with the historical understanding of the right to bear arms. In *Rahimi*, the Court drew lessons from the common law to conclude that the Second Amendment allowed the government to "bar[] people from misusing weapons to harm or menace others." *Rahimi*, 602 U.S. at 693. Similarly, in *Bruen*, the Court relied on treatises and editorials in historical newspapers to illuminate the meaning of the Second Amendment. *See Bruen*, 597 U.S. at 21, 45, 57, 63 (citing 4 William Blackstone, *Commentaries on the Laws of England* (4th ed. 1769); Sir Matthew Hale, *Pleas of the Crown* (1736); T. Barlow, *The Justice of Peace* (1745); William Rawle, *A View of the Constitution of the United States of America* (2d ed. 1829); and *The Loyal Georgian*, Feb. 3, 1866)). The Court explained that this inclusive approach to historical inquiry followed directly from *Heller*, which "canvassed the historical record," examining "a variety of legal and other sources" such as historical scholarship, judicial opinions, and public commentary. *Id.* at 20-21, 35 (citation omitted).

This broad-based historical inquiry is not unique to the Second Amendment; the Court has looked beyond enacted regulations to discern meaning in other constitutional contexts as well. To understand the meaning of the Sixth Amendment's Confrontation Clause, the Court looked to history books and ratification debates. *See Crawford v. Washington*, 541 U.S. 36, 42-50 (2004). To discern the scope of the First Amendment's Speech Clause, the Court examined Founding-era recusal rules from the House of Representatives. *See Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 123 (2011). And the Court looked to published descriptions of historical practices to construct the original meaning of the Establishment Clause. *See Town of Greece v. Galloway*, 572 U.S. 565, 575-76 (2014) (citing *Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910* (1910)). As these cases illustrate, enacted regulations are a source—but not the only source—for piecing together constitutional meaning.

B. Requiring a threshold number of positive enactments contradicts the principles of *Bruen* and *Rahimi*.

The United States and petitioners further err in arguing that a contemporary law must have some minimum number of historical analogues to be consistent with historical tradition. As the Court explained in *Bruen*, historical regulations can help to illuminate the Second Amendment's meaning, which is defined by the Amendment's "text and historical understanding." *Bruen*, 597 U.S. at 26-27. At the same time, however, the Court has not established an

inflexible numerical threshold for historical analogues. Instead, the Court has found historical evidence insufficient to justify a modern regulation when it "contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for self-defense." *Id.* at 67 (quoting *Heller*, 554 U.S. at 632).

With that principle in mind, the Court in *Bruen* assessed the historical evidence and concluded that there was substantial, affirmative "evidence of an . . . enduring American tradition permitting public carry" for ordinary self-defense needs. 597 U.S. at 67; *see id.* at 53-55 (concluding from state-court decisions that "the history reveals a consensus that States could *not* ban public carry altogether"); *id.* at 56-57 (reading surety statutes as "*presum[ing]* that individuals had a right to public carry"). The Court accordingly rejected a handful of examples that contradicted that consensus. *See id.* at 65-66. But *Bruen* never looked for—or instructed courts to look for—a critical mass of Founding- or Reconstruction-era regulation such that any contemporary law that failed to meet that threshold would be *per se* invalid. *Rahimi*, too, rejected such a mechanical approach to interpreting the Constitution, explaining that the "appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin the Nation's regulatory tradition." *Rahimi*, 602 U.S. at 681 (emphasis added).

The United States and petitioners also offer no guidance on how a court should decide on the minimum number of regulations necessary to form a historical consensus. To apply an arbitrary threshold,

notwithstanding the specifics of the historical evidence in any particular case, is precisely the opposite of the "careful . . . assess[ment]" of historical evidence that *Bruen* requires. 597 U.S. at 25, 35.

At bottom, the goal of a Second Amendment analysis is to "examine . . . 'historical tradition' . . . to help delineate the contours of the right," *Rahimi*, 602 U.S. at 691 (quoting *Bruen*, 597 U.S. at 17), and to "consider[] whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692. That goal is not reducible to a simple numbers test; it does not require mechanically counting enacted regulations any more than it requires "a 'dead ringer' or a 'historical twin.'" *Id.* (quoting *Bruen*, 597 U.S. at 30).

C. Requiring a threshold number of positive enactments is inconsistent with fundamental constitutional principles.

The United States's and petitioners' narrow focus on the number of enacted regulations that can be invoked as similar to a challenged law is also inconsistent with fundamental features of our constitutional system.

First, this Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). Indeed, "[o]ur system of federalism" actively "encourages . . . state experimentation." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979); *see also McDonald v. City of Chicago*, 561

U.S. 742, 785 (2010) (plurality op.) ("[S]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." (citation omitted)). This heterogeneity is a feature, not a bug, of our Constitutional order. It "enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Arizona State Legislature*, 576 U.S. at 817 (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)). It also means that a law's enactment by only a "handful of states," Pet'r Br. 28, says little about whether other states would view that law as unconstitutional. Instead, it might reflect only the reality that states can develop different approaches to regulation to meet needs specific to their location and populations.

Second, legislatures do not always "maximally exercise[] their power to regulate." *See Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). For example, since the founding, Congress has chosen to provide federal courts with a narrower statutory grant of federal question jurisdiction than the constitutional limit allows. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983) ("Article III 'arising under' jurisdiction is broader than federal question jurisdiction under § 1331[.]"). And Congress has broad power to preempt state and local laws under the Supremacy Clause but often chooses not to. *See, e.g.*, *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015). Legislatures may fail to act for any number of reasons—including because of "sluggishness of government, the multitude of matters that clamor for

attention, and the relative ease with which men are persuaded to postpone troublesome decisions." *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring in result); *see also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."). Given this reality, the fact that legislatures have not acted to address a particular problem says little about whether "anyone thought [they] lacked the authority to do so." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 253 (2022).

* * * * *

This Court should reject the United States's and petitioners' attempt to alter the Second Amendment inquiry by adopting a standalone impermissible-purpose test or requiring some rigid minimum number of relevantly similar historical enactments to justify a contemporary regulation. Both proposed approaches would be inconsistent with this Court's prior analysis and with fundamental features of our constitutional system.

CONCLUSION

The Ninth Circuit's decision should be affirmed.

Respectfully submitted,

ERIC A. TIRSCHWELL
JANET CARTER
WILLIAM J. TAYLOR, JR.
PRIYANKA GUPTA SEN
ERIK P. FREDERICKSEN
EVERYTOWN LAW
450 Lexington Avenue
P.O. Box 4184
New York, NY 10163

ALLISON O'NEILL
COOLEY LLP
10265 Science Center Drive
San Diego, CA 92121

KATHLEEN R. HARTNETT
Counsel of Record
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111
khartnett@cooley.com
(415) 693-2000

DANIEL GROOMS
RAYMOND P. TOLENTINO
ANNA O. MOHAN
DEV P. RANJAN
COOLEY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Counsel for Amicus Curiae