No. 22-915

In The Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* PATRICK J. CHARLES IN SUPPORT OF NEITHER PARTY

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief is submitted on behalf of historian and legal scholar Patrick J. Charles to educate the Court on why a macro approach to identifying and analogizing our history and tradition is better suited to adjudicating the constitutionality of firearm regulations than a micro approach.

Amicus curiae is the author of several books, including *Vote Gun: How Gun Rights Became Politicized in the United States* (Columbia University Press, 2023) and *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* (Prometheus Books, 2018), and more than twenty articles on the history of the Second Amendment, firearm regulations, and the use of history as a jurisprudential tool. *Amicus curiae*'s scholarship has been cited and relied upon by several Circuit Courts of Appeals and by members of this Court. *Amicus curiae* currently serves as the Division Chief for the Air Force Historical Research Agency's (AFHRA) Oral History and Studies Division. For over a decade, *amicus curiae* has served as a United States Air Force historian in several capacities, including recently serving as the head of AFHRA's Research Division, where *amicus curiae* oversaw all official historical information and archival requests for the United States Air Force. The information and analysis

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[1] *Amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* or his counsel, has made a monetary contribution to this filing.

contained herein are solely those of the *amicus curiae*, and not those of the United States Air Force or the Department of Defense.

SUMMARY OF THE ARGUMENT

In *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127-34 (2022), this Court pronounced that 'text, history, and tradition' was the foundation from which the lower courts would gauge the constitutionality of firearm regulations moving forward. What remains unclear is how the lower courts are to implement that standard. Indeed, in *Bruen*, this Court went to great lengths to explain why New York's "may issue" licensing law failed under a 'text, history, and tradition' analysis. *Id*. at 2134-56. However, given that *Bruen* contains several historical and analytical contradictions,[2] the lower courts have produced a myriad of historical analogue analyses. *See*, *e.g.*, *Range v. Attorney General United States*, 69 F.4th 96 (3d Cir. 2023); *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023); *NRA v. Bondi*, 61 F.4th 1317 (11th Cir. 2023). Several of these analyses, if allowed to stand, will eventually negate the Court's list of longstanding, presumptively constitutional firearm

[2] *See* Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 Clev. St. L. Rev. 623, 667-90 (2023); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. ___, manuscript at 39-43 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408228.

regulations as outlined in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010)—regulations that courts have continuously upheld for over a decade. In addition to *Heller*'s and *McDonald*'s list of longstanding, presumptively constitutional firearm regulations, other well-established and reasonable firearm regulations could be struck down as unconstitutional. *See Range*, 69 F.4th at 104 (noting it is "dubious" to deduce that the federal firearms laws enacted in the 1930s qualify as "longstanding" given *Bruen*'s "emphasis on Founding- and Reconstruction-era sources").

The point is that if *Bruen*'s 'text, history, and tradition' test is to serve as a reliable, constitutional guardrail in gauging the constitutionality of firearm regulations, this Court must further outline the contours of its test in a way that is more transparent, objective, holistic, and scalable. Only by doing so can this Court ensure consistent implementation of its standard by the lower courts. With this in mind, *amicus curiae* proffers a solution: identifying and analogizing history and tradition from the macro, not micro level. A macro approach would require courts to base their judgments principally on common, contextually identifiable historical threads that are virtually undeniable. By demanding reliance on what can be historically proven from the evidentiary record, not inferred, a macro approach would minimize the problem of the courts resorting to historical conjecture and

speculation in forming judgments, particularly in those instances where the evidentiary record is silent.

ARGUMENT

I. *Bruen*'s Unanswered 'Text, History, and Tradition' Questions

In *Bruen*, this Court was clear in pronouncing that 'text, history, and tradition' is the jurisprudential foundation from which the lower courts are to gauge the constitutionality of firearm regulations moving forward. 142 S. Ct. at 2127-34. Less clear is how the lower courts are to implement that standard. In the pantheon of Supreme Court jurisprudence, this is not a new problem. Whenever this Court issues a jurisprudentially transformative opinion like *Bruen*, lower courts must wrestle with it as new cases and controversies arise. What makes *Bruen* different is that the opinion's invocation of 'text, history, and tradition' contains several historical and analytical contradictions. *See United States v. Daniels*, No. 22-60596, slip op. 30, 34 (5th Cir. 2023) (Higginson, J., concurring) ("[It] has become increasingly apparent . . . that [the] courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry."); *see also* Charles, *Fugazi*, *supra*, at 675-81; Blocher & Ruben, *supra*, at 39-43. This, in turn, has left the lower courts with more 'text, history, and tradition' questions than answers—too many, in fact,

to examine here.[3] Therefore, for brevity's sake, and so that *amicus curiae* may adequately brief the Court on the prudential reasons for adopting a macro approach to history and tradition, only two of the many unanswered questions post-*Bruen* are outlined below.

A. What Qualifies as a History and Tradition of Regulation Post-*Bruen*?

Perhaps the most pressing unanswered question left open by *Bruen* is what qualifies as a history and tradition of regulation?[4] Thus far, lower courts have produced conflicting determinations. According to the Northern District of New York, *Bruen* requires that the government produce "at least three historical laws" for any type of firearm regulation to constitute an analogous "tradition." *Antonyuk v. Hochul II*, 2022 U.S. Dist.

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[3] *See* Jacob D. Charles, *The Dead Hand of the Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 Duke L.J. ___, manuscript at 24-68 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545.

[4] *See*, *e.g.*, *United States v. Love*, 2022 U.S. Dist. LEXIS 229113, at 7 (N.D. Ind. Dec. 20, 2022) ("reviewing courts . . . must find the goldilocks of historical analogues: not too old, not too new, but just right. And how many analogues are necessary? While some of the language in *Bruen* suggests the answer is one . . . at other times the Supreme Court suggests two or even three historical analogues are not enough. [Therefore, e]ach district court must determine whether the proposed analogues are analogue-enough, or if they require the presence of the analogue cavalry to carry the day."); *see also* Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 Wm. & Mary L. Rev. ___, manuscript at 16-19 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4372216.

LEXIS 182965, at 21 (N.D.N.Y. Oct. 6, 2022). In a subsequent opinion, the same district court modified its previous pronouncement by requiring the government to produce evidence of a type of firearm regulation that governed more than fifteen percent of the entire United States population. *Antonyuk v. Hochul III*, 2022 U.S. Dist. LEXIS 201944, at 191 (N.D.N.Y. Nov. 7, 2022). In contrast to the Northern District of New York's strict numerical approach to identifying a history and tradition of firearm regulation is the temporal approach of *Firearms Policy Coalition v. McCraw*, wherein the Northern District of Texas held that any type of firearm regulation that starts in 1856 is too far removed from the ratification of the Bill of Rights to constitute a suitable tradition, particularly when the type of firearm regulation contradicts earlier, Founding Era history. 623 F. Supp. 3d 740, 755-56 (N.D. Tex. Aug. 25, 2022); *see also United States v. Stambaugh*, 2022 U.S. Dist. LEXIS 206016, at 8-9 (W.D. Okla. Nov. 14, 2022). Some lower courts have taken *McCraw* a bit further by declaring that the Founding Era is the only historical period that matters when determining what qualifies as a history and tradition of regulation. *See*, *e.g.*, *Hardaway v. Nigrelli*, 2022 U.S. Dist. LEXIS 200813, at 39-40 (W.D.N.Y. Nov. 3, 2022). Meanwhile, other lower courts have declared the Reconstruction Era more historically informative. *See*, *e.g.*, *Bondi*, 61 F.4th at 1323.

These divergent approaches to identifying a history and tradition of firearm regulation will lead to stark geographical conflicts in this country's Second

Amendment jurisprudence, with the outcomes of factually similar cases turning on geographic happenstance rather than law.

B. How Are Courts to Apply Analogical Reasoning to an Identifiable History and Tradition of Regulation?

Another unanswered question post-*Bruen* is how are the lower courts to properly perform analogical reasoning once they have identified a history and tradition of regulation? For some lower courts, the answer is that the history and tradition presented by the government must be closely analogous to the modern law being challenged. *See*, *e.g.*, *Teter v. Lopez*, No. 20-15948, slip op. at 20-31 (9th Cir. 2023). Consider *United States v. Rahimi*, the very case before this Court. The Fifth Circuit found that our Anglo-American history and tradition of disarming dangerous, non-law abiding, and non-virtuous persons was insufficient for 18 U.S.C. § 922(g)(8) to survive constitutional scrutiny. 61 F.4th at 460. Indeed, the Fifth Circuit weighed and analyzed several historical laws. *Id*. at 456-60. In the end, however, it discounted every law as not "measuring 'relevantly similar'" enough to 18 U.S.C. § 922(g)(8). *Id*. at 460. For instance, in its analysis of early "going armed" laws—laws that generally led to a weapons forfeiture—the Fifth Circuit reasoned that they were not historically analogous enough to 18 U.S.C. § 922(g)(8) because the disarming involved was principally "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." *Id*. at 458-59.

In *Range v. Attorney General United States*, the Third Circuit similarly discounted the very same history and tradition of disarming dangerous, non-law abiding, and non-virtuous persons in its adjudication of 18 U.S.C. § 922(g)(1). 69 F.4th at 103-05. The Third Circuit reasoned that because "the particular (and distinct) punishment at issue—*lifetime disarmament*—is [not] rooted in our Nation's history and tradition," and the defendant, Bryan Range, was convicted of a crime that "did not involve a firearm," the Anglo-American history and tradition of disarming dangerous, non-law abiding, and non-virtuous persons could not support barring the defendant from acquiring, owning, and using firearms. *Id*. at 105. And although the Third Circuit noted that its decision should be construed as "a narrow one," *id*. at 106, the court's reasoning could be applied by other federal courts to reach *any* federal or state law that *permanently* bars felons from acquiring, owning, and using firearms.

In contrast to *Rahimi* and *Range* is *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023). There, the Eighth Circuit determined that the very same history and tradition presented by the United States government in *Rahimi* and *Range* was sufficiently analogous to uphold 18 U.S.C. § 922(g)(1) against constitutional challenge. *Compare Jackson*, 69 F.4th at 502-05, *with Rahimi*, 61 F.4th at 456-60; *Range*, 69 F.4th at 103-05. The Eighth Circuit arrived at this conclusion by identifying and analogizing the Anglo-American history

and tradition of disarming dangerous, non-law abiding, and non-virtuous persons at the macro, not micro level. *Jackson*, 69 F.4th at 504-05. In other words, according to the Eighth Circuit, because there is indeed an identifiable Anglo-American history and tradition of legislatures disarming dangerous, non-law abiding, and non-virtuous persons, the entire regulatory category of legislative acts prohibiting the possession of firearms by dangerous persons must be presumed constitutional. *Id*. at 505; *see also United States v. Brown*, 2023 U.S. Dist. LEXIS 131280, at 24-37 (D. Utah Jul. 26, 2023) (applying similar analogical reasoning in upholding 18 U.S.C. § 922(g)(8)).

For the reasons outlined below, *amicus curiae* urges this Court to adopt the Eighth Circuit's macro approach to history and tradition. Doing so would mean requiring courts to base their judgments principally on those common, identifiable evidentiary threads that are contextually undeniable. A macro approach to history and tradition does not engage in historical conjecture or speculation,[5] *i.e.*, stripping "abstract events from their [historical] context and set[ting] them up in implied comparison with the present day[.]" HERBERT

[5] *See*, *e.g.*, Charles, *Fugazi*, *supra*, at 693 ("[H]istory-based legal claims that are principally derived from the lawyering or select parsing of historical sources rather than substantive no-kidding, historical evidence are not the type of history-based legal claims that jurists should be building their evidentiary base from which they legally reason, nor from which they historically analogize from. For jurists, or anyone for that matter, to build an analogy on nothing more than the lawyering of history or a historical inference is essentially the same thing as fabricating history.").

BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 57 (1950). Rather, a macro approach relies squarely on what can be historically proven from the evidentiary record and seeks to minimize the practice of lawyering or explaining away well-established history and tradition.[6]

II. Resolving *Bruen*'s Unanswered History and Tradition Questions: The Case for a Macro Approach

As this Court noted in *Bruen*, the reason that history is jurisprudentially relied upon when interpreting the law is the overarching perception that history is "more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about the 'the costs and benefits of firearms restrictions'. . . ." 142 S. Ct. at 2130 (citations omitted). History is indeed law, and law is indeed history. The two academic disciplines are inseparable. *See* Patrick J. Charles, *History*

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[6] *Amicus curiae* is not suggesting that adopting a macro approach to history and tradition would foreclose the use of micro level history altogether. Rather, the macro approach should govern how courts initially frame and analogize from a history and tradition of firearm regulation. *See* Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 Fordham Urb. L.J. 1727, 1860 (2012) (asserting that once the government shows a "long tradition" of regulation the burden should then fall on the challenging party "to provide historical evidence that [the area of] regulation [was] perceived as violating the right to keep and bear arms"). For some historiographical examples of "lawyering" and "explaining away" history in the Second Amendment context, *see id*. at 1767-91.

in Law, Mythmaking, and Constitutional Legitimacy, 63 Clev. St. L. Rev. 23, 36 (2014). As Sixth Circuit Judge Jeffrey S. Sutton has put it, "In one sense, law is history. All of law is backward looking. A trial recreates events of the past. A court of appeals decision relies on precedents, decisions of the past that must themselves be construed. . . ." Amanda L. Tyler et al., *A Dialogue with Judges on the Role of History in Interpretation*, 80 Geo. Wash. L. Rev. 1889, 1896 (2012); *see also* Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 Tex. Tech. L. Rev. 1173, 1176 (2009).

The overlap between the academic disciplines of law and history does not end there. If one pauses to consider, the principal duties of jurist and historian are not all that different. Both are objective fact and truth seekers.[7] And both are tasked with objectively weighing and analyzing competing evidence and claims. Consider the following statement contained within the Department of the Army's proposed field manual for military historians, circa 1949:

> The cardinal virtue of the historian is objectivity, or freedom from bias or special interest. The historian's responsibility is to discover

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[7] Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 Seton Hall L. Rev. 479, 483 (2008) ("Both historians and lawyers are, at least ostensibly, engaged in a search for 'truth'—an accurate interpretation of past events."); Larry D. Kramer, *When Lawyers Do History*, 72 Geo. Wash. L. Rev. 387, 395 (2003) ("When lawyers, judges, and legal scholars turn to history, they do so because they believe, and want their readers to believe, that a historical pedigree adds authority to their argument.").

> the truth and to put it on record. To do this [the historian] has to keep a constant watch on [their] prejudices and assumptions. [The historian] cannot be objective unless [he/she] can keep prejudices and unwarranted assumptions out of [his/hers] observations, reports, and writings.

Department of the Army, Army Air Forces Historical Division, *Proposed Field Manual for Military Historians*, at 13 (Feb. 15, 1949) (Maxwell Air Force Base, AL: AFHRA).[8] If one substitutes the word "historian" with "jurist," the statement still reads true.

Yet the fact that the academic disciplines of law and history overlap does not mean that jurists are trained historical experts or that the use of history in law is always a legitimate enterprise. *See*, *e.g.*, Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 Minn. L. Rev. 377, 471 (1998) ("[H]aphazard or insufficiently thorough historical research, like haphazard or insufficiently thorough legal research, is at best useless, and is at worst dangerous."); *see also* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 526 (1995); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 Cal. W. L. Rev. 227, 267-68 (1987); H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 1, 659, 699 (1987).

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[8] A copy of this document can be provided by emailing a request to AFHRA.NEWS@us.af.mil.

The question that *amicus curiae* seeks to help this Court in answering is how can jurists ensure they are harnessing and utilizing history in a legitimate way—a way that is transparent, reliable, and predictable? As this Court's own history-based pronouncements inform, there is no definitive answer—no firm precedent that must be followed. The relevant history in any case is simply whatever the respective jurist or jurists declare relevant—a historical "smell test" if you will. *See* Melton, *supra*, at 383; Wiecek, *supra*, at 227. The lower courts' application of *Bruen* underscores this point. *See* Part I.A-B. That is why it behooves the Court to succinctly outline the contours of its history and tradition test in a way that is more objective, holistic, and scalable for lower courts. A macro approach to history and tradition is far and away the best means available in providing the Court this way ahead.

A. The Limits of Historical Record Keeping

As any professional historian or archivist will attest, due to the limits of historical record keeping, there are far more questions about the past that we can ask than answer. And the further one goes back in time, the harder it becomes to reconstruct the past, particularly at the micro level. This includes the history and tradition of firearm regulation. Consider, for example, that except for the legislative debates of Congress, few detailed legislative records of the eighteenth and nineteenth centuries exist. The same is true of eighteenth- and nineteenth-century constable records, justice of the peace records, local law enforcement records, and

local and lower court judicial records. *See* Charles, *Fugazi*, *supra*, at 655, 671; *see also* Laura Edwards, *Weapons and the Peace*, DUKE CTR. FOR FIREARMS LAW (Jul. 25, 2023), https://firearmslaw.duke.edu/2023/07/weapons-and-the-peace/. This absence of important archival records makes it extremely difficult for historians and archivists to prove many historical aspects of a respective law or body of law, such as how a historical law or body of law was administered and enforced, how frequently a law or body of law was enforced, and so forth.

Moreover, as *amicus curiae* can attest from having researched the history and tradition of firearm regulation for the last fifteen years, it is utterly impossible to locate and collate all the varying firearm regulations of any given type or category.[9] There are two principal reasons for this. First, until the early-to-mid twentieth century, firearm regulations were far from uniform—that is until the National Conference of Commissioners on Uniform State Laws led the way for the adoption of uniform firearm regulations. *See* Part II.B.2. Rather, firearm regulation was highly localized and often varied from jurisdiction to jurisdiction, particularly from the mid-nineteenth through the early twentieth century. *Id*. Second and equally important, virtually all pre-twentieth century historical record keeping contains wide evidentiary gaps and shortfalls. This makes

[9] The Duke Center for Firearms Law has made great strides towards this goal with its repository of historical gun laws. *See Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS LAW (last visited Aug. 15, 2023), https://firearmslaw.duke.edu/repository/search-the-repository/. However, as the Center's website attests, the repository is "not comprehensive." *Id*.

it challenging for academics to reconstruct the past on any given historical topic, issue, or subject evenhandedly. This includes the history and tradition of firearm regulation.

What succinctly illustrates these points is the history and tradition of prohibiting dangerous and unusual weapons. In *Heller* and *Bruen*, this Court recognized this history and tradition as jurisprudentially relevant in setting the constitutional parameters of the Second Amendment. 554 U.S. at 627; 142 S. Ct. at 2143; *id*. at 2162 (Kavanaugh, J., concurring). Yet, if one diligently searches for any concrete historical evidence of this common law prohibition against dangerous and unusual weapons being enforced, other than the off-hand mention in several legal commentaries,[10] one will come up empty.[11] There are simply no working examples for the courts to historically analogize from[12]—at least not up through the close of the nineteenth century.[13]

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[10] *See*, *e.g.*, 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 1138, 1170-71 (Kermit L. Hall & Mark David Hall eds., 2007); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 155 (1769).

[11] As best as *amicus curiae* can tell, the term "unusual weapons" first appears in Matthew Hale's *Pleas of the Crown* section on "forcible entry." *See* MATTHEW HALE, PLEAS OF THE CROWN 138 (1678).

[12] A recent Ninth Circuit opinion weighs this out. *See Teter*, No. 20-15948, slip op. at 20-21.

[13] The only case on point is the 1846 case *State v. Huntly*, wherein the North Carolina Supreme Court held that "a gun" by itself qualifies as a "unusual weapon" within the meaning of the

The history of discretionary armed carriage permitting schemes circa the mid-to-late nineteenth century is another example. Although this Court in *Bruen* held that these laws never existed until the early twentieth century, 142 S. Ct. at 2121, they indeed did and spread across the United States quite rapidly, *see* Brief of *Amicus Curiae* Patrick J. Charles in Support of Neither Party, *New York State Rifle & Pistol Ass'n, Inc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), at 8-13, appendix 2-45. Yet despite the clear and convincing historical evidence of this fact, *see* Charles, *Fugazi*, *supra*, at 659-66, there is much that the surviving evidentiary record cannot answer, such as: when was the first discretionary armed carriage law enacted; why the local jurisdictions that enacted discretionary armed carriage laws chose them over other armed carriage regulatory regimes, such as concealed carry prohibitions and surety laws; how many local jurisdictions adopted these laws; and how exactly were these discretionary regimes administered?

The reason for highlighting these two historical examples is not to re-litigate *Bruen*. Rather, it is to show the limits of historical record keeping and the direct impact it can have on reconstructing the past. The problem is not confined to the history and tradition of firearm regulation up through the close of the nineteenth century. It extends to most twentieth- and

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common law. 25 N.C. 418, 422 (1843). However, seeing that this Court has held that common use firearms are constitutionally protected under the Second Amendment, *Bruen*, 142, S. Ct. at 2132, *Huntly* can no longer serve as a working example.

twenty-first century historical record keeping, as *amicus curiae* can personally attest having served as the head of AFHRA's Research Division. While in this position, *amicus curiae* oversaw all official historical information and archival requests for the United States Air Force. And based on that experience, *amicus curiae* can attest that roughly half of all the historical information and archival requests that AFRHA receives cannot be fully answered. Charles, *Fugazi*, *supra*, at 567 n.230. This is true despite AFHRA's vast archival holdings, the wide proliferation of United States Air Force historians at the Wing and Group level that periodically provide AFHRA with history reports and archival material, and the fact that as early as 1929 the War Department required that every unit "prepare[ ] and ke[ep] up to date a detailed history of the services of the organization concerned." War Department, Army Regulation No. 345-105, *Military Records: Historical Records and Histories of Organizations*, Nov. 18, 1929, at 1.[14]

Ultimately, the limits of historical record keeping inform us that it is far easier to reconstruct the past from the macro level, rather than the micro level, particularly if the historical reconstruction is to be done in a way that is uniform and consistent. Certainly, there are many historical topics, issues, and subjects that academics have reconstructed from the micro level, including aspects of firearm regulation. *See*, *e.g.*,

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[14] Copies of the various editions of Army Regulation 345-105 can be obtained by emailing a request to AFHRA.NEWS@us.af.mil.

Brennan Gardner Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 U.C. Davis L. Rev. 2603 (2022) (examining the history of Texas public carry restrictions circa the nineteenth century from the micro level). However, based on *amicus curiae*'s fifteen years of experience in this field, the *entire* history and tradition of firearm regulation *does not* fall into this category. *See*, *e.g.*, Charles, *Fugazi*, *supra*, at 655-56 (discussing the lack of "surety law" enforcement records); Patrick J. Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSRPA v. Bruen, DUKE CTR. FOR FIREARMS LAW (Aug. 1, 2021), https://firearmslaw.duke.edu/2021/08/a-historians-assessment-of-the-anti-immigrant-narrative-in-nysrpa-v-bruen/ (discussing the clear evidentiary shortfalls of the anti-immigrant narrative presented before this Court in *Bruen*). The aforementioned history and tradition of prohibiting dangerous and unusual weapons, and the history and tradition of armed carriage licensing laws are just two examples. There are indeed others that *amicus curiae* can point to should this Court desire additional briefing.

B. Why a Macro, Not Micro Approach to History and Tradition is Jurisprudentially the Better Approach

In 1874, novelists Mark Twain and Charles Dudley Warner wrote, "History never repeats itself, but the kaleidoscopic combinations of the pictured present often seem to be constructed out of the broken fragments of antique legends." 3 MARK TWAIN & CHARLES DUDLEY

WARNER, THE GILDED AGE 76 (1874). This observation is an astute one—although the past and present can never be the same, there are often similarities. And it is from these similarities that important lessons can be drawn. There are, however, limits on how much one can objectively analogize between the past and the present. *See* Cass Sunstein, *Commentary: On Analogical Reasoning*, 106 Harv. L. Rev. 741, 767-81 (1993) (discussing the objections and limits to analogical reasoning in general); *see also* Blocher & Ruben, *supra*, at 49 ("[I]t will often be impossible to identify a narrow and precise principle of similarity by which to compare modern and historical gun laws."). In the words of the late historian Edward Potts Cheyney, an early proponent of science-based history, "No matter how full our knowledge of the [history], no matter how impartially [it is] interpreted, there will always be a lack of exact analogy." EDWARD P. CHEYNEY, LAW IN HISTORY AND OTHER ESSAYS 169 (1927); *see also id*. at 27-28.

The fact that there are limits to objectively analogizing between the past and present does not mean that this Court in *Bruen* was wrong in requiring the use of historical analogues when adjudicating the constitutionality of modern firearm regulations. Far from it. *See* Charles, *The Second Amendment in Historiographical Crisis*, *supra*, at 1859-60 (outlining a similar historical analogue test when adjudicating the constitutionality of firearms regulations post-*McDonald*), *accord* Charles, *Fugazi*, *supra*, at 693-94 (noting the limits of importing the past for use in the present). There is indeed much wisdom and judicial common

sense to be gleaned from examining our history and tradition of firearm regulation. *See*, *e.g.*, *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1274-75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (noting how any "history-and-tradition based approach" should provide "governments . . . *more* flexibility and power to impose gun regulations" than under a tiered, strict-scrutiny approach). However, harnessing this wisdom and common sense in a way that is transparent, objective, holistic, and jurisprudentially scalable will require that history and tradition be identified and analogized from a macro, not micro level. The prudential reasons for doing so are outlined below.

1. The Constitution is an Enduring Document

It is often stated that the Constitution is an enduring document, and "its principles were designed to, and do, apply to modern conditions and developments." *Heller*, 670 F.3d at 1275 (Kavanaugh, J., dissenting); *see also Bruen*, 142 S. Ct. at 2134; *Cohens v. Virginia*, 19 U.S. 264, 387 (1821). Historically speaking, this includes the power of legislatures to enact laws within the four corners of the Constitution, and in the interest of the public good. *See*, *e.g.*, Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 Wm. & Mary Bill of Rts. J. 457, 502-17 (2011) (discussing the founding generation's views on

the Constitution and the public or common good). And based on what limited late eighteenth-century evidence has survived for historical posterity, it is safe to conclude that the Second Amendment was publicly understood to permit legislatures to enact reasonable firearm regulations in the interest of public health, safety, and welfare. *See*, *e.g.*, *The Address and Reasons of the Minority of the Convention of the State of Pennsylvania, to Their Constituents*, Dec. 12, 1787, *reprinted in* PENN. PACKET & DAILY ADVERTISER, Dec. 18, 1787, at 1 (noting it was lawful to disarm individuals for "crimes committed" or when there may be "real danger of public injury from individuals"); *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 123 (1825) (noting that the Second Amendment "ought not . . . in any government . . . be abused to the disturbance of the public peace"). By 1791, the year that the Bill of Rights was ratified, such reasonable regulations included laws that disarmed dangerous and disaffected persons, hunting laws, prohibitions on discharging firearms near occupied buildings and populated areas, gunpowder storage laws, unlawful armed assemblage, armed carriage restrictions, armed assault, and brandishing. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 59-61 (2017). By the close of the nineteenth century, the list of reasonable regulations had expanded to include express prohibitions on carrying weapons in so-called "sensitive places," armed carriage licensing laws, restrictions on minors purchasing, using, and carrying weapons,

restrictions on the commercial sale of weapons,[15] and firearms registration. *Id*.

Yet in the wake of *Bruen*, many litigants have argued that the power of federal, state, and local governments to enact firearm regulations must be tightly constrained to reflect only those firearms regulations that were on the statute and ordinance books in 1791, and that all subsequent firearm regulations are irrelevant. Some lower courts have concurred. *See*, *e.g.*, *Hardaway v. Nigrelli*, 2022 U.S. Dist. LEXIS 200813, at 39-40. It would be imprudent, however, for this Court to follow suit. There are several reasons for this. First and foremost, there is no substantive body of historical evidence proving that the Second Amendment was ratified or publicly understood as confining lawmakers to enacting only those firearm regulations that are closely analogous to those on the statute and ordinance books circa 1791. If anything, the historical evidence points in the opposition direction. *See*, *e.g.*, Robert Churchill, *Gun Regulation, the Police Power, and the Right to Keep and Bear Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 161-65 (2007); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American*

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[15] There were indeed laws restricting the commercial sale of weapons circa 1791. However, given the questionable, racist pedigree of these laws, *amicus curiae* purposely omitted them from the list of reasonable regulations circa 1791. Charles, *Fugazi*, *supra*, at 683; *see also* Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 Cardozo L. Rev. 1343, 1345-56 (2022) (contextualizing the history of early American firearm regulations based on race).

Origins of Gun Control, 73 Fordham L. Rev. 487, 502-12 (2004); *see also* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 Nw. U.L. Rev 1821, 1824-31 (2011). Consider the 1878 case *State v. Reando*, where the Missouri Supreme Court upheld the state's "sensitive places" armed carriage law as an unexceptional exercise of the police power:

> The statute in question is nothing more than a police regulation, made in the interest of peace and good order, perfectly within the power of the legislature to make . . . The right to keep and bear arms necessarily implies the right to use them, and yet acts passed by the legislature regulating their use, or rather making it an offence to use them in certain ways and places, have never been questioned.

The Supreme Court: On Carrying Concealed Weapons, STATE JOURNAL (Jefferson City, MO), Apr. 12, 1878, at 2.[16]

Another reason why it would be imprudent for the Court to tightly constrain or roll back lawmakers' authority to enact firearm regulations to the year 1791 is

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[16] This newspaper reprint of *State v. Reando* appears to be the only copy of the case to have survived historical posterity, thus further underscoring *amicus curiae*'s point on limited historical record keeping. The case cannot be found in the Missouri Supreme Court's Historical Database. It was, however, briefly reported in an 1878 issue of *The Central Law Journal*. *See Abstract of Decisions of the Supreme Court of Missouri: October Term, 1877*, 6 Central L.J. 16, 16 (1878).

that today's world is demonstrably different from that of our forebears, particularly as it pertains to firearms technology. In 1791, firearm technology severely limited the firing rate, lethality, reliability, and portability of firearms. A skilled rifleman could discharge, on average, two to three rounds a minute. *See* James E. Hicks, *United States Military Shoulder Arms, 1795-1935*, 1 Journal of the American History Foundation 23, 31 (1937). Today, however, anyone armed with a standard semi-automatic firearm can, with little to no formal military training, match the firepower of an entire late eighteenth-century militia company by discharging upwards of 48 rounds a minute—at much longer distances and far greater social cost than their late eighteenth-century militia counterparts. The point here is not to challenge *Bruen*'s pronouncement that modern firearms that "facilitate" the right to "armed self-defense" are presumably protected under the Second Amendment. 142 S. Ct. at 2132. Rather, the point is that given the advances in firearms technology, it would be imprudent for the Court to tightly constrain lawmakers' authority to enact firearm regulations to the year 1791, or any specific year from the late eighteenth century through the close of the nineteenth century for that matter. It is far more sensible to identify and analogize the history and tradition of firearm regulation more broadly. The wide prevalence of firearms localism for much of this nation's history underscores this point.

2. For Much of Our History, Firearms Localism, Not Firearms Nationalism, was the Norm

From the late eighteenth through the late nineteenth century, firearms localism, not firearms nationalism, was the norm. Charles, *Fugazi*, *supra*, at 683-86, 714-15; *see also* Joseph Blocher, *Firearms Localism*, 123 Yale L.J. 82, 112-16 (2013). This means that from the late eighteenth through the late nineteenth century, firearm regulation was predominantly localized, and often varied within the same state from one local jurisdiction to the next.[17] It was

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[17] Many mid-to-late nineteenth century state laws and local government charters bear this out. *See*, *e.g.*, THE LAWS OF THE STATE OF KANSAS 118, 134 (1871), https://catalog.hathitrust.org/Record/100836175 (providing all Kansas cities "of the third class" wide latitude to "prohibit and punish the carrying of firearms or other deadly weapons, concealed or otherwise"); LAWS OF THE STATE OF INDIANA PASSED AT THE FIFTY-FIRST REGULAR SESSION OF THE GENERAL ASSEMBLY 201, 202 (1879), https://catalog.hathitrust.org/Record/008892461 (1879 law providing all Indiana towns the authority "to regulate or prohibit the use of firearms, fireworks, or other things tending to endanger persons and property"); ACTS OF TENNESSEE: EXTRAORDINARY SESSION 48, 55 (1885), https://catalog.hathitrust.org/Record/100666682 (providing the mayor and alderman of the city of Knoxville the authority to "prevent and suppress the sale of fire-arms and carrying of concealed weapons"); ACTS OF THE ONE HUNDRED AND TWELFTH LEGISLATURE OF THE STATE OF NEW JERSEY AND THE FORTY-FOURTH UNDER THE NEW CONSTITUTION 483, 501 (1888), https://catalog.hathitrust.org/Record/010134285 (1888 law providing all New Jersey towns the authority "to regulate or prohibit the use of firearms and the carrying of weapons of any kind"); THE COMPLETE CODES AND STATUTES OF THE STATE OF MONTANA IN FORCE JULY 1, 1895, at 424, 427 (1895), https://catalog.hathitrust.org/Record/010447759 (providing all Montana "city or town council[s]" the

not until the early-to-mid twentieth century that lawmakers attempted to make firearm regulation more uniform. *See* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 194-204 (2018) (outlining the history for uniform firearm regulations); *see also* W.H., *Uniform Firearms Act*, 18 Va. L. Rev. 904 (1932). Uniformity, however, was never actually achieved. *See*, *e.g.*, NATIONAL RIFLE ASSOCIATION, DIGEST OF FEDERAL AND STATE FIREARMS LAWS (1966); *Firearms: Problems of Control*, 80 Harv. L. Rev. 1328, 1336-37 (1967); F.J.K., *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. Pa. L. Rev. 905, 906-17 (1950); NATIONAL SHOOTING SPORTS FOUNDATION, INC., FACT PACK II ON FIREARM OWNERSHIP (1970) (providing examples of model, uniform firearm laws that were being pushed by gun rights advocates circa the mid-to-late 1960s).

This history is significant because many litigants post-*Bruen* have argued, and some lower courts have agreed, that for a specific type of firearm regulation to qualify as an identifiable 'tradition' under *Bruen*, the regulation must be closely analogous to a specified number of historical laws or meet a specified population threshold. *See*, *e.g.*, *Antonyuk II*, 2022 U.S. Dist. LEXIS 182965, at 21; *Antonyuk III*, 2022 U.S. Dist. LEXIS 201944, at 191. It would be imprudent,

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authority to "prevent and suppress the sale of firearms the carrying of concealed weapons"); *see also* Charles, *Fugazi*, *supra*, at 662 n.256, 685 n.406 (providing more than two dozen examples of firearms localism within state laws and local government charters).

however, for this Court to adopt either of these strict numerical approaches given the predominance of firearms localism throughout much of this nation's history. Doing so would make it almost impossible for government defendants to satisfy their burden of providing the courts with a suitable history and tradition of firearm regulation—save perhaps for armed carriage restrictions, laws prohibiting the discharging of firearms at buildings, and mid-to-late nineteenth-century laws restricting minors from purchasing, using, and carrying weapons. Moreover, should this Court adopt either of these strict numerical approaches to identifying a history and tradition of firearm regulation, its list of presumptively constitutional firearm regulations will assuredly be struck down as unconstitutional. *See* Charles, *Fugazi*, *supra*, at 682-83.

3. A Macro Approach to History and Tradition is More Workable and More Jurisprudentially Reliable than a Micro Approach

In *Bruen*, this Court pronounced that although answering "historical, analogical questions" can at times be difficult, 142 S. Ct. at 2134, it is a task that is more jurisprudentially "legitimate, and more administrable, than asking judges to 'make difficult empirical judgements' about 'the costs and benefits of firearm restrictions,'" *id*. at 2130 (citations omitted). The "job of judges is not to resolve historical questions in the abstract," this Court reasoned, but to "resolve *legal* questions presented in particular cases or controversies,"

id. at 2130 n.6, adding that the "'legal inquiry is a refined subset' of a broader 'historical inquiry,'" which "relies on 'various evidentiary principles and default rules' to resolve uncertainties," *id*. (quoting William Baude & Steven E. Sachs, *Originalism and the Law of the Past*, 37 L. &. Hist. Rev. 809, 810-11 (2019)).

Amicus curiae agrees with this Court that jurists are sufficiently equipped to answer any "historical, analogical questions" when interpreting the law or Constitution. 142 S. Ct. at 2134. But this is not the problem that lower courts are facing in *Bruen*'s wake. Rather, the problem is the lack of jurisprudential standard in: a) identifying what qualifies as a history and tradition of firearm regulation; and b) performing analogical reasoning once an identifiable history and tradition of firearm regulation is identified. *See*, *e.g.*, *Daniels*, No. 22-60596, slip op. at 32-38 (Higginson, J., concurring). A macro approach to identifying and analogizing the history and tradition of firearm regulation, like that employed by the Eighth Circuit, *see Jackson*, 69 F.4th at 502-05, alleviates this problem. *See* Blocher & Ruben, *supra*, at 49-66. Consider once more the limits of historical record keeping. It impossible to reconstruct the history of every type of firearm regulation at the micro level (and not within the short confines of briefing schedules).[18] Certainly, based on the evidentiary

[18] *Amicus curiae* can attest to this fact from personal experience. For more than a decade, *amicus curiae* has researched the various types of armed carriage regulations in our Anglo-American history. *See*, *e.g.*, Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373 (2016). Still, today *amicus*

record that has survived for historical posterity, academics have successfully constructed several facets of our history and tradition of firearm regulation. *See*, *e.g.*, Rivas, *supra*, at 2603-22. Unfortunately, as this Court knows, not every historical reconstruction of the law is "created equal." *Bruen*, 142 S. Ct. at 2136. The history and tradition of prohibiting dangerous and unusual weapons and the history and tradition of armed carriage licensing laws underscore this point. *See supra* pp. 15-16.

This is why this Court should endorse a macro approach to history and tradition. Such an approach would not only provide the lower courts with a workable, jurisprudentially scalable solution to reconstructing the history and tradition of firearm regulation, but also better preserve the Constitution as an enduring document.[19] Furthermore, a macro approach would minimize the likelihood of lawyers, legal scholars, and jurists cherry-picking or manipulating[20] those facets of

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curiae continues to locate new, unknown historical laws and evidence in this area. *See*, *e.g.*, Charles, *Fugazi*, *supra*, at 688-90 (discussing nineteenth century abolitionist John Brown's views on armed carriage); *id*. 709-10 (discussing the arrival and spread of mid-to-late nineteenth armed carriage prohibitions within town and city commercial/corporate limits). The point to be made is that history is forever developing as new historical evidence is discovered, and therefore it is more prudent to jurisprudentially rationalize from the macro, not micro level.

[19] Once more, *amicus curiae* is not suggesting that this Court should foreclose the use of micro level history altogether. *See supra* n. 6.

[20] This problem is particularly rife in the Second Amendment context, where much of the so-called history being presented

the historical record that they like and discarding or explaining away those they do not. *See* Sutton, *supra*, at 1184-86 (identifying the risks associated with jurists relying squarely on history in constitutional cases); *see also* Jack M. Balkin, *Constitutional Memories*, 31 Wm. & Mary Bill of Rts. J. 307, 340 (2022) (noting how easy it is for jurists to "pick and choose the sources they trust," and therefore "construct a version of historical memory that buttresses their ideological and philosophical priors"); Charles, *History in Law*, *supra*, at 54 ("One cannot take those portions of a legal past he or she agrees with, discard the others, and proclaim constitutional objectivity and, therefore constitutional legitimacy."); CHEYNEY, *supra*, at 27 ("[T]he

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before lower courts is the advocate's version, rather than that of any historical expert. *See United States v. Bullock*, 2023 U.S. Dist. LEXIS 112397, at 55-58 (S.D. Miss. Jun. 28, 2023). For decades, this problem has grown as special interest groups have increasingly paid for and produced an entire body of scholarship with the sole purpose of persuading the courts to adopt their view the Second Amendment. *See*, *e.g.*, Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/; CHARLES, ARMED IN AMERICA, *supra*, at 279-80 and accompanying notes. And within this this body of scholarship, one will be hard pressed to find examples where the constitutionality of firearm regulations is conceded or defended, nor will one find much of any scholarly disagreement from its chief architects. *See id*. at 282-83; *see also* Charles, *Racist History*, *supra*, at 1345-65. That special interest groups have been closely involved in producing this body of scholarship is not to suggest that the historical arguments contained within should not be duly considered by this Court and lower courts. Rather, the point is that the cherry-picking and manipulating of history in many Second Amendment writings is rather profound, and a macro approach would help this Court and the lower courts resolve the objectivity problem.

treasure-house of history is so rich that all kinds of precedents can be drawn from it. . . . An ingenious and industrious advocate can always find in the history the arguments he [or she] wants. But so can his [or hers] opponent; [and therefore] arguments from history are generally inconclusive except to those who are already convinced [by the history being presented].”). To state this differently, a macro approach to history and tradition ensures that courts are principally relying on those common, identifiable historical threads that are virtually undeniable. This, in turn, ensures that the history and tradition that the courts identify and analogize from maintains sufficient elasticity to withstand the test of time.

CONCLUSION

This case presents the Court with a valuable opportunity to guide the lower federal and state courts in their approach to implementing *Bruen*’s ‘text, history and tradition’ methodology for assessing the constitutionality of firearms restrictions in the United States. In resolving this case, *amicus curiae* urges the Court to adopt a macro approach to identifying and analogizing historical restrictions on firearms, by focusing on common, contextually identifiable, and virtually undeniable historical threads. Doing so will avoid the cherry-picking and manipulation that is inherent in a micro approach, and will lead to more consistent jurisprudential analyses and outcomes in

Second Amendment litigation than we have seen so far post-*Bruen*.

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Respectfully submitted,

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