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 PROFESSOR MARY ANNE FRANKS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

Dr. Mary Anne Franks is a legal scholar and professor of law at the George Washington Law School with deep expertise in Second Amendment law, constitutional law, criminal law, and family law. In addition to teaching courses on these subjects for more than a decade, she has authored an award-winning book on constitutional law and several articles on Second Amendment doctrine, self-defense, gun violence, and gender-based violence.[1] She submits this brief to highlight the similarities between the Court's abortion rights jurisprudence and its gun rights jurisprudence, and the consequences of failing to apply consistent principles in issues implicating the destruction of life.

Dr. Franks submits this brief on her own behalf and not as a representative of her university.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution does not confer upon domestic abusers a right to possess firearms. Before *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York*

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[1] Amicus states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amicus—contributed money that was intended to fund preparing or submitting the brief.

State Rifle & Pistol Association, Inc., v. Bruen, 142 S. Ct. 2111 (2022), it would have been unthinkable for any court—much less a U.S. Court of Appeals—to hold that the Constitution guarantees the right of an individual with a documented history of armed terrorization of intimate partners and the general public to possess lethal firearms. While *Heller* and *Bruen* do not command a contrary result, this case highlights how the invention and expansion of an individual right to bear arms leads to increasingly dangerous and grotesque consequences.

Based on its reasoning in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), this Court must correct course on its Second Amendment jurisprudence. In *Dobbs,* this Court cited concern for the destruction of potential life in discarding the nearly fifty years of precedent of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 979 (1992). The threat to currently existing life posed by the possession of firearms, especially in the hands of domestic abusers, provides sufficient reason to correct the fifteen years of misguided precedent since *Heller*. Applying the logic of *Dobbs* and its treatment of history and stare decisis to this case makes clear that *Heller* and *Bruen* were egregiously wrong and must be overruled.

As nothing in the text or history of the Constitution supports an individual right to possess

firearms, the government may regulate gun ownership for legitimate reasons. Considering the serious risks that domestic abusers with access to firearms pose to their intimate partners and their children, 18 U.S.C. 922(g)(8)'s goal of disarming abusers to prevent injury and death to women and children is not only legitimate, but compelling. Failure to apply the reasoning of *Dobbs* to this case would suggest that the Court's concern for human life in *Dobbs* was a mere pretext; that its historic methods can be selectively implemented to reach a preferred conclusion; and that the Court's real motivation is to sanctify gun culture, to the detriment of women, children, and minorities.

ARGUMENT

I. This Court's Approach In *Dobbs* Establishes That There Is No Text, History, Or Tradition that Supports An Individual Constitutional Right To Gun Possession.

In *Dobbs*, this Court overruled nearly fifty years of precedent and two seminal cases that had established a constitutional right to an abortion. 142 S. Ct. 2228. The Court reasoned that neither the text of the Constitution, nor the history or tradition of our country, supported such a right. *Id.* at 2245-56. Emphasizing that the exercise of the abortion right involves the destruction of potential human life, the

Court decried the "raw judicial power" of *Roe* and *Casey* that "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." *Id.* at 2265.

By the Court's reasoning in *Dobbs,* the alleged right of individuals to own deadly weapons must meet the same fate. Such a right appears nowhere in the text of the Constitution and finds no support in either the history or tradition of this country. The Second Amendment makes no mention of individuals or self-defense, and the overwhelming consensus among scholars, historians, and the Court itself for more than a century was that its protections referred to the collective right of the people to bear arms for the common defense. By contrast, in *Heller* and *Bruen*, the Court first invented and then expanded a right whose exercise involves the destruction of currently existing human life, contributing to an epidemic of violence that undermines public welfare and targets women in particular for terror, injury, and death.

There is perhaps no issue more profound in its moral and social importance than how to regulate access to the instruments of death, and the Constitution demands that this question be left to the people and their elected representatives to decide. *See id.* at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations upon it, are to be resolved like most

important questions in our democracy: by citizens trying to persuade one another and then voting.'" (quoting *Casey,* 505 U.S. at 979 (Scalia, J., concurring in part and dissenting in part))). Applying *Dobbs*, *Heller* and *Bruen* were egregiously wrong when they were decided, and their 15 years of misguided, unsupportable precedent must be overruled.

A. Neither the text of the Constitution, nor history and tradition, support an individual right to gun possession.

The Court in *Dobbs* stated that constitutional analysis must begin with "the language of the instrument … which offers a 'fixed standard' for ascertaining what our founding document means." 142 S. Ct. at 2244–45 (quoted source omitted) Accordingly, under *Dobbs*, constitutional rights must be expressly supported by reference in the text of the Constitution itself or by history and tradition. The Court declared that because "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision," the right does not exist. *Id.* at 2242. The individual right to gun possession must meet the same fate.

1. The Second Amendment makes no reference to an individual right to bear arms.

The *Dobbs* Court described *Roe* as "remarkably loose in its treatment of the constitutional text. It held

that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned." *Id.* at 2245. In similarly loose fashion, *Heller* held that the right of individuals to keep handguns in the home, which is not mentioned in the Constitution, is part of the right of self-defense, which is also not mentioned. See *Heller*, 554 U.S. at 651 (Stevens, J., dissenting). "What is lacking in *Heller* is what was lacking in *Roe*: the sort of firm constitutional foundation from which to announce a novel substantive constitutional right." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009).

The understanding that the Second Amendment meant what it said—that it codified a limited collective right to bear arms in support of militias—was the settled consensus in federal courts, and certainly the Supreme Court, for more than 200 years before the radical, and ahistorical, pronouncement in *Heller*. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4 (2000). The Second Amendment, in full, states: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Nothing there establishes an individual right to possess firearms, stating in the passive voice only that whatever rights already exist "shall not be infringed." *Id.* The Second Amendment begins with its purpose—to ensure a "well regulated Militia"—and, unlike other

protections in the Bill of Rights, does not connect the "right of the people to keep and bear Arms" to any individual or personal right. *Compare* U.S. Const. amend. IV ("The right of the people to be secure *in their persons, houses, papers, and effects* …") and U.S. Const. amend. V ("nor shall any person be … compelled in any criminal case *to be a witness against himself*."). *See Heller,* 554 U.S. at 640-652 (Stevens, J., dissenting); *see also id.* at 642-43 (reasoning that "the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont did expressly protect such civilian uses at the time" and noting "[t]he contrast between those two declarations and the Second Amendment … confirms that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear Arms' was on military uses of firearms, which they viewed in the context of service in state militias").

2. The Constitution provides no other source for an individual right to possess arms supported by history and tradition.

Because the Second Amendment, properly understood, does not provide an individual right to possess arms, any claimed constitutional right would need some other source in the Constitution. *See Dobbs,* 142 S. Ct. at 2245. None exist.

a. There is no support for an individual right to possess firearms elsewhere in the text of the Constitution.

The Constitution nowhere else mentions "arms" or "self-defense," and there is no basis for reading into the Second Amendment such a right from other provisions. As *Dobbs* made clear, "those who claim that [the Constitution] protects such a right must show that the right is somehow implicit in the constitutional text." 142 S. Ct. at 2245.

The Ninth Amendment. The Ninth Amendment's reservation of rights to the people has never included an individual right to bear arms. Even *Heller* did not so claim, referring to the Ninth Amendment only in its discussion over who was included in the "the people" used in the First, Second, Fourth, and Ninth Amendments. *Heller,* 554 U.S. at 579-80. And this Court has never held that among the rights "retained by the people" under the Ninth Amendment is an individual right to possess arms.

The Fourteenth Amendment. *Bruen* maintained that the Fourteenth Amendment simply made the Second Amendment right enforceable against the states, as initially pronounced in *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), and did not broaden or expand that right: "individual rights enumerated in the Bill of Rights and made applicable

against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Bruen,* 142 S. Ct. at 2137.

Dobbs forecloses any argument that the individual right to possess weapons is implicit in the Fourteenth Amendment's reference to "liberty." After the Court in *Dobbs* found no textual support for *Roe'*s holding, it turned to the analysis of whether the right to an abortion is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty," answering in the negative to both questions. 142 S. Ct. at 2246 (internal quotations and citations omitted).

If the constitutional guarantee of "liberty" is not capacious enough to protect a woman's basic right to bodily integrity, it follows that firearm possession—which has at best an ancillary relationship to bodily integrity and at worst an antagonistic one—cannot be the type of "liberty" the Constitution was intended to protect. As the *Dobbs* Court warned,

> In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to

> recognize rights that are not mentioned in the Constitution.

Id. at 2247.

b. There is no support for a constitutional individual right to possess firearms in American history or tradition.

The *Dobbs* Court espoused its belief in a lack of historical support for a constitutional right to an abortion by noting that "[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion" and that "[u]ntil a few years before *Roe*, no federal or state court had recognized such a right." *Dobbs,* 142 S. Ct. at 2242–43.

Yet similarly, until the early part of the 21st century, no federal court—much less this Court—had ever suggested that the Constitution guarantees an individual right to possess firearms independent of participation in a militia. Indeed, this Court had consistently said the opposite. *See, e.g., United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (the right to bear arms "is not a right granted by the Constitution"); *United States v. Miller*, 307 U.S. 174, 178 (1939) ("With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be

interpreted and applied with that end in view."); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *Miller* for proposition that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'").[2]

In *Dobbs,* the Court observed that "[f]or the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens." 142 S. Ct. at 2240. The same was true for even longer—more than two centuries—regarding the state regulation of firearms, until *Heller* drastically altered the landscape in 2008. Before then, states historically had restricted gun possession without any suggestion the Constitution imposed a barrier. Texas banned the public carrying of arms. *See* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 105–07 & n.73 (2016). Ronald Reagan, when he was Governor of California, signed into law the Mulford Act, which prohibited the public carrying of loaded firearms without a permit. *See* Cal. A.B. 1591 (April 5, 1967). And Colorado, "the setting of two of the nation's most

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[2] The *Heller* majority did cite a smattering of pre-Civil War state court cases purportedly recognizing an individual right to bear arms under the Second Amendment. 554 U.S. at 610-614. But the majority never explained how or why decisions from courts that it would never defer to today somehow trump 150 years of consistent Supreme Court jurisprudence.

notorious mass shootings," banned large capacity magazines after the massacres at Columbine High School in 1999 and the Aurora movie theater in 2012. *Rocky Mountain Gun Owners v. Polis*, 467 P.3d 315, 317 (Colo. 2020).

Indeed, throughout our nation's history, states have restricted who could own guns and what types of guns they could own, including limiting access to firearms for those shown to have engaged in domestic violence. Alabama has long prohibited those "convicted of ... a crime of violence" from owning a pistol. Ala. Code § 13A-11-72 (2023, enacted at least by 1994). Similarly, Alabama bars those under a domestic violence protection order "from possessing a firearm or other weapon." Ala. Code § 38-9F-8(c)(4) (2023). Florida criminalizes the possession of a "firearm or ammunition" by those under a domestic violence protective order. Fla. Stat. § 790.233 (2023). And Montana similarly authorizes courts to prevent someone under a domestic violence protective order "from possessing or using the firearm used in the assault." Mont. Code Ann. § 40-15-201(2)(f) (2023). While the contours of how each state has chosen to limit individuals under domestic violence protective orders from possessing firearms, almost all have done so "in accordance with the views of its citizens." *Dobbs*, 142 S. Ct. at 2240.

c. There is no longstanding support for a constitutional individual right to possess firearms in legal scholarship.

Apart from text and history, the *Dobbs* Court pointed to the fact that no scholars had advocated a right to abortion until shortly before the *Roe* decision: "although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*." *Dobbs*, 142 S. Ct. at 2248.

Similarly, "from the time law review articles first began to be indexed in 1887 until 1960, all law review articles dealing with the Second Amendment endorsed the collective right model." Bogus, *supra*, at 4–5. The first law review article advocating that the Second Amendment be interpreted to protect an individual right to bear arms did not appear until 1960, and it acknowledged that:

> [t]he majority of the jurisdictions have concluded that both the United States Constitution and the various state constitutions, having a similar provision relating to the right to bear arms, refer to the militia as a whole composed and regulated by the state as it desires. The individual does not have the right to own

> or bear individual arms, such being a privilege not a right.

Stuart R. Hays, *A Right to Bear Arms, A Study in Judicial Misinterpretation.* 2 WM. & MARY L. REV. 381, 397 (1960). Indeed, there was no significant shift in the scholarly literature until 1970, just as the National Rifle Association began funding academic support for its political position. Michael Waldman, *How the NRA Rewrote the Second Amendment*, BRENNAN CENTER FOR JUSTICE (May 20, 2014) (noting the NRA's funding for articles supporting an individual right under the Second Amendment began in the 1970s).[3]

B. Gun regulation is an issue of profound moral and social importance that the Constitution demands be left to the people and their elected representatives to decide.

Gun use is, as the *Dobbs* majority characterized abortion, "a profound moral issue on which Americans hold sharply conflicting views." *Dobbs*, 142 S. Ct. at 2240. If, as the majority emphasized in *Dobbs*, the Constitution does not authorize the Court to force states to treat fetuses as lacking "the most basic human right—to live," the same must surely be true about the victims of gun violence. *Id*. at 2261. But that is precisely the egregious error committed by *Heller*

[3] https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment

and *Bruen*. By uncritically adopting self-serving claims about the necessity, effectiveness, and purpose of gun ownership, the Court bestowed upon gun owners the unchecked power to dictate if and how other people are allowed to live. Given the gender and racial disparities in gun ownership and use, this power disproportionately endangers the most vulnerable communities, including women, children, and minorities. The Court in *Dobbs* denounced the imposition "on the people a particular theory about when the rights of personhood begin"; it must equally denounce the imposition on the people a particular theory about whose rights of personhood count and whose do not. 142 S. Ct. at 2261.

Because firearms are designed with the exclusive purpose of causing death, *Heller's* holding that the Second Amendment confers an individual right to bear arms "quite directly empowers individuals to kill." Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728 (2011). More than 100,000 people are shot by guns in the U.S. every year, including nearly 8,000 children and teenagers, and more than 42,000 die from gun violence. Brady United, *Key Statistics* (Jan. 2021).[4] One in five U.S. adults has been threatened by a gun. Shannon Schumacher et al., *Americans' Experiences With Gun-Related Violence, Injuries, and Deaths,* KAISER FAMILY FOUNDATIONN

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[4] https://www.bradyunited.org/key-statistics

(Apr. 11, 2023).[5] Countless others have experienced the trauma of witnessing gruesome gun violence, including family members, bystanders, law enforcement, and medical personnel. There is no place where Americans are free from the lurking threat of gun violence to themselves and their loved ones—not homes, not schools, not movie theaters, not outdoor concerts, not grocery stores, not houses of worship. Widespread gun possession objectively and exponentially raises the risk of death and horrific injury for every American. A constitutional right to keep and bear lethal weapons grants the most paranoid, delusional, and fearful individuals the power of life and death over the entire public. *See* Mary Anne Franks, *The Second Amendment's Safe Space, or the Constitutionalization of Fragility*, 83 LAW & CONTEMP. PROBS. 137, 149 (2020).

The idealized vision of the gun owner as a noble and skillful defender of life and property must not distract from the reality that gun use destroys life. The mere assertion that an act constitutes lawful self-defense does not make it so, and the possession and use of weapons is no exception. As this case shows, firearms are used for many purposes that have nothing to do with self-defense, including domestic violence, armed robbery, intimidation, suicide, assault, and murder. Even firearms that are intended for lawful self-defense can kill and injure innocent parties, including through accidents, access by

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[5] https://www.kff.org/other/poll-finding/americans-experiences-with-gun-related-violence-injuries-and-deaths/

unintended users, stray bullets, or the shooter's miscalculation of the need for deadly force.

Constitutional indulgence of the myth of armed self-defense does not impact all Americans equally. Gun owners are disproportionately white and male. Nearly half (48%) of white men say they own a gun, while only a quarter of white women, 24% of nonwhite men, and 16% of nonwhite women say the same. Kim Parker et al., *America's Complex Relationship with Guns*, PEW RESEARCH CENTER (June 22, 2017).[6] White men are also the primary beneficiaries of self-defense and deadly use of force presumptions. *See* Caroline E. Light, *Stand Your Ground: A History of America's Love Affair With Lethal Self-Defense* 9-10 (Beacon Press, 2017) (reasoning that "the language of these laws promises self-defense rights to everyone, but [stand your ground] laws are adjudicated through the lens of our society's implicit racial and gender biases" and noting that stand your ground laws "have exacerbated racial discrepancies in the adjudication of self-defense: whites who kill Blacks in states with [stand your ground] laws are more than eleven times more likely to escape conviction than Blacks who kill whites").

Women are particularly endangered by guns inside the home, and racial minorities are particularly endangered by gun use outside the home. *See* Mary Anne Franks, *The Cult of the Constitution* 90-1

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[6] https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/

(Stanford University Press, 2020). The frequency of gun violence against transgender people is on the rise. Everytown Research, *Remembering and Honoring Pulse* (June 16, 2023).[7] Given the gender and racial disparities in gun ownership and use, *Heller* and *Bruen,* in identifying self-defense as the touchstone for gun rights in the Constitution, *Heller,* 554 U.S. at 635-36, impermissibly demand that states value the fears of white men more than the right to life of women, children, and minorities.

II. The Principles Of Stare Decisis That This Court Relied Upon In *Dobbs* Favor The Court Correcting The Course Of Its Second Amendment Jurisprudence.

In overruling *Roe* and *Casey*, the *Dobbs* Court relied on "the nature of the Court's error," "the quality of the reasoning," the "workability" of the rule, their "effect on other areas of the law," and "reliance interests." *Dobbs*, 142 S. Ct. at 2265-78. These same factors favor the Court correcting its course and returning the issue of individual gun possession to the people and their elected representatives.

Nature of the Error

Gun use is, as the *Dobbs* majority characterized abortion, "a profound moral issue on which Americans hold sharply conflicting views." 142 S. Ct. at 2240.

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[7] https://everytownresearch.org/report/remembering-and-honoring-pulse/

Given the increasing toll of gun violence and the passionate attachment of many Americans to guns, it is not surprising that Americans are deeply divided about gun use. A 2023 national poll revealed that 60% of Americans "think it is more important to control gun violence than to protect gun rights," including more than a third of Republicans. Marist Poll, *Gun Violence in the United States* (May 24, 2023).[8] A Pew Research poll found that 60% of Americans think that gun violence is a "very big problem," but Americans are evenly split on the question of whether gun ownership does more to increase or decrease safety. Pew Research Center, *Gun Violence Widely Viewed as a Major – and Growing – National Problem* (June 28, 2023).[9] Americans' divided views on gun use are comparable to their divided views on abortion rights, with more than 61% of Americans in support of abortion rights and 37% opposed. Marist Poll, *Abortion Rights in the United States* (April 26, 2023).[10]

People on both sides of the gun debate make strongly held and sincere policy arguments, and absent explicit support for the individual right to use guns in text, history, or tradition, it is time for the Court to "return the power to weigh those arguments

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[8] https://maristpoll.marist.edu/polls/gun-violence-in-the-united-states/

[9] https://www.pewresearch.org/politics/2023/06/28/gun-violence-widely-viewed-as-a-major-and-growing-national-problem/

[10] https://maristpoll.marist.edu/polls/abortion-rights-in-the-united-states

to the people and their elected representatives." *Dobbs,* 142 S. Ct. at 2259.

Yet while this Court in *Dobbs* found it had to "heed the Constitution and return the issue of abortion to the people's elected representatives," *id*. at 2243, it usurped the people's ability to control the equally morally charged and divisive issue of gun violence in *Heller* and *Bruen*. If the permissibility and limitations of a practice that purportedly destroys *potential* life "are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting," *see id.* (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in part and dissenting in part)), surely the same must be true of a practice that unquestionably destroys *currently existing* life. "That is what the Constitution and the rule of law demand." *Dobbs*, 142 S. Ct. at 2243.

Yet *Heller* committed the very same transgression for which the Court in *Dobbs* chastised *Roe* and *Casey*: "usurp[ing] the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." *See Dobbs,* 142 S. Ct. at 2265.

This Court in *Heller* and *Bruen* failed to engage in "any serious discussion of the legitimacy of the States' interest in" preventing gun violence. *See Dobbs,* 142 S. Ct. at 2261. Women, children, and racial and sexual minorities will continue to

disproportionately bear the consequences of *Heller* and *Bruen*. Megan J. O'Toole et al., *The Changing Demographics of Gun Homicide Victims and How Community Violence Intervention Programs Can Help*, Everytown Research (June 28, 2023).[11] As Justice Kavanaugh emphasized in *Ramos*, a decision's "real-world effects on the citizenry, not just its effects on the law and the legal system," are among the factors to be considered in determining whether the precedent should be overruled. *Ramos v. Louisiana,* 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part). The real-world effects of discounting the state's legitimate interests in preventing gun violence, especially by domestic abusers, include particularly horrific consequences for women: "[N]early one in four (23.2%) women … will experience severe physical violence at the hands of their intimate partner in their lifetime" and "[n]early half of all women murdered in the United States are killed by a current or former intimate partner, and more than half of these intimate partner homicides are by firearm." Educational Fund to Stop Gun Violence, *Domestic Violence and Firearms* (July 2020).[12] "Women are five times more likely to be murdered by an abusive partner when the abuser has access to a gun." *Id.*

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[11] https://everytownresearch.org/changing-demographics-gun-homicide-victims-how-community-violence-intervention-programs-can-help/

[12] https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/

Quality of the Reasoning

The *Dobbs* Court characterized *Roe* as not only "wrong," but "weak," citing its failure to ground its reasoning in "text, history, or precedent"; its reliance on "an erroneous historical narrative"; its assertion of seemingly arbitrary limitations; its lack of explanation for its central rule; and the "scathing scholarly criticism" it received even from those sympathetic to the underlying issue. *Dobbs*, 142 S. Ct. at 2266.

These criticisms apply with at least equal force to *Heller*. *Heller*'s finding of an individual right to use handguns inside the home for self-defense has no basis in text, history, or precedent; the historical narrative on which the decision relied was selective and erroneous; it asserted without explanation that certain "longstanding prohibitions" on gun possession would be respected; it failed to explain how it arrived at the rule that the Second Amendment, which makes no mention of individuals, handguns, self-defense, or the home, protects the right of individuals to use handguns for self-defense in the home; and it faced scathing criticism even from historians and legal scholars sympathetic to gun rights. *See, e.g.*, Wilkinson, *supra*.

The *Bruen* Court compounded *Heller*'s unprincipled and inconsistent use of history. To illustrate, in *Dobbs*, the Court declared that the fact that "many States in the late 18th and early 19th

century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so," fixating on the lack of a record or recognition. *Dobbs,* 142 S. Ct. at 2255. The Court continued, "[a]lthough a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*." *Id.* at 2250. In other words, in *Dobbs,* the Court declared that the lack of historical regulation of abortion is no bar to contemporary regulation.

But in *Bruen,* the Court declared that the opposite was true for guns: "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen,* 142 S. Ct. at 2131. In direct contradiction to *Dobbs,* the *Bruen* majority held that the lack of historical regulation—indeed, of "distinctly similar historical regulation"—*does* constitute a bar to contemporary regulation. This double standard defies both history and reason.

The reasoning of *Heller* and *Bruen* is deeply flawed in yet another way: it rests on a presumed, unimpeachable connection between gun ownership and self-defense and asserts a universal set of "ordinary self-defense needs" backed by the right to

bear arms both in the home and in public. *Bruen,* 142 S. Ct. at 2156; *Heller,* 554 U.S. at 636.

But guns are neither necessary nor particularly well-suited for the exercise of self-defense. There are many ways to engage in self-defense without firearms, and firearms are rarely successfully used in self-defense. Jennifer Mascia, *How Often Are Guns Used for Self-Defense?*, The Trace (June 3, 2022).[13] And while the Court in *Bruen* claimed that the right to armed self-defense can purportedly never turn on "special needs," 142 S. Ct. at 2156, the concept of lawful self-defense by definition requires the demonstration of a special need. The use of deadly force cannot be justified in the abstract; it is a determination contingent upon multiple factors, including the existence of an unlawful and imminent threat of severe bodily injury or death, necessity, and proportionality. *See* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 83 (2020).

The *Heller* Court enshrined constitutional protection for the possession and use of a weapon in the home for the purpose of self-defense without interrogating how such purpose could or should be shown. *See Heller*, 554 U.S. at 629 ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."). To assume that gun use in

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[13] https://www.thetrace.org/2022/06/defensive-gun-use-data-good-guys-with-guns/

the home is "for" self-defense is to endorse the self-serving perspective of gun owners at the expense of those whose lives they endanger. Many people who buy and keep a weapon in the home intending to use it "for" self-defense have wildly inaccurate views of what constitutes lawful self-defense, while others keep and use guns in the home for reasons that are expressly antithetical to the concept of self-defense. Those reasons include the use of use guns to terrorize, intimidate, injure, and kill members of their household. *See generally* Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the lives of battered women*, 94. AM. J. PUB. HEALTH 1412 (2004).

The myth of armed self-defense that the *Bruen* Court uncritically embraced also fails to acknowledge the gendered and racialized realities of gun violence. Gun violence in the home is a distinctly gendered phenomenon. Men are at least twice as likely to own guns than women. *See* Megan Brenan, *Stark Gender Gap in Gun Ownership, Views of Gun Laws in U.S.,* GALLUP (Dec. 2, 2022) (noting that in the United States gun ownership among men has consistently been at least double that of women).[14] In many gun-owning households, only the male members of the household even know about the gun. *See* Jens Ludwig et al., *The Gender Gap in Reporting Household Gun Ownership*, 88 AM. J. PUB. HEALTH 1715, 1717 (1998) (explaining that wives' lack of knowledge can be a reason behind wives underreporting, which could

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[14] https://news.gallup.com/poll/406238/stark-gender-gap-gun-ownership-views-gun-laws.aspx

stem from disagreement among spouses in which a woman opposes keeping a gun in the home). Men are far more likely to use guns against women in a household than the reverse. *See* Violence Policy Center, *When Men Murder Women: An Analysis of 2020 Homicide Data;*[15] *see also* Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249 (2017). When there are guns in a home, a woman's chance of being injured or killed increases exponentially: "While a gun in the home puts everyone in the home at risk of injury or death, the risk was especially great for abused women living in a home with a gun. Indeed, an abused woman who lived in a home with a gun was 6 times more likely to be killed than other women." Educational Fund to Stop Gun Violence, *Domestic Violence and Firearms* (July 2020).[16]

Pregnant women are at particularly high risk of gun violence. Women in the United States "are more likely to be murdered during pregnancy or soon after childbirth" than to die from obstetric causes, and most of these pregnancy-associated homicides "are linked to the lethal combination of intimate partner violence and firearms." Rebecca B. Lawn, *Homicide is a leading cause of death for pregnant women in US*, THE BMJ (Oct. 19, 2022).

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[15] https://vpc.org/when-men-murder-women-introduction/

[16] https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/

Bruen compounded *Heller's* egregious error by greatly expanding the power of gun owners to dictate life and death according to their subjective fears and insecurities. As it did in *Heller*, the Court ignored a wealth of empirical evidence about who uses guns and why in favor of unsupported claims linking guns and self-defense. This includes multiple studies showing that laws making it easier for people to obtain and carry weapons in public, such as Stand Your Ground and permitless carry laws, are correlated with significant increases in homicides and other violent crimes. *See* Nick Wilson, *Fact Sheet: Weakening Requirements to Carry a Concealed Firearm Increases Violent Crime*, Center for American Progress (Oct. 4, 2022)[17]; *see also* RAND Corp., *Effects of Stand-Your-Ground Laws on Violent Crime* (Jan. 10, 2023).[18] Evidence also shows that these laws exacerbate existing gendered and racial disparities in self-defense claims. Men are far more likely to benefit from Stand Your Ground defenses than women. *See* Justin Murphy, *Are "Stand Your Ground" Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005–2013*, 99 SOC. SCI. Q. 439, 451 (2017) ("Conviction for a male defendant in a typical domestic case was found to be about 40%, but for a female defendant in an otherwise objectively equivalent case, the probability of conviction was

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[17] https://www.americanprogress.org/article/fact-sheet-weakening-requirements-to-carry-a-concealed-firearm-increases-violent-crime

[18] https://www.rand.org/research/gun-policy/analysis/stand-your-ground/violent-crime

found to be around 80%."); Elizabeth Flock, *How Far Can Abused Women Go to Protect Themselves?*, NEW YORKER (Jan. 13, 2020).[19] Further, homicides involving white defendants and Black victims are far more likely to be found justified than those involving Black defendants and white victims., *See, e.g.*, Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and its Racial Implications*, DUKE CTR. FOR FIREARMS LAW (Jan. 18, 2022) ("In Stand-Your-Ground states, 'homicides in which white shooters kill Black victims are deemed justifiable five times for frequently than when the situation is reversed.'" (quoted source omitted)).

This Court pronounced in *Heller* an "inherent right of self-defense," as well as the right to possess the specific means to that end—individual possession of a firearm. 554 U.S. at 628. In doing so, the Court imposed a value judgment on all Americans: that the desire of some individuals to wield a lethal tool to exercise a hypothetical future need for self-defense outweighs the actual costs to the safety and security of children, women, and minorities.

Workability

According to *Dobbs*, "another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and

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[19] https://www.newyorker.com/magazine/2020/01/20/how-far-can-abused-women-go-to-protect-themselves

applied in a consistent and predictable manner." 142 S. Ct. at 2272. The Court lambasted *Casey's* promulgation of the "undue burden" standard as an "unworkable" rule that required considering ambiguous factors, generates confusion among the lower courts, and creates unpredictable results. *Id.* at 2272-75.

The standard in *Bruen* is guilty of these same sins. *Bruen's* jettisoning of means-end scrutiny, its demand that the state "identify an American tradition justifying" regulation, 142 S. Ct. at 2156, and its requirement that courts and attorneys act as historians is a review framework which "courts, operating in good faith, are struggling [with] at every stage[.]" *United States v. Daniels*, No. 22-60596, 2023 WL 5091317, *17 (5th Cir. Aug. 9, 2023). Lower courts "have reached inconsistent conclusions about what the test requires and how it works in practice, and their decisions since *Bruen* "have been scattered, unpredictable, and often internally inconsistent." Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming). Once again, these decisions demonstrate *Bruen*'s "significant negative jurisprudential or real-world consequences." *See Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in judgment in part).

As one recent example, Judge Carlton W. Reeves of the Southern District of Mississippi noted

that courts do not have the institutional competence to undertake sophisticated historical research:

> This Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess. The sifting of evidence that judges perform is different than the sifting of sources and methodologies that historians perform. … [W]e are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791. Yet we are now expected to play historian in the name of constitutional adjudication.

United States v. Bullock, No. 18-cr-165, 2022 WL 16649175, *1 (S.D. Miss. Oct. 27, 2022) (internal citations omitted).

Even if judges were capable of sophisticated historical analysis, *Bruen*'s test would still be unworkable. As Supreme Court of Ohio Justice Jennifer Brunner expressed in a recent case, historical analysis is not "once-and-for-all process that will eventually produce a single, final version of what happened in the past," *State v. Philpotts*, 194 N.E.3d 371, 372 (Ohio 2022) (Brunner, J., dissenting). Rather, historical analysis is constantly evolving

because the present is constantly evolving. As Justice Brunner emphasized, one cannot simply ignore the fact that the historical tradition of firearms regulation in the U.S. does not include the participation of women and nonwhite people, but attempting to discern what their views would have been is also fraught with uncertainty. *Id.* at 373.

Effect on Other Areas of the Law

The *Dobbs* majority observed that "[m]embers of this Court have repeatedly lamented that 'no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.'" *Dobbs*, 142 S. Ct. at 2275 (quoted source omitted). But the Court's decision in *Bruen*, delivered only one day before *Dobbs*, was not only a cataclysmic shift in Second Amendment analysis that cast doubt on all gun control regulation (no matter how minimal, longstanding, or effective in protecting the public welfare), but also constituted a dramatic reshaping of constitutional analysis that threatens to wreak havoc on other legal rules and doctrines.

In *Dobbs,* the Court decried what it characterized as the disruptive effects of *Roe* and *Casey*, including "flout[ing] … the rule that statutes should be read where possible to avoid unconstitutionality" 142 S. Ct. at 2276. But by abolishing means-end scrutiny and literally shifting the burden to the government to prove the

constitutionality of gun regulations, *Bruen* obliterated the doctrine of constitutional avoidance in Second Amendment challenges. *Bruen,* 142 S. Ct. at 2126 ("[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and "[t]o justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."). There is little reason to expect that this effect will be limited to Second Amendment cases.

Bruen also threatens far more "distort[ion] of First Amendment doctrines" than that alleged by the *Dobbs* Court regarding *Roe* and *Casey*. *See Dobbs,* 142 S. Ct. at 2276. As Professor Jacob Charles observes, the two-part framework adopted by lower courts after *Heller* was itself derived from First Amendment jurisprudence. Charles, *supra*. *Bruen's* disposal of the second part of that framework—means-end scrutiny—in Second Amendment analysis does not bode well for the survival of this "prominent fixture of modern free speech jurisprudence." *Id.*

The upheaval of *Bruen* extends to other areas of law as well, including Fourth Amendment jurisprudence. "The liberalization of gun rights …has created some conflict with criminal law enforcement. It raises new questions about the ability of law enforcement officers to protect their own, and the

public's, safety, and to determine which gun owners pose a threat of danger to the community." J. Richard Broughton, *Danger at the Intersection of Second and Fourth*, 54 IDAHO L. REV. 379, 381 (2018). The situation presents profound risks to the lives of law enforcement officers: a 2016 study concluded that law enforcement officer homicide rates were three times higher in states with high firearm ownership compared with states with low firearm ownership. David I. Swedler et al., *Firearm Prevalence and Homicides of Law Enforcement Officers in the United States*, 105 AM. J. PUB. HEALTH 2042 (2015).

Reliance

This Court in *Dobbs* was careful to disclaim any consideration of "intangible" reliance or "generalized assertions about the national psyche" with regard to abortion. *Dobbs,* 142 S. Ct. at 2276. Yet in *Heller* the Court highlighted the very same strategy of honoring a "generalized assertion[] about the national psyche" to find an individual right to possess a firearm for self-defense in the home, elevating "the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms." 554 U.S. at 624 n.24. But as Justice Stevens observed in his *Heller* dissent, "it is hard to see how Americans have 'relied,' in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have 'relied' on the laws passed by democratically

elected legislatures, which have generally adopted only limited gun-control measures." *Id.* at 676 n.38 (Stevens, J., dissenting).

III. 18 U.S.C. 922(g)(8) Is Constitutional Regardless Of Whether *Heller* And *Bruen* Remain Good Law, But Efforts to Enlist The Constitution In The Destruction of Human Life Will Continue Until They Are Overruled.

As described in Section I, nothing in the text, history, or tradition of the Second Amendment supports an individual right to bear arms for self-defense. As a result, rational basis review is warranted under *Dobbs*. *See* 142 S. Ct. at 2283 ("Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.") The question is: does the State have a legitimate interest in prohibiting the possession of firearms by persons subject to domestic violence restraining orders via 18 U.S.C. 922(g)(8)? The answer is clearly yes. The State has a legitimate interest in the preservation of life and the protection of the health and safety of women, children, and all other domestic abuse victims. *See Dobbs*, 142 S. Ct. at 2284 ("[T]hese legitimate interests include respect for and preservation of prenatal life at all stages of

development" and "the protection of maternal health and safety.")

Even if the *Heller* and *Bruen* framework remain undisturbed in this case, the government may lawfully prevent adjudicated domestic abusers like Rahimi from possessing weapons for the reasons stated in the State's brief. Pet. Br. at 11-34.

But the floodgates of opportunistic Second Amendment challenges have been opened in the state and federal courts, and it will be impossible for this Court to correct all of the grotesque and disastrous outcomes that will result. Until *Heller* and *Bruen* are overruled, the Constitution will continue to be enlisted in the destruction of human life.

CONCLUSION

For the above reasons, the judgment below should be reversed.

Respectfully submitted,

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