26-5258

ORIGINAL

No. ______________

IN THE

SUPREME COURT OF THE UNITED STATES

Brian McCarthy — PETITIONER
(Your Name)

vs.

Marcie Lombard — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Massachusetts Appeals Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brian Michael McCarthy
(Your Name)

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(Address)

Marlborough Ma, 01752
(City, State, Zip Code)

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(Phone Number)

Questions Presented

1. Whether, as applied here, the First, Second, and Fourteenth Amendments permit a State to employ a totality-of-the-circumstances methodology that transforms concededly lawful conduct into a constitutionally sufficient finding of dangerousness, thereby authorizing the burdening of enumerated constitutional rights without an objectively sufficient present predicate.

2. Whether the First Amendment permits a State to rely upon lawful petitioning activity as a component of a judicial dangerousness determination where the litigation activity was not found to be frivolous, unlawful, or otherwise outside constitutional protection.

3. Whether the Second Amendment, as interpreted in New York State Rifle & Pistol Ass'n v. Bruen and United States v. Rahimi, permits the continued burdening of the right to keep and bear arms where the dangerousness determination rests upon a methodology that aggregates lawful, non-threatening conduct rather than an objectively sufficient present predicate demonstrating a credible threat of physical harm.

List of Parties

Brian M. McCarthy, *Petitioner*

Marcie Lombard, *Respondent*

Related Cases

Framingham District Court, Case No. 2549RO110065, *M.L. v. Brian M. McCarthy*. Extension order entered February 14, 2025.

Massachusetts Appeals Court, Case No. 25-P-721, *M.L. v. Brian M. McCarthy*. Judgment entered April 24, 2026.

Massachusetts Supreme Judicial Court, Case No. FAR-30912, *M.L. v. Brian M. McCarthy*. Order denying further appellate review entered June 24, 2026.

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts: The opinion of the United States court of appeals appears at Appendix to the petition and is [ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished. The opinion of the United States district court appears at Appendix to the petition and is [ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[X] For cases from state courts: The opinion of the highest state court to review the merits appears at Appendix to the petition and is [ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or, [X] is unpublished (Order denying further appellate review, App. 15a).

The opinion of the **Massachusetts Appeals Court** appears at Appendix **App. 1a** to the petition and is [ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or, [X] is unpublished (Unreported summary memorandum and order pursuant to Rule 23.0, App. 2a).

JURISDICTION

[ ] For cases from federal courts: The date on which the United States Court of Appeals decided my case was . [ ] No petition for rehearing was timely filed in my case. [ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix . [ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on in Application No. A . The jurisdiction of this Court is invoked under 28. U. S. C. §1254(1).

[X] For cases from state courts: The date on which the highest state court decided my case was **June 24, 2026** (date) A copy of that decision appears at Appendix **App. 15a**. [X] A timely petition for rehearing was thereafter denied on the following date: **No petition for rehearing was filed**, and a copy of the order denying rehearing appears at Appendix . [X] An extension of time to file the petition for a writ of certiorari was granted to and including **No extension was sought or granted** (date) on (date) in Application No. A .

The jurisdiction of this Court is invoked under 28. U. S. C. §1257(a).

Constitutional and Statutory Provisions Involved

U.S. Const. amend. I (Petition Clause)

"Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. amend. II (Second Amendment)

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. Const. amend. XIV, § 1 (Due Process Clause)

"No State shall... deprive any person of life, liberty, or property, without due process of law..."

Mass. G.L. c. 209A, § 3 (Relevant Part)

"A person suffering from domestic abuse may file a complaint in the court requesting protection from such abuse... The court may enter such orders as it deems necessary to protect the plaintiff from abuse, including... refraining from abusing the plaintiff... [and] ordering the defendant to immediately surrender to the licensing authority... all firearms, rifles, shotguns, machine guns and ammunition..."

Statement of the Case

This case presents a recurring constitutional question of national importance concerning the limits of a State's authority to convert lawful, constitutionally protected conduct into evidence of future dangerousness sufficient to justify a domestic abuse prevention order carrying severe constitutional consequences, including the total deprivation of the right to keep and bear arms and the severe restriction of parental rights.

Massachusetts General Laws chapter 209A authorizes civil abuse prevention orders where a plaintiff demonstrates a reasonable fear of imminent serious physical harm. The statute does not authorize courts to substitute lawful petitioning activity, lawful parental conduct, or non-threatening communications for a constitutionally sufficient present predicate of imminent violence. That, however, is precisely what occurred here.

On January 31, 2025, Respondent obtained an ex parte abuse prevention order after alleging, among other things, that Petitioner had sent "multiple threatening emails" to Respondent and her attorney and had engaged in escalating harassment. See Affidavit of Respondent, (App. 28a). The affidavit otherwise described routine parenting disputes concerning parenting exchanges, medical appointments, and disagreements over the parties' custody order. The ex parte court did not review the alleged communications before issuing the order.

A full evidentiary hearing was conducted on February 14, 2025. Unlike the ex parte proceeding, the trial court reviewed the actual communications in their entirety. The principal factual allegation used to obtain emergency ex parte relief—that Petitioner had sent "multiple threatening emails"—failed to survive adversarial testing. After personally reviewing every email and Our Family Wizard message introduced into evidence, the trial judge expressly found: "There's nothing in these emails that's threatening... nothing that he actually comes out and threatens." Transcript of February 14, 2025, (Pet. App. 16a). The trial judge specifically clarified: "He seeks remedies in court, compliance with the court order." Transcript of February 14, 2025 (App. 16a). The court further acknowledged that Petitioner's communications consisted largely of attempts to obtain compliance with existing court orders and the pursuit of judicial remedies. Those findings are undisputed in the record.

The court likewise rejected Respondent's claim that Petitioner's attendance at a pharmacy constituted harassment. The evidence established that Petitioner attended the pharmacy because the parties' five-year-old son had been ill for several days, and Petitioner sought medication instructions concerning the child's care during his parenting time. After hearing testimony regarding that incident, the judge ruled simply: "Well, that's not harassment." Transcript of February 14, 2025 (App. 17a).

Despite explicitly clearing the communications of any threatening content and finding that the pharmacy encounter was not harassment, the trial court nevertheless extended the abuse prevention order by shifting to a purely predictive, standardless rationale. See Order of Extension, (App. 13a–14a). In explaining its decision, the court stated that "the law has changed recently" and referred to the concept of "coercive control." Transcript of February 14, 2025 (App. 21a). The court treated Petitioner's litigation activity, repeated court filings, efforts to enforce parenting orders, attendance at medical appointments involving his child, and non-threatening communications as collectively demonstrating "escalation," notwithstanding its express findings that Petitioner's communications contained no threats and that the pharmacy incident was not harassment.

As required by federal law, 18 U.S.C. § 922(g)(8), the extension of the abuse prevention order immediately deprived Petitioner of his ability to possess firearms, notwithstanding the absence of any finding that he threatened anyone, misused firearms, or committed any act of violence. The order likewise imposed substantial collateral consequences affecting Petitioner's reputation, liberty interests, and parental rights.

Petitioner filed post-hearing motions challenging the extension, including motions seeking findings of fact, reconsideration, and the admission of additional evidence; each motion was denied. See Docket Denying Post-Hearing Motions, (App. 25a-26a).

The Massachusetts Appeals Court affirmed in an unpublished memorandum issued pursuant to Rule 23.0. See *M.L. v. B.M.*, No. 2025-P-0721, (App. 1a–12a). Although the trial court had relied upon "coercive control," the Appeals Court expressly declined to decide whether that theory supported the order, stating: "we need not and do not reach that question." (App. 6a). Instead, it affirmed under the traditional statutory theory of fear of imminent serious physical harm. To do so, the Appeals Court explicitly noted that the trial court "credited the plaintiff's account of past threats to her physical safety, an escalation in the defendant's 'menacing' behavior, and the plaintiff's resulting fear (which the judge found reasonable)." (App. 7a). The Appeals Court further emphasized that the trial judge properly considered litigation context under *Iamele*, including "ongoing child custody or other litigation that engenders hostility." (App. 8a). It relied upon Petitioner's allegedly angry and acrimonious communications, extensive litigation history, custody filings, and other conduct to conclude that Respondent's fear was objectively reasonable, explicitly stating that "the judge credited the plaintiff's account of... an escalation in the defendant's 'menacing' behavior," (App. 7a), despite the trial court's express finding that Petitioner's communications contained no threats. The Massachusetts Supreme Judicial Court subsequently denied further appellate review. See Order Denying Further Appellate Review, (App. 15a).

This case presents an unusually clean vehicle for resolving the Questions Presented because Petitioner accepts the findings below for purposes of this petition and challenges only the constitutional framework governing the dangerousness determination that followed.

Reasons for Granting the Petition

This case presents an exceptionally clean, unencumbered vehicle to resolve a profound and recurring constitutional question left open by *United States v. Rahimi*. The record contains no messy factual disputes or independent state-law procedural barriers to review. For purposes of this petition, Petitioner accepts every credibility determination and factual finding made below as true. The question presented arises on a pure issue of constitutional law: whether, accepting those findings—including the trial court's express determinations that Petitioner's communications were not threats and that the pharmacy incident did not constitute harassment—the Constitution permits a judicial finding of dangerousness to rest solely upon an open-ended totality-of-the-circumstances analysis, or instead requires identifiable constitutional predicates before enumerated constitutional rights may be burdened.

A. The Decision Below Permits a State to Satisfy an Objective Standard of Imminent Serious Physical Harm by Treating Lawful, Constitutionally Protected Present Conduct as Evidence of Escalating Dangerousness.

When present conduct independently demonstrates dangerousness, contextual background elements merely provide clarity. When present conduct does not independently demonstrate dangerousness, the totality analysis begins performing constitutional work. This petition asks what constitutional principle limits the amount of work a totality analysis is permitted to perform before lawful conduct may be transformed into dangerousness.

The constitutional question is not whether a court may consider contextual factors as part of a background framework. It may. The question is what constitutional limits govern the work that a totality analysis is permitted to perform. Under the rule adopted below, a remote background event does not merely provide context; it permanently alters the approach by which all future lawful conduct is evaluated. It functions as an unguided mechanism that transforms otherwise lawful petitioning activity and parental rights into evidence of predictive dangerousness, where the totality analysis functions as the entire constitutional basis.

The inevitable constitutional consequence of this framework is a standardless methodology that permits the routine deprivation of constitutional rights. Under this script, a litigant need only make an allegation of a remote incident, wait for the routine friction of a contentious custody arrangement to occur, and then demand that the court aggregate those lawful acts as "escalation." If the Constitution permits this mode of analysis, then a citizen's fundamental rights may be burdened through a routine template in which a remote historical allegation supplies the contextual foundation while an entirely lawful contemporary record is simply relabeled as "escalation

What, under the Constitution, does the exercise of protected parental and petitioning rights "escalate" to? Does mere contention between parents over schedules and court compliance qualify as physical dangerousness simply because a past background factor exists?

This case presents that question cleanly because the trial court's explicit findings define what Petitioner did not do before the State extended a civil abuse prevention order. The trial court reviewed Petitioner's communications and found: "There's nothing in these emails that's threatening... He seeks remedies in court, compliance with the court order." (App. 16a). The court also rejected the other asserted basis for treating Petitioner's conduct as abuse, ruling that

Petitioner's appearance at a pharmacy to obtain his sick son's medication instructions "is not harassment." (App. 17a)

The respondent sought emergency relief approximately seventy-two days after that pharmacy incident. During that intervening period, no contemporaneous threat or act of violence was identified. Instead, the order followed Petitioner's continued pursuit of judicial relief through the Probate and Family Court. What, then, supplied the missing statutory predicate of "imminent serious physical harm"? The lower courts relied on an unguided totality review, recharacterizing lawful present conduct as "escalation" to form a propensity-based prediction of dangerousness where the totality analysis itself serves as the asserted constitutional basis for the dangerousness determination. At what point does the Constitution require a constitutionally sufficient present predicate before contextual factors may transform otherwise lawful conduct into evidence of dangerousness?

The totality relied upon below consisted of two distinct categories of conduct that performed fundamentally different constitutional functions. The historical record, offered as the contextual justification for future predictive judgments, consisted of a credited but uncorroborated allegation that Petitioner damaged a door approximately five years earlier and allegations that Petitioner had previously screamed in Respondent's face. The contemporary record, upon which the constitutional finding of present dangerousness necessarily depended, consisted of protected petitioning activity through repeated court filings; lawful parental efforts to enforce custody orders and attend his son's medical appointments; communications the trial court expressly found contained no threats; a pharmacy encounter the trial court expressly found was "not harassment"; and Petitioner's continued pursuit of judicial relief. Even accepting every one of those allegations and findings as true for purposes of this petition, what constitutional principle transforms a remote historical record, coupled with a contemporary record expressly found to contain no threats and no harassment, into the present imminent serious physical harm required before enumerated constitutional rights may be burdened? Historical conduct may provide context, but it cannot eliminate the constitutional requirement that the State identify an objective present predicate of dangerousness.

The Constitution cannot permit that transformation to occur merely because a court characterizes the aggregate as "escalation." Nor may the State satisfy the constitutional requirement of imminent serious physical harm merely by relabeling lawful, non-threatening conduct as "escalation." "Escalation" is a conclusion, not an objective constitutional predicate. Where the trial court has expressly found that the contemporary communications contained no threats and that the principal contemporary encounter was not harassment, the Constitution requires the State to identify the objective present conduct that transformed those lawful acts into imminent serious physical harm. Otherwise, the statutory requirement of imminence ceases to function as a constitutional limitation and instead collapses into a semantic exercise in which the label "escalation" simply replaces the constitutional analysis it is supposed to perform.

B. The Turning of the First Amendment Petition Clause into Evidence of Dangerousness

This case presents that question cleanly because the trial court's own findings demonstrate precisely how Petitioner's protected petitioning activity became incorporated into the dangerousness determination. Here is the paragraph with the accurate transcript and appendix citations filled in directly from the record:

The conduct the trial court treated as evidence of escalation included Petitioner's persistent exercise of his First Amendment right to petition the courts for redress of grievances. At the hearing, Respondent's counsel emphasized that there had been "multiple, multiple filings" by

Petitioner in probate court, "so much so that there was a gatekeeper order." (App. 23a). The trial court recognized that Petitioner had "a right to petition the court," but immediately linked that right to the gatekeeper order, stating: "I really can't look at that as being abusive," but "if the Court sees it as harassing or . . . to the point that they had to issue a gatekeeper order against you, I mean, you're not helping yourself." (App. 18a).

The court returned to that theme repeatedly. It recited that the Probate and Family Court had noted Petitioner's filings and had entered an order prohibiting additional post-trial motions without prior permission. When Petitioner asked the court to explain the alleged escalation, the court described an increasing, menacing, and acrimonious conduct and immediately grounded that conclusion in the gatekeeper order, saying that, as it had mentioned repeatedly, the probate court had issued a gatekeeper order because Petitioner was "inundating" the court, without once reviewing any filings. (App. 19a–20a).

The First Amendment protects the right to petition the government for redress of grievances, including meaningful access to the courts. As this Court has recognized, "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). That protection would possess little constitutional content if the State could later utilize the exercise of that right itself as affirmative evidence that the citizen is dangerous. Nothing in the record establishes that Petitioner's filings were frivolous, vexatious, fraudulent, or otherwise outside the protection of the First Amendment, and neither the trial court nor the Appeals Court identified any adjudication to that effect. Indeed, the trial court never reviewed the underlying motions before utilizing the resulting gatekeeper order as evidence of dangerousness. To the contrary, the trial court explicitly acknowledged that Petitioner was pursuing lawful judicial remedies, stating: "He seeks remedies in court, compliance with the court order." (App. 16a-17a). Yet the same protected petitioning activity was later incorporated into the courts' theory of "escalating" behavior and utilized as a component of the dangerousness determination itself. Because the State never found that Petitioner's litigation activity had crossed the constitutional line into an unprotected category, it necessarily relied upon constitutionally protected petitioning itself as one component of the dangerousness determination. That is precisely the constitutional transformation this petition challenges. If constitutionally protected petitioning activity may itself become part of the predicate for dangerousness simply by being aggregated with other lawful conduct and characterized as "escalating" behavior, then the Constitution must supply objective legal principles governing that transformation. Otherwise, the constitutional threshold depends not upon objective law, but upon an unguided judicial characterization of protected conduct.

Compounding this error, the trial court never actually reviewed Petitioner's underlying filings before treating the gatekeeper order as evidence of dangerousness. It did not examine a single motion or determine that any filing contained threatening language. Instead, it inferred from the mere existence of an administrative management order that Petitioner had become abusive, and repeatedly relied upon that inference within its totality analysis as evidence of a propensity for future physical violence. The court's final written order contained no findings of fact, no structured balancing test, and no explicit conclusion of law establishing a threat of physical violence, consisting instead of a bare checkbox extension. See Order of Extension, (App. 13a–14a). Due process does not permit a court to substitute an administrative filing-management order—or a silent, check-the-box extension form—for the independent constitutional determination of dangerousness required before enumerated rights may be burdened.

C. The Turning of Parental Rights into Evidence of Dangerousness

Nor was protected petitioning the only lawful conduct transformed into evidence of dangerousness. The same methodology was applied to Petitioner's Fourteenth Amendment parental rights. The alleged "escalation" also included lawful parental conduct protected under the Fourteenth Amendment. Respondent's counsel argued that Petitioner's exercise of his parental rights itself demonstrated "escalation" because he attended his son's pediatric appointment after informing Respondent he would be present. Respondent acknowledged in her affidavit that she informed Petitioner he did not have her permission to attend and threatened to call the police if he came. See Affidavit of Respondent, (App. 28a). The custody judgment, however, contains no provision requiring Respondent's permission for Petitioner to attend his son's medical appointments. Thus, the conduct relied upon as evidence of dangerousness consisted not of violating a court order, but of exercising a parental right the custody judgment itself did not prohibit. Respondent further acknowledged that Petitioner attended, sat in a separate examination room to speak with the physician after the appointment, and that the parties left without any contact. (App. 28a).

Respondent likewise relied upon Petitioner's appearance at a parenting exchange earlier than she believed the custody order permitted, and routine communications through a court-approved parenting application. During the pharmacy encounter, Respondent alleged that Petitioner approached her in an angry and aggressive tone and followed her into the pharmacy. She did not allege that Petitioner struck her, attempted to strike her, blocked her movement, physically restrained her, brandished a weapon, or engaged in any objectively threatening act.

Rather, her allegation rested upon her characterization of Petitioner's demeanor during an encounter that the trial court explicitly ruled was "not harassment." (App. 17a).

The common thread is unmistakable. The conduct aggregated as "escalation" consisted of constitutionally protected petitioning, lawful parental activity, and communications the trial court expressly found contained no threats, together with an encounter the court expressly found was "not harassment." The constitutional question is not whether those facts may be considered as background. It is whether they may themselves become the affirmative basis for a finding of dangerousness sufficient to burden enumerated rights.

D. The Complete Eradication of Fourteenth Amendment Meaningful Notice and the Inevitable Chilling of Unrelated Rights

Without a constitutionally sufficient present predicate governing present conduct, ordinary citizens receive no meaningful notice of what conduct will subject them to the loss of fundamental rights. A law or judicial framework violates due process when it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis..." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

After a remote historical allegation has been credited, how is an ordinary citizen supposed to know that the following otherwise lawful, routine activities will later be judicially aggregated and transformed into evidence of present physical dangerousness:

Attending a child's pediatric or medical appointments; Filing non-frivolous motions to enforce existing custody orders; Pursuing a lawful appeal through authorized legal channels; Communicating through a court-approved parenting application such as OurFamilyWizard; Appearing at court-ordered parenting exchanges or requesting police-assisted exchanges to minimize conflict; Speaking in an angry or raised voice during an encounter that the trial court expressly found did not constitute harassment and contained no threat of physical violence.

The constitutional defect inherent in allowing escalation and propensity reasoning without a clear baseline extends beyond the retroactive loss of rights; it exerts a massive, impermissible chilling effect on the day-to-day exercise of independent constitutional guarantees. When the state analytical framework allows non-threatening, acrimonious domestic friction to satisfy a dangerousness standard, citizens are forced to surrender the exercise of one fundamental right out of fear of losing another. A parent cannot freely exercise First Amendment petitioning rights or Fourteenth Amendment parental liberties when the routine, high-conflict friction of a custody dispute carries the severe structural penalty of automatic civil disarmament.

The consequences of that uncertainty are neither abstract nor confined to the Second Amendment. A Massachusetts abuse prevention order is issued through a civil proceeding under a preponderance standard, yet its violation immediately exposes the restrained party to criminal liability. When the methodology governing issuance lacks an objective constitutional predicate and instead permits lawful, non-threatening conduct to be recharacterized as "escalation," ordinary citizens receive no meaningful notice of what conduct will suddenly subject them not only to the loss of enumerated constitutional rights, but also to immediate arrest and criminal prosecution. The chilling effect is therefore immediate and substantial. A parent seeking to comply with custody orders, attend a child's medical appointments, communicate regarding a sick child, or petition a court for relief must constantly guess whether otherwise lawful conduct will later be recharacterized as "escalation," thereby exposing that parent not only to additional civil restrictions, but also to criminal sanctions for violating an order created through that same

standardless methodology. Due process cannot tolerate a framework in which constitutional uncertainty surrounding the civil order itself becomes the gateway to criminal punishment.
The Fourteenth Amendment cannot protect parental liberty and due process while simultaneously permitting the lawful exercise of that liberty to become part of the evidentiary basis for curtailing constitutional rights without a constitutionally sufficient present predicate. A constitutional right provides no meaningful protection if its lawful exercise may itself become affirmative evidence supporting the deprivation of another enumerated constitutional right. If the Constitution permits that result without identifying the minimum objectively threatening present conduct necessary before background factors may constitutionally satisfy a dangerousness standard, then the determination ceases to be governed by an objective rule of law and instead depends upon a judge's subjective prediction of future risk, where the totality analysis itself becomes the constitutional predicate.

The due process problem extends beyond notice. Meaningful appellate review likewise depends upon an articulated legal standard capable of objective judicial review. The Appeals Court affirmed by relying upon the trial judge's finding of Petitioner's "escalating" conduct as part of the dangerousness determination, yet neither court articulated the legal standard that transformed otherwise lawful conduct into constitutionally sufficient escalation. The Appeals Court therefore reviewed only the trial court's conclusion, not an identifiable constitutional rule capable of objective review. Without an articulated governing standard, neither litigants nor reviewing courts can determine whether the dangerousness finding rests upon objective constitutional principles or merely an unguided aggregation of lawful conduct under a totality-of-the-circumstances analysis. When the deprivation of enumerated constitutional rights turns upon an undefined concept lacking identifiable legal limits, meaningful appellate review is impaired, meaningful notice disappears, and the constitutional boundary itself becomes vulnerable to arbitrary application.

E. The Devolving of the Totality Analysis into Discretionary Balancing via the Rubric of "Tone" and the Accumulation of Non-Threatening Acts

The State's principal response will be that dangerousness is inherently predictive, that courts must therefore evaluate the totality of the circumstances, and that the Constitution imposes no further limitation upon that methodology. The State will argue that it evaluated the totality of Petitioner's contemporary actions, focusing heavily on the angry, acrimonious, or persistent tone of the communications and encounters to perceive an underlying danger.

But this argument exposes the deeper, fatal constitutional defect. The question is not whether individual parts may be viewed together; the question is what objective constitutional predicate limits a court's discretion to determine that lawful contention is constitutionally sufficient to establish the dangerousness predicate required to deprive a citizen of fundamental rights. A totality analysis is a methodology for evaluating facts; it is not itself a constitutional fact. The Constitution therefore requires an objective legal principle explaining why the accumulation of individually lawful acts becomes constitutionally sufficient to establish present dangerousness. A series of acts that are each explicitly found to be non-threatening and non-harassing cannot become constitutionally sufficient to satisfy a physical dangerousness standard solely through accumulation unless the Constitution identifies an objective principle explaining why.

If the contemporary record consists of attending a medical appointment, filing a non-frivolous motion, communicating through a court-approved parenting application, complying with a custody order, requesting a police-assisted exchange, speaking in an angry or raised voice during an encounter expressly found not to constitute harassment, and communications expressly found to contain no threats, then the Constitution requires some objective constitutional predicate explaining how those acts collectively transmute into physical danger. Under the lower courts' methodology, a subjective characterization of a litigant's tone serves as an unguided constitutional wild card, granting judges unchecked permission to transform speech into a physical threat based on personal perception, even where that speech is explicitly found to contain no threats.

The First Amendment does not protect an individual's right to access the courts or communicate through a court-approved application only when they do so with a tone that a court deems sufficiently polite or passive. Passionate, angry, or persistent speech regarding parental rights and legal enforcement remains protected under the Constitution unless it crosses an objective threshold. As this Court has long held, "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969). A series of objectively non-dangerous acts and acrimonious verbal encounters cannot satisfy an objective dangerousness standard merely because a court labels the collective tone, yelling, or accumulation as escalation.

When the State answers the demand for a constitutional boundary by pointing to judicial experience, common sense, or the whole picture, it is not identifying a limiting principle—it is merely describing a methodology. Pointing to judicial experience explains who decides, but not what constitutional rule limits the decision. Pointing to the whole picture explains how evidence is viewed, but not when the Constitution permits that evidence to constitute a constitutionally sufficient finding of dangerousness. Methodology explains the process of reaching a conclusion; it cannot itself supply the constitutional content of the conclusion reached. Absent a constitutionally sufficient present predicate, the dangerousness inquiry inevitably devolves into discretionary balancing.

That conclusion does not challenge the ordinary discretion judges exercise in weighing evidence or assessing credibility. Courts have always possessed such discretion. The constitutional defect arises when discretion itself becomes the governing legal standard. This Court has repeatedly required objective constitutional limits that constrain official discretion where fundamental rights are implicated. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983). Likewise, *Bruen* rejected an approach that leaves the scope of an enumerated Second Amendment right to open-ended, means-end judicial interest balancing, requiring instead that firearm regulations be justified by reference to historical tradition. See *Bruen*, 597 U.S. at 22–24. Petitioner's challenge is therefore not to judicial discretion itself, but to the absence of any objective constitutional predicate governing the framework by which that discretion is exercised.

The undefined concept of "escalation" becomes the mechanism by which discretionary balancing is reintroduced under another name. Rather than identifying an independently sufficient present predicate, the court utilizes a remote historical record as contextual justification, aggregates an otherwise lawful contemporary record, assigns constitutional significance through subjective assessments of tone, acrimony, persistence, and "escalation," and then concludes that the totality itself supplies the asserted constitutional basis for the dangerousness determination. As *Heller* explained, "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *District of Columbia v.*

Heller, 554 U.S. 570, 636 (2008). A constitutional guarantee subject to such ad hoc, case-by-case judicial assessment ceases to be an objective rule of law.

If the Constitution imposes no constitutionally sufficient present predicate before a totality analysis may satisfy a dangerousness finding, then there is literally no limiting principle. Every act that is not independently sufficient to establish dangerousness nevertheless becomes eligible for aggregation. Filing motions, attending medical appointments, communicating through court-approved applications, appearing for parenting exchanges, speaking angrily, raising one's voice, or any other lawful act may be added together until a court subjectively concludes that enough has accumulated. At what point a constitutionally sufficient dangerousness determination is reached is not discovered through objective law; it is created through judicial discretion. If that is the constitutional rule, then the Constitution protects fundamental rights only until a judge concludes that enough lawful conduct has accumulated. Constitutional guarantees cannot depend upon an undefined point of accumulation known only to the individual decisionmaker.

F. The Ingenious Mechanism by Which Objective Standards Are Replaced with Discretionary Balancing

This case illustrates the "ingenious mechanism" by which an unguided decisionmaking framework permits objective constitutional standards to be replaced with discretionary balancing. The structural progression by which this is accomplished unfolds as follows: A historical allegation of misconduct is made; the trial court conducts a civil protective order hearing and makes a purely subjective credibility determination, choosing to credit that historical allegation. The court then examines the contemporary evidence and explicitly notes the specific factual exclusions in the record:

No threatening communications; (App. 16a); No harassment during the principal contemporary encounter (the pharmacy incident); (App. 17a); No contemporaneous assault or attempted assault; No present acts of physical violence or firearm misuse; No objectively threatening present conduct demonstrating an acute, present danger; and No present conduct independently satisfying the statutory requirement of imminent serious physical harm.

Rather than concluding that the contemporary record lacks an independent factual basis for violence or threats, the court deploys the totality of the circumstances analysis as an active transformer. The credited historical allegation becomes the permanent interpretive lens through which every item of the contemporary record is constitutionally evaluated.

The contemporary record—consisting of ordinary incidents of animosity, yelling or shouting that naturally arise in a high-conflict custody dispute, filing non-frivolous motions, communicating through a court-approved application, attending a child's medical appointments, appearing for court-ordered parenting exchanges, and verbal anger devoid of threats—is judicially recharacterized as "escalation." That undefined finding of escalation is utilized to support a predictive, propensity-based leap that future physical violence might occur. That standardless prediction completely replaces the need for a constitutionally sufficient present predicate and serves as the asserted constitutional basis for a total deprivation of liberties.

This case exposes the constitutional line the lower courts crossed. A totality-of-the-circumstances analysis may evaluate, explain, or place objectively threatening conduct in context. It cannot itself manufacture the constitutional predicate it is supposed to evaluate. Where the contemporary conduct relied upon by the court is expressly found to contain no threats and to constitute no harassment, the totality analysis no longer performs an evidentiary function; it performs a constitutive one. It transforms lawful conduct into dangerousness. The

Constitution requires an objective limiting principle governing that transformation. Otherwise, there is no constitutional boundary at all—only the unconstrained authority to recharacterize lawful conduct until it acquires constitutional significance.

The core constitutional defect exposed by this progression is that a credited historical allegation is given the absolute power to serve as the entire constitutional threshold. Under this framework, there is literally no amount of contemporary conduct that cannot be transformed into dangerousness once the totality analysis is permitted to substitute itself as the governing standard. The constitutional limit disappears entirely.

Every deprivation of Petitioner's enumerated rights originated with allegations unsupported by objective corroborating evidence. Those allegations were not merely background facts; they became the indispensable constitutional catalyst for every subsequent step in the State's methodology. They supplied the historical narrative, permanently altered the constitutional significance of Petitioner's otherwise lawful conduct, supported the finding of "escalation," and ultimately furnished the dangerousness determination used to burden fundamental rights. If the Constitution permits that chain to begin with nothing more than uncorroborated allegations, then any citizen's exercise of constitutional rights may be placed in jeopardy by accusation alone. The question is not whether a trial court may assess credibility. The question is whether, when enumerated constitutional rights are at stake, allegations unsupported by objective corroborating evidence may serve as the constitutional catalyst that ultimately authorizes their deprivation.

Before the credibility finding, the petitioner's lawful present conduct is recognized by the law as just that—lawful, constitutionally protected behavior. After the credibility finding, the identical lawful conduct is suddenly transformed into evidence of dangerousness. The profound constitutional defect is that the constitutional character of the present conduct changes solely because the unguided framework changes. A judge is effectively granted the power to transmute non-violent, everyday domestic contention into a physical threat based entirely on a remote past cloud. The conduct does not change; the law does not change; only the state's unguided approach changes.

Once a historical accusation is credited under an unguided framework, a citizen's fundamental rights are effectively stripped of all contemporary constitutional protection; their everyday behavior is permanently recharacterized as dangerous simply because they are engaged in an acrimonious, high-conflict domestic dispute. There is effectively no stopping point.
At no point in this progression does the court identify what constitutional governance constrains the totality, or what minimum objective present conduct must exist to separate natural verbal or legal contention from an actual physical threat. The Constitution cannot permit fundamental, enumerated rights to turn entirely on an unguided pipeline running from bare accusation, to credibility finding, to lawful contemporary conduct, to a prediction of danger, without identifying the constitutional floor that constrains the state's methodology to produce a constitutionally sufficient present predicate.

If the Constitution permits enumerated rights to be burdened whenever uncorroborated allegations are combined with the ordinary exercise of those same constitutional rights, then those rights no longer function as constitutional guarantees against the State. They become privileges contingent upon the State's willingness to refrain from treating their exercise as evidence of dangerousness. A constitutional guarantee cannot simultaneously protect the exercise of a right while permitting the exercise of that same right to become affirmative evidence supporting its own destruction.

A totality-of-the-circumstances analysis may evaluate evidence, but it cannot eliminate the need for an objectively sufficient constitutional predicate. Methodology cannot replace constitutional substance. When every item of the contemporary record relied upon by the court is expressly found to be non-threatening and non-harassing, the Constitution requires the State to identify the objective constitutional principle that transformed that contemporary record into imminent serious physical harm. Without that explanation, the totality analysis itself becomes the constitutional predicate—a role the Constitution does not permit it to perform.

G. Bruen and Rahimi Do Not Permit Civil Disarmament Based Upon an Unguided Predictive Methodology Requiring the Totality Analysis to Serve as the Constitutive Constitutional Predicate.

This case does not ask whether a State may determine that a citizen is dangerous. *Rahimi* confirms that, in appropriate circumstances, a qualifying judicial determination may support temporary civil disarmament. The question presented here is what constitutional principles govern that qualifying determination before it becomes constitutionally sufficient to burden enumerated constitutional rights. More specifically, may a State satisfy that constitutional requirement by employing a methodology that utilizes a remote historical allegation to transform an otherwise lawful contemporary record into dangerousness through an undefined theory of "escalation"?

Nothing in *Bruen* or *Rahimi* suggests that the constitutional sufficiency of a dangerousness determination may depend upon an unguided methodology that permits lawful, constitutionally protected conduct to acquire constitutional significance solely through aggregation. *Rahimi* assumed the existence of a constitutionally sufficient dangerousness determination. This petition asks what constitutional principles govern that determination where the contemporary record is expressly found to contain no threats, no harassment, and no independently threatening present conduct.

H. This Petition Presents an As-Applied Challenge to the Constitutional Sufficiency of the Dangerousness Determination.

In *United States v. Rahimi,* this Court rejected a facial challenge to 18 U.S.C. § 922(g)(8). As Justice Gorsuch observed, however, "*Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in particular circumstances.*" 144 S. Ct. at 2463 (Gorsuch, J., concurring).

This petition presents such an as-applied challenge. Petitioner does not contend that every judicial finding of dangerousness is constitutionally insufficient. Rather, this case asks what constitutional principles govern a dangerousness determination when it serves as the predicate for burdening enumerated constitutional rights. Here, the trial court expressly found that the contemporary record contained no explicit threats, no actionable harassment, and no independently threatening present conduct, yet nevertheless concluded that Petitioner was sufficiently dangerous through an undefined theory of "escalation" and a standardless totality-of-the-circumstances analysis that transformed the contemporary record through the lens of a remote historical allegation. This petition asks whether the Constitution requires objective constitutional content to govern that determination before fundamental rights may be burdened.

This Court's jurisprudence in other due process contexts establishes that a bare assertion of dangerousness cannot substitute for the legal predicates required before a severe deprivation of liberty may occur. In the context of civil commitment, this Court observed that "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); *see also*

Kansas v. Crane, 534 U.S. 407 (2002). Rather, the Court explained that dangerousness alone was ordinarily insufficient and that the statutes it had upheld coupled dangerousness with additional legal elements. The constitutional concern was not the label "dangerousness" itself, but whether the law supplied objectively identifiable predicates giving that label constitutional significance.

The corresponding constitutional question presented here is therefore whether the Constitution likewise requires objectively identifiable constitutional predicates before a judicial finding of dangerousness becomes constitutionally sufficient to burden enumerated constitutional rights. If so, what constitutional principle transformed Petitioner's contemporary record—expressly found to contain no threats and no harassment—into imminent serious physical harm?

Here, the constitutional question is squarely presented. The trial court expressly found that Petitioner's communications contained "nothing that . . . actually comes out and threatens," yet nevertheless concluded that Petitioner's conduct was "threatening," "menacing," and "escalating." The Appeals Court likewise affirmed by relying upon "an escalation in the defendant's 'menacing' behavior" and later reiterated that the judge properly considered Petitioner's "escalating" conduct, despite acknowledging that the communications themselves were not threatening. Neither court, however, identified the legal characteristics that transformed otherwise lawful conduct into "escalation" sufficient to establish dangerousness. That omission is significant because "escalation" was not merely descriptive; it supplied the analytical bridge between conduct expressly found to contain no threats or harassment and a judicial finding of dangerousness sufficient to burden enumerated constitutional rights.

This case illustrates the constitutional defect with unusual clarity. At the evidentiary hearing, Petitioner expressly asked the trial court to identify the objective conduct that constituted the alleged pattern of "escalation." The resulting exchange demonstrates the precise methodological shortcut challenged in this petition. When Petitioner asked the court to explain the alleged escalation, the court described an increasing, menacing, and acrimonious conduct and immediately grounded that conclusion in the gatekeeper order:

> MR. MCCARTHY: Can the Court explain what that escalation is and her fear . . . for the record?
>
> THE COURT: There's an increasing, a sort of menacing and acrimonious conduct on your part. And there's lots of evidence of that because what you know, as I said, and I go back, it's like the fifth time I've mentioned it, but when the probate court order issues a gatekeeper order because you are just inundating them with filings constantly, that tells me that there's —
>
> MR. MCCARTHY: Your Honor, it's my right to file a motion.
>
> THE COURT: Well, you do. But there's also —
>
> MR. MCCARTHY: Your Honor —
>
> THE COURT: You can overdo it. Believe me, as a judge, I — you can overdo it when it comes to we have —
>
> MR. MCCARTHY: Your Honor, I filed three, three motions.
>
> THE COURT: There would be no gatekeeper order if it was just three motions. Obviously, it's not — (App. 19a–20a).

When asked to identify the objective present conduct that transformed Petitioner's contemporary record into constitutionally significant "escalation," the trial court did not identify a contemporaneous threat, assault, attempted assault, or any independently threatening present act. Instead, it relied upon an administrative gatekeeper order entered in a separate court division and concluded that Petitioner had simply "overdo[ne]" the exercise of his First Amendment right to petition the courts.

The Appeals Court subsequently affirmed by relying upon Petitioner's alleged "escalating" conduct without articulating the legal or constitutional standard that transformed otherwise lawful conduct into escalation sufficient to establish dangerousness.

That omission is constitutionally significant. "Escalation" was not merely descriptive; it supplied the analytical bridge between conduct expressly found to contain no threats or actionable harassment and a judicial finding of dangerousness sufficient to burden Petitioner's First, Second, and Fourteenth Amendment rights. The historical record supplied the context; the contemporary record supplied the conduct; "escalation" supplied the transformation. Yet neither court identified the constitutional rule authorizing that transformation. If the Constitution permits that transformation, it must supply objective legal limits governing when otherwise lawful conduct becomes constitutionally sufficient to establish dangerousness. If no such limits exist, then the dangerousness determination depends not upon objective constitutional law but upon an unguided aggregation of lawful conduct under a totality-of-the-circumstances analysis. The Due Process Clause does not permit a court to substitute an administrative filing-management order for an independent dangerousness determination.

If the State's position is that no objective constitutional predicate is required—that a court may simply aggregate an unguided mosaic of lawful, non-threatening conduct under a totality analysis until it subjectively concludes that dangerousness exists— then the methodology itself has replaced the constitutional predicate. This petition therefore presents the question whether such an unconstrained constitutional framework is consistent with the principles articulated in

Bruen, which rejected open-ended judicial balancing as the mechanism for defining the scope of an enumerated constitutional right.

Just as this Court has refused to accept a bare conclusion of dangerousness as constitutionally sufficient in other due process contexts, it should clarify whether the Constitution requires a constitutionally sufficient present predicate before an unguided aggregation of lawful, contentious conduct may be transformed into a judicial finding of dangerousness sufficient to deprive a citizen of enumerated constitutional rights—and, if so, what that constitutional predicate is.

The Constitution does not protect fundamental rights merely by requiring a court to invoke the label "dangerousness." If that alone were sufficient, the constitutional inquiry would collapse into semantics, permitting the deprivation of enumerated rights whenever a court simply pronounced the requisite conclusion. Rather, constitutional rights are protected not merely by requiring courts to pronounce the word "dangerousness," but by requiring that dangerousness possess objective constitutional content capable of meaningful notice, meaningful appellate review, and principled judicial application. Otherwise, the constitutional limitation resides not in law, but solely in the judge's characterization of the facts. This petition asks the Court to identify the constitutional principles that give substantive meaning to that indispensable constitutional determination.

i. The Evidentiary and Methodological Gulf and the Unresolved Question of Rahimi

In *Rahimi*, this Court applied the *Bruen* framework to 18 U.S.C. § 922(g)(8) and upheld temporary disarmament because our tradition "allows the Government to disarm an individual who poses a credible threat to the physical safety of another." *United States v. Rahimi*, 602 U.S. 181, 144 S. Ct. 2442, 2447 (2024). In *Rahimi*, the qualifying judicial finding was that the respondent posed a credible threat to the physical safety of another. This petition asks what constitutional rules govern that qualifying determination where the trial court expressly found that the communications were not threats and that the pharmacy encounter did not constitute harassment, yet nevertheless concluded that the respondent was sufficiently dangerous to justify the deprivation of enumerated constitutional rights.

The record here exposes an extraordinary analytical distance separating the circumstances of *Rahimi* from the unguided predictive process used by the lower courts. In *Rahimi*, the dangerousness predicate rested upon a clear, objective, and contemporaneous act of physical violence: an assault in a parking lot where the individual physically dragged the victim into a vehicle and discharged a firearm. *Id.* at 2447. *Rahimi* addressed the constitutionality of an outcome—disarmament based on a judicially determined, credible threat of physical violence.

Crucially, what *Rahimi* does not define is the structural constitutional rule governing the determination itself. *Rahimi* does not answer: How much evidence is constitutionally enough to establish a credible threat; What the irreducible minimum present conduct must be to satisfy that threshold; What role a totality analysis may play when contemporary acts contain no threats; or Whether a totality analysis can itself create the dangerousness finding out of individual acts cleared of being threats or harassment.

Rahimi simply assumed the existence of a qualifying judicial determination. This petition directly poses the unresolved constitutional question that follows: What objective constitutional predicate limits a court's discretion to determine that lawful contention is constitutionally sufficient to satisfy a finding of dangerousness when an unguided predictive shortcut is deployed to allow the totality framework to serve as the constitutive constitutional basis out of a contemporary record where the explicit factual findings contain no threats or harassment?

The State cannot evade the limits of *Bruen* and *Rahimi* by pointing to the mere existence of a state-court hearing. A checked box or a conclusory declaration of dangerousness after a hearing does not automatically satisfy the Constitution when the underlying approach completely lacks objective parameters and has no stopping point. The trial court found no threats in the communications, (App. 16a), and explicitly held that the principal contemporaneous encounter was not harassment, (App. 17a). When Petitioner repeatedly asked what present conduct made him dangerous, the court never identified a contemporaneous threat, assault, attempted assault, firearm misuse, physical obstruction, or any other present act demonstrating objective dangerousness. Id. Instead, the court relied on a predictive chain of reasoning: a remote background allegation became the lens through which otherwise lawful present conduct acquired a threatening character, allowing the unguided totality analysis to serve as the entire constitutive threshold.

The historical allegations do not resolve the constitutional problem; they expose it. The transcript reflects that the parties presented competing accounts concerning a remote historical incident involving damage to a door, and that Respondent acknowledged she struck Petitioner first during that confrontation. (App. 24a). Petitioner does not ask this Court to reweigh that historical event or disturb the factual findings concerning it. Even accepting every historical allegation credited below as true, the constitutional question remains unchanged: may remote historical events permanently transform an otherwise non-threatening contemporary record into the "credible threat to the physical safety of another" required by *Rahimi*, where the trial court expressly found the contemporary record contained no threats and no harassment?

ii. The State's Failure to Carry Its Burden of Identifying a Historical Analogue for Its Methodology

"escalation." That transformation is not governed by any objective constitutional rule; it depends entirely upon an undefined process of discretionary balancing.

Without this Court's intervention, an undefined theory of "escalation" will become the preferred ingenious mechanism by which lower courts insulate discretionary disarmament orders from meaningful constitutional scrutiny under the Second Amendment. A citizen's right to keep and bear arms cannot depend upon a court's undefined assessment that lawful speech, lawful litigation, lawful parenting, and non-threatening communications have simply accumulated to the point where they appear dangerous. The Constitution requires objective constitutional standards—not subjective judicial characterizations—before enumerated rights may be burdened.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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