No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZACKEY RAHIMI,
Respondent.

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

BRIEF OF SECOND AMENDMENT LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who have devoted a substantial part of their research and writing to the history of weapons regulation in the United States and the legal standards governing application of the Second Amendment. Their scholarship has been published by a major university press and in leading law journals and has been cited by members of this Court and the courts of appeals. Amici have closely followed judicial decisions interpreting and applying *N.Y. State Rifle & Pistol Association, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022), and are well suited to explain how clarifying the proper understanding of that decision would dispel the confusion and divergent outcomes abounding throughout the lower courts today.

Joseph Blocher is the Lanty L. Smith '67 Professor of Law and Senior Associate Dean of Faculty and Research at Duke University School of Law. His scholarship on gun rights and regulation has been published in the Harvard Law Review Forum, the Yale Law Journal, the Stanford Law Review, and other leading academic journals. See, *e.g.*, *Good Cause Requirements for Carrying Guns in Public*, 127 Harv. L. Rev. F. 218 (2014); *Firearm Localism*, 123 Yale L.J. 82 (2013); *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1 (2012). His work has been cited by many federal courts of appeals. *E.g.*, *Heller* v. *District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011). Professor

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Blocher co-authored a book with fellow amicus Professor Darrell Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* (2018), which includes a comprehensive account of the history, theory, and law of the right to keep and bear arms.

Jacob D. Charles is an Associate Professor of Law at Pepperdine University Caruso School of Law. His scholarship focuses on the legal regulation of state and private violence, Second Amendment doctrine and theory, and the place of guns in the criminal legal system. His scholarship has appeared or is forthcoming in the Harvard Law Review Forum, Michigan Law Review, University of Pennsylvania Law Review, Virginia Law Review, and Duke Law Journal. See, *e.g.*, *Violence and Nondelegation*, 135 Harv. L. Rev. F. 463 (2022) (with Darrell Miller); *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 Mich. L. Rev. 581 (2022); *The Trajectory of Federal Gun Crimes*, 170 U. Penn. L. Rev. 637 (2022) (with Brandon L. Garrett).

Darrell A. H. Miller is the Melvin G. Shimm Professor of Law at Duke University School of Law. His Second Amendment scholarship has been published in the University of Chicago Law Review, the Harvard Law Review Forum, the Yale Law Journal, the Columbia Law Review, and other leading journals. See, *e.g.*, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. Chi. L. Rev. 295 (2016) (with Joseph Blocher); *Institutions and the Second Amendment*, 66 Duke L.J. 69 (2016); *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122

Yale L.J. 852 (2013). His work has been cited by federal courts of appeals. *E.g.*, *Heller* v. *District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

Eric Ruben is an Associate Professor of Law at SMU Dedman School of Law. His scholarship on the Second Amendment has been published or is forthcoming in the California Law Review, Duke Law Journal, Georgetown Law Journal, Iowa Law Review, Yale Law Journal, and other prominent publications. See, *e.g.*, *An Unstable Core: Self-Defense and the Second Amendment*, 108 Calif. L. Rev. 63 (2020); *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433 (2018) (with Joseph Blocher); *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. F. 121 (2015) (with Saul Cornell). His work has been cited by this Court as well as federal district courts and courts of appeals.

Reva B. Siegel is the Nicholas deB. Katzenbach Professor of Law at Yale Law School. She writes widely on constitutional law and is a member of the American Philosophical Society, a member of the American Academy of Arts and Sciences, and an honorary fellow of the American Society for Legal History. Her recent Second Amendment articles include *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. Rev. (forthcoming 2023) (with Joseph Blocher) and *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 115 Nw. Univ. L. Rev. 139 (2021) (with Joseph Blocher). Her articles on inequality include *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *N.Y. State Rifle & Pistol Association, Inc.* v. *Bruen*, this Court held that Second Amendment claims should be assessed based on "a test rooted in the Second Amendment's text, as informed by history," rather than "means-end scrutiny," and that a government seeking to justify a firearms regulation must therefore "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. 2111, 2127 (2022). To date, the lower courts' application of *Bruen*'s approach has not produced consistent, principled results, however.[2]

To the contrary, courts applying *Bruen*'s methodology have come to conflicting conclusions on virtually

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[2] Some of the amici submitting this brief also submitted a brief in *Bruen* in which they urged this Court to affirm the means-ends scrutiny approach that had emerged as the view of most courts of appeals before this Court's consideration of that question. Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party at 11, *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843). Amici urged that approach in part because of the risk that a purely historical approach would not yield consistent, principled results—and would instead provide cover for ad hoc judicial policymaking—given (1) the vast differences between modern firearms technology and the technology that existed in 1791, (2) the profound changes in the nation's social and economic circumstances since the time of the founding and (3) the vast differences in firearms regulation that the public deems optimal given these changes. See *id.* at 16-25. Amici recognize that the Court rejected their suggestion in *Bruen*. In this brief, amici respectfully suggest clarifications to *Bruen*'s approach that will ameliorate some of the difficulties in interpretation and application that have arisen in *Bruen*'s aftermath.

every consequential Second Amendment issue to come before them. For example:

- **Laws restricting possession by users of controlled substances, see, *e.g.*, 18 U.S.C. § 922(g)(3).** Compare *United States* v. *Harrison*, No. CR-22-00328-PRW, 2023 WL 1771138, at *24 (W.D. Okla. Feb. 3, 2023) (law violates Second Amendment), with *United States* v. *Le*, No. 4:23-cr-00014-SHL-HCA, 2023 WL 3016297 (S.D. Iowa Apr. 11, 2023) (upholding statute).
- **Laws prohibiting acquisition of new guns by people who are under indictment for crimes punishable by imprisonment for more than one year, see, *e.g.*, 18 U.S.C. § 922(n).** Compare *United States* v. *Kelly*, No. 3:22-cr-00037, 2022 WL 17336578, at *6 (M.D. Tenn. Nov. 16, 2022) (holding law was enforceable), with *United States* v. *Quiroz*, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022) (holding same law unconstitutional).
- **Laws prohibiting assault weapons, see, *e.g.*, 720 Ill. Comp. Stat. 5/24-1.** Compare *Herrera* v. *Raoul*, No. 23 CV 532, 2023 WL 3074799, at *1 (N.D. Ill. Apr. 25, 2023) (holding law was enforceable), with *Barnett* v. *Raoul*, No. 3:23-cv-00209-SPM, 2023 WL 3160285, at *12 (S.D. Ill. Apr. 28, 2023) (holding same law was unenforceable under the Second Amendment).
- **Laws prohibiting high-capacity magazines, see, *e.g.*, 2022 Or. Ballot Measure 114.** Compare *Or. Firearms Fed'n, Inc.* v. *Brown*, No. 2:22-cv-01815-IM, 2022 WL 17454829, at *9 (D. Or. Dec. 6, 2022) (holding law was enforceable), with *Rocky Mountain Gun Owners* v. *Bd. of Cnty. Comm'rs*, No. 1:22-cv-02113-CNS-MEH,

2022 WL 4098998, at *2 (D. Colo. Aug. 30, 2022) (holding law similar to that considered in *Brown* unconstitutional).

- **Laws restricting possession of firearm without a serial number, see, *e.g.*, 18 U.S.C. § 922(k).** Compare *United States* v. *Price*, 635 F. Supp. 3d 455, 465 (S.D. W. Va. 2022) (holding statute unconstitutional), with *United States* v. *Reyna*, No. 3:21-CR-41 RLM-MGG, 2022 WL 17714376, at *5 (N.D. Ind. Dec. 15, 2022) (upholding same law).
- **Statute restricting convicted felons from possessing firearms, 18 U.S.C. § 922(g)(1).** Compare *United States* v. *Jackson*, 69 F.4th 495, 501 (8th Cir. 2023) (upholding), with *Range* v. *Att'y Gen.*, 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (striking down statute as applied to the challenger).

In the view of amici, a good deal of the confusion plaguing the lower courts can be traced to two closely related errors in the way the approach prescribed in *Bruen* has been understood and applied.

First, numerous cases reflect a mismatch between the reasoning employed to determine what persons, items, or conduct fall within the scope of the Second Amendment right, and the reasoning employed to determine whether a government regulation falls within the historical tradition that delimits the outer bounds of the right. That is, courts apply an expansive approach to identifying, for example, what counts as "arms" within the protective ambit of the Second Amendment, while taking a parsimonious approach to identifying a tradition of regulation analogous to the

challenged law.[3] If left uncorrected, analytical mismatches of this kind can become a means of smuggling in the very "judge-empowering interest-balancing inquiry" that *Bruen*'s historical approach was adopted to prevent. *Bruen*, 142 S. Ct. at 2129 (internal quotation marks omitted) (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 634 (2008)).

This risk can be addressed by clarifying that, in determining whether a challenged regulation is "consistent with this Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2135, courts must reason at the same level of generality in identifying historical analogues for modern regulations as courts do in determining the scope of the right to bear arms. That will preserve both sides of "the balance struck by the founding generation," *id.* 2133 n.7, between protection of the right to possess and use firearms and protection of the public from the dangers posed by misuse of firearms.

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[3] To be sure, some cases make the opposite error by improperly narrowing the scope of the Second Amendment right while taking an overly expansive approach to identifying historical analogues for modern regulation. See, *e.g.*, *Nat'l Ass'n for Gun Rights, Inc.* v. *City of San Jose*, No. 22-cv-00501-BLF, 2023 WL 4552284, at *5-6 (N.D. Cal. July 13, 2023) (defining the claimed right as "choosing to keep and bear arms at home without the burden of insuring liability for firearm-related accidents" rather than "owning or possessing firearms in the home for self-defense"); see also *Caetano* v. *Massachusetts*, 577 U.S. 411, 411 (2016) (Massachusetts state court erred in finding that stun guns do not count as Second Amendment "arms" on the ground that they "were not in common use at the time of the Second Amendment's enactment" (quoting *Commonwealth* v. *Caetano*, 26 N.E.3d 688, 693 (Mass. 2015)). Such cases, too, pose the risk of judicial policymaking.

Second, courts have rejected historical analogues offered in defense of modern firearms regulations by narrowly confining the purpose of the challenged regulations to the particular modern circumstances that generated those regulations, and then rejecting putatively analogous regulations from the founding era on the ground that they were not adopted to address precisely the same social problem as the modern regulation at issue. Although this second analytical error is a subset of the first—and poses comparable risks of empowering judicial policymaking in the guise of historical inquiry—it is sufficiently frequent and serious that it should be addressed directly. This Court should make clear that firearms regulations do not have to address precisely the same dangers to precisely the same people in precisely the same way as historical regulations in order to be "relevantly similar" for purposes of *Bruen*'s analogical test. 142 S. Ct. at 2132.

The Fifth Circuit's ruling in this case illustrates the misguided results produced by the failure to apply *Bruen*'s historical approach consistently with the principles identified above. The Fifth Circuit characterized the tradition of the right to keep and bear arms broadly but characterized our nation's historical gun regulation unduly narrowly, discounting founding-era legislation disarming individuals then deemed dangerous on the theory that the specific focus of those laws differed from § 922(g)(8), which is meant to protect against gun violence in abusive relationships. Had the Fifth Circuit applied *Bruen* properly, it would have held § 922(g)(8) constitutional because it is part of a long tradition of regulations disarming dangerous individuals.

ARGUMENT

I. COURTS SHOULD DEFINE TRADITIONS OF FIREARMS RIGHTS AND REGULATIONS EVENHANDEDLY.

In *Bruen*, this Court rejected the means-ends scrutiny that most courts of appeals had applied when adjudicating Second Amendment claims. The Court did so based largely on the view that such an approach would give courts too much power to depart from the original public meaning of the Second Amendment by making impermissible policy judgments about how robustly the right to bear arms should be protected from government regulation. As the Court put it: the "Second Amendment 'is the very *product* of an interest balancing by the people.'" *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635). *Bruen* directed that courts must, instead, look to history and tradition to determine the nature and contours of the balance struck by the people that is reflected in the Second Amendment's text.

When the Framers wrote the Second Amendment, they would have made judgments about how to strike that balance based on the weaponry of their time and the nature of their social arrangements. But the Second Amendment "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132. In particular, and as *Bruen* recognized, courts must apply the balance struck by the Framers to two significantly changed circumstances.

First, courts adjudicating Second Amendment cases will necessarily have to determine whether and to what extent the Amendment protects the right to possess and use an immense array of modern weaponry wholly unknown to the founding generation.

Bruen suggests that courts must answer that question using analogies between modern and historical arms that operate at a high level of generality. This Court explained that, under its decision *Heller*, "the Second Amendment protects the possession and use of weapons that are "'in common use at the time.'"" *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 627). This Court in *Bruen* accordingly explained that "even if * * * colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Id.* at 2143. The Court further explained that, "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Id.* at 2132. *Bruen* therefore requires reasoning by general historical analogy to ascertain what modern weaponry qualifies as "arms" within the meaning of the Amendment. If a firearm is in "common use" and can "facilitate armed self-defense," then it is relevantly similar to the arms protected by the Second Amendment at the time of its adoption and the right to bear that weapon warrants constitutional protection.

Second, "[m]uch like we use history to determine which modern 'arms' are protected by the Second Amendment," *Bruen* directed that "so too does history guide our consideration of modern regulations that were unimaginable at the founding." 142 S. Ct. at 2132. "The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Ibid*. For this reason, *Bruen* held

that "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* at 2133. That is why, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636).

The "analogical method" called for by *Bruen* is thus "an instruction to consider how our predecessors coordinated the values served by regulating guns and the burdens they imposed on the right of self-defense." Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere From Weapons Threats Under* Bruen, 98 N.Y.U. L. Rev. (forthcoming 2023) (manuscript at 117) (on file with authors). As this Court explained, "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Bruen*, 142 S. Ct. at 2133. Its aim is to determine how the balance struck in the Constitution should be implemented in cases involving the regulation of modern weaponry to address modern challenges. *Id.* at 2133 n.7 (courts should "apply faithfully the balance struck by the founding generation to modern circumstances.").

As the experience of the lower courts applying the analysis called for in *Bruen* illustrates, however, further refinement is needed to ensure that the search for historical analogues will generate consistent, principled results—and will avoid the very sort of ad hoc judicial policy balancing that *Bruen*'s historical approach was adopted to prevent. Specifically, amici

urge this Court to clarify that courts assessing historical analogues to modern firearms regulation should: (1) recognize that preserving the balance "struck by the traditions of the American people," *Bruen*, 142 S. Ct. at 2131, requires that historical analogues to modern firearms regulations be evaluated at a level of generality commensurate with that used to define the scope of the Second Amendment right; and (2) exercise particular care to avoid defining the policy justifications for modern regulations and putative historical analogues so narrowly that the historical analysis frustrates rather than vindicates the Framers' judgments about the appropriate limits on the right.

Calibrating the level of generality at which historical analogues should be evaluated. To ensure that the analytical approach prescribed in *Bruen* generates consistent and principled results, "courts should not apply a broad and forgiving principle to characterize a regulatory tradition while applying a narrow and rigid characterization of a gun-rights claim, nor vice versa." Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. (forthcoming 2023) (manuscript at 65) (on file with authors). See generally Darrell A. H. Miller, *Second Amendment Equilibria*, 166 Nw. Univ. L. Rev. 239, 269-271 (2021). Critically, incommensurate treatment "would license a court to engage in *selective* updating through its analogical reasoning, for example by expanding the class of modern 'Arms' while limiting legislatures' efforts to expand the class of persons who are protected from gun harms." Blocher & Siegel, *Guided by History*, *supra* (manuscript at 106). Such selective updating would essentially reweigh the right, masking a "freestanding 'interest-balancing'" that reliance on history and tradition was meant to prevent. See *Heller*, 554 U.S. at

634; cf. Blocher & Ruben, *Originalism-by-Analogy*, *supra* (manuscript at 65) (noting that such an approach would "distort[] the holistic historical record and risk[] confirmation bias").

Although some courts have departed from the balance struck by the Framers by defining too narrowly what counts as protected "arms," see note 3, *supra*, more frequently courts post-*Bruen* have analogized expansively to conclude that modern weaponry deserves Second Amendment protection while simultaneously rejecting historical analogues to modern firearms regulations on the ground that their justifications do not correspond precisely to the purposes of regulations that existed at the time of the founding. But what is true for the people's freedom to use arms to defend themselves must also be true for the people's collective, democratically determined judgments about how best to protect society against harms that the use of modern firearms can inflict.

Precisely because "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868," *Bruen*, 142 S. Ct. at 2132, the search for historical analogues to modern firearms regulations should focus on the basic categorical judgments reflected in the constitutional balance the Framers struck between the right to possess and carry weapons and the legitimate protection of public safety—and not on the particularized manifestations of those risks in Eighteenth or Nineteenth Century society. Blocher & Ruben, *Originalism-by-Analogy*, *supra* (manuscript at 50). Thus, "rather than asking whether the Founding generation specifically disarmed domestic abusers or prohibited rocket launchers," courts should ask if one reason the laws disarmed

persons was because they were found "dangerous." Blocher & Ruben, *Originalism-by-Analogy*, *supra* (manuscript at 49). If only historical laws that disarmed persons for exactly the same reasons as modern laws disarm people can qualify as historical analogues, then democratically elected branches' authority to protect society from the dangerous misuse of firearms will remain historically fixed and only the ability to bear arms will "apply to circumstances beyond those the Founders specifically anticipated," *Bruen*, 142 S. Ct. at 2132; cf. Miller, *Second Amendment Equilibria*, *supra*, at 249-255.

This Court's treatment of laws restricting the possession of firearms in "sensitive places" exemplifies the correct approach. The Court has made clear that it is appropriate to "use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Bruen*, 142 S. Ct. at 2133. That is, modern regulation may limit the right to bear arms in particular sensitive places—such as airline cabins, 49 C.F.R. § 1540.111(a), or subways, N.Y. Pen. Law § 265.01-e(1), (2)(n)—even though such places have no precise historical analogue.

The same considerations should govern cases involving modern regulations that limit the possession of firearms by defined categories of persons that legislatures determine are dangerous. As a historical matter, legislatures' justifications for regulation have always included the need "to prohibit dangerous people from possessing guns." *Kanter* v. *Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated on other grounds*, *Bruen*, 142 S. Ct. at 2111. For example, historical laws disarmed "those who refused to

swear an oath of allegiance," enslaved people, or "Native Americans" because "founding-era legislatures" deemed these groups "to be a threat to public safety." *Id.* at 454-458.[4] Looking further back, England's Militia Act of 1662 authorized local officials to disarm individuals that they deemed "dangerous to the Peace of the Kingdome." 14 Car. 2, c. 3, § 13 (Eng.). And during the Massachusetts ratifying convention for the United States Constitution, Samuel Adams proposed a provision for protecting the right to arms that would have restrained Congress from preventing "peaceable citizens" from keeping arms. 6 *The Documentary History of the Ratification of the Constitution* 1453 (John P. Kaminski & Gaspare J. Saladino eds., 2000). It is thus clear that "the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen*, 142 S. Ct. at 2127, encompasses government regulations that disarm categories of persons that the democratically accountable branches of government have determined pose unacceptable dangers.

Calibrating Purpose Correctly. The Court should also clarify that in evaluating historical analogues to a modern firearms regulation—particularly a regulation that seeks to keep weaponry out of the hands of dangerous individuals—courts should not reject proposed analogues because they addressed dangers that are not identical to the dangers addressed by

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[4] "It should go without saying that such race-based exclusions would be unconstitutional today." *Kanter*, 919 F.3d at 458 n.7 (Barrett, J., dissenting). Beyond that unconstitutionality, such laws are also based on odious views and stereotypes. But excluding them from consideration altogether would distort the historical record. See Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 Stan. L. Rev. Online 30, 37 (2023).

the modern regulation at issue. In *Heller*, this Court rejected the notion that the Second Amendment right should be limited to the particular reasons the Framers articulated in the constitutional text for protecting that right. The Court noted that "the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia." *Heller*, 554 U.S. at 599. But "[t]he prefatory clause" did not establish "that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Ibid.* The Court accordingly refused to conflate the reason for "the right's *codification*" with the "*central component* of the right itself." *Ibid.*

In applying *Bruen*'s "analogical reasoning," 142 S. Ct. at 2133, courts similarly should not limit the search for "a well-established and representative historical *analogue*," *ibid.*, to laws enacted for the same exact reason as the modern regulation at issue. That would limit the analogical exercise to finding "a dead ringer for historical precursors." *Ibid.*

There are several reasons why requiring such a tight fit between historical and modern purposes would be improper. First, historical regulations may have been adopted to serve more than one purpose or may reflect a particularized application of a more general regulatory objective that the founding generations considered compatible with the right to bear arms—in other words, "this Nation's historical tradition of firearm regulation" is multifaceted. *Bruen*, 142 S. Ct. at 2130; see also *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972) ("The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."); Blocher & Ruben,

Originalism-by-Analogy, *supra* (manuscript at 47) ("This point bears emphasizing since some opinions that have implied the need for principles of relevant similarity when engaging in analogical reasoning have assumed that there could be only one such principle." (emphasis omitted)). Trying to find an exact match between historical and modern purposes may unintentionally lead to focusing on the most prominent justifications for regulations—ignoring other justifications for regulation that are no less significant or established.

Second, the fact that a law did not exist at the time of the founding does not mean that such a law would not have been deemed consistent with the Second Amendment. "[A] list of the laws that *happened to exist* in the founding era is, as a matter of basic logic, not the same thing as an exhaustive account of what laws would have been theoretically *believed to be permissible* by an individual sharing the original public understanding of the Constitution." *Kelly*, 2022 WL 17336578, at *2. Courts should not "assume that historical legislatures always legislated to the maximum extent of their constitutional authority," Jacob D. Charles, *The Dead Hand of the Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 Duke L.J. (forthcoming 2023) (manuscript at 38-40) (on file with author), or that guns were always constrained through state legislation, as opposed to common law or other local sources of regulation, see p. 20, *infra* (discussing the use of peace bonds in the domestic violence context). Thus, confining the scope of the tradition of firearms regulation in *Bruen*'s analogical inquiry to statutes in place in the founding era would infect the Second Amendment with an incorrect understanding of the tradition of governmental regulatory authority.

II. THE FIFTH CIRCUIT'S DECISION IN THIS CASE DOES NOT RESPECT THE HISTORICAL BALANCE STRUCK BY THE FRAMERS IN THE SECOND AMENDMENT.

The decision of the Fifth Circuit in this case illustrates a failure to give full effect to "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2135, and thus departs from the Second Amendment balance struck by the Framers.

The Fifth Circuit held that the United States failed "to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." Pet. App. 27a. In doing so, the panel did not treat gun rights and regulation commensurately. It characterized respondent's right broadly as the "right 'to keep' firearms," *id.* at 14a, but incongruously constricted the scope of the historical analogues offered by the United States in defense of the law.

"Firearms and domestic strife are a potentially deadly combination." *United States* v. *Hayes*, 555 U.S. 415, 427 (2009). "Domestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *United States* v. *Castleman*, 572 U.S. 157, 160 (2014) (citations omitted) (describing Congressional purpose in enacting companion provision to § 922(g)(8), § 922(g)(9)).

Given that persons subject to domestic violence protective orders have been found by a court to be dangerous to others, the United States argued in the court of appeals that § 922(g)(8) is analogous to colonial laws that disarmed people because they were "considered to be dangerous" to others. Pet. App. 19a. But the panel

rejected that historical analogy on the theory that those colonial laws disarmed individuals who posed different types of dangers to different kinds of people than domestic abusers do today. *Ibid.* According to the panel, "[t]he purpose of laws disarming 'disloyal' or 'unacceptable' groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse,' posed by another individual." *Id.* at 20a (citation omitted). For similar reasons, the panel rejected an analogy to colonial laws against "going armed" derived from "the ancient criminal offense of 'going armed to terrify the King's subjects.'" *Id.* at 21a. The panel thought that these laws "appear to have been aimed at curbing terroristic or riotous behavior, i.e., disarming those who had been adjudicated to be a threat to society generally, rather than to identified individuals" as § 922(g)(8) does. *Id.* at 24a. "In other words," the court stated, "where 'going armed' laws were tied to violent or riotous conduct and threats to society, § 922(g)(8) implicates a much wider swath of conduct, not inherently dependent on any actual violence or threat." *Ibid.*

This was error. Although *Bruen* directed courts to consider "why * * * regulations burden a law-abiding citizen's right to armed self-defense," 142 S. Ct. at 2133, the panel incorrectly found historical laws not analogous to § 922(g)(8) by parsing the reasons "*why* they disarmed people" far too narrowly, Pet. App. 20a. In doing so, the Fifth Circuit refused to acknowledge critical changes in the form and understanding of domestic violence—exactly the kind of "unprecedented societal concerns or dramatic technological changes," to which government may respond under *Bruen*—as explained below. *Bruen*, 142 S. Ct. at 2132. By limit-

ing analogous laws under *Bruen* to laws that historically sought to address the exact same dangers to the same people as a law disarming domestic abusers today, the panel's approach denies the people, acting through the democratically accountable branches of government, the authority to decide that the misuse of firearms by domestic abusers poses a categorical risk akin to those that the founding generation thought sufficient to justify disarming particular categories of dangerous persons.

Society's approach to domestic violence at the time of the founding was unquestionably different from its approach today. The founding generation "underprotected women from domestic violence" because of "their own moral insensibility." Blocher & Ruben, *Originalism-by-Analogy*, *supra* (manuscript at 51). "The common law authorized a man to 'correct' subordinate members of the household, including his wife." Blocher & Siegel, *Guided by History*, *supra* (manuscript at 131). To be sure, that "authority" was not unlimited—it did not license homicide, *ibid.*, and "peace warrants" could be issued to constrain domestic violence, Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* 180 (2009) (describing how peace bonds allowed battered wives to "legally transform[] their husbands' violence from personal conflicts into illegal acts that endangered the public order"); Blocher & Siegel, *Guided by History*, *supra* (manuscript at 131). Even so, spousal abuse was often considered a family matter. "The states' reticence to intervene and disarm abusers has long been tied to traditional gender status roles in which a woman was viewed as a dependent of her abuser rather than an equal and independent member of the community."

Blocher & Siegel, *Guided by History*, *supra* (manuscript at 132).

Even if the Framers had recognized domestic violence as a serious problem, they would have had little reason to regulate firearms to address it. That is because "colonial-era muskets were simply not used as commonly in domestic violence incidents as handguns are today." Blocher & Ruben, *Originalism-by-Analogy*, *supra* (manuscript at 51); see also Randolph Roth, Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History, *in A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment* 117 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019) (observing that "[f]amily and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand," which were not guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists"). "At the founding, guns were so cumbersome they were rarely used for domestic abuse; but as weapons have become more numerous and deadly, they have amplified the threats, injuries, and lethality of domestic violence." Blocher & Siegel, *Guided by History*, *supra* (manuscript at 131-132).

Today, the people have come to recognize that "domestic abuse is a serious problem in the United States," *Georgia* v. *Randolph*, 547 U.S. 103, 117 (2006), all the more so because of changes in the lethality and prevalence of modern firearms in the home. The United States "witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *Castleman*, 572 U.S. at 159-160. Americans therefore have come to

view as inadequate the system of common law peace warrants and other enforcement practices that failed to treat intimate partner violence with the same seriousness as other forms of interpersonal violence. See Blocher & Siegel, *Guided by History*, *supra* (manuscript at 129-134). "The very goal of § 922(g)(8) is thus to protect not only persons but a 'political and social order' in which women as well as men are entitled to the equal protection of the civil and criminal law." *Id.* (manuscript at 132).

The Fifth Circuit would not have invalidated a law addressing this widespread danger if it had properly characterized the longstanding tradition of disarming dangerous individuals whose possession of firearms can harm others. Instead, the Fifth Circuit went looking for laws addressing a problem posed by arming dangerous individuals that was not recognized at the founding and did not exist in the same form as today—a search that was bound to be in vain and that guaranteed that § 922(g)(8) would be invalidated. By limiting the regulatory tradition to combatting the particular problems that led prior generations to disarm dangerous individuals, the panel foreclosed regulation designed to combat dangers "beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132.

The Fifth Circuit's decision illustrates how limiting historical analogues to laws that combatted precisely the same dangers to the same people dooms "modern regulations that were unimaginable at the founding," *Bruen*, 142 S. Ct. at 2132. This Court should reverse and make clear that firearms regulations do not have to address precisely the same dangers to the same people as historical regulations in order to be "relevantly similar" for purposes of *Bruen*'s analogical test. *Ibid.*

Rather, laws that disarm individuals who are dangerous to others can be analogous to historical laws disarming dangerous individuals even if those individuals were dangerous for different reasons or posed dangers to different types of people. That principle follows from this Court's precedent that "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*" and that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Ibid.*

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

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August 21, 2023