No. 24-1234

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ALI DANIAL HEMANI,

Respondent.

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

BRIEF OF *AMICUS CURIAE* GLOBAL ACTION ON GUN VIOLENCE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Global Action on Gun Violence (GAGV) is a non-profit organization dedicated to reducing gun violence throughout the world using litigation, human-rights advocacy, and messaging, with a focus on stopping cross-border gun trafficking. GAGV has presented reports and testimony at the Organization of American States, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, United Nations bodies, and numerous international conferences, and has submitted amicus briefs in this Court in *United States v. Rahimi*, 602 U.S. 680 (2024), and *Bondi v. VanDerStok*, 604 U.S. 458 (2025).

SUMMARY OF ARGUMENT

This Court's recent Second Amendment jurisprudence —most notably *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022)—has sown confusion and inconsistency across the federal judiciary. *Heller*'s ambiguous methodology and *Bruen*'s rigid, history-only test have proven unworkable—for courts and legislatures alike. *United States v. Rahimi*, 602 U.S. 680 (2024), only added confusion by allowing courts to zoom in or out of *Bruen*'s historical lens as they see fit. The result is a patchwork of conflicting, arbitrary decisions and judicial subjectivity. Legislatures, in turn, are

1. Under Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

hamstrung—forced to justify modern, evidence-based gun regulations by reference to centuries-old practices that bear little relevance to today's public safety challenges, all to the detriment of public safety and the rule of law. *Heller* and *Bruen* have also proven inconsistent with this Court's longstanding recognition that states have broad police power to protect public safety, and that no right should be read to significantly endanger other individuals.

This Court should move past *Bruen*'s approach, which has proven inflexible, and restore the means-end scrutiny framework that existed pre-*Bruen*. Means-end scrutiny respects both constitutional text and the government's compelling interest in protecting the public, allowing for tailored, effective responses to gun violence. This Court should reaffirm the government's authority to enact such common-sense measures and provide lower courts and legislatures with a workable, principled standard for evaluating Second Amendment claims.

ARGUMENT

I. *Heller* Set a Flawed Foundation for *Bruen*.

In the two centuries before *Heller*, courts interpreted the Second Amendment by holistically reading its entire text and faithfully interpreting that text as the Framers intended—to protect well-regulated state militias from federal overreach. *See, e.g.*, *United States v. Miller*, 307 U.S. 174, 178 (1939) (the Second Amendment was adopted "[w]ith the obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces"); *Heller*, 554 U.S. at 638 (Stevens, J., dissenting) (explaining that since *Miller*, hundreds of judges have relied on

the view of the Amendment we endorsed there"). That reading, accepted from 1791 to 2008, was not only correct textually and historically; it enabled lower courts to strike an appropriate balance between private gun ownership (which was respected throughout this period) and public safety. This pragmatic approach allowed for the evolution of firearm regulation in response to contemporary challenges, while not threatening broad private gun ownership.

Heller marked a sharp departure from this precedent. For the first time, this Court recognized an individual right to possess firearms for self-defense. *See Heller*, 554 U.S. at 570. While *Heller* stopped short of providing a clear analytical framework for courts tasked with evaluating the constitutionality of firearm regulations, it offered broad assurances that "longstanding prohibitions" on firearm possession by felons, the mentally ill, or in sensitive places remained "presumptively lawful," albeit without explaining the rationale or limits of these exceptions. *See id.* at 626–27 & n.26.

II. *Bruen* Has Proven to Be Unworkable.

a. *Bruen* Needlessly Upset the Post-*Heller* Judicial Consensus, With Dangerous Implications.

Before *Bruen*, despite broad disagreements, one area of consensus among the courts of appeals was understanding *Heller* to allow—not forbid—consideration of both historical context and the practical impact of gun regulations. Indeed, post-*Heller*, lower courts coalesced around a similar two-step test to apply to Second Amendment cases: first, considering whether the

regulated conduct fell within the Second Amendment's historical scope (as stated in *Heller*), and second, applying means-end scrutiny to determine whether the regulation appropriately balanced individual rights with public safety. *Bruen*, 597 U.S. at 103 (Breyer, J., dissenting). This approach was consistent with how courts generally construe constitutional limits on state authority—*i.e.*, by considering the government's interest in protecting public safety. *See id*. at 105–07 (Breyer, J., dissenting). This approach was also faithful to history, by allowing courts to recognize the longstanding police power authority of governments to protect lives from gun violence, *see McDonald v. City of Chicago*, 561 U.S. 742, 901–02 (2010) (Stevens, J., dissenting), which is now a leading cause of death for children and teens, and has been deemed a public health crisis in the U.S. *See* Silvia Villarreal et al., Gun Violence in the United States 2022: Examining the Burden Among Children and Teens 1 (2024); Centers for Disease Control & Prevention, Provisional Mortality Statistics, 2023–2024, CDC WONDER, http://wonder.cdc.gov/ucd-icd10-expanded.html (data from Multiple Cause of Death Files; last visited Dec. 16, 2025).

In proclaiming a history-only test in *Bruen*, this Court essentially dictated to lower courts that they must treat the government's contemporary interest in protecting life and its historically recognized police power authority as de minimis considerations in the constitutional analysis in Second Amendment cases. Worse, *Bruen* uses history as a one-way ratchet: *Bruen* relaxes historical rigidity when expanding gun rights, reasoning that, just as the First Amendment protects modern forms of communication and the Fourth Amendment applies to contemporary forms of search and seizure, the Second Amendment

must also be interpreted to protect modern firearms that facilitate armed self-defense. *See Bruen*, 597 U.S. at 28. Yet *Bruen* holds that the scope of this protection is to be determined solely by reference to text, history, and tradition of firearm regulation that prevailed centuries ago. *Id.* at 17. In other words, the Court read the Second Amendment to establish a right to own and use powerful semi-automatic handguns, but the regulation of those modern high-powered weapons must be determined by how far less-lethal muskets and rifles were regulated in a far less dangerous era. Indeed, under *Bruen*, even if a law is universally supported by a broad and bipartisan consensus—including legislators, experts, and advocacy groups across the spectrum, like Everytown and the National Rifle Association—the Court must still strike it down unless it sufficiently resembles a historical analogue (though *Bruen* leaves unclear how old and how close that resemblance must be). Notably, although *Bruen* assigns fixed meaning based on the understandings of those who ratified the Second Amendment (or the Fourteenth Amendment, or some later period—*Bruen* does not specify what historical time period should control), it applies those meanings to circumstances that could not have been anticipated in the past. *Id.* at 28, 37–38

Before *Bruen*, no court of appeals had adopted the exclusive, history-only approach that *Bruen* now mandates. *Id.* at 103 (Breyer, J., dissenting). Neither the Second Amendment nor *Heller* demanded such a test.

b. *Bruen*'s Strict Historical Analogue Approach is Flawed and Illogical.

Closer scrutiny and experience have shown that *Bruen*'s exclusively historical test is flawed and illogical for three primary reasons. *First*, it is based on the flawed assumption that legislative inaction on gun regulation during the Founding and Reconstruction eras implied that lawmakers understood such regulation as unconstitutional. However, that such legislatures did not enact gun restrictions in a particular area does not necessarily shed light on their understanding of the scope of the Second Amendment. There are a variety of non-constitutional reasons why lawmakers may have chosen not to legislate in this area, such as political inertia, predominant political power of those opposing regulation, prevailing social norms, lack of perceived need, the absence of modern policy tools, or the fact that certain public safety challenges simply did not exist at the time. Legislative silence cannot be reliably interpreted as evidence of constitutional limits, and *Bruen*'s assumption to the contrary is fundamentally unsound.

Second, *Bruen*'s test, while ostensibly embracing history, ignores the established historical tradition that allows broad police power authority to protect public safety, a tradition recognized not only by the Framers, but by this Court in limiting all manner of rights, from speech to property and more. *See* Jonathan E. Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 Geo J.L. & Pub. Pol'y 187, 201 (2016). Thus, the historical test is fundamentally ahistorical.

Third, experience has shown that *Bruen* does not produce the consistent, objectively verifiable results it advertised. It fails to articulate clear and coherent standards for each aspect of its historical inquiry, leaving the outcome to the discretion of individual judges. This Court's own analysis of New York's proper-cause requirement in *Bruen* demonstrates how susceptible *Bruen*'s broad and poorly defined test is to arbitrary application. *Rahimi* compounded confusion over the level of generality to apply to historical analogues, suggesting that courts could zoom in and out of history to achieve desired results.

i. *Bruen*'s Test Erroneously Assumes that Legislative Inaction Implies Unconstitutionality.

Bruen's test assumes that every historical "legislative *failure* to regulate firearms was an application [of] or reference [to] the Second Amendment." Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of New York State Pistol & Rifle Association v. Bruen*, 32 Wm. & Mary Bill Rts. J. 1, 24 (2023). By placing the burden on the government to identify historical analogues to modern gun regulations, *Bruen* effectively assumes that "legislatures always legislated to the maximum extent of their constitutional authority, at least with respect to guns." Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67, 111 (2023); *see also* Leah M. Litman, *Debunking Antinovelty*, 66 Duke L.J. 1407, 1427 (2017) ("The idea that legislative novelty suggests that prior Congresses believed that similar legislation was unconstitutional is premised on

the notion that if Congress possessed a particular power, it would have exercised it."). In other words, *Bruen* assumes that if lawmakers failed to regulate, it was because they viewed such legislation as unconstitutional.

This assumption is flawed. As an initial matter, "the mere fact that the government *chose* not to regulate . . . did not mean that, as a historical matter, it could *not* have regulated." David S. Han, *Transparency in First Amendment Doctrine*, 65 Emory L.J. 359, 386 (2015). Indeed, legislatures may have declined to act for a host of reasons "that do not illuminate the question of constitutionality." Charles, *Dead Hand*, *supra*, at 112. Lawmakers may simply have made the "conscious choice not to regulate, despite having the power to do so" because of prevailing social and political norms. Amanda L. Tyler, *Levels of Generality, the Limits of Originalism, and the Supreme Court's Second Amendment Jurisprudence*, 78 SMU L. Rev. 265, 288 (2025). Or, because opponents of a law need control of only "one legislative off-ramp to block it," political inertia—not a belief that a law was unconstitutional—may explain why a law was not enacted. Alschuler, *Twilight-Zone*, *supra*, at 24. Today's political realities reflect this: even widely popular legislation, like requiring criminal background checks for all firearm sales, has not been enacted by Congress even though such laws are widely understood to be constitutional. *See, e.g.*, *Heller*, 554 U.S. at 626–27, 627 n.26 ("laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful"). Moreover, from 1791 to 2008, the Second Amendment was widely understood to protect only participation in state militias, not private gun ownership, *see, e.g.*, *Miller*, 307 U.S. at 178; *Heller*, 554 U.S. at 638 (Stevens, J., dissenting), so legislative

inaction during that period should not be read to address the scope of individual gun rights. As a result, even if legislative inaction were relevant, pre-*Heller* legislative conceptions of constitutionality are largely irrelevant to today's Second Amendment analysis.

Further, modern firearm-related challenges and policy solutions may not have existed or been considered historically. Consider, for example, that firearms today are far more lethal, more capable of mass-slaughter, and more widely available. *See* Joseph Blocher & Christopher Buccafusco, *Technologies of Violence: Law, Markets, and Innovation for Gun Safety*, 103 Tex. L. Rev. 1195, 1217–21 (2025) (discussing the evolution of firearm technology since the Founding). Modern challenges arising out of this technological development, such as mass shootings and urbanized violence, did not exist at the Founding or during Reconstruction, and thus there was no need to address them. *See* Stephen Breyer, *Pragmatism of Textualism*, 138 Harv. L. Rev. 717, 744–45 (2025) (describing the unique challenges today's lawmakers face due to improvements in firearm technology); *see also* Kermit V. Lipez, *The Evolution of the Supreme Court's Second Amendment Jurisprudence*, 25 J. App. Prac. & Process 231, 331 (2025) (observing how "removed from reality judges feel when they must apply *Bruen*, which mandates their immersion in esoteric eighteenth-century legal history, to modern gun-control measures designed to ameliorate a level of gun violence unknown in the eighteenth century").

Similarly, earlier legislatures may not have "regulate[d] because they did not deem a group's interests worthy of protection." Charles, *Dead Hand*, *supra*, at 112. For instance, as members of this Court acknowledged in

Rahimi, there were no Founding or Reconstruction era restrictions on firearm possession by domestic abusers. 602 U.S. at 704 (2024) (Sotomayor, J., concurring); *id.* at 744 (Jackson. J., concurring); *id.* at 752 (Thomas, J., dissenting). But this was not due to a belief that such laws were unconstitutional. Rather, the absence of such policy was due to "societal norms" that were "accepting [of] domestic violence," and "the limited frameworks for addressing domestic violence." *United States v. Ryno*, 675 F. Supp. 3d 993, 997–1001 (D. Alaska 2023) (describing how the historical tradition of "coverture" permitted domestic abuse and rendered the implementation of disarmament laws against domestic abusers virtually impossible). The fact that this Court upheld the law at issue in *Rahimi*, which prohibited legally determined domestic abusers from possessing firearms, *Rahimi*, 602 U.S. at 693, implicitly acknowledged the logical fallacy of *Bruen*'s test. Yet this Court nonetheless preserved *Bruen*'s test, and by extension, its assumption that failure to legislate implies unconstitutionality.

Finally, scientific, empirical, and academic advancements in policymaking have provided lawmakers today with a much larger toolkit of policy solutions to address gun violence than lawmakers historically possessed. For example, "[m]odern research has increased our understanding of mental health and revealed a strong connection between means restriction and suicide prevention not appreciated in the 1700s, when a firearm would have been a less-preferred instrument." Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 152 (2023). This research has resulted in policy innovations meant to reduce gun-related suicides such as laws "requiring guns to be safely stored or providing

for extreme risk-protection orders." *Id.* Accordingly, the historical failure to legislate in a manner comparable to a regulation today may not so much reflect a historical view that such a law is constitutionally impermissible, but rather, that it was simply not available to or considered by lawmakers.

ii. *Bruen* Disregards the Longstanding Tradition of Police Powers to Protect Public Safety.

Bruen's test purports to rest on historical tradition, yet it overlooks the longstanding tradition—recognized by the Framers and this Court—of broad police power authority to protect public safety, even when such regulation limits constitutional rights. Indeed, colonial and early state governments routinely regulated firearm use, including prohibitions on concealed carry, and post-Civil War state constitutions expressly authorized legislative regulation of arms in the interest of public safety. *See* Lowy, *The Right Not to Be Shot*, *supra*, at 201.

This regulatory tradition is not unique to the Second Amendment. Courts have consistently held that public safety justifies limits on other constitutional rights, including speech, property, and habeas corpus. The First Amendment, for example, does not protect conduct that endangers the public, such as falsely yelling "fire!" in a crowded theater. *Id.* at 199 (citing *Schenk v. United States*, 249 U.S. 47, 52 (1919)). By disregarding this settled historical understanding, *Bruen* adopts a historical test that is itself ahistorical, severing the right to bear arms from the broader constitutional tradition that permits reasonable regulation to protect public safety.

iii. *Bruen*'s Result and its Lack of Guidance Make it Susceptible to Arbitrary Application.

1. *Bruen* Provides No Direction for Identifying Historical Analogues.

Bruen provides little guidance for lower courts to apply its exclusively historical test, articulating no clear method for identifying historical analogues to modern gun regulations. While *Bruen* pointed to two metrics—whether modern and historical regulations impose a "comparable burden on the right of armed self-defense," and whether such burden is "comparably justified"—it explicitly declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment." 597 U.S. at 29. This rendered the already "nebulous" task of identifying analogous historical traditions, "broad" and "imprecise." *First quoting* Charles, *Dead Hand*, *supra*, at 101 (citing Darrell A.H. Miller, *Amendment Traditionalism and Desuetude*, 14 Geo. J.L. & Pub. Pol'y 223, 225–26 (2016) (underscoring that, in the Second Amendment context, "the Court's imprecise appeal to tradition poses a host of familiar conceptual and interpretive problems," such as those about whose tradition matters, what period of time, what level of abstraction, and how to incorporate conflicting traditions)); *then quoting* Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 Brooklyn L. Rev. 797, 818 (2023) ("[T]he metrics the Court identified are so broad and imprecise that they offer almost no clarification at all.").

Bruen did not define what constitutes an analogous regulation, simply instructing that an historical analogue should be "comparable" to the modern regulation. Nor did it clarify the evidentiary threshold the government must meet for a regulation to be sufficiently "comparable." Indeed, this Court's pronouncement that the government need not identify a precise "historical *twin*" to be an appropriate analogue, while also rejecting regulations that "remotely resemble" historical analogues, offers no real guidance. *Bruen*, 597 U.S. at 30.

At best, this Court provided a few examples of how the government must present historical evidence to withstand challenges under other constitutional provisions. *See id.* at 25. For example, this Court noted that the government must point to historical evidence to establish that a particular category of expressive conduct is unprotected under the First Amendment. *Id.* at 24–25 (citing *United States v. Stevens*, 559 U.S. 460, 468–71 (2010)). Similarly, this Court cited to its use of history in determining the scope of the Confrontation and Establishment Clauses. *Id.* at 25 (citing *Giles v. California*, 554 U.S. 353, 358 (2008); *Am. Legion v. Am. Humanist Ass'n.*, 588 U.S. 29, 60 (2019)). But none of these examples, and more specifically, none of the cases this Court cited in support of these examples, provide guidance on the government's burden. *See Stevens*, 559 U.S. 460 (holding simply that the government must present "historical evidence" to establish that a category of speech is unprotected under the First Amendment); *Giles*, 554 U.S. at 358 (noting that the Confrontation Clause is interpreted as it was understood at the time of the Founding, but otherwise failing to specify the government's evidentiary burden); *Am. Legion*, 588 U.S. at 60 (noting simply that the Court

would look to "history for guidance" to interpret the Establishment Clause). Indeed, *Bruen* is devoid of any detailed discussion on this issue.

Bruen also left unresolved what time period—1791, when the Second Amendment was ratified, or 1868, when it was incorporated through the Fourteenth Amendment—should serve as the relevant benchmark for identifying analogues. The Court merely observed that "[h]istorical evidence that long predates or postdates" either date would carry less weight, acknowledged the "ongoing scholarly debate" on the issue, and declined to adopt a definitive position. *Bruen*, 597 U.S. at 34, 37–38.

Rahimi likewise left courts without meaningful guidance and failed to clarify what factors courts should consider in identifying historical analogues. Although the Court in *Rahimi* appeared to accept nine analogues of one type and four of another as sufficient to satisfy the government's burden, it did not explain the rationale behind these numbers or clarify whether this quantity of evidence would be required in future cases. *See Rahimi*, 602 U.S. at 696, 697–98; *see also id.* at 746 (Jackson, J., concurring) (noting that the Court failed to clarify "[h]ow many analogues add up to a tradition"). Indeed, on its face, claiming that historical analogues endorsed disarming domestic abusers when that same history generally allowed domestic abuse appears tenuous at best.

This lack of guidance leaves the test largely to the discretion of judges, who are often untrained in history and constrained by time and resources, to determine whether the government has presented enough valid historical analogues to satisfy its evidentiary burden.

As a result, the test is highly susceptible to arbitrary application, as is evident in the widely inconsistent lower court decisions applying *Bruen*—many of which have overturned longstanding, commonsense gun regulations. *See infra* Part II(c)(ii).

2. *Bruen* is Susceptible to Arbitrary Application and Judicial Subjectivity.

This Court need look no further than *Bruen* itself to appreciate the practical challenges that can result from *Bruen*'s test. Historians supplied extensive evidence of close historical analogues to New York's proper-cause requirement—from before the Second Amendment, and through every era of American history. *See, e.g.*, Brief for Professors of History and Law as Amici Curiae Supporting Respondents, *Bruen*, 597 U.S. 1 (No. 20-843); Brief for Everytown for Gun Safety as Amicus Curiae Supporting Respondents, *id.* (No. 20-843); *see also* Michael Partrick, *Bruen: The Court's Announcement of the Historical Analogy Test and the Aftermath Thereof*, 25 Wyo. L. Rev. 27, 30–35 (2025). But the Court's approach to history left each analogue supportive of New York's law wanting, suggesting that the Court fell victim to "looking over the heads of the [crowd] for [its] friends," rather than faithfully following the historical record. A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 377 (2012).

After providing only two vague metrics for identifying historical analogues, this Court rejected nearly all the government's proffered practices, traditions, and putative analogues for a "host of additional metrics" that it did not previously justify or explain. Smith, *Historical Tradition*,

supra, at 818; *see also* Charles, *Dead Hand*, *supra*, at 100. This approach allows judges to pick and choose what factors to consider in determining whether a certain practice is sufficiently analogous to a modern regulation, and risks that judges will "shape the evidence to support their desired conclusion." Smith, *Historical Tradition*, *supra*, at 818.

For instance, this Court in *Bruen* dismissed three of the government's proposed colonial-era analogues in part because it "doubt[ed] that [just] three colonial regulations could suffice to show a tradition of public-carry regulation." *Bruen*, 597 U.S. at 46. The Court then went on to reject another of the government's analogues in part because it was enacted "nearly 70 years after the ratification of the Bill of Rights." *Id.* at 55 n.22. While these statements might have clarified the government's burden and the appropriate time period, this Court did not apply these requirements uniformly to other gun regulations that it declared constitutional. For example, *Bruen* reaffirmed *Heller*'s pronouncement that "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are consistent with the Second Amendment despite the "historical record yielding relatively few 18th and 19th-century" sensitive place restrictions. *Id.* at 30 (quoting *Heller*, 554 U.S. at 626). Similarly, the Court stated that nothing in its opinion displaced "shall-issue" licensing regimes "employed in 43 states." *Id.* at 79 (Kavanaugh, J., concurring). But had the Court applied its three-minimum and time period requirements to these laws, it is arguable that they would have also found them to violate the Second Amendment, as there were virtually no sensitive-place and licensing restrictions until

the nineteenth century. Smith, *Historical Tradition*, *supra*, at 824; Alschuler, *Twilight-Zone*, *supra*, at 19 (explaining that the "Founding generation did not impose preconditions on carrying firearms") (citations omitted). Thus, while the government's proposed analogues in *Bruen* were too few or too new to withstand the test, this Court nonetheless approved laws with virtually no Founding-era counterparts. All of this demonstrates that *Bruen*'s and *Rahimi*'s refusal to provide clear and coherent guidance on the various features of *Bruen*'s test makes it highly susceptible to arbitrary application.

The lack of clear standards set forth in *Bruen* also opens the door to judicial subjectivity. Without objective rules, judges can select sources or analogues that support their preferred outcomes, giving the appearance of neutrality while enabling personal bias to shape the outcome. As Judge Berzon has observed, "a framework that relies exclusively on text, history, and tradition to adjudicate Second Amendment claims provides only the aura, but not the reality, of objectivity and resistance to manipulation based on a judge's supposed biases." *Duncan v. Bonta*, 19 F.4th 1087, 1118 (9th Cir. 2021) (Berzon, J., concurring); *see also* Emily Bazelon, *How "History and Tradition" Rulings Are Changing American Law*, N.Y. Times Mag. (Apr. 29, 2024), https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html (reporting Justice Barrett's acknowledgment that a judge's hunt for historical sources could be like "looking over a crowd and picking out your friends"); Lipez, *Evolution*, *supra*, at 325 ("This originalist claim to objectivity is unpersuasive. Meaning is often in the eye of the beholder."). With little guidance on how to administer *Bruen*'s test, it should

come as no surprise that lower courts have struggled to apply it consistently and coherently.

c. *Bruen*'s Framework is Unsustainable and Produces Inconsistent Results.

Lower courts have faced significant challenges in applying *Bruen*, repeatedly calling for clearer guidance and more workable standards. *See Rahimi*, 602 U.S. at 742 n.1 (Jackson, J., concurring) (collecting cases). These difficulties have persisted after *Rahimi*, with courts continuing to grapple with the complexities of the analysis. *See, e.g.*, *United States v. Morton*, 123 F.4th 492, 499 n.2 (6th Cir. 2024) ("there is significant disagreement about much of the [28 U.S.C. § 922(g)(1)] analysis that the Supreme Court should resolve"). As discussed above, *Bruen*'s lack of clear standards leads to inconsistent outcomes.

i. *Bruen* is Impractical for Courts.

The practical difficulties facing lower courts in conducting the historical analysis *Bruen* requires are well recognized. "Courts are . . . staffed by lawyers, not historians" and "[l]egal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems." *Bruen*, 597 U.S. at 107 (Breyer, J., dissenting). Indeed, "[t]he ultimate irony is that the version of history endorsed in [*Heller* and *Bruen*] has itself been deemed untrustworthy by actual historians." *United States v. Brown*, 764 F. Supp. 3d 456, 465 nn.18–20 (S.D. Miss. 2025) (collecting scholarly articles); *see also Bruen*, 597 U.S. at 110 (Breyer, J., dissenting) (collecting scholarly sources arguing that *Heller* misread the text and history

of the Second Amendment). "Many aspects of the history of firearms and their regulation are ambiguous, contradictory, or disputed." *Bruen*, 597 U.S. at 112 (Breyer, J., dissenting); *see also Binderup v. Att'y Gen. United States of America*, 836 F.3d 336, 391 (3d Cir. 2016) ("Our Court's multiple opinions in this case illustrate just how contested Founding-era historiography can be."); *United States v. Holbert*, 764 F. Supp. 3d 309, 319 (E.D. Va. 2025) (highlighting practitioners' historical and academic records in which constitutional scholars and historians disagree about the Founders' intent).

Time and resource constraints only exacerbate these challenges. *See Bruen*, 597 U.S. at 111 (Breyer, J., dissenting); *United States v. Jackson*, 661 F. Supp. 3d 392, 406 (D. Md. 2023), *aff'd*, 152 F.4th 564 (4th Cir. 2025). Lower courts do "not have the resources to carry the burden of conducting a historical analysis of the myriad citations practitioners and the Supreme Court articulated especially given the number of cases before [them]." *Holbert*, 764 F. Supp. 3d at 320. Although this Court has noted that lower courts may rely on "the principle of party presentation," *Bruen*, 597 U.S. at 25 n.6, this only shifts the burden to decide the meaning of constitutional provisions—decisions "that may affect the lives and conduct of millions of Americans"—based on the "presentations of attorneys in an adversarial dispute," whose adversarial "obligations will undoubtedly color the historic evidence presented[,]" Smith, *Historical Tradition*, *supra*, at 826. As one district court candidly explained:

> This Court's review of only the legal and historical part of the record before it . . .

> demonstrates the difficulty in discerning representative analogues. This Court fears it risks making incorrect historical findings because it lacks knowledge about other potentially pivotal historical, academic, or legal information. Worse, this Court fears it risks being unable to make an intellectually honest or academically accurate record—factual or legal—because of its inability to properly evaluate its own record.

United States v. Hill, 703 F. Supp. 3d 729, 746–47 (E.D. Va. 2023) (internal citations omitted)), *aff'd*, 2025 WL 314159 (4th Cir. Jan. 28, 2025), *cert. denied*, 145 S. Ct. 2864 (2025).

ii. *Bruen*'s Framework Produces Inconsistent Outcomes.

Consistency in judicial decisions is essential to promoting fairness, predictability, and public confidence in the legal system. Yet *Bruen* has produced widespread inconsistency at every level of the judiciary. While circuit splits on legal issues are to be expected, splits should be the rare exception when courts are supposedly bound by the same fixed historical record.

The fact that this Court granted certiorari in this case demonstrates that very problem. In considering the constitutionality of 28 U.S.C § 922(g)(3), which prohibits firearm possession by unlawful drug users, the Seventh Circuit concluded that "historical laws that kept guns out of the hands of the intoxicated and the mentally ill are sufficiently analogous to [Section] 922(g)(3)'s proscription of firearm possession by active and persistent drug users

. . . to satisfy constitutional scrutiny." *United States v. Seiwert*, 152 F.4th 854, 872 (7th Cir. 2025). In contrast, the Eighth Circuit has held that "[n]othing in our tradition" allows for categorical disarmament simply because an individual belongs to a group such as drug users; instead, Section 922(g)(3) may apply on a case-by-case showing that an individual is acting mentally ill and dangerous, inducing terror, or poses a credible threat to others with a firearm. *United States v. Cooper*, 127 F.4th 1092, 1096 (8th Cir. 2025). The Fifth Circuit, meanwhile, determined that the relevant "history and tradition . . . support, at most, a ban on carrying firearms while an individual is *presently* under the influence." *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024).

A similar lack of uniformity exists with respect to 28 U.S.C § 922(g)(1), which concerns firearm possession by felons. The courts of appeals are split on the constitutionality of this provision as applied to nonviolent offenders. *See United States v. Holmes*, No. 24-cr-00129, 2025 WL 2996493, at *1 (E.D. Mo. Oct. 23, 2025) (collecting cases). The inconsistency extends to the district court level as well. For instance, in the Third Circuit, "most, but not all" district courts have upheld the statute as constitutional," while others have found Section 922(g)(1) to be "unconstitutional, facially and as applied." *United States v. Glass*, No. 24-cr-30124, 2025 WL 2771011, at *3, *5 (S.D. Ill. Sept. 29, 2025) (collecting cases). These divergent outcomes underscore the instability and unpredictability that *Bruen*'s framework has introduced to Second Amendment jurisprudence.

d. *Bruen*'s Test has Proven Unworkable for Legislatures.

Bruen's exclusively historical test is not just unworkable for courts—it also imposes significant burdens on legislatures seeking to enact commonsense gun regulations. Lawmakers are now required to ensure that modern firearm restrictions have historical analogues, diverting attention from contemporary public safety needs to the search for centuries-old precedent.

This case illustrates the problem. Congress enacted Section 922(g)(3) based on empirical findings that habitual drug users pose certain public safety risks that warrant disarmament. Yet instead of relying on modern research and evidence that substantiate this concern, the government must instead focus entirely on analogizing Section 922(g)(3) to Founding-era practices—a near-impossible task, given the absence of historical restrictions on habitual drug users.

i. *Bruen* Hamstrings Legislatures from Enacting Reasonable Gun Regulations and Addressing Public Safety Needs.

Bruen mandates consistency between modern gun regulations and historical practice, 597 U.S. at 24, "abandon[ing] all consideration" of the government's interests or "whether the . . . regulation accomplishes [those] interests." Smith, *Historical Tradition*, *supra*, at 798. Accordingly, *Bruen* imposes an entirely new task on legislatures—devoting resources to "historical research and fact-finding" to ensure that modern firearm restrictions comport with this nation's history and

tradition. *See* Joseph Blocher & Brandon L. Garrett, *Originalism & Historical Fact-Finding*, 112 Geo. L.J. 699, 746 (2024) (identifying the additional burdens that *Bruen* imposes on legislatures); *see also Rahimi*, 602 U.S. at 744 (Jackson, J., concurring) (noting that *Bruen* requires legislatures to "locate and produce . . . troves of centuries-old documentation looking for supportive historical evidence."). To maximize the likelihood that gun regulations will withstand judicial review, legislatures may be compelled to create a detailed "historical record" in support of "proposed legislation," conduct hearings, and even establish "specialized office[s]" dedicated to researching and documenting historical analogues. Blocher, *Originalism & Historical Fact-Finding*, *supra*, at 746; *see also* Charles, *Dead Hand*, *supra*, at 150 (urging "legislatures enacting gun regulations . . . to create a legislative record" that contains "the historical tradition or support for the law"). *Bruen*'s test thus imposes additional burdens on lawmakers—who are no more expert in history than judges or their clerks—and creates obstacles that hinder the legislative process and the enactment of gun regulations.

Devising solutions to modern gun-related challenges is no easy task, because, as discussed in Part II(b)(i), *supra*, modern firearm restrictions often lack clear historical analogues. The shortage of historical analogues has led courts to question the constitutionality of longstanding, commonsense firearm restrictions that policymakers have relied on to protect public safety. *See* Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post-Bruen: An Empirical Assessment*, 110 Va. L. Rev. 20 (2024) (documenting hundreds of decisions relying on *Bruen* to strike down, among other things,

age-restrictions, sensitive place restrictions, background check requirements, assault weapons bans, domestic abuser prohibitions, and restrictions on ghost guns). Despite *Rahimi*'s modest (albeit imprecise) clarification on how comparable a modern restriction must be to historical practice to satisfy *Bruen*'s test, courts continue to question the constitutionality of these laws, illustrating the ongoing burden that *Bruen* places on public policy. *See, e.g.*, Graham Ambrose, *Gunmaking at the Founding*, 77 Stan. L. Rev. 235, 283–85 (2025) (discussing the continued uncertainty of ghost gun restrictions after *Rahimi*); Kari Still, Kellen Heniford & Mark A. Frassetto, *The History and Tradition of Regulating Guns in Parks*, Harv. L. & Pol'y Rev. 201, 204–10 (2024) (discussing the continued uncertainty of sensitive place restrictions after *Rahimi*); Mark A. Frassetto, *Mass Violence and the Second Amendment: Analogizing Historical Prohibitions on Armed Groups to Modern Prohibitions on Assault Weapons and Large-Capacity Magazines*, 76 Ala. L. Rev. 43, 46–47 (2024) (addressing the unresolved question of whether assault weapon and large-capacity magazine bans are constitutional under *Bruen* and *Rahimi*).

ii. This Case Demonstrates the Practical Pitfalls of an Exclusively History-Based Approach

This case exemplifies the difficulties legislatures face under *Bruen* to implement contemporary solutions to modern gun-related challenges, and that courts face to determine their constitutionality. As the Fifth Circuit recognized in *Connelly*, which forms the basis of the decision below, "[t]here was very little regulation of drugs (related to firearm possession or otherwise) until the late

19th century." 117 F.4th at 279; *see also United States v. Hemani*, No. 24-40137, 2025 WL 3544982, at *1 (5th Cir. Jan. 31, 2025), *cert. granted*, No. 24-1234 (Oct. 20, 2025).

For example, marijuana "was used medicinally in the United States" in 1791, when the Second Amendment was ratified, and 1868, when the Second Amendment was incorporated. Troy E. Grandel, *One Toke Over the Line: The Proliferation of State Medical Marijuana Laws*, 9 U.N.H. L. Rev. 135, 136–37 (2010). "The *United States Pharmacopeia* of 1850 even recognized the medicinal value of marijuana, listing ailments that marijuana might help treat, such as leprosy, incontinence, alcoholism, rabies, and dysentery." *Id.* at 137. Neither the federal government nor any state imposed legislative constraints on marijuana until the twentieth century. David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & Health 1, 6 (2020). This was because prior to the twentieth century, there was virtually no "public concern for[] or understanding" of the impact of drugs generally, let alone on gun violence. *Connelly*, 117 F.4th at 279 (citation omitted).

At first, legislatures cracked down harshly on marijuana use. In the 1950s, Congress passed the Boggs Act, and thirty-four states passed "Little Boggs Acts," which imposed severe criminal penalties for violations of laws regulating marijuana. Patton, *A History, supra*, at 12. But by the early 1970s, these laws came to be seen as too harsh—police officers began to ignore minor violations, judges imposed less severe sentences, and "thirty-two States reduced their criminal penalties for cannabis possession." *Id.* at 14. By the 1990s, states began legalizing cannabis for medicinal use, and in the 2010s, states began legalizing recreational marijuana. *Id.*

at 19. Currently, fifty-four percent of Americans live in a state where recreational use of marijuana is legal. *See* Athena Chapekis & Sono Shah, *Most Americans Now Live in a Legal Marijuana State – and Most Have at Least One Dispensary in Their County*, Pew Research Center (Feb. 29, 2024), https://www.pewresearch.org/short-reads/2024/02/29/most-americans-now-live-in-a-legal-marijuana-state-and-most-have-at-least-one-dispensary-in-their-county/"; *see also* Executive Order (Dec. 18, 2025) (directing expedited federal marijuana reclassification to the less restrictive Schedule III under the Controlled Substances Act)."

Laws regulating other narcotics followed a similar initial trajectory. In the latter half of the nineteenth century, "[c]ocaine, as well as morphine and heroin, was an ingredient in numerous patent medicines, tonics, and other products." Carl B. Schultz, *Statutory Classification of Cocaine as a Narcotic: An Illogical Anachronism*, 9 Am. J.L. & Med. 225, 227–228 (1983). Pure cocaine was "readily available," and Coca-Cola even "contained cocaine from 1866, when it was first marketed, until 1903." *Id.* at 228. Only in the twentieth century did legislatures begin regulating cocaine. *Id.*

A test focused on historical analogues ties legislators' hands and forces them to rely on nineteenth century (and earlier) understandings to fix today's problems. A court in 1890, 1950, and 2025 considering legislation like Section 922(g)(3) restricting habitual marijuana, or cocaine, users from possessing firearms would each have had the same historical record allowing such drug use in 1791 and 1868. Each court would have been considering radically different legislation, enacted to address radically different problems, based on radically different scientific

and social understandings of drug use. However, none of that matters under the *Bruen* historical analogue test.

Here, without a clear historical analogue to tie Section 922(g)(3) to, the government is forced to rely on "founding-era laws restricting the rights of drunkards." Petr.'s Br. at 18. This reliance is only relevant to the extent such laws regulating this class of people are relevant under *Bruen*, given that the class at issue––drug users––were not restricted whatsoever from possessing firearms when the Second Amendment was ratified or later, when it was incorporated. In any event, as the Fifth Circuit found in *Connelly*, these laws regulating drunkards are distinct from Section 922(g)(3) because they did not disarm non-intoxicated individuals, which Section 922(g)(3) does. 117 F.4th at 280–81.

That Section 922(g)(3) disarms non-intoxicated habitual drug users is entirely logical given the government's contemporary public safety interests underlying the provision. Congress enacted this prohibition after finding that habitual drug users, even when not intoxicated, have a higher propensity for gun violence. *See United States v. Carter*, 750 F.3d 462, 469–470 (4th Cir. 2014) (*Carter II*) (discussing the government's proffered motivations behind Section 922(g)(3)); *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010), *abrogated on other grounds by Seiwert*, 152 F.4th at 862–63 (departing from *Yancey* because it had applied means-end scrutiny, which was abrogated by *Bruen*). This is because, unlike in 1791 and 1868 when marijuana and cocaine were legal, beginning in the twentieth century, habitual drug users are more likely to "interact with a criminal element when obtaining their drugs" and "commit crimes to obtain resources to purchase drugs," and "less likely to exercise self-control." *United States v. Carter*, 669 F.3d 411, 419–20 (4th Cir.

2012) (*Carter I*). Modern empirical research supports this. *See, e.g.*, *Carter II*, 750 F.3d at 467 (discussing studies that "indicate a strong link between and violence"); *Yancey*, 621 F.3d at 684 (noting that "Congress was not alone in concluding that habitual drug abusers are unfit to possess firearms," citing similar statutes in twenty-seven states).

In contrast, during the Founding era, alcohol was widely available, so individuals did not need to interact with a criminal element to obtain it, and there was a more limited understanding of the causes and effects of alcoholism. As a result, Founding-era lawmakers had little reason or occasion to disarm non-intoxicated habitual alcohol consumers in the way Congress has now addressed habitual drug users. Yet under *Bruen*, because history is the focal point of the Second Amendment inquiry, the government is compelled to draw analogies to historical practices that simply did not exist. This highlights the core difficulty legislatures now face: *Bruen* forces them to justify modern, evidence-based policy choices solely by reference to historical interests that may not have been addressed—not because of any constitutional limitation, but simply because those issues may not have existed at all.

e. Means-End Scrutiny, as Unanimously Applied by the Courts of Appeals Pre-*Bruen*, is a Workable Solution

Considering this history, *Bruen* leaves the Court with a problem. Upholding Section 922(g)(3) by finding that the prohibitions on habitual drug users are analogous to those on drunkards, despite the historical record of allowing gun possession by drug users, would effectively repudiate *Bruen*, and would add further chaos to the understanding of *Bruen*'s test, as there is no direct historical analogue for disarming habitual drug users who are not actively under

the influence. But invalidating Section 922(g)(3) would be a striking act of judicial activism, displacing decades of established doctrine and longstanding public consensus that prohibiting firearm possession by unlawful drug users promotes the protection of public safety. Moreover, refusing to consider society's evolving views on marijuana use in particular—which appears impermissible under *Bruen*—further complicates this Court's task. *Bruen*'s test is ill-suited to address these complexities, especially as the legal and social status of certain substances, such as marijuana, continues to change across jurisdictions.

The solution is simple: return to the means-end scrutiny applied unanimously by the courts of appeals pre-*Bruen*. For over a decade following *Heller*, and before *Bruen*, every circuit court to address the question adopted the "two-step framework for evaluating whether a firearms regulation is consistent with the Second Amendment." *Bruen*, 597 U.S. at 103 (Breyer, J., dissenting). As discussed in Part II(a), this approach first asks whether the regulated conduct falls within the historical scope of the Second Amendment, and, if so, applies means-end scrutiny to determine whether the regulation appropriately balances individual rights with the government's interest in public safety. *See id.* This framework, which mirrors the analysis used in other constitutional contexts, *see id.* at 105–07 (collecting cases), provides courts with a principled and practical method for evaluating firearm regulations. The "rejection of means-end scrutiny and adoption of a rigid history-only approach . . . is anomalous." *Id.*

Importantly, when courts apply means-end scrutiny, the "policy" judgment at issue is that of the legislature,

not the judiciary. The judicial role is limited to assessing whether enacted laws are compatible with the scope of the constitutional right at issue. *See* Bernadette Meyler, *Fiction at the Court*, 138 Harv. L. Rev. F. 22, 36–37 (2024). Means-end scrutiny offers a flexible and pragmatic framework, allowing legislatures to address modern challenges—such as gun violence—through evidence-based, tailored solutions. Abandoning this approach in favor of a rigid, history-only test "is the most judge-empowering, anti-democratic model of judging imaginable." Lipez, *Evolution*, *supra*, at 330.

Although *Heller* rejected a freestanding "interest-balancing" test for the core protection of the Second Amendment, it did not foreclose the use of means-end scrutiny for evaluating the constitutionality of firearm regulations. *See Heller*, 554 U.S. at 634. In fact, the widespread adoption of this two-step approach by the courts of appeals after *Heller* brought much-needed clarity and consistency to Second Amendment jurisprudence. This Court's recent decisions further support a return to this balanced framework. In *Rahimi*, this Court recognized that the constitutionality of a regulation should be assessed in light of the principles and purposes underlying the nation's regulatory tradition, not by demanding a precise historical twin. *Rahimi*, 602 U.S. at 681. This approach, in practice, allows for the kind of means-ends analysis that lower courts have long used to evaluate the fit between a law and the government's objectives. *See* Breyer, *Pragmatism*, *supra*, at 769; Nelson Lund, *Second Amendment Originalism, "General Law," and Rahimi's Two-Fold Failure*, 78 SMU L. Rev. 459, 489 (2025).

Section 922(g)(3), which prohibits firearm possession by anyone who is an unlawful user of or addicted to a controlled substance, would satisfy means-end scrutiny in the mine run of cases. This statute is part of a longstanding set of federal prohibitions on firearm possession by certain categories of individuals, including felons and the mentally ill. *Heller*, 554 U.S. at 626–27. Applying the two-step framework, courts have consistently found that, even if Section 922(g)(3) burdens conduct protected by the Second Amendment, it survives intermediate scrutiny. The government has a compelling interest in preventing gun violence, and there is a substantial relationship between that interest and disarming habitual drug users, who are statistically more likely to engage in violent or criminal behavior. *See Carter I*, 669 F.3d at 416–17; *Carter II*, 750 F.3d at 470; *Yancey*, 621 F.3d at 687. However, given the trend toward legalization of certain drugs and the associated reduction in violent or criminal behavior of users of those drugs, courts should consider whether, as applied, Section 922(g)(3) should treat habitual marijuana users the same as other unlawful drug users. *See, e.g.*, Evelina Gavrilova, Takuma Kamada & Floris Zoutman, *Is Legal Pot Crippling Mexican Drug Trafficking Organizations? The Effect of Medical Marijuana Laws on U.S. Crime*, 129 Econ. J. 375 (2019). More broadly, as laws and social perceptions regarding various drugs continue to evolve, courts should have the flexibility to ensure that firearm regulations reflect contemporary realities and evidence to effectively serve public safety needs.

In sum, restoring means-end scrutiny would provide courts and legislatures with a workable, principled standard for evaluating Second Amendment claims.

CONCLUSION

This Court should apply means-end scrutiny to Section 922(g)(3).

Respectfully submitted,

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