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 AMICI CURIAE PROFESSORS OF SECOND AMENDMENT LAW, THE SECOND AMENDMENT LAW CENTER, AND THE INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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AMICI CURIAE STATEMENT OF INTEREST

Amici law professors teach and/or write on the Second Amendment: Randy Barnett (Georgetown), Robert Cottrol (George Washington), Lee Francis (Mississippi College), Donald Kilmer (Lincoln), Joyce Malcolm (George Mason, emerita), George Mocsary (Wyoming), Joseph Muha (Akron), Joseph Olson (Mitchell Hamline, emeritus), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell).[1]

Cited by this Court in *Heller* and *McDonald*, and oft-cited by lower courts, these professors include authors of the first law school textbook on the Second Amendment, and many other books and law review articles on the subject.[2]

The Second Amendment Law Center ("2ALC") is a nonprofit corporation in Henderson, Nevada. The Center defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Founded in 1985 on the eternal truths of the Declaration of Independence, the Independence Institute is a 501(c)(3) public policy research organization in

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[1] No counsel for any party authored the brief in any part. Only amici funded its preparation and submission.

[2] *See* https://davekopel.org/Briefs/SCt/Rahimi/ProfessorBiographies.pdf.

Denver, Colorado. The briefs and scholarship of Research Director David Kopel have been cited in seven opinions of this Court, including *Bruen*, *McDonald* (under the name of lead amicus Int'l Law Enforcement Educators & Trainers Association (ILEETA)), and *Heller* (same). Kopel has also been cited in 89 opinions of lower courts. The Institute's Senior Fellow in Constitutional Studies, law professor Robert Natelson, has been cited in eleven opinions by Justices of this Court.

SUMMARY OF ARGUMENT

This brief addresses "who" may be deprived of the right to arms. Some lower courts have had difficulty discerning lessons to draw from historical laws disarming various groups.

Constitutional enactments about the right to arms have added specificity to the right. When a constitutional enactment forbids depriving a particular group of the right to arms, the prior laws targeting that group are repudiated as legitimate precedents from which modern gun control analogies may be drawn.

The 1689 English Bill of Rights, which is part of the British Constitution and was applicable in America, repudiated deprivation of arms rights because of peaceful political disagreement or because of adherence to a Protestant denomination that was not the established Church of England. The 1689 enactment allowed some restrictions based on economic or social class, and did not protect non-Protestants.

The 1788 United States Constitution rejected arms restrictions for persons whose religious scruples did not allow them to "swear" an "oath."

The 1791 Second Amendment rejected arms rights limitations based on religion or class/income. Therefore, the short-lived 1756 anti-Catholic laws in two colonies have no validity as post-1791 precedents for limitations on Second Amendment rights.

The 1865 Thirteenth Amendment abolished all the "badges and incidents" of slavery. Being disarmed is an incident of being enslaved. Hence, the Thirteenth Amendment obliterated the precedential value of earlier statutes forbidding slaves to have arms or allowing possession only with a discretionary license.

All four clauses of section one of the 1868 Fourteenth Amendment finished the work. Prior statutes imposing arms restrictions on free people of color were thereafter negated as precedents for arms restrictions.

During the American Revolution, some "Loyalists" still considered themselves "subjects of the King of Great Britain," and not "the people of the United States." Textually, Second Amendment rights inhere only in "the people" of the United States.

Similarly, when the Constitution was ratified, Indians were members of foreign nations. Their relations with the United States were governed by treaties ratified by the Senate. Later, Indians became citizens of the United States, with the right to keep and bear arms. The colonial and Early Republic arms laws about

Indians who were members of other nations are valid precedents today for arms laws applying to citizens of foreign nations.

The precedents about members of foreign nations are not useful here, because Mr. Rahimi is a U.S. citizen, and hence one of the people of the United States.

However, as accurately catalogued in the Solicitor General's brief, there is ample original meaning precedent for limiting an individual's arms rights based on a judicial finding that the person poses a danger to others. Therefore, state statutes addressing the same subject as 18 U.S.C. §922(g)(8)(C)(i) can comply with the Second Amendment.

While subsection (C)(i) requires finding of "a credible threat," subsection (C)(ii) does not, and therefore is an infringement. The problem could be solved by changing a single word between §922(g)(8)(C)(i) and (ii): "or" to "and." Making (C)(i) and (C)(ii) conjunctive instead of disjunctive would remedy the infringement in (C)(ii).

ARGUMENT

I. The original public meaning of the Second Amendment is not infringed by laws to take arms from persons proven to be dangerous to others.

According to Petitioner, this Court's statements about "law-abiding, responsible citizens" mean that a person's arms rights may be restricted "if his

possession of a firearm would pose a danger of harm to himself or others." PetBr27. Petitioner's conclusion regarding "harm" "to others" is supported by citations to common law and statutory offenses against carrying arms to terrify the public, and to surety statutes for persons who carried arms in a manner threatening to breach the peace. PetBr23-24. Additional support comes from cited commentary from 1840 through 1868. *Id.* at 19-21.

Regarding persons who pose a danger to others, amici agree that such laws do not infringe the Second Amendment. Amici will address the "who" of disarmament, which is part of the "why." This brief takes no position on "how"—that is, whether the §922(g)(8) ban on firearms possession is analogous to the particular restrictions that historic laws imposed on dangerous people.

Petitioner's emphasis on danger is a welcome departure from positions in other cases involving as-applied challenges by individuals who are plainly not dangerous. *See*, *e.g.*, *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 98 (3d Cir. 2023) (en banc) (in 1995 paid $2,458 restitution for food stamp fraud); *United States v. Daniels*, 77 F.4th 337, 348 (5th Cir. 2023) (no evidence that marijuana user carried or shot firearms while intoxicated).

While Petitioner's point about dangerousness is correct, some of Petitioner's cites are inapt, including the 1662 Militia Act of "wicked" King Charles II. PetBr14 (citing 14 Car. 2 ch. 3, §13). In the American

view, the right to arms "was trampled under foot by Charles I. and his two wicked sons and successors." *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008) (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)). Petitioner offers no evidence that the 1662 statute "was acted upon or accepted in the colonies." *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935)).

Petitioner misunderstands the parliamentary debate following the 1780 Gordon Riots in London. No one denied the propriety of confiscating firearms from rioters. PetBr15-16. The debate involved General Amherst's alleged order, which he denied, to take guns carried by defensive neighborhood patrols who continued after the riot had been suppressed. Nicholas Johnson, David Kopel, George Mocsary, Gregory Wallace, & Donald Kilmer, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 155-56 (3d ed. 2022) ("Johnson").

Petitioner's citation to California's 1855 law about "Greasers" is unpersuasive. PetBr26 n.21. "Greaser" was "applied contemptuously" to Mexican-Americans, some of whom greased wagon axles or animal hides. *Greaser*, OXFORD ENGLISH DICT. defn. 2.a (Online, Mar. 2023). The precedential value of the Greaser Act was erased by the Fourteenth Amendment, as explained below.

Likewise questionable is Petitioner's citation to an 1874 *New York Times* article about "drunken loafers."

PetBr21. This citation, like others to the late nineteenth century, is at most marginally relevant. *Bruen* at 2137. Petitioner's citations to twentieth century laws tell us nothing about the original meaning of the Second Amendment. *Id.* at 2154 n.28.

A. While Petitioner's amici rely on invidious discrimination, constitutional enactments repudiate such discrimination for arms rights.

Petitioner's brief does not rely on slave codes, in contrast to Petitioner's briefing below. *See United States v. Rahimi*, 61 F.4th 443, 456 (5th Cir. 2023) (noting government citation of slave laws).

Several of Petitioner's amici do try to convert long-rejected invidious discrimination into modern constitutional precedent. *See* Amicus Briefs of Second Amendment Law Scholars 14-15; Professors of History and Law 9-10; 97Percent 5-6; National League of Cities 15; Public-Health Researchers and Lawyers 3, 14-15; Texas Advocacy Project 5.

These briefs overlook the arms-related constitutional enactments repudiating the invidious laws. The right to arms is governed by constitutional enactments, and not by abuses the enactments were designed to stop.

As legal historian Sir Henry Maine observed, "the movement of the progressive societies has hitherto been a movement *from Status to Contract*." Henry

Maine, Ancient Law 182 (1861). Similarly, the progress of the right to arms has been constitutional enactments to repudiate unjust exclusions.

1. The 1689 English Bill of Rights

In the American legal tradition, the progress began with the 1689 English Bill of Rights. Previously, the "wicked" Stuart monarchs had attempted to disarm political dissidents, and to disarm persons who did not adhere to the established Church of England. Johnson at 126-39.

The English Bill of Rights declared: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." *Heller* at 593 (citing 1 Wm. & Mary ch. 2, §7).[3]

As a result, the English government stopped enforcing an abusive portion of the 1662 Militia Act. The act's text ordered confiscation of arms from the "dangerous" or the "disaffected"; after 1689 the act was only enforced against the "dangerous." *See* PetBr14 (citing sources). Peaceful political disagreement was no longer grounds for arms confiscation.[4]

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[3] The English Bill of Rights is among several documents, such as Magna Carta (1215), that, along with various unwritten traditions, comprise the British Constitution.

[4] At the time, "disaffected" could include being nonviolently "dissatisfied." *Disaffected*, Oxford English Dict.

The protection of the rights of all Protestants, regardless of denomination, did not apply to England's small Catholic minority.[5] A statute enacted the same year as the Bill of Rights allowed arms for Catholics who swore a loyalty oath denying papal authority in England; or, for those who would not swear, if a Justice of the Peace granted them a license. 1 Wm. & Mary ch. 15 (1689).

The language "suitable to their Conditions" could be interpreted to allow class or economic discrimination. Thus, an 1870 English statute required persons carrying handguns off their property to purchase a nondiscretionary annual 10-shilling tax stamp at the post office. 33 & 34 Vict. ch. 57 (1870). The tax stamp, equivalent to about $84 today, burdened poor people.

American colonial charters guaranteed that Americans would have all the rights of Englishmen, and they also guaranteed a written right that the people in England did not have: the perpetual right to import arms.[6]

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[5] The English Bill of Rights was not initially considered to apply in Ireland or Scotland, which had their own parliaments. In Ireland, firearms were allowed only with discretionary licenses, rarely issued to either Catholics or Protestants. Johnson at 2159-62 (supplemental online chapter, http://firearmsregulation.org/www/FRRP3d_CH22.pdf).

[6] *See* FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3783, 3786-88 (Thorpe ed., 1909) ("Southern Colony"); 3 *id.* at 1834-35, 1839 ("Northern Colony"). Americans' rights of Englishmen were reiterated in subsequent colonial charters. *See* 1 *id*. at 533 (Connecticut); 2 *id*. at 773 (Georgia); 3 *id.* at

In the American colonies, no enactments discriminated against keeping or bearing arms on the basis of income. Religious discrimination for arms was rare but not nonexistent.

In 1637, long before the 1689 Bill of Rights protected arms rights for all Protestants, theocratic Massachusetts Bay Colony issued an ex parte decree "with no due process," disarming 75 Antinomian followers of Anne Hutchinson.[7]

In 1643 Virginia, the royal governor imprisoned, disarmed, and banished 118 recent Puritan immigrants; they moved to Maryland. *See* Charles Campbell, HISTORY OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA 211-12 (1860).

After an attempted assassination of King William III in England in 1696, the royal governor of New York confiscated the firearms of all ten Catholic men in the colony.[8]

1681 (Maryland); 3 *id.* at 1857 (Massachusetts Bay); 5 *id.* at 2747 (Carolina, later divided into North and South Carolina); 6 *id*. at 3220 (Rhode Island).

[7] Marilyn Westerkamp, THE PASSION OF ANNE HUTCHINSON 51 (2021); Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 263 (2020). Antinomians believe that grace liberates Christians from obedience to the Mosaic Law.

[8] Shona Johnston, Papists in a Protestant World: The Catholic Anglo-Atlantic in the Seventeenth Century 219-20 (2011) (Ph.D. dissertation, Georgetown University). https://repository.library.georgetown.edu/bitstream/handle/10822/553125/johnstonShona.pdf?sequence=1&isAllowed=y.

At the beginning of French & Indian War in 1756, the royal governor of New Jersey, in defiance of the rights of "the Subjects which are Protestants," confiscated firearms from Moravians, a Protestant pacifist denomination who owned hunting guns; the governor called the Moravians "snakes" and likely wanted their guns for the colony's militia. Johnson at 198.

Also in 1756, Pennsylvania confiscated "papist" arms to distribute to the militia. 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 627 (Ray ed., 1898). Virginia did the same. If a person would not sign an oath, his arms would be taken, except those "necessary" for "the defence of his house or person." William Hening, 7 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35 (1823).[9]

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[9] Maryland in 1756 is sometimes said to have done the same, based on a cite to 52 ARCHIVES OF MARYLAND 450 (Pleasants ed., 1935). However, that source shows the Lower House, on May 22, 1756, passing a militia bill with an anti-Catholic provision. *Id.* at 454 (reprinting 48 Lower House Journal 301). Both houses adjourned the same day, without the Upper House acting on the bill. The Governor's speech to the legislature that afternoon expressed his "Surprize" that no militia bill had been enacted. *Id.* at 297-98 (reprinting 35 Upper House Journal 115), 474-75 (same message, 48 L.H.J. 217). In the next legislative session, the Lower House twice rejected a militia bill. *Id.* at 640-41 (Oct. 7, 1756; 48 L.H.J. 359). The session laws tables for the Feb.-May and Sept.-Oct. 1756 legislative sessions show that no militia or Catholic arms bill was enacted. 1756 Md. L. 34 (Feb. sess.); 1756 Md. L. 7 (Sept. sess.).

2. The 1791 Second Amendment

According to James Madison's notes for his speech introducing the Bill of Rights in the United States House of Representatives, the English Bill of Rights had numerous defects. Among them was the limitation of "arms to Protestts." James Madison, Notes for Speech on Constitutional Amendments, June 8, 1789, in 12 MADISON PAPERS 193-94 (Hobson & Rutland eds., 1979).[10]

Even if the First Amendment's Free Exercise Clause had never been enacted, the Second Amendment by its own force forbids religious discrimination in arms rights. For example, a post-9/11 law to disarm Muslim citizens of the United States would have been a Second Amendment infringement.

Madison also chose to omit the 1689 English text about "Conditions." In the decades before and after the Second Amendment, American laws did not restrict arms rights based on wealth. As the Tennessee Supreme Court stated regarding the State Constitution, the English Bill of Rights "Conditions" were "abrogated"; "all free citizens" have the right, "without any

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The error confusing Lower House passage with actual enactment is made, *inter alia*, in the Johnson textbook at 197, and is corrected in its 2023 Supplement at 101.

[10] The speech as summarized in Annals of Congress does not include explication about the right to arms. The "Annals of Congress were not a transcript, but were assembled years later from newspaper reports of the debates." David Hardy, *Ducking the Bullet:* District of Columbia v. Heller *and the Stevens Dissent*, 2010 Cardozo L. Rev. de novo 61, 80 n.109.

qualification whatever, as to their kind and nature." *Simpson v. State*, 13 Tenn. 356, 360 (1833).

It is true that in the late nineteenth century some Jim Crow states enacted laws of overt economic discrimination, with a subtext of discrimination against freedmen and poor whites. Tennessee and Arkansas outlawed sale of handguns other than the Army and Navy types. *See State v. Burgoyne*, 75 Tenn. 173 (1881); *Dabbs v. State*, 39 Ark. 353 (1885).

The military-style handguns were the best-made, most expensive, largest, highest-capacity, and most powerful. Many former Confederate officers already owned them. Poor people of any race could not necessarily afford such an excellent arm.

After incidents in which blacks used repeating rifles to deter lynch mobs, Florida in 1893 imposed a $100 bond (over $3,000 today) for a license to "carry around with him on his person and in his manual possession" a "Winchester rifle or other repeating rifle." 1893 Fla. L. 71, ch. 4147; Johnson at 522-23. The law was extended to handguns in 1901. 1901 Fla. L. 57, ch. 4928. Florida Supreme Court Justice Rivers Buford had been a State Representative in the legislative session that passed the handgun provision. Later, in a 1941 opinion, he disapprovingly pointed out that the license law violated the Second Amendment and its Florida analogue, and "was never intended to apply to the white population and in practice has never been so applied," for "it has been generally conceded to be in contravention of the Constitution and non-enforceable

if contested." *Watson v. Stone*, 148 Fla. 516, 524 (1941) (Buford, J., concurring).[11]

The few examples of economic discrimination from the late nineteenth century do not overcome the textual removal of English "Conditions" in the American Bill of Rights. *Bruen* properly noted the illegality of "exorbitant" fees for carry permits. *Bruen* at 2138 n.9.

3. The 1865 Thirteenth Amendment

The original Constitution did not attempt to abolish slavery; instead, it authorized Congress to forbid the "Importation" of slaves starting in 1808. U.S. Const. art. I, §9. As the Founders understood, disarmament is a necessary condition for slavery. They defined "slavery" broadly; to them, "slavery" included chattel slavery (as practiced against African and Indian captives) and also political systems based on arbitrary will rather than consent. Either way, to be disarmed is to subject to the arbitrary will of another—to be enslaved or enslaveable. If slaves had a right to arms, they would not be slaves for long.[12]

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[11] The *Watson* majority applied the rule of lenity to possession in an automobile glove compartment. Drivers "should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens." *Id.* at 703.

[12] Some states forbade slave possession of arms, while others left the choice to the owner or a local official's discretion. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 845-46 (2010) (Thomas, J., concurring).

The venerated English martyr of liberty Algernon Sidney wrote, "he is a fool who knows not that swords were given to men, that none might be slaves, but such as know not how to use them." Algernon Sidney, DISCOURSES CONCERNING GOVERNMENT ch. 2, §4 (West ed., 1996) (1698). Thomas Jefferson called Sidney, Aristotle, Cicero, and John Locke the four major sources of the American consensus on rights and liberty, which Jefferson distilled into the Declaration of Independence. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 16 THE WRITINGS OF THOMAS JEFFERSON 117-19 (Lipscomb ed., 1903).

When King George III in 1768 put Boston under military occupation, the city's government urged Bostonians to arm themselves. Samuel Adams agreed: The English Bill of Rights had been enacted because of the wicked Stuarts, "bigoted to the greatest degree to the doctrines of *slavery* and regardless of the *natural, inherent, divinely hereditary* and *indefeasible* rights of their subjects." Samuel Adams (E.A.), BOSTON GAZ., Feb. 27, 1769, in 1 THE WRITINGS OF SAMUEL ADAMS 317-18 (Cushing ed., 1904). Pursuant to the 1689 Bill of Rights, as expounded by Blackstone, there is a right to arms "at any time; but more especially" for "self preservation against the *violence of oppression*." *Id.*

Patrick Henry, too, equated disarmament with slavery, as in his famous speech:

> But when shall we be stronger? . . . Will it be when we are totally disarmed, and when a

> British guard shall be stationed in every house? . . .
>
> . . . There is no retreat but in submission and slavery! Our chains are forged! Their clanking may be heard on the plains of Boston!
>
> . . . Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!

Patrick Henry, *The War Inevitable*, Speech at the Second Revolutionary Convention of Virginia, Mar. 23, 1775, in William Wirt, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 122-23 (1817). In the same spirit, the Declaration of Independence affirmed that Americans are "with one mind, resolved to die freemen rather than live slaves." Declaration of Independence (U.S. 1776).

American State Constitutions and State Conventions declared, "The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." N.H. Const., Bill of Rights, art. X; Tenn. Const. of 1796, art. 11, §2; Resolution of Virginia's Proposed Amendments, in 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657 (Elliot ed., 1836) (preamble); Resolution of North Carolina's Proposed Amendments, 4 ELLIOT at 243 (Declaration of Rights).

The American Revolution's *Novus ordo seclorum* produced changes not foreseen when the Revolution began. If "all Men are created equal," then slavery is invalid. Starting in the 1780s, the Declaration of Independence became a moral center of abolitionism in the United States. *See* Alexander Tsesis, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 44, 50-55, 61-62, 104-12, 116, 119, 126, 136-43, 182 (2012).

Abolitionist constitutionalism relied in part on the Second Amendment. According to Joel Tiffany, reporter for the N.Y. Court of Appeals, and author of legal treatises:

> Here is another of the immunities of a citizen of the United States, which is guaranteed by the supreme, organic law of the land . . . [It] is accorded to every subject for the purpose of *protecting and defending himself*, if need be, in the enjoyment of his absolute rights to life, liberty and property. And this guaranty is to all without any exception; for there is none, either expressed or implied . . . It is hardly necessary to remark that this guaranty is absolutely inconsistent with permitting a portion of our citizens to be enslaved. The colored citizen, under our constitution, has now as full and perfect a right to keep and bear arms as any other; and no State law, or State regulation has authority to deprive him of that right.
>
> But there is another thing implied in this guaranty; and that is *the right of self defence*. For the right to keep and bear arms, also

> implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.

Joel Tiffany, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117 (1850). Or as abolitionist Lysander Spooner wrote in 1845, the Second Amendment "obviously recognizes the natural right of all men 'to keep and bear arms' for their personal defence; and prohibits both Congress and the State governments from infringing the right of 'the people'—that is, of *any* of the people,—to do so." Lysander Spooner, THE UNCONSTITUTIONALITY OF SLAVERY 116 (1845).

Among the "incidents" of slavery was, "He is not allowed to keep or carry fire-arms." *Neal v. Farmer*, 14 Ga. 185, 202-03 (1853). Therefore, when the Thirteenth Amendment declared "Neither slavery nor involuntary servitude . . . shall exist within the United States," the "badges and incidents" of slavery were likewise outlawed. U.S. Const. amend. XIII, §1; *Civil Rights Cases*, 103 U.S. 3, 20-21 (1883).

Following the ratification of the Amendment, Horace Greeley, the newspaper editor, abolitionist, and (later) 1872 presidential nominee of the Democratic and Liberal Republican parties, argued in a speech:

> [T]he moment slavery had passed away, all possible pretexts for disarming Southern blacks passed away with it. Our Federal Constitution gives the right to the people everywhere to keep and bear arms and every law whereby any State legislature undertakes to

> contravene this, being in conflict with the Constitution of the United States, had no longer any legal force.

James Parton, THE LIFE OF HORACE GREELEY 535-36 (1869).

Ever since 1865, the arms provisions of the slave codes have been analogues for what is forbidden by our constitutional right to arms.

4. The 1868 Fourteenth Amendment

The Thirteenth Amendment notwithstanding, many former slave states attempted to keep freedmen in de facto servitude, including by thwarting their Second Amendment rights. *McDonald* at 771-76 (opinion of the Court), 826-35, 846-50 (Thomas, J., concurring).

> Black veterans returning home were considered dangerous, and disarming them was a priority for the white supremacists of the defeated Confederacy . . . There is an ironic similarity between the claims made by southern whites then and the argument made by gun control proponents today. Sheriffs and white posses raided black homes to seize "illegal" guns and declared such seizures were not infringements of blacks' Second Amendment right to possess guns as part of a militia.

Charles Cobb, "THIS NONVIOLENT STUFF'LL GET YOU KILLED": HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE 44 (2014).

As Frederick Douglass explained, "the Legislatures of the South can take from him the right to keep and bear arms, as they can—they would not allow a negro to walk with a cane where I came from . . . " *In What New Skin Will the Old Snake Come Forth?*, in 4 THE FREDERICK DOUGLASS PAPERS 79, 83-84 (Blassingame & McKivigan eds., 1991) (May 10, 1865). "Notwithstanding the provision in the Constitution of the United States, that the right to keep and bear arms shall not be abridged, the black man has never had the right either to keep or bear arms." *Id*. at 84. Absent a constitutional amendment to enforce that right against the States, "the work of the Abolitionists is not finished." *Id*. "Keep no man from the ballot box or jury box or the cartridge box, because of his color." *Id.* at 158 (Feb. 7, 1867).

Before the Civil War, slave states had also targeted free people of color. For example, an 1840 North Carolina statute forbade any "free negro, mulatto, or free person of color" to possess or carry arms without a license. The state supreme court admitted the statute would be unconstitutional if applied to whites; however, "free people of color have been among us, as a separate and distinct class, requiring, from necessity, in many cases, separate and distinct legislation." *State v. Newsom*, 27 N.C. 250, 252 (1844).

Such reasoning was multiply forbidden by section 1 of the Fourteenth Amendment. First, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Thus, the

Amendment overturned *Dred Scott*'s theory that free people of color are not American citizens, and hence could be forbidden "to keep and carry arms wherever they went." *Scott v. Sandford*, 60 U.S. 393, 417 (1857), *superseded by* U.S. Const. amend. XIV, §1.

Second, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The language was specifically intended to protect Second Amendment rights for all citizens, not only militiamen. *McDonald* at 847-50 (Thomas, J., concurring).

Third, "nor shall any State deprive any person of life, liberty, or property, without due process of law." The clause forbids certain government actions, including bans on keeping and bearing arms, because some statutes are necessarily *not* "law" in the American sense, namely "ordered liberty." *Id.* at 776-78 (plurality op.). *Cf. Calder v. Bull*, 3 U.S. 386, 388 (1798) (Chase, J., seriatim op.) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."); Declaration of Independence ("pretended legislation," "pretended offenses").

And fourth, "nor deny to any person within its jurisdiction the equal protection of the law." The Equal Protection Clause recognizes a duty of state governments to protect the rights of all "persons" by effectively enforcing its laws without discrimination. Because of the Clause, after 1868, legislatures intent

on racial discrimination in arms laws wrote those laws without specific reference to race.

"We the People of the United States" govern most supremely by constitutional enactment. By such enactments, we the people have abolished many infringements of the right to keep and bear arms. Those infringements today are analogues for types of laws that the constitutional right to arms forbids, not the types of laws that it allows.

5. Indians

Some amici, the United States in some lower courts, and some lower courts have pointed to colonial period or Early Republic laws against arms sales to Indians. These are irrelevant to the case at bar, because they involved the citizens of other nations.

The Constitution created by "We the People of the United States" did not purport to establish a system of government and rights for the people of France or of the Cherokee nation. Instead, Congress was simply given power "To regulate Commerce with foreign nations . . . and with the Indian Tribes." U.S. Const. art. I, §8.

When the United States was in friendly relations with a foreign nation or an Indian tribe, their agreements were treaties ratified by the Senate. To the extent that Congress chose, it could regulate trade with non-American nations, whether Indian or overseas. Regulation of trade with foreigners does not infringe

the Second Amendment rights of foreigners, because foreigners are not "the people." For example, today a Russian cannot claim that his Second Amendment rights are infringed because federal regulations prevent him from buying an American-made gun. 15 C.F.R. §746.8.

In the years following 1787, the practical sovereignty of the Indian tribes was diminished. An 1871 statute declared that henceforth "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . " 16 Stat. 544, 566 (codified at 25 U.S.C. §71).

Laws recognized American citizenship of more and more Indians, with citizenship for all in 1924. Indian Citizenship Act, 8 U.S.C. §1401(b). To the extent laws have infringed the arms rights of citizen Indians, they were unconstitutional *ab initio*.[13]

Historic laws regarding arms restrictions for noncitizens are relevant today. For example, foreigners

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[13] In the colonial period and thereafter, some Indians chose to live in American society rather than in tribal nations. Indians who did so were "taxed" and were counted for congressional apportionment; Indians who lived in tribal nations were "not taxed" and not represented in Congress. U.S. Const. art., I §2; amend. XIV, §2. The Fourteenth Amendment forbids state governments from arms discrimination against citizen Indians, but the Second Amendment has not been deemed enforceable against tribal governments. *See* Angela Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1721-25 (2012).

visiting the U.S. on a tourist visa may only possess firearms if "admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States." 18 U.S.C. §922(g)(5)(B), (y)(2)(A). The statute does not infringe the Second Amendment, because foreign tourists are not included in "the people" of the United States.

Citizenship analogies also inform analysis of the firearms prohibition for a person, "who, having been a citizen of the United States, has renounced his citizenship." 18 U.S.C. §922(g)(7).

Citizenship analogies are not relevant to the *Rahimi* case, because Mr. Rahimi is a citizen of the United States. That he is dangerous and unvirtuous does not make him a noncitizen, and therefore he is one of "the people."

6. Disloyalty in wartime

During the American Revolution some state laws took arms from people who refused to swear loyalty to the United States. *United States v. Jackso*n, 2023 WL 5605618, *4 (8th Cir., Aug. 30, 2023) (Stras, J., dissenting from denial of rehearing en banc). In wartime, disarmament is permissible for enemy combatants and for persons who have shown inclination to aid the enemy.

For example, after the German surrender in World War II in May 1945, but before the Japanese surrender

in September, some Germans in Japanese-occupied China continued to aid the Japanese army. This Court rejected the claim that the Germans had a right to be tried by a civil court rather than a military tribunal. According to Justice Jackson's opinion for the Court, granting the Germans Fifth Amendment rights would mean that during "military occupation" of territories formerly held by the Axis, "irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' could require the American Judiciary to assure them freedoms of [the] . . . right to bear arms as in the Second" Amendment. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); *see also* Attorney General oral argument, *Ex Parte Milligan*, 71 U.S. 2, 20 (1866) (Second Amendment did not "hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.").

During the American War of Independence, the anti-independence "Loyalists" rejected being "the people of the United States." They fought to remain "subjects of the King of Great Britain." The Second Amendment is not infringed by wartime disarmament of individuals who choose to exclude themselves from "the people."

In the revolutionary period, some Americans bearing true faith and allegiance to the United States were unwilling to "swear" an "oath." *Range*, 69 F.4th at 126-27 (Krause, J., dissenting). Jesus had said "Swear not at all." *Matthew* 5:34. The wrongful disarmament of religiously scrupulous non-swearing citizens was repudiated by the Constitution. The President-elect "shall

take the following Oath or Affirmation:—'I do solemnly swear (or affirm) . . . '" U.S. Const. art. II, §1. Likewise, all federal and state officers "shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI.

Because the Commander in Chief and other officials may choose affirmation instead of oath, citizens with similar scruples may not be disarmed.

7. Conclusion

The analogical validity of old laws does not depend on modern judges' moral analysis. Instead, constitutional enactments control. Although some old gun controls were the fruit of poisonous trees, we the people by our constitutional enactments have removed those trees, root and branch. The enactments of 1689, 1788, 1791, 1865, and 1868 ended all validity of bigoted gun control laws. Today, those laws are analogues for types of gun control that are forbidden.

In contrast, historic gun control laws based on citizenship remain proper analogues for modern laws.

B. Synthesis of disarmament precedents.

The disarmament precedents that have *not* been repudiated by constitutional enactments have two broad categories. The first is a group standard and the second an individual one. The existence of two standards is not surprising, because the Second Amendment is about sometimes bearing arms in a group (such as

the militia, a sheriff's posse comitatus, or a hunting party) and sometimes individually (such as for defense in one's automobile). After London's 1780 Gordon Riots, the Recorder of London—the city attorney—affirmed that the defensive neighborhood patrols were an exercise of the right to arms: "that right, which every Protestant most unquestionably possesses, *individually*, may, and in many cases *must*, be exercised collectively." William Blizard, DESULTORY REFLECTIONS ON POLICE 59-60 (1785). Just as the right is necessarily sometimes exercised collectively and sometimes individually, the limitations of the right will sometimes be collective and sometimes individual.

Collectively, an absence of Second Amendment rights arises from not being among "the people."

Individually, Second Amendment rights may be restricted based on specific behavior demonstrating danger to others.

The dangerousness category draws no support from old laws about Catholics, free people of color, poor people, and the like. Although legislatures, kings, or other officials did consider these groups to be dangerous, the people, through constitutional enactments, have stricken such laws from being valid precedents for limiting our right to arms. *Accord* ACLU br. 12 n.4 (racist cites not needed to uphold statutes against individuals judicially found to pose "a violent threat").

C. Applying "law-abiding responsible citizens."

As Petitioner states, disarmament of persons who are dangerous to others is consistent with this Court's language about "law-abiding citizens." The words are not meant to produce absurd results. A city council could not prohibit firearms possession by someone convicted of overtime parking, even if the council made the crime punishable by up to three years in jail and even if the person were convicted a hundred times.

Likewise, "law-abiding citizens" should not be construed as implicitly over-ruling *United States v. Verdugo-Urquidez*, which stated that "the people" safeguarded by the Bill of Rights, including the Second Amendment, includes persons who have "developed substantial connections with this country." 494 U.S. 259, 271 (1990). The category surely includes noncitizens who have been granted lawful permanent residency. *Accord* 18 U.S.C. §922(5)(B) (no prohibition for persons admitted under immigrant visas).

II. The defects of section 922(g)(8).

The decision below should be affirmed because a single word in 922(g)(8) makes it facially unconstitutional. The statute bans firearms possession based on two different types of court orders:

> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

Because (C)(i) requires a judicial finding of dangerousness, it does not infringe the Second Amendment. Subsection (C)(ii) does not require such a finding and is an infringement. Judicial orders that acrimonious domestic parties not do something illegal in the future is not equivalent to a judicial finding that there is "a credible threat" of illegal behavior. Congress could easily fix the problem by changing the "or" at the end of (C)(i) to "and."[14] Alternatively, subsection (C)(ii) could be severed.

Amicus California Legislative Women's Caucus ("CLWC") attempts to rescue (C)(ii), saying it is used when "the subject of the order has a history of threats of violence or there is other credible evidence that violence may occur." CLWC 22-23. If (C)(ii) were so worded, it would be similar to (C)(i) and not an infringement.

Because (C)(ii) is so open-ended, it encompasses mutual protective orders that infringe the Second Amendment by disarming victims. Unlike federal law, California has specific protections against

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[14] That §922(g)(8) was drafted without Second Amendment scruples is unsurprising. The sponsor, well-respected Sen. John Chafee, had previously introduced legislation to confiscate all handguns. S. 2913, 102d Cong. (1992).

inappropriate issuance of mutual orders. CLWC 24. Such orders are also prohibited in Illinois. Legal Aid Chicago br. 27.[15]

The Second Amendment aside, §922(g)(8) is still constitutionally dubious. The connection to congressional power "To regulate Commerce . . . among the several States" is even weaker than the "Gun-Free School Zones" statute previously held unconstitutional. *United States v. Lopez*, 514 U.S. 549 (1995); U.S. Const. art. I, §8. Indeed, the statute in *Lopez* exempted the home and other private property (then-18 U.S.C. §922(q)(2)(B)(i)), whereas (g)(8) does not.

Some of the §922(g) prohibitions are well-grounded in the Interstate Commerce Clause: "to ship

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[15] However, Legal Aid is untroubled by §922(g)(8)'s lack of safeguards against improper mutual orders. The brief quotes an article that a survivor's possession of a defensive firearm "doubles the risk of firearm homicide by an abusive partner." *Id.* at 21. The cited article contains no such words. The cited article found, "Addition of the relationship variables resulted in victims' sole access to a firearm no longer being statistically significant and substantially reduced the effects of abuser's drug use." Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 Am. J. Pub. Health 1089, 1090 (2003).

The Houston Area Women's Center quotes a study that "[W]omen with firearm access have a higher risk for homicide victimization." Br. 7, quoting Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization among Household Members: A Systematic Review and Meta–analysis*, 160 Annals of Internal Med. 101, 107 (2014). Unlike the Campbell article, the statement does not differentiate whether the abuser has access to the same firearm. Indeed, the article suggests that most fatalities came from "an interpersonal dispute within the household or other domestic violence." *Id.*

or transport in interstate or foreign commerce." Another prohibition, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," has a distant connection to interstate commerce, by involving a property transfer.

The prohibition "possess in or affecting commerce"—as read by Petitioner to encompass mere possession of a gun that once crossed a state line—is far disconnected from the power "To regulate Commerce . . . among the several States." *See* David Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 Harv. J.L. & Pub. Pol'y 107, 120 (1998) (criticizing "the 'herpes' theory" that a single crossing of state lines makes an item forever subject to the interstate commerce power); David Kopel & Glenn Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act*, 30 Conn. L. Rev. 59 (1997) (some bans on arms possession, like bans on particular abortion procedures within a state, exceed the legitimate scope of the interstate commerce power).

When Congress acts beyond its enumerated powers, federal-state comity is injured. Federal courts do not exist to adjudicate state domestic relations cases. "Since the birth of the union, it is the individual states that have held the power to enact laws for the good and welfare of their citizens, including those laws providing for protective orders." Tarrant County Crim. Dist. Atty. br. 24 (capitalization changed).

Based on evidence in particular cases, state judges sometimes issue orders that a domestic party not possess a firearm. Illinois br. 9. In contrast, (g)(8) can make a state court order have a legal effect that the state judge declined to impose. Thus, "a State is denied the ability to impose certain restrictions on persons without also" prohibiting their firearms rights. Royce Barondes, THE CIVIL RIGHT TO KEEP AND BEAR ARMS: FEDERAL AND MISSOURI PERSPECTIVES 178 (2023 ed.).

III. Amicus briefs.

This Court's opinions affirmed "the freedom of speech" for over a century before the Court actively began protecting it.[16] As judicial engagement progressed, the Court had to develop increasingly sophisticated free speech doctrines. When doing so, the Court did not rely on theories propounded by persons who considered the freedom of speech pernicious and who wanted to shrink the broad right to microscopic size.

In the instant case, some of Petitioner's amici also filed briefs in *Heller*, *McDonald*, and *Bruen*. These cases affirmed elementary, obvious points about the Second Amendment: it is a normal individual right; it is applied to the States by the Fourteenth Amendment; and it is not contingent on an individual's special need. In all three cases, some of the present amici attempted to persuade this Court to render the Second Amendment a nullity. Such amici include New York City,

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[16] This Court's first case holding a statute to violate the freedom of speech was *Stromberg v. California*, 283 U.S. 359 (1931).

Chicago, the State of Illinois, several of the Religious Leaders and Organizations, and various gun control groups. Organizations that believe a right should not exist are not the best guides for the proper interpretation of that right, just as "A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion." *Students for Fair Admissions v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2176 (2023).

Amicus Patrick Charles offers "to educate the Court" about *Bruen*. Charles br. 1. He believes that "*Bruen* fails to adhere to even basic academic standards" and that it did not invoke history "honestly or honorably." Patrick Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 Clev. St. L. Rev. 623, 626, 629 (2023). He accuses Justice Thomas "and assuredly many others of the bench and bar" of "selectively invoking the authoritative power of history in a manner that justifies [their] own predilections." *Id*. at 638. According to Charles, "fugazi" means that "the Second Amendment, at least as articulated by *Bruen*, is historically ruined and fake." *Id.* at 627.

Mr. Charles' proposed "macro" approach amounts to interest-balancing; for at a high enough level of generality, "[e]verything is similar in infinite ways to everything else." *Bruen* at 2132 (quoting C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 774 (1993)). This Court correctly requires analogues that, while not historical twins, are "relevantly similar." *Id.*

Petitioner's amici "Professors of History and Law" include some, most notably Professor Saul Cornell, whose theories were rejected by the majority and cited by the dissents in *Heller*, *McDonald*, and *Bruen*. In Professor Cornell's view of *Bruen*, "Thomas has taken law-office history to a new low, even for the Supreme Court, a body whose special brand of 'law chambers history' has prompted multiple critiques and been a source of amusement for generations of scholars and court watchers." *Bruen* was "tendentious, error-filled, and highly selective culling of evidence" and "a new low for the court." "[T]he Bizzaro constitutional universe inhabited by Thomas" is "bonkers." Professor Cornell denounces, "Thomas, Alito, and their ideological co-conspirators," and "the surreal originalist universe inhabited by Thomas and his colleagues." Having perpetrated a "historical charade," Justices "Gorsuch and Barrett" are "ideological warriors and political hacks." Saul Cornell, *Cherry-picked history and ideology-driven outcomes: Bruen's originalist distortions*, Scotusblog.com, June 27, 2022.

More politely, Professor Jack Rakove adheres to his understanding that "The entire point of the 2nd Amendment was to secure the status of the state militia in response to the Militia Clause in Art. I, sect. 8 of the Constitution. No one at the time though it had anything to do with constitutionalizing a common-law concept of self-defense." @JRakove, Twitter/X, Aug. 27, 2023.[17] Although Professor Rakove is sincere and

[17] https://twitter.com/JRakove/status/1695938835795136581.

eminent, he is not a reliable guide to interpreting a meaningful Second Amendment.

"*Bruen* should be overturned" declares a brief from a Senator who previously sent this Court a threat letter in the form of an amicus brief. Br. of Richard Blumenthal, et al., 8 n.2; Richard Blumenthal, et al., br. in *New York State Rifle & Pistol Ass'n. v. City of New York, New York*, 140 S. Ct. 1525, 1528 (2020) (Alito, J., dissenting); *Senators File an Enemy-of-the-Court Brief*, Wall St. J., Aug. 19, 2019.

The Second Amendment Law Scholars ("SALS") complain that *Bruen*'s historical test is too hard to apply, because some lower courts have disagreed on particular issues. SALS 4-5. But lower courts also sometimes disagreed in the now-discarded Two-Step Test.

Moreover, Step One of the old test, which many courts had been applying since *Heller*, is "broadly consistent" with the original meaning test adopted by *Heller* and affirmed by *Bruen*. *Bruen* at 2127. *Bruen* simply offers lower courts guidance for legal history analysis.

CONCLUSION

Laws that were repudiated by subsequent constitutional enactments do not justify modern gun control laws. Such laws are analogues for identifying modern infringements of the right to arms.

Some valid historic laws are proper analogues for restricting arms rights of individuals who have been found by a court to be dangerous to others. Although the current version of 18 U.S.C. §922(g)(8) is not such a law, it easily could be, if "or" were changed to "and" after §922(g)(8)(C)(i).

The judgement below should be affirmed.

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Respectfully submitted,

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