

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )  
                                Petitioner, )  
                                v. ) No. 22-915  
ZACKEY RAHIMI, )  
                                Respondent. )  
- - - - -

Pages: 1 through 105  
Place: Washington, D.C.  
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Washington, D.C.

Tuesday, November 7, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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of the Petitioner.

J. MATTHEW WRIGHT, Assistant Federal Public Defender,  
Amarillo, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-915, United States versus Rahimi.

General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONER

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

Guns and domestic abuse are a deadly combination. As this Court has said, all too often, the only difference between a battered woman and a dead woman is the presence of a gun. Armed abusers also pose grave danger to police officers responding to domestic violence calls and to the public at large, as Zackey Rahimi's own conduct shows.

To address that acute threat, Congress and 48 states and territories temporarily disarm individuals subject to domestic violence protective orders. Congress designed Section 922(g)(8) to target the most dangerous domestic abusers. It applies only if, after notice and a hearing, a court makes an express finding that

1 the person poses a credible threat to an  
2 intimate partner's physical safety or imposes a  
3 specific prohibition on the use of physical  
4 force, and the disarmament lasts only as long as  
5 the order remains in effect.

6 The Fifth Circuit profoundly erred in  
7 reading this Court's decision in Bruen to  
8 prohibit that widespread common-sense response  
9 to the deadly threat of armed domestic violence.  
10 Like Heller and McDonald, Bruen recognized that  
11 Congress may disarm those who are not  
12 law-abiding, responsible citizens.

13 That principle is firmly grounded in  
14 the Second Amendment's history and tradition.  
15 Throughout our nation's history, legislatures  
16 have disarmed those who have committed serious  
17 criminal conduct or whose access to guns poses a  
18 danger, for example, loyalists, rebels, minors,  
19 individuals with mental illness, felons, and  
20 drug addicts.

21 Rahimi offers no historical evidence  
22 that those laws were thought to violate the  
23 right to keep and bear arms or that the Second  
24 Amendment was originally understood to prevent  
25 legislatures from disarming dangerous

1 individuals.

2           Despite all that, the Fifth Circuit  
3 held that Section 922(g)(8) is facially  
4 unconstitutional because the founding generation  
5 didn't disarm domestic abusers in particular.  
6 But Bruen specifically approved that kind of  
7 demand for a historical twin. The Fifth  
8 Circuit's approach departs from the Second  
9 Amendment's original meaning and would enact the  
10 very sort of regulatory straitjacket that this  
11 Court disclaimed in Bruen.

12           I welcome the Court's questions.

13           JUSTICE THOMAS: General, would you  
14 just briefly define what you mean by  
15 "law-abiding and responsible"?

16           GENERAL PRELOGAR: Of course, Justice  
17 Thomas. So I would break that into its two  
18 constituent components. With respect to those  
19 who are not law-abiding, history and tradition  
20 shows that that's defined by those who have  
21 committed serious crimes defined by the  
22 felony-level punishment that can attach to those  
23 crimes.

24           This case focuses on the "not  
25 responsible citizens" principle, and in this

1 context, we think that history and tradition  
2 show that it applies to those whose possession  
3 of firearms would pose an unusual danger, beyond  
4 the ordinary citizen, with respect to harm to  
5 themselves or harm to others.

6 JUSTICE THOMAS: What if someone --  
7 this is a civil action. I think we could agree  
8 on the -- if this were -- these were criminal  
9 proceedings. What if someone is categorized as  
10 irresponsible for not storing firearms properly?

11 GENERAL PRELOGAR: So I think that  
12 there would be a history and tradition to  
13 support the idea that if someone has improperly  
14 stored their firearms and thus demonstrated by  
15 their conduct that they're not fit to keep and  
16 bear arms, they would fit within this category  
17 of those who are not responsible. And -- and  
18 there were a number of historical laws that  
19 operated that way, for example, those who had  
20 improperly stored gunpowder and caused the risk  
21 of explosions.

22 JUSTICE THOMAS: Below, you in your --  
23 you -- you had a list of classes of individuals  
24 who were excluded in -- in your opening  
25 argument. Now below you included in that class

1 or in those classes slaves and Native Americans.  
2 Why did you drop those classes?

3 GENERAL PRELOGAR: We haven't invoked  
4 those laws at this stage of the proceedings  
5 because we think that they speak to a distinct  
6 principle and the textual hook that at the  
7 particular point in time those categories of  
8 people were viewed as being not among the people  
9 protected by the Second Amendment in the first  
10 instance.

11 Obviously, that was an odious  
12 classification, but those laws were generally  
13 accompanied by stripping of other political  
14 rights or ability to -- to participate in the  
15 political community, and we think they were  
16 justified at that time on that basis.

17 And so the reason we haven't invoked  
18 them here is because we focused on the more  
19 directly relevant laws that apply to those who  
20 are indisputably among the people but  
21 nevertheless fit within this enduring  
22 constitutional principle that the legislature  
23 has authority to draw lines and make predictive  
24 judgments about those whose access to firearms  
25 will create that untenable risk of danger.



1 CHIEF JUSTICE ROBERTS: Is someone who  
2 drives 30 miles an hour in a 25-mile --  
3 mile-an-hour zone -- does that person qualify as  
4 law-abiding or -- or not?

5 GENERAL PRELOGAR: I think that that  
6 wouldn't qualify to the extent that it's  
7 classified as a misdemeanor or a minor criminal  
8 conduct under state law. And I do want to be  
9 clear that we -- we certainly think that  
10 wouldn't apply under the not responsible  
11 category, but if you're focusing on law-abiding  
12 in particular, we think that history and  
13 tradition there support the conclusion that you  
14 can disarm those who have committed serious  
15 crimes.

16 So it's not just that any kind of --  
17 of conduct that is an offense would qualify.

18 CHIEF JUSTICE ROBERTS: Is it -- are  
19 you making a misdemeanor/felony distinction?

20 GENERAL PRELOGAR: That's the line  
21 that history and tradition reflect, and so, yes,  
22 I think that that is the relevant category with  
23 respect to law-abiding citizens. But, again, I  
24 would just emphasize here we're not directly  
25 invoking the law-abiding aspect of the principle

1 because Mr. Rahimi didn't have the kind of -- of  
2 -- of criminal record that would justify  
3 disarmament on that basis. Instead, our  
4 arguments here are directed at the aspect of the  
5 standard focused on those who are not  
6 responsible.

7 JUSTICE BARRETT: You say --

8 CHIEF JUSTICE ROBERTS: Responsibility  
9 is a very broad concept. I mean, not taking  
10 your recycling to the curb on Thursdays. I  
11 mean, if you're -- if it's a serious problem,  
12 you're -- it -- it's irresponsible. Setting a  
13 bad example, you know, by yelling at a  
14 basketball game in a particular way.

15 It seems to me that the problem with  
16 responsibility is that it's extremely broad, and  
17 what -- what seems responsible to some --  
18 irresponsible to some people might seem like,  
19 well, that's not a big deal to others.

20 So what is the model? I mean, is --  
21 is -- do you go back to what was irresponsible  
22 at the common law or what's -- take a poll and  
23 see if people think it's irresponsible, you  
24 know, to get into a fistfight at a -- at a, you  
25 know, sports event where tempers were running

1 high or -- or what?

2 GENERAL PRELOGAR: So I want to be  
3 really clear that we're not using the term "not  
4 responsible" to describe colloquially anyone who  
5 you might describe as -- as demonstrating  
6 irresponsibility in many of those contexts that  
7 you just described in your hypotheticals.  
8 Instead, we read this Court's case law and, in  
9 particular, its articulation of that principle,  
10 we're tracking the Court's language here, the  
11 principle of responsibility, as being  
12 intrinsically tied to the danger you would  
13 present if you have access to firearms.

14 And I would draw a parallel here to  
15 the principles the Court has articulated with  
16 respect to sensitive places or with dangerous  
17 and unusual weapons. In each of those  
18 categories --

19 CHIEF JUSTICE ROBERTS: Well, just to  
20 be clear, you're -- you're using "responsible"  
21 as a placeholder for dangerous with respect to  
22 the use of firearms?

23 GENERAL PRELOGAR: Correct. So that's  
24 how we understand history and tradition in this  
25 context. And the reason that we've used the

1 term "not responsible" is it -- it's because  
2 it's the own -- the standard that this Court  
3 itself has articulated in Heller and repeated in  
4 McDonald and then repeated again in Bruen.

5 I think probably the reason the Court  
6 has used the term "not responsible" is it gets  
7 at the idea that some of the categories of  
8 people who can be disarmed might not intend to  
9 be dangerous. They might not be culpable in  
10 that sense, like the mentally ill or minors, and  
11 so I think responsibility gets at the idea that  
12 they might not actually intend to be a danger  
13 but, in fact, would present the danger --

14 JUSTICE KAVANAUGH: So there's no --

15 GENERAL PRELOGAR: -- if they had  
16 firearms.

17 JUSTICE KAVANAUGH: -- no daylight at  
18 all then between not responsible and dangerous?

19 GENERAL PRELOGAR: Yes. With respect  
20 to responsibility in particular, our  
21 understanding of what history and tradition  
22 reflect and how this Court has used the term is  
23 that it's identifying those whose possession of  
24 firearms presents an unusual danger beyond the  
25 ordinary citizen.

1           And, again, I would draw the -- the  
2 analogy to sensitive places and to dangerous and  
3 unusual weapons. In each of these contexts, the  
4 Court is trying to identify those arms that are  
5 especially dangerous, those places where  
6 carrying weapons will pose unique dangers, and  
7 those categories of people who, beyond the  
8 ordinary citizen, possess a -- a particular  
9 danger if they have access to firearms.

10           JUSTICE BARRETT: So it's not a  
11 synonym for virtue?

12           GENERAL PRELOGAR: No. We're not  
13 invoking a --

14           JUSTICE BARRETT: It's not -- you're  
15 not pulling in the virtuous citizenry?

16           GENERAL PRELOGAR: We are not, no. We  
17 think that here there is a direct link under the  
18 responsible citizens principle to danger, and we  
19 think that the disarmament provision I'm  
20 defending here, Section 922(g)(8), clearly  
21 satisfies that link because it requires  
22 individualized findings of dangerousness and a  
23 legislative consensus that individuals in this  
24 category present the requisite level of danger.

25           JUSTICE BARRETT: Well, then how do

1 you know? I mean, I think there would be little  
2 dispute that someone who was guilty, say, or  
3 even had a restraining order -- that domestic  
4 violence is dangerous, okay. So someone who  
5 poses a risk of domestic violence is dangerous.

6 How does the government go about  
7 showing whether certain behavior qualifies as  
8 dangerous? Because this might be in a  
9 heartland, but then you can imagine more  
10 marginal cases.

11 So you've invoked the consensus among  
12 the states, tradition of dangerousness, and I  
13 don't think you'd get a lot of push-back because  
14 this is violence after all, domestic violence.

15 What about more marginal cases?

16 GENERAL PRELOGAR: So I think that the  
17 factors we think courts could apply in this  
18 context -- and I should emphasize that this is  
19 subject to meaningful judicial review -- would  
20 fall into a couple of different categories.

21 At the outset, I would take the class  
22 of disarmament provisions that require  
23 individualized findings of dangerousness and say  
24 those fall in the heartland, as you just  
25 suggested. We have a judicial order here that

1 specifically found that Mr. Rahimi's conduct was  
2 dangerous to his intimate partner.

3           Then I think you get to the category  
4 of cases where a legislature might be making  
5 categorical predictive judgments that  
6 individuals with a certain characteristic or  
7 quality or past conduct present a danger, and  
8 those, I think, can be harder cases.

9           But the factors I would point to first  
10 would be the breadth of the law, because we know  
11 that the Second Amendment was entire -- was  
12 intended to prevent disarming wide swaths of the  
13 American public. So, if it's sweeping broadly  
14 or indiscriminately and capturing people we  
15 think of as ordinary citizens, that's going to  
16 be a problem.

17           Next, I would look at the  
18 justifications and the evidence before the  
19 legislature. This would operate like sensitive  
20 places. You could look and see is that place,  
21 in fact, dangerous if there are weapons there.  
22 So too you could look at the evidence the  
23 legislature was consulting with respect to its  
24 judgment of dangerousness.

25           And then the third factor would be

1 that legislative consensus. And I don't want to  
2 suggest that this is dispositive either way  
3 because some legislatures can be the first  
4 mover, and if multiple legislatures enact an  
5 unconstitutional law, that doesn't give you a  
6 safe harbor, but I do think that legislatures  
7 are best positioned to make these kinds of  
8 predictive judgments about dangerousness, and if  
9 you have the kind of consensus that we see here  
10 with respect to Section 922(g)(8), that's  
11 entitled to a lot of weight in the analysis.

12 And I don't want to say, Justice  
13 Barrett, that this is always going to be easy  
14 and that these factors will cash out in obvious  
15 ways. I would say that I think that this is not  
16 a close case and that Section 922(g)(8) is  
17 clearly constitutional and fits within the  
18 category of disarming irresponsible citizens  
19 under these principles.

20 JUSTICE JACKSON: But can I ask you --

21 JUSTICE BARRETT: Thank you.

22 JUSTICE JACKSON: -- a question about  
23 that, though? I guess I'm trying to understand  
24 whether we can really be analyzing this  
25 consistent with the Bruen test at the level of



1     generality of dangerousness.  I -- I wonder  
2     whether we need to be taking into account how  
3     historically domestic violence in particular was  
4     treated so that if we had evidence that, you  
5     know, men who engaged in domestic violence  
6     historically were actually not perceived as then  
7     dangerous from the standpoint of -- of  
8     disarmament, what -- what -- what -- what would  
9     we do with that in this situation?

10                 GENERAL PRELOGAR:  So I don't think  
11     that historical attitudes about dangerousness  
12     would be controlling with respect to modern-day  
13     circumstances, and I would draw an analogy here  
14     to dangerous and unusual weapons.

15                 You know, the Court has recognized,  
16     for example, that handguns were not in common  
17     possession at the time of the founding and might  
18     have been considered unusual weapons then.  But  
19     that's not what the Court would look at for  
20     determining whether you could ban handguns  
21     today.

22                 JUSTICE JACKSON:  But is that just  
23     because that's a new technology?  I mean, the --  
24     the circumstance with respect to domestic  
25     violence clearly existed back in the day, and

1 the question I guess -- I -- I'm just trying to  
2 understand how the Bruen test works in a  
3 situation in which there is at least some  
4 evidence that domestic violence was not  
5 considered to be, you know, subject to the kinds  
6 of regulation that it is today.

7 And so, when we're looking under that  
8 test for historical analogues, I guess, you  
9 know, a series of regulations that relate to  
10 disarming dangerous people, I -- I -- I need to  
11 understand why that would be enough.

12 GENERAL PRELOGAR: Well, so let me try  
13 to respond to the methodological point, and then  
14 I want to respond to the specific questions  
15 you've raised about how domestic violence was  
16 treated at the founding and today.

17 On the methodological point, I don't  
18 think that you could read Bruen to suggest that  
19 we need regulations that specifically disarm  
20 domestic abusers because that would be coming  
21 dangerously close to imposing on the government  
22 the requirement for an identical twin of a  
23 regulation.

24 And, of course, original meaning isn't  
25 dictated by the happenstance of whether there

1 was a law on the books in 1791 that happened to  
2 disarm domestic abusers. I think you have to  
3 come up a level of generality and use history  
4 and tradition to help identify and discern the  
5 enduring constitutional principles that define  
6 and delimit the --

7 JUSTICE JACKSON: But what if we had a  
8 --

9 GENERAL PRELOGAR: -- scope of the  
10 Second Amendment right.

11 JUSTICE JACKSON: -- hypothetical --  
12 what if -- what if we had a hypothetical in  
13 which we actually determined based on the  
14 historical record that domestic violence was not  
15 considered dangerousness back in the day? I  
16 mean, I -- I just don't know what we'd do with  
17 that scenario.

18 GENERAL PRELOGAR: So I think, in that  
19 scenario, you would recognize that is -- it is  
20 consistent with the Second Amendment's original  
21 and enduring meaning that you can disarm  
22 dangerous people, and the conception of what  
23 regulations that permits today is not controlled  
24 by Founding-Era applications of the principle.

25 JUSTICE JACKSON: Then what's the

1 point of going to the Founding Era? I mean, I  
2 thought it was doing some work. But, if we're  
3 still applying modern sensibilities, I don't  
4 really understand the historical framing.

5           GENERAL PRELOGAR: The work that  
6 history and tradition are doing is helping to  
7 discern those principles in the first place.  
8 The idea, for example, that you can ban firearms  
9 in sensitive places, the fact is that the  
10 Framers didn't ban firearms in schools even  
11 though they existed at the Founding, but the  
12 Court has already recognized that those  
13 analogues and the historic banning of firearms  
14 in places where they present safety concerns can  
15 justify a modern-day regulation that does  
16 require the banning of weapons in schools.

17           And so too here, I think the Court can  
18 identify the constitutional principle, which  
19 it's already articulated -- we're not asking the  
20 Court to break new ground here -- and say today,  
21 Section 922(g)(8) is a clear application of that  
22 principle that you can disarm dangerous people.

23           And, Justice Jackson, I do want to  
24 push back on the idea and the premise of your  
25 question that there was evidence at the

1 Founding, for example, that you couldn't disarm  
2 domestic abusers. It's true that the Founders  
3 didn't do that, but there's no evidence to  
4 suggest that they would have thought that that  
5 crossed a constitutional line.

6 And the fact that domestic violence  
7 was subject to a very different legal and  
8 societal regime at the time and was not viewed  
9 as the kind of system that warrants systematic  
10 governmental interference, I think, can't be  
11 held against us now that we're looking at how  
12 Congress is reacting to the profound threats  
13 that armed domestic violence presents.

14 JUSTICE ALITO: General, one  
15 provision, one section of the provision at issue  
16 here, applies when a court order includes a  
17 finding that the person represents "a credible  
18 threat to the physical safety of such intimate  
19 partner or child."

20 But another provision applies when the  
21 order "by its terms explicitly prohibits the  
22 use, attempted use, or threatened use of  
23 physical force...". that does not require a  
24 finding of dangerousness.

25 Why is that necessary and how can that

1 be justified?

2           GENERAL PRELOGAR: I think,  
3 ultimately, a court would have to find  
4 dangerousness to enter a subparagraph (c)(2)  
5 injunction based on the general equitable  
6 principle that in order to enjoin conduct, you  
7 have to think that conduct is reasonably likely  
8 to occur.

9           This is a universal equitable  
10 principle. It certainly applies in Texas and in  
11 virtually all of the states. And I think what  
12 it means is that a -- a judge who's considering  
13 a request for a protective order wouldn't have a  
14 basis in law to enter that subparagraph (c)(2)  
15 prohibition on the use of physical force unless  
16 the judge thought the force was sufficiently  
17 likely to materialize.

18           JUSTICE ALITO: Well, we are told in  
19 some of the amicus briefs that there are  
20 situations in which the family court judge who  
21 has to act quickly and may not have any  
22 investigative resources faces a he/she -- a he  
23 said/she said situation, and the judge just  
24 says: Well, I'm going to issue an order like  
25 this against both of the parties.

1 Do you agree that that occurs?

2 GENERAL PRELOGAR: No. I think that  
3 that is largely a mischaracterization of what is  
4 happening in the -- the state courts day in and  
5 day out. With respect to mutual protective  
6 orders in particular, the vast majority of  
7 states -- we cite a source that counts 48 of  
8 them -- either prohibit outright or  
9 substantially restrict the entry of those kinds  
10 of mutual protective orders.

11 And then I think the account is  
12 basically trying to suggest or insinuate that  
13 these state courts are nevertheless entering  
14 protective orders that are not justified by the  
15 facts and the law, and that just flies in the  
16 face of the presumption of regularity that this  
17 Court applies in this context.

18 Even the data on the ground don't bear  
19 out the assertions that family courts are just  
20 reflexively entering these kinds of protective  
21 orders. By Respondent's own count in the  
22 particular Tarrant County statistics he  
23 collected, there were 522 requests for  
24 protective orders, but that only resulted in 289  
25 final protective orders.

1           So I think, even as a statistical  
2 matter, it's incorrect to say that, invariably,  
3 these orders are being entered without any basis  
4 in fact or law to justify them.

5           JUSTICE ALITO: Is there anything that  
6 a person who is subject to one of these orders  
7 can do if the person claims that there wasn't  
8 really sufficient notice or that due process  
9 rights were violated in some way or that any  
10 need for the protective order has expired?

11           Presumably, the person could go back  
12 to the state court that entered the order. But,  
13 if the state court is completely unreceptive to  
14 that, is there any other avenue for relief?

15           GENERAL PRELOGAR: So I think it's  
16 important to parse out different aspects of the  
17 question. Certainly, in a Section 922(g)(8)  
18 prosecution, an individual could challenge the  
19 adequacy of the notice or the hearing. And so,  
20 if the argument is I didn't actually receive the  
21 notice or I didn't have an opportunity to  
22 participate, that would be a -- a defense  
23 because Section 922(g)(8) requires that.

24           JUSTICE ALITO: Yes. But --

25           GENERAL PRELOGAR: But --



1                   JUSTICE ALITO:  -- before the fact --  
2           so the person -- the person thinks that he or  
3           she is in danger and wants to have a firearm.  
4           Is the person's only recourse to possess the  
5           firearm and take -- you know, take their chances  
6           if they get prosecuted?

7                   GENERAL PRELOGAR:  No.  I mean, I  
8           think the person would obviously have an ability  
9           to, within the state court system, challenge the  
10          entry of the protective order.  But I don't  
11          think there would be any basis to say you could  
12          collaterally challenge that in the federal  
13          prosecution.  And, ultimately, this just  
14          reflects the -- the history and tradition  
15          demonstrating that there are certain categories  
16          of people where we don't have to tolerate the  
17          risks of armed domestic violence that they would  
18          present, even in situations where they might  
19          claim that they need to have a gun for other  
20          reasons.

21                   JUSTICE ALITO:  There's no recourse  
22          before the fact in federal court?

23                   GENERAL PRELOGAR:  So I think that  
24          they could seek recourse in the state courts  
25          themselves.  They could protest the notice and

1 the opportunity for a hearing. But, if a court  
2 has entered a protective order that complies  
3 with the restrictions in 922(g)(8), then a  
4 federal court can rely on that in enforcing this  
5 prohibition.

6 JUSTICE ALITO: Is there any  
7 possibility of administrative relief?

8 GENERAL PRELOGAR: I think that at the  
9 state level, there are certain mechanisms in  
10 place where people can seek relief. And one  
11 important thing to emphasize is that these  
12 protective orders are inherently time-limited.

13 It varies a little bit at the state  
14 level. I've seen provisions that authorize the  
15 imposition of these protective orders for six  
16 months up to about five years. I think, most  
17 commonly, they're in effect for just one year.  
18 But, you know -- and the federal firearms  
19 prohibition tracks the length and duration of  
20 the protective order, so that also, I think,  
21 means that the -- the disarmament lasts only so  
22 long as the danger is in effect.

23 JUSTICE ALITO: Well, one more  
24 question. The Alameda County Public Defenders'  
25 amicus brief says that some restraining orders

1 are permanent. Is that true? And if that is  
2 true, how do you justify a permanent prohibition  
3 even if the -- any danger has disappeared?

4 GENERAL PRELOGAR: So I'm not aware of  
5 state law authority to -- to -- that authorizes  
6 or that routinely enters permanent protective  
7 orders. As I mentioned, this is -- varies  
8 across state law, so I don't want to suggest  
9 that there's a universal answer here, but these  
10 orders are generally time-limited or provide  
11 mechanisms for courts to go back and review the  
12 finding of dangerousness for purposes of  
13 effectuating the -- the basic command of the  
14 protective order.

15 JUSTICE ALITO: Thank you.

16 JUSTICE SOTOMAYOR: Just -- just to be  
17 clear, none of the situations that Justice Alito  
18 is pointing to are the facts of this case,  
19 correct?

20 GENERAL PRELOGAR: That's --

21 JUSTICE SOTOMAYOR: Or the facts of  
22 this statute?

23 GENERAL PRELOGAR: That's right. So I  
24 -- I --

25 JUSTICE SOTOMAYOR: And the

1       constitutionality of this statute is what's at  
2       issue?

3                   GENERAL PRELOGAR:  Yes, and the Fifth  
4       Circuit invalidated the statute on its face.  I  
5       do want to suggest that to the extent the Court  
6       has been left with the impression in some of  
7       these amicus briefs that the protective orders  
8       are routinely entered -- are routinely entered  
9       without a basis to conclude that someone  
10      actually presents the individualized finding of  
11      danger, I do not think there is any record or  
12      evidence to support that conclusion here.

13                   And I would say, again, this runs  
14      counter to the presumption of regularity that  
15      the Court ordinarily affords in this context,  
16      but I think it also runs counter to Congress's  
17      recognition and circumscribing of Section  
18      922(g)(8) to ensure that it's covering those who  
19      had notice and an opportunity for a hearing and,  
20      therefore --

21                   JUSTICE SOTOMAYOR:  Counsel, in the  
22      end, if there are due process failures in any  
23      system, that'll be subject to a separate  
24      challenge, correct?

25                   GENERAL PRELOGAR:  That's correct.

1 And Mr. Rahimi hasn't made a due process claim  
2 here. He's not challenging Section 922(g)(8) on  
3 that independent ground.

4 JUSTICE SOTOMAYOR: I'd -- I'd like to  
5 go back to your law-abiding or responsible  
6 citizen category. I now understand why you  
7 think it's -- it's appropriate. You think  
8 "dangerous" is too limited because we have  
9 restrictions on the age of people possessing  
10 firearms and on the mentally ill, and they're  
11 not -- why do you -- and -- and I understand  
12 they're not necessarily dangerous, but I guess  
13 their lack of responsibility or judgment could  
14 be questioned, correct?

15 GENERAL PRELOGAR: What I would say is  
16 we think that they are inherently dangerous,  
17 even though they might not be culpable or  
18 intending to create that kind of danger with  
19 firearms.

20 JUSTICE SOTOMAYOR: Okay.

21 GENERAL PRELOGAR: That there's an  
22 inherent risk based on their qualities or  
23 characteristics that demonstrates that, as  
24 compared to the ordinary citizen, allowing them  
25 access to firearms is going to present that risk

1 of danger to self or others.

2 JUSTICE SOTOMAYOR: So, if we use  
3 "danger" in the way you're defining it, as  
4 broadly as you're defining it, you don't need  
5 responsible citizen category?

6 GENERAL PRELOGAR: Yes. I think these  
7 are essentially getting at the same concept. I  
8 guess what I would say, Justice Sotomayor, is  
9 that we have tracked the Court's own language  
10 here. And I think it would be important, if the  
11 Court wants to refer to concepts of  
12 dangerousness, to make clear that it's not  
13 backtracking from what it said in Heller and in  
14 McDonald and in Bruen, that you can disarm those  
15 who are not law-abiding, responsible citizens,  
16 with the mentally ill as one of the exemplar  
17 categories the Court held up to illustrate that  
18 proposition.

19 And I think that the term  
20 "responsible" gets at the -- the broader group  
21 of people who can be disarmed even though they  
22 might not be culpable precisely because of this  
23 risk of danger. But, if the Court --

24 JUSTICE SOTOMAYOR: Thank you,  
25 counsel.

1 JUSTICE KAVANAUGH: Can you finish  
2 that answer?

3 GENERAL PRELOGAR: I was going to say  
4 but, if the Court were to refer to these  
5 concepts of dangerousness, I just think it would  
6 be important to make clear that it's not  
7 backtracking from what it has said in prior  
8 cases. And it's not just that the Court has  
9 referred to this concept in the abstract. It's  
10 actually embedded it in various aspects of how  
11 Second Amendment analysis operates.

12 So, for example, the Court has said  
13 background checks are okay because they're  
14 intended to decide whether you're the kind of  
15 ordinary, law-abiding, responsible citizen in  
16 the first place, or that when you're looking at  
17 whether a weapon is dangerous and unusual, you  
18 should ask is this the kind of weapon that a  
19 law-abiding, responsible citizen would need for  
20 self-defense.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 GENERAL PRELOGAR: And so I just think  
23 there's a risk of -- of creating confusion about  
24 that.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. I -- I guess, to get back to the  
2 beginning, so why did you use the term  
3 "responsible" if what you meant was dangerous?

4 I mean, "responsible" presents all  
5 sorts of problems, and "dangerous" is sort of a  
6 different set of considerations. I mean, if you  
7 thought that our prior precedents were talking  
8 about dangerous, it was a little confusing to  
9 all of a sudden find "responsible" being the  
10 operative term.

11 GENERAL PRELOGAR: Well, we relied on  
12 the same phrasing the Court itself used when it  
13 first articulated this -- this constitutional  
14 principle in Heller. And so I think we were  
15 trying to point out that the Court itself has  
16 already recognized the category of regulation  
17 that's consistent with original meaning under  
18 the Second Amendment, and we just followed the  
19 Court's lead in using that phrase, those who are  
20 not law-abiding, responsible citizens.

21 And as I was just suggesting --

22 CHIEF JUSTICE ROBERTS: Well, but just  
23 to be clear, your argument today is that it  
24 doesn't apply to people who present a threat of  
25 dangerousness? Whether you want to characterize



1       them as responsible or irresponsible, whatever,  
2       the test that you're asking us to adopt turns on  
3       dangerousness?

4                   GENERAL PRELOGAR:  Correct, for those  
5       who are not responsible citizens.  I do want to  
6       be clear that we think there are different  
7       principles that apply --

8                   CHIEF JUSTICE ROBERTS:  So dangerous  
9       --

10                  GENERAL PRELOGAR:  -- with those who  
11       are not law-abiding.  So I just want to be clear  
12       we don't think dangerousness is necessarily the  
13       standard there, although there's obviously going  
14       to be a lot of overlap.  That's defined by its  
15       own history and tradition.  But we do think that  
16       dangerousness defines the category of those who  
17       are not responsible.

18                  CHIEF JUSTICE ROBERTS:  Thank you.  
19                                   Justice Thomas?

20                  JUSTICE THOMAS:  If this were a -- a  
21       criminal proceeding, then you would have a  
22       determination of what you're talking about,  
23       someone would be convicted of a crime, a felony  
24       assault or something.

25                               But, here, you have a -- a --

1 something that's anticipatory or predictive,  
2 where a court is -- civil court is making the  
3 determination. Just from an -- an analytical  
4 standpoint, would there be a difference between  
5 a criminal determination and a civil  
6 determination?

7 GENERAL PRELOGAR: So I don't think  
8 that it would make a difference with respect to  
9 whether the legislature can create categories of  
10 people who are considered dangerous or not  
11 responsible, and that's very much informed by  
12 history and tradition here.

13 It is not the case that the only  
14 disarmament provisions that have existed over  
15 time targeting those who are dangerous are  
16 provisions that focused on those with criminal  
17 convictions. That is, of course, an important  
18 component of the law-abiding standard in  
19 particular, but we have a number of examples  
20 from throughout history of those who were  
21 disarmed even after civil adjudications or a  
22 civil-like process, and that includes --

23 JUSTICE THOMAS: Could you give me an  
24 example?

25 GENERAL PRELOGAR: Sure. So, for

1 example, mental illness. This was the category  
2 that Heller held up as the quintessential  
3 example of those who aren't responsible, even  
4 though mental illness in our legal system has  
5 always been adjudicated through civil  
6 proceedings.

7           That was true, for example, of  
8 loyalists. The disarmament provisions on  
9 loyalists were enforced through those who were  
10 refusing to take a loyalty oath, and so there  
11 wasn't any necessity of a criminal conviction.  
12 So too with those who were intoxicated. You  
13 didn't need to show that they had actually been  
14 criminally convicted in order to disarm them.

15           So I think that there is a  
16 longstanding tradition here of recognizing that  
17 individuals can be determined through this  
18 predictive judgment to be dangerous even in the  
19 absence of a criminal conviction.

20           JUSTICE THOMAS: Just one last  
21 question. This is a judicial determination  
22 here. Would you be able to make the same  
23 arguments if it had been a -- an administrative  
24 determination?

25           GENERAL PRELOGAR: I think it would be

1 far more difficult to defend an executive branch  
2 or an administrative determination because of a  
3 separate Second Amendment principle that guards  
4 against granting executive officials too much  
5 discretion to decide who and who cannot have  
6 firearms.

7 In the American -- there was some  
8 history about that in -- in England, of course,  
9 but in the American legal tradition, these  
10 principles have been deployed through  
11 legislative judgments or through express  
12 judicial findings of dangerousness. So I don't  
13 think that we could point to the same history  
14 and tradition of giving executive branch  
15 officials that discretion.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: Suppose -- suppose  
19 that a jurisdiction enacted a concealed carry  
20 permitting regulation that is almost identical  
21 to the one we invalidated in Bruen, except that  
22 it requires an applicant to show -- to show that  
23 he or she is sufficiently responsible.

24 Would that be constitutional?

25 GENERAL PRELOGAR: So, if that were

1 implemented through a system of executive  
2 discretion, just as I was discussing with  
3 Justice Thomas, I think that there could be  
4 additional principles that come into play that  
5 would guard against that kind of licensing  
6 regime.

7           Now, to the extent that that kind of  
8 background system was intended just to implement  
9 the -- the bases for disarmament that reflect  
10 legislative judgments and, you know, in other  
11 words, to check for whether you have a history  
12 of -- of commitment to a mental institution or a  
13 criminal record or so forth, then I think those  
14 objective standards could be deployed as part of  
15 a background check system, and -- and Bruen  
16 specifically suggested as much.

17           JUSTICE ALITO: One more question. In  
18 response to my question about the provision that  
19 prohibits the possession of a firearm by someone  
20 against whom an order prohibiting violence has  
21 been entered and the provision doesn't on its  
22 face require a finding of dangerousness, as I  
23 recall, your answer was that state laws  
24 generally do require that and anyway, equitable  
25 principles require that.

1           Now suppose someone is later  
2 prosecuted for violating that provision. Could  
3 -- would it be a defense for that person to say  
4 that the state law in question did not require  
5 such a finding and, in fact, there was no such  
6 finding in my case?

7           GENERAL PRELOGAR: I don't think that  
8 that would provide a basis to collaterally  
9 challenge the entry of the protective order in  
10 the federal prosecution. And we don't think  
11 that this -- that there should be a system of  
12 as-applied challenges in this context, because I  
13 think that what we know is that Congress is  
14 entitled to make categorical judgments,  
15 predictive judgments of dangerousness based on  
16 history and tradition even in -- if there are  
17 really edge cases where that predictive judgment  
18 wasn't actually necessary to guard against a  
19 danger there.

20           But, if what you're suggesting is that  
21 there might be a state out there that is  
22 ordering judges to enter the subparagraph (c)(2)  
23 prohibition without any basis to think that  
24 physical force is likely, I think a person would  
25 have a very strong due process challenge to that

1 kind of law, and that law would likely be  
2 invalidated on the separate basis that it  
3 doesn't provide due process if it's requiring  
4 courts to enter relief that the facts and the  
5 law don't support.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: General, there seems  
10 to be a fair bit of division and a fair bit of  
11 confusion about what Bruen means and what Bruen  
12 requires in the lower courts.

13 And I'm wondering if you think that  
14 there's any useful guidance, in addition to  
15 resolving this case, but any useful guidance we  
16 can give to lower courts about the methodology  
17 that Bruen requires be used and how that applies  
18 to cases even outside of this one?

19 GENERAL PRELOGAR: Yes. I think that  
20 there are three fundamental errors and  
21 methodology that this case exemplifies and that  
22 we are seeing repeated in other lower courts and  
23 that this case provides an opportunity for the  
24 Court to clarify that Bruen should not be  
25 interpreted in the way that Respondent is

1 suggesting.

2           The first error we see is that  
3 Respondent has asserted here and other courts  
4 have embraced the idea that the only thing that  
5 matters under Bruen is regulation. In other  
6 words, you can't look at all of the other  
7 sources of history that usually bear on original  
8 meaning.

9           And I don't think that that can be  
10 squared with this Court's precedents, starting  
11 with Heller, which consulted a -- a wide variety  
12 of historical sources, the same kind of evidence  
13 we've come forward with here about English  
14 practice, state constitutional precursors,  
15 treatises, commentary, state judicial decisions.  
16 All of that is relevant evidence about the scope  
17 of the Second Amendment right, and I think the  
18 Court could make clear that it's not a  
19 regulation-only test.

20           Second, I think that looking just at  
21 regulations themselves, one of the fundamental  
22 problems with how courts are applying Bruen is  
23 the level of generality at which they're parsing  
24 the historical evidence.

25           Court after court has looked at the



1 government's examples and picked them apart to  
2 say: Well, taking them one by one, there's a  
3 minute -- minute difference between how this  
4 regulation operated in 1791 or the ensuing  
5 decades and how Section 922 provisions operate  
6 today. And I think that comes very close to  
7 requiring us to have a dead ringer when Bruen  
8 itself said that's not necessary.

9           The way constitutional interpretation  
10 usually proceeds is to use history and  
11 regulation to identify principles, the enduring  
12 principles that define the scope of the Second  
13 Amendment right. And so we think that you  
14 should make clear the courts should come up a  
15 level of generality and not nit-pick the -- the  
16 historical analogues that we're offering to that  
17 degree.

18           And, third and finally, I think that  
19 in many instances, courts are placing  
20 dispositive weight on the absence of regulation  
21 in a circumstance where there's no reason to  
22 think that that was due to constitutional  
23 concerns.

24           So, for, example here, we don't have a  
25 regulation disarming domestic abusers. But

1       there is nothing on the other side of the  
2       interpretive question in this case to suggest  
3       that anyone thought you couldn't disarm domestic  
4       abusers or couldn't disarm dangerous people.  
5       And in that kind of context, I think to suggest  
6       that the absence of regulation bears  
7       substantially on the meaning of the Second  
8       Amendment is to take a wrong turn.

9                 It's contrary to the situation the  
10       Court confronted in Bruen, where there was a lot  
11       of historical evidence to say states can't  
12       completely prohibit public carry, and against  
13       that evidence, you might say that the absence of  
14       regulation is significant.

15                But, here, there's nothing on the  
16       other side of this interpretive question, and I  
17       think that that just shows that you shouldn't  
18       hold the absence of a direct regulation against  
19       us.

20                JUSTICE KAGAN: Thank you.

21                CHIEF JUSTICE ROBERTS: Justice  
22       Gorsuch?

23                JUSTICE GORSUCH: Good morning,  
24       General. I want to follow up on your response  
25       to Justice Kagan, I think your second response,

1 the level of generality question.

2 Do you -- do you think the level of  
3 generality -- I -- I take your point you've got  
4 surety laws, you've got affray laws, you've got  
5 a lot of historical evidence, maybe not the  
6 historical twin.

7 And -- and you're saying we should  
8 overlook that in the same way I think you would  
9 say -- I want to make sure you'd say the  
10 analysis also applies similarly to the -- to the  
11 right side of the ledger, the regulation side on  
12 the right side. We're not looking for is -- is  
13 it -- is it a fowler or is it -- is it a musket.

14 Is -- is that a fair understanding of  
15 -- of -- of how you see the law?

16 GENERAL PRELOGAR: Yes. We think that  
17 it applies in both directions, both in  
18 understanding the right itself and in  
19 understanding the limitations that are built  
20 into that right.

21 JUSTICE GORSUCH: Okay. And you --  
22 you had a discussion about the length of time  
23 that some of these orders last, and you  
24 emphasized that you're only arguing for a  
25 temporary dispossession.

1                   And I -- I guess I -- I'm wondering,  
2                   on a facial challenge, do we need to get into  
3                   any of that, right? Is -- normally, we ask on a  
4                   facial challenge, is there any set of  
5                   circumstances in which the dispossession would  
6                   be lawful? And there may be an as-applied if  
7                   it's a lifetime ban. That would come to us and  
8                   that would be a separate question. Is that how  
9                   you see it too?

10                   GENERAL PRELOGAR: I agree that that  
11                   would be a separate question, yes. I think that  
12                   there is good reason to reject as-applied  
13                   challenges if and when they come --

14                   JUSTICE GORSUCH: Sure.

15                   GENERAL PRELOGAR: -- before the Court  
16                   because of the categorical judgments that we  
17                   think history and tradition support, but I  
18                   acknowledge that here it's only a facial  
19                   challenge.

20                   JUSTICE GORSUCH: Okay. And -- and  
21                   along the same lines on the facial challenge  
22                   aspect of it, do we need to resolve (c)(2) and  
23                   the questions that Justice Alito was asking  
24                   given that the -- the -- the defendant, the  
25                   plaintiff before us -- the Respondent, sorry,

1 is -- is -- is -- has been adjudicated under  
2 (c)(1) and we actually have a finding of a  
3 credible threat. The dangerousness argument  
4 seems most apparent there. And we don't know  
5 much about how all states administer (c)(2)  
6 regimes.

7 GENERAL PRELOGAR: So I agree that  
8 this is a facial challenge, and the Court could  
9 confine its analysis to (c)(1). I guess I would  
10 make just two responses to that.

11 JUSTICE GORSUCH: Sure.

12 GENERAL PRELOGAR: One is to say that  
13 I think it's going to be difficult for the Court  
14 to avoid the (c)(2) issue.

15 JUSTICE GORSUCH: Of course.

16 GENERAL PRELOGAR: We ourselves have a  
17 pending petition where the Fifth Circuit has  
18 invalidated an application of the statute in a  
19 (c)(2) context. So, unless you want to see me  
20 here again next term on this issue, I would say  
21 that --

22 JUSTICE GORSUCH: Always delighted to  
23 see you, General.

24 (Laughter.)

25 GENERAL PRELOGAR: -- the issue has

1       been fully briefed, and we think it's an  
2       important part of the statute.

3                   But the second thing I would say is  
4       that even if you wanted to confine your analysis  
5       to (c)(1), I do think that at the very least,  
6       you would have to reject some of the key  
7       premises of Respondent's arguments in this case,  
8       and that relates to the colloquy I had with  
9       Justice Kagan, for example, the level of  
10      generality --

11                   JUSTICE GORSUCH:   Right.

12                   GENERAL PRELOGAR:   -- at which he's  
13      parsing the regulations, the fact that we don't  
14      have a domestic violence example in particular,  
15      his arguments that legislatures just can't  
16      disarm anybody, that persons can't be disarmed,  
17      that kind of thing.

18                   JUSTICE GORSUCH:   I follow all of  
19      that.  Got you.  And the same thing goes with  
20      due process.  We don't have a due process  
21      challenge before us, and so we don't need to  
22      resolve any of that either.

23                   GENERAL PRELOGAR:   That's correct.  He  
24      did not make a due process claim here.

25                   JUSTICE GORSUCH:   Okay.  And then,

1       lastly, some lower courts have recognized a  
2       duress defense in -- to 922 charges. You know,  
3       someone's invaded their home and they use it in  
4       self- -- a gun that they have illegally in  
5       self-defense.

6                   What's the government's view on that?

7                   GENERAL PRELOGAR: So, you know, I --  
8       I want to be careful here because I haven't  
9       actually reviewed the cases that you must be  
10      referring to where those defenses --

11                  JUSTICE GORSUCH: Yeah, there are a  
12      few out there.

13                  GENERAL PRELOGAR: -- have been made.  
14      I would have to take a look at those to provide  
15      you with a well-thought-out government view on  
16      that issue. Obviously, we recognize that there  
17      are distinctive legal doctrines like necessity  
18      and defense that can come into play. And so I  
19      -- I'm sorry that I don't have a --

20                  JUSTICE GORSUCH: What would you  
21      counsel us to do about them? I know it's not  
22      fair standing at the podium not having reviewed  
23      them, but there are these historical common-law  
24      defenses of necessity and duress when it's not  
25      aimed at the -- the -- the subject of the

1 protective order, but a home invasion, for  
2 example.

3 GENERAL PRELOGAR: So I would urge the  
4 Court not to say anything about those doctrines  
5 here, where we've got a facial challenge and  
6 where, certainly, Mr. Rahimi isn't making that  
7 kind of defense to a Section 922(g)(8)  
8 conviction. I would save for another day how  
9 the Court might think about those issues where  
10 they're squarely presented.

11 JUSTICE GORSUCH: Thank you very much.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh?

14 JUSTICE KAVANAUGH: Just to follow up  
15 on your colloquies with the Chief Justice and  
16 Justice Sotomayor, I just want to make sure I  
17 have the terminology exactly correct as you see  
18 it.

19 One category you think the government  
20 can prohibit possession by those who are not  
21 law-abiding, and you said that encompasses  
22 serious offenses, is that correct?

23 GENERAL PRELOGAR: That's correct,  
24 which we would define by felony-level  
25 punishment.



1 JUSTICE KAVANAUGH: Okay. And the  
2 second is the government can prohibit possession  
3 by those who are not responsible, and by that,  
4 you mean those who are dangerous, is that  
5 correct?

6 GENERAL PRELOGAR: Yes, those whose  
7 possession of firearms would present a danger to  
8 themselves or others, but they don't have to be  
9 intentionally dangerous, which gets at the  
10 culpability question.

11 JUSTICE KAVANAUGH: Good. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: My question is on  
15 the law-abiding and responsible also. I guess I  
16 understood our use of that phrase in our prior  
17 cases to describe the would-be gun -- gun owners  
18 in those cases. Like, we're not talking about  
19 who might be able to be disarmed. There might  
20 be other people. But all of those people were  
21 law-abiding and responsible, and there was no  
22 allegation that they weren't.

23 But it seems to me that in your brief  
24 and in parts of the argument the government is  
25 asking for that to be a test. But I don't think

1 we presented it as a test. Do you see a reason  
2 for us to use that as the test, law-abiding and  
3 responsible, given some of the ambiguities in  
4 that phrase?

5 GENERAL PRELOGAR: So I wouldn't  
6 describe it as a test. I guess what I would do  
7 is describe it as the relevant category, the  
8 shorthand to get at the idea that legislatures,  
9 consistent with the Second Amendment, can take  
10 action to disarm particular types of people  
11 whose possession of weapons present these types  
12 of concerns, either that they have committed  
13 serious crimes or present a danger.

14 And I would use this as shorthand in  
15 the same way the Court has referred to the  
16 sensitive places principle or the dangerous and  
17 unusual weapons principle.

18 JUSTICE BARRETT: So could I just say  
19 it's dangerousness? Let's say that I agree with  
20 you that when you look back at surety laws and  
21 the affray laws, et cetera, that it shows that  
22 the legislature can make judgments to disarm  
23 people consistently with the Second Amendment  
24 based on dangerousness.

25 GENERAL PRELOGAR: We certainly --

1 JUSTICE BARRETT: Why can't I just say  
2 that?

3 GENERAL PRELOGAR: We certainly agree  
4 that that's what history and tradition show. We  
5 think that defines the scope of the category of  
6 those who are not responsible. We don't think  
7 dangerousness is the standard with law-abiding,  
8 and I recognize you might have some different  
9 views on that, Justice Barrett. You don't need  
10 to resolve that issue here. This is a -- this  
11 is a case just about someone who is not  
12 responsible in the form of being dangerous.

13 So, yes, we would be happy with a  
14 decision that says legislatures for time  
15 immemorial throughout American history have been  
16 able to disarm those who are dangerous.

17 JUSTICE BARRETT: But you're trying to  
18 save, like, the range issue. So you're not  
19 applying dangerousness to the crimes?

20 GENERAL PRELOGAR: That's correct. We  
21 think that there are additional arguments that  
22 can be made to defend felon disarmament and that  
23 those depend on the unique history and tradition  
24 with respect to criminal conduct. And so we  
25 would hope to have the opportunity to present

1 those arguments and perhaps --

2 JUSTICE BARRETT: In that case  
3 perhaps.

4 GENERAL PRELOGAR: -- persuade you in  
5 a future case, yes.

6 JUSTICE BARRETT: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Jackson?

9 JUSTICE JACKSON: Yes. And just to  
10 clarify in response to what you just said to  
11 Justice Barrett, the determination of  
12 dangerousness would be evaluated based on what  
13 modern legislatures think counts as dangerous?  
14 We're not bound to what qualified as dangerous  
15 back in the day?

16 GENERAL PRELOGAR: That's correct. We  
17 think that once the Court recognizes the  
18 principle that history and tradition support  
19 this durable principle that you can disarm  
20 dangerous people, then the question becomes for  
21 any follow-on challenge whether the legislature  
22 with respect to a particular category has  
23 appropriately deemed these individuals dangerous  
24 and, therefore, fitting within that historical  
25 tradition.

1                   And I think the inquiry there would  
2 not be confined to how the Founders thought  
3 about dangerousness. Instead, it would turn on  
4 some of the factors that I was discussing  
5 earlier with Justice Barrett about the breadth  
6 of the law, the evidence that supports the  
7 legislative judgment --

8                   JUSTICE JACKSON: The kinds of things  
9 we used --

10                  GENERAL PRELOGAR: -- and the  
11 consensus.

12                  JUSTICE JACKSON: The kinds of things  
13 we used to look at with the tiers of scrutiny,  
14 what's the justification for this? Is that what  
15 you're saying?

16                  GENERAL PRELOGAR: No, I don't think  
17 that this is just a revival of some form of  
18 means-ends scrutiny because we wouldn't be  
19 asking the -- a court to balance the intrusion  
20 on the individual interest against the weight of  
21 the government's interest. Instead, this is  
22 about whether the legislature has properly  
23 classified a law as falling within the principle  
24 in the first place.

25                  And so it's not about balancing

1 between those two different interests but,  
2 rather, about looking at the legislature's  
3 predictive judgment of dangerousness and  
4 determining ultimately whether it's justified.

5 JUSTICE JACKSON: All right. So let  
6 me just ask you about your first methodology --  
7 methodological error that you identified in  
8 response to Justice Kagan. You say that the  
9 courts are focusing too much just on regulation,  
10 legislation, and not on other indicia of what  
11 the historical tradition is.

12 But, when you were talking with  
13 Justice Thomas at the beginning, you seemed to  
14 suggest that the tradition with respect to  
15 slaves and Native Americans would not be subject  
16 to consideration for this. In other words, only  
17 the regulation as it relates to certain segments  
18 of society, I guess, count underneath this  
19 historic traditions test?

20 GENERAL PRELOGAR: Well, the reason we  
21 haven't invoked those other laws is because we  
22 think they were applications of a separate  
23 principle under the Second Amendment, which is  
24 that those who are not considered among the  
25 people can be disarmed. That, of course, has

1 the textual hook, and the Court in Heller  
2 defined that as those who are not part of the  
3 political community. And when we looked at how  
4 those laws operated, they traditionally stripped  
5 the affected individuals from all rights to  
6 participate in the political community --

7 JUSTICE JACKSON: I understand that --

8 GENERAL PRELOGAR: -- and, therefore  
9 --

10 JUSTICE JACKSON: -- but where does  
11 that leave us with respect to the application of  
12 our test? I'm trying to understand if there's a  
13 flaw in the history and traditions kind of  
14 framework to the extent that when we're looking  
15 at history and tradition, we're not considering  
16 the history and tradition of all of the people  
17 but only some of the people as per the  
18 government's articulation of the test?

19 GENERAL PRELOGAR: Well, I certainly  
20 think that those laws are a part of history. We  
21 don't think that they're a part of history that  
22 are directly relevant to the separate question  
23 at issue here. And so we've instead pointed to  
24 a variety of other laws that we think more  
25 clearly bear on the issue of when legislatures

1 can disarm even those who are among the people.

2 JUSTICE JACKSON: All right. And,  
3 finally, let me just ask you prospectively from  
4 the standpoint of a legislator today -- I mean,  
5 we've been talking about sort of the  
6 retrospective view of this, you know, when  
7 there's an existing gun control measure that's  
8 being challenged, how do we determine by looking  
9 at history whether or not it's constitutional.

10 But let's say I'm a legislator today  
11 in Maine, for example, and I'm very concerned  
12 about what has happened in that community, and  
13 my people, the constituents, are asking me to do  
14 something.

15 Do you read Bruen as step one being go  
16 to the archives and try to determine whether or  
17 not there's some historical analogue for the  
18 kinds of legislation that I'm considering?

19 GENERAL PRELOGAR: No. I think that  
20 Bruen requires a close look at history and  
21 tradition and analogue to the extent they exist  
22 and are relevant for purposes of articulating  
23 the principle.

24 But, once you have the principle  
25 locked in -- and, here, the principle would be



1 you can disarm those who are not responsible or  
2 dangerous, however the Court wants to phrase  
3 it -- then I don't think it's necessary to  
4 effectively repeat that same historical  
5 analogical analysis for purposes of determining  
6 whether a modern-day legislature's disarmament  
7 provision fits within the category.

8           Instead, I think you would look at the  
9 factors I was articulating earlier in response  
10 to Justice Barrett's question about the evidence  
11 before the legislature of dangerousness, the  
12 consensus view, whether legislatures routinely  
13 think of this circumstance as being dangerous,  
14 the breadth of the law, and other factors along  
15 those lines.

16           JUSTICE JACKSON: But, if the  
17 principle has not yet been established, what do  
18 I do as a legislator?

19           GENERAL PRELOGAR: So I think, if  
20 there is no relevant principle that a law would  
21 slot into, like sensitive place regulation or  
22 dangerous person regulation, then you would  
23 conduct the Bruen analysis in order to help try  
24 to identify those principles of the Constitution  
25 that define the scope of the Second Amendment

1 right.

2 But it wouldn't just be a hunt for a  
3 particular, precise historical analogue. I -- I  
4 think that that's really a caricature of Bruen,  
5 and that would make the Second Amendment a true  
6 outlier because there's no constitutional right  
7 that's dictated exclusively by whether there  
8 happened to be a parallel law on the books in  
9 1791.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Mr. Wright.

14 ORAL ARGUMENT OF J. MATTHEW WRIGHT  
15 ON BEHALF OF THE RESPONDENT

16 MR. WRIGHT: Thank you, Mr. Chief  
17 Justice, and may it please the Court:

18 My friend has -- described several  
19 times the government's principle that in this  
20 case, they are not relying on any analogues that  
21 were directed at people who were not part of the  
22 people, outside the community, the national or  
23 political community entirely.

24 That means loyalist laws are entirely  
25 off the analogical spectrum here because

1       loyalists were also pervasively deprived of all  
2       of the rights of the people and citizenship.  
3       They were enemies. The government said so in  
4       its Bruen amicus brief.

5                   In response to Justice Gorsuch's  
6       question about how the courts of appeals handle  
7       the issue of self-defense, necessity, duress, we  
8       cite a case on page 11 of our brief, United  
9       States versus Penn, I remember that case very  
10      well, it will show you how they handle it.  
11      There's effectively not one. I mean, even brief  
12      fleeting possession that lasts a little bit  
13      longer while being chased by people, not enough.  
14      So there is no real keeping for self-defense  
15      exception to this principle.

16                   And in regards to I think it was  
17      Justice Alito's question of duration of  
18      protective orders, by default, they can be  
19      permanent in Alabama, Colorado, Montana,  
20      Washington. No specific limit in Florida,  
21      Michigan, North Dakota, Vermont. Ten years in  
22      Arkansas, five years in California, Ohio, South  
23      Dakota. And in Texas, where the default is two  
24      years, if the judge finds or a finding is made  
25      that felony violence was committed, it can be

1 five years and the time is tolled, for instance,  
2 when someone's in jail. And so, while it may be  
3 the case that if we counted noses, exactly 51 or  
4 52 are around a year or so, it is not the case  
5 that they are short.

6 Now the danger with any kind of  
7 historical inquiry is like the person looking  
8 down a well. So it feels like what the  
9 government is doing is looking down the dark  
10 well of American history and seeing only a  
11 reflection of itself in the 20th and 21st  
12 century and saying that's what history shows.

13 When Congress enacted Section  
14 922(g)(8) in 1994, it acted without the benefit  
15 of Heller, McDonald, and Bruen, so we shouldn't  
16 be surprised that they missed the mark. They  
17 made a one-sided proceeding that is short a  
18 complete proxy for a total denial of a  
19 fundamental and individual constitutional right.

20 At this time, I would welcome  
21 questions from the Court.

22 JUSTICE THOMAS: Counsel, would you  
23 take a few -- a bit of your time to recount  
24 exactly what happened below in this case, not in  
25 the district court but in state court?

1           MR. WRIGHT: So what happened in state  
2 court we know very little about for certain. We  
3 have the order, which was attached as an exhibit  
4 to the federal complaint, and the order reflects  
5 certain findings.

6           We have shown that those findings are  
7 incredibly common in this one county in Texas,  
8 but if you did an electronic search of appellate  
9 cases in Texas with the words "credible threat"  
10 and "physical safety," I think you would only  
11 find three unpublished appellate cases all from  
12 this county.

13           So there are words in it, but it  
14 wasn't a disputed type of finding. It was an  
15 agreed order. So my client, who was  
16 unrepresented, and a -- a district attorney, a  
17 Tarrant County assistant district attorney,  
18 entered into a stipulation. This order was  
19 entered. The language was in the order. It's  
20 in the joint appendix. You can read it. And --  
21 and that's it.

22           Now I believe that, Justice Thomas,  
23 more happened. You could -- we could figure out  
24 what happened if we pulled out the records, but  
25 those aren't relevant. What happens in the

1 civil proceeding doesn't matter for purposes of  
2 922(g)(8).

3 JUSTICE THOMAS: Well, I think what's  
4 -- what does matter is we're assuming  
5 dangerousness or irresponsibility. Take your  
6 pick. And we are -- we have a very thin record,  
7 and I'm trying to get a sense of what actually  
8 happened in this case.

9 MR. WRIGHT: So there are allegations  
10 that were taken in the federal pre-sentence  
11 report, and -- and those are the ones that made  
12 their way into the opinion below.

13 And if I could then distinguish  
14 between the facts that the court found for  
15 purposes of fixing a sentence in this case and  
16 the facts that could be contested at a jury, the  
17 facts that are the subject of the guilty plea,  
18 the ones that are essential to the conviction,  
19 in terms of the former category, there was a  
20 finding that there was, you know, a physical  
21 assault, that someone had attempted to intervene  
22 and that Mr. Rahimi had fired a gun into the air  
23 at that time. Those -- and -- and -- and there  
24 are pending charges right now in Tarrant County  
25 for three misdemeanor offenses that are the same

1       allegations that are the -- so -- so the -- the  
2       federal pre-sentence report found that those  
3       actions preceded and were the cause for the  
4       protective order.

5                   JUSTICE SOTOMAYOR:   I --

6                   JUSTICE GORSUCH:    Oh, please.

7                   JUSTICE SOTOMAYOR:   Go ahead.

8                   JUSTICE GORSUCH:    Are you sure?

9                   JUSTICE SOTOMAYOR:   Yes.

10                  JUSTICE GORSUCH:   Okay.  Counsel,  
11       you -- you -- you mentioned the self-defense,  
12       duress, necessity concerns in your opening.  But  
13       this is a facial challenge, right, so we have to  
14       ask is it unconstitutional in any application,  
15       and that would include cases where those  
16       circumstances don't exist.  We don't have to  
17       address those in this case, do we?

18                  MR. WRIGHT:    Your Honor, I think you  
19       do have to address them because the existence of  
20       such a defense is part of the crime, you know,  
21       the definition of the crime.  And so, if, as the  
22       lower courts have consistently held, there  
23       either is no such defense or it is hen's tooth  
24       rare, then that plays into --

25                  JUSTICE GORSUCH:    Hen's tooth rare.  I

1 haven't heard that in a while. I like that.

2 MR. WRIGHT: That -- that plays into  
3 the facial analysis of the statute. And I think  
4 one of the areas we diverge with my friend is  
5 this facial versus as-applied distinction, which  
6 even this Court I was happy to read finds that  
7 distinction amorphous sometimes. I certainly  
8 do.

9 But, in this case, by -- by a facial  
10 challenge, we mean the elements specifically  
11 target conduct that is explicitly protected by  
12 the plain text of the Second Amendment.

13 JUSTICE GORSUCH: And if -- if --  
14 if -- if I were to disagree with you on that,  
15 though, there -- there would be an as-applied  
16 challenge available later in those cases, right?

17 MR. WRIGHT: An as-applied challenge  
18 -- well, if you were to disagree with me, yes,  
19 that -- that's correct, Justice Gorsuch.

20 JUSTICE GORSUCH: And the same thing  
21 when it comes to temporary dispossession. I  
22 understand your concern about permanent  
23 dispossession, but, again, that isn't what's  
24 necessarily before us in a facial challenge,  
25 where we have to ask is it unconstitutional in



1 all of its applications, right?

2 MR. WRIGHT: Your Honor, that -- that  
3 test for faciality, I -- I think, is primarily  
4 remedial. It typically comes up in the civil  
5 context where someone is suing to enjoin the  
6 enforcement of a statute and -- and so the  
7 Salerno test it's called, you know, comes into  
8 play as to, typically, that assumes there is a  
9 valid application or a space of valid  
10 application of the statute, and then the  
11 complaint is either there's too much outside or  
12 my case is outside or something like that.

13 Ours is a facial challenge in the way  
14 that Lopez was a facial challenge, where the  
15 facts of Lopez were clearly within Congress's  
16 power under the Commerce Clause. This Court  
17 found the facts of that case were Person A was  
18 going to pay Lopez \$40 to give that gun to  
19 Person C after school.

20 That's within the commerce power, but  
21 the statute itself was not within Congress's  
22 power to enact. And so that statute failed as  
23 it then existed, the pre-amendment version of  
24 the Gun-Free School Zones Act, on its face.

25 JUSTICE BARRETT: I -- I just wanted

1 to go back to your conversation with Justice  
2 Thomas, and I guess this touches on what you  
3 just said to Justice Gorsuch about the thinness  
4 of the proceeding in state court.

5 She did submit a sworn affidavit  
6 giving quite a lot of detail about the various  
7 threats, right? So it's not like he just showed  
8 up and the judge said credible finding of  
9 violence?

10 MR. WRIGHT: So, Justice Barrett, I  
11 know that to be true. And I've personally  
12 looked at it. That's correct. And it's a  
13 matter of public record that you can see that.

14 JUSTICE BARRETT: I -- I've got it.

15 MR. WRIGHT: Right. So -- so -- and I  
16 don't mean to suggest that. I mean that in  
17 terms of what was necessary for the federal  
18 prosecution, so what we could have defended this  
19 case on if it went to the jury, the federal  
20 jury, I mean, for the criminal prosecution, what  
21 happened before, whether it was good or bad,  
22 doesn't matter under the statute.

23 And we take that as a given from this  
24 Court's decision in Lewis, where there's sort of  
25 a -- a conceded constitutional problem with the

1 underlying felony prosecution.

2 JUSTICE GORSUCH: Well, you -- you  
3 haven't raised a due process challenge to the  
4 underlying felony prosecution either, right?

5 MR. WRIGHT: Well, Your Honor, and,  
6 again --

7 JUSTICE GORSUCH: It's a Second  
8 Amendment challenge strictly speaking.

9 MR. WRIGHT: That's correct, Your  
10 Honor. And we take that from Lewis. Lewis says  
11 what Congress intended when it passed the Gun  
12 Control Act in 1968 was those matters are off  
13 the table.

14 So, in Lewis, there's no doubt there  
15 is a constitutional violation and a violation of  
16 due process under this Court's holding.  
17 However, there is no Fifth Amendment claim  
18 against a felon in possession prosecution, even  
19 if the underlying felony is concededly unlawful  
20 and unconstitutional.

21 So we take that as a given when we  
22 come to a statute like this, that even if we  
23 could show a due process issue with respect to  
24 the issuance of the protective order, that would  
25 be no defense against the federal prosecution.

1                   But, if I'm wrong about that, I'm  
2 happy to hear it.

3                   JUSTICE GORSUCH: It would have been  
4 in the state prosecution, though?

5                   MR. WRIGHT: I'm sorry?

6                   JUSTICE GORSUCH: It would have been  
7 in the state prosecution potentially, in the  
8 state protective order proceeding, and you could  
9 have had a due process argument and raised it  
10 there.

11                  MR. WRIGHT: You're right, Justice  
12 Gorsuch, and that gets to a really important  
13 point here. Because Congress has made this sort  
14 of a per se automatic disarmament and it has  
15 tied it to the issuance of a protective order,  
16 there is no due process required before a court  
17 enters an order enjoining me from committing  
18 physical abuse against someone else. That is  
19 not a protected right.

20                  So what we have is a proceeding that's  
21 designed to adjudicate small rights or no rights  
22 at all. And then, based on the results of that  
23 proceeding and even the findings that are  
24 entered in that proceeding, we take very  
25 consequential actions that go against an

1 individual's fundamental right to keep arms, of  
2 citizenship.

3           So I do not believe -- at least I'm  
4 not aware of any due process that would apply  
5 with respect to the part of the order that  
6 922(g)(8) cares about, the one that says you  
7 cannot abuse that person. And -- and so, in  
8 that sense, there's no due process claim we  
9 could raise.

10           So that's -- so that's the thing.  
11 Congress has taken a big right, the Second  
12 Amendment, and has --

13           JUSTICE GORSUCH: You're -- you're not  
14 saying that before a protective order is  
15 entered, there's no due process rights that an  
16 individual has, are you? I mean, is that the  
17 position you really want to take?

18           MR. WRIGHT: For a (g)(8) order, so an  
19 order that forbids further abuse.

20           JUSTICE GORSUCH: I'm talking about in  
21 state court.

22           MR. WRIGHT: Right. Right. So --

23           JUSTICE GORSUCH: You're saying  
24 there's no -- the Due Process Clause is silent  
25 before a protective order can be entered against

1 an individual?

2 MR. WRIGHT: To the extent that the  
3 only remedy granted by that order is forbidding  
4 abuse, forbidding physical abuse, I don't think  
5 that you have any right to due process before  
6 that is entered because you have no right to  
7 abuse anyone. It's -- it's just not. The  
8 incentives --

9 JUSTICE GORSUCH: You have no right to  
10 murder someone, but we give you a trial.

11 MR. WRIGHT: Right. So --

12 JUSTICE GORSUCH: Right? And so  
13 there's always process before a right or life,  
14 liberty, or property is taken from you of some  
15 kind. What measure of due process depends upon  
16 facts, circumstances -- I -- I'm not -- I'm not  
17 talking about that. But I -- I'm -- I'm  
18 surprised to hear you say that the Fifth and the  
19 Fourteenth Amendments' Due Process Clauses don't  
20 apply to an individual who is being subject to a  
21 protective order.

22 MR. WRIGHT: I think depending on what  
23 the protective order required. So those --  
24 those probably do kick in in the same way that  
25 if this were a -- a true disarmament proceeding.

1 So this Court I don't think has announced the  
2 criteria that would be required in something  
3 like a red flag law, but something like that.  
4 So it's -- everyone's attention is focused on  
5 the loss of firearm rights.

6 There would be certain requirements.  
7 And -- and we could argue about it. I would  
8 submit it would probably need to be clear and  
9 convincing evidence, but it would certainly need  
10 to be fundamentally fair because this is a  
11 fundamental right.

12 That's not what any state does for a  
13 civil protective order. There's typically no  
14 incentive and often no real opportunity to  
15 contest the issuance of the order. And in many  
16 cases, people are happy to consent to the orders  
17 because they don't want to be around the person  
18 anymore either.

19 JUSTICE BARRETT: But, counsel, I just  
20 want to clarify, you're right you don't have,  
21 you know, the right to commit violence against  
22 anyone, but this protective order says a whole  
23 lot more than that. I mean, he's prohibited  
24 from communicating with his family, with going  
25 within 200 yards of her residence. So I think

1 that paints a little bit of a different picture  
2 in the due process rights that might apply.

3 MR. WRIGHT: I agree, Your Honor, that  
4 the Due Process Clause would impose limits  
5 against involuntary termination of access to  
6 one's children, for -- for instance. So I don't  
7 mean to suggest -- and -- and, Justice Gorsuch,  
8 if that's what I implied, I didn't mean to. I  
9 don't mean to suggest that the Due Process  
10 Clause doesn't -- it doesn't matter what happens  
11 in one of these proceedings.

12 JUSTICE JACKSON: So, counsel --

13 JUSTICE KAGAN: Mr. Wright, may -- may  
14 I ask just about your basic argument here? And  
15 I'm just going to read you a sentence from the  
16 brief, and I want to know whether, you know,  
17 that's your essential argument.

18 It says, "...the Government has yet to  
19 find even a single American jurisdiction that  
20 adopted a similar ban while the founding  
21 generation walked the earth."

22 So is that what we should be looking  
23 for? And if we don't find that similar ban, we  
24 say that the government has no right to do  
25 anything?



1                   MR. WRIGHT: Your Honor, I think  
2                   that's largely what Bruen says. However, I  
3                   don't think it has to be so narrow. So, if the  
4                   government could affirmatively prove from the  
5                   historical tradition of either American firearms  
6                   laws or even I would be willing to spot them the  
7                   way that we have treated other fundamental  
8                   constitutionally protected rights, if they could  
9                   tie it to one of those historical traditions,  
10                  that would be good enough under the logic of  
11                  Bruen, if not the exact rule --

12                  JUSTICE KAGAN: I guess I'm not quite  
13                  sure what the answer means. I mean, I took that  
14                  sentence to be saying we're looking for a  
15                  regulation that even if it's not every jot and  
16                  tittle is essentially targeting the same kind of  
17                  conduct as the regulation under review.

18                  And, you know, the -- the Solicitor  
19                  General told us that was the wrong approach,  
20                  that what Bruen really directs courts to do is  
21                  to think about the various principles that were  
22                  operating at that time, whether those principles  
23                  gave rise to a particular regulation that was  
24                  near-identical to the one under review.

25                  And -- and so I guess I'm asking you

1 to comment on those two ways of understanding  
2 Bruen.

3 MR. WRIGHT: I think both  
4 methodological positions lead to the same  
5 result, which is affirmance of the decision  
6 below. It's not just something that is about  
7 domestic violence or a ban that's punishable by  
8 exactly 10 years. In other words, that's the  
9 way that some of the amici have described what  
10 we're arguing for.

11 I'm saying there's no ban, there's no  
12 history of bans for people who were part of the  
13 national community. They don't exist. I'm  
14 saying that the plain text of the Second  
15 Amendment, the way that it distinguished from  
16 the English common-law tradition, I'm saying  
17 that the early commentators like St. George  
18 Tucker and William Rawle, they all said, if  
19 you're just keeping the firearm --

20 JUSTICE KAGAN: So -- but that does  
21 suggest, I mean, that you're looking for a ban  
22 on domestic violence. And, you know, 200 some  
23 years ago, the problem of domestic violence was  
24 conceived very differently. People had a  
25 different understanding of the harm. People had

1 a different understanding of the right of  
2 government to try to prevent the harm. People  
3 had different understandings with respect to  
4 pretty much every aspect of the problem.

5 So, if you're looking for a ban on  
6 domestic violence, it's not going to be there.

7 MR. WRIGHT: Justice Kagan, I'm  
8 looking for a ban. I'm looking for a ban, some  
9 criminal punishment for just the keeping of a  
10 firearm. That's what I'm looking for. And it's  
11 based not on the loss of status of citizenship,  
12 you know, or being outside the community. I'm  
13 looking for a ban that applies to a  
14 rights-holding American citizen. I mean, that's  
15 -- I'd start with that.

16 Short of that, again -- and I suspect  
17 the response to that is this Court has  
18 tentatively approved felon in possession. But  
19 felons are so different. They have all kinds of  
20 process. There's a long tradition of denying  
21 people convicted of infamous crimes all manner  
22 of rights of citizenship or not.

23 So, if I could just set that aside,  
24 there's no ban because, at the time, when the  
25 people of the time actually wrote about it, they

1 wrote that there's no right to misuse a firearm.  
2 So the allegations that have been made against  
3 my client, we do not contend that behavior is  
4 protected by the Second Amendment.

5 The behavior that's protected is the  
6 keeping of arms. The behavior that is also  
7 protected is the carrying of arms, but I would  
8 concede -- I would concede there is a strong  
9 historical tradition of providing more  
10 restrictions against the right to public carry  
11 because that's where you encounter other people.

12 This is someone who's keeping a  
13 firearm in his own home. The oldest American  
14 tradition at least of a federal government,  
15 someone who everyone agreed was subject to the  
16 Second Amendment, passing that kind of law, was  
17 1968. This tie is older than that so-called  
18 tradition, Your Honor. It -- it just -- it's  
19 20th century, late 20th century. And so we  
20 disagree at a very fundamental level of whether  
21 there is this tradition.

22 JUSTICE ALITO: So you -- your  
23 argument is that except for someone who has been  
24 convicted of a felony, a person may not be  
25 prohibited from possessing a firearm in the

1 home, is that correct?

2 MR. WRIGHT: I would add one more  
3 caveat to it, Justice Alito, and that is if  
4 severe criminal punishment will result, because  
5 that is something that Heller itself and Bruen  
6 itself took into this balance, because what --  
7 the right that's protected is the right of  
8 someone who, by keeping the firearm, you know,  
9 is used -- for lawful -- someone who's keeping a  
10 firearm for lawful purposes, how does this  
11 regulation infringe on that? If it is a small  
12 fine or even loss of the weapon, maybe that  
13 doesn't violate that right. You could make it  
14 illegal, you're prohibited from keeping a  
15 weapon, but if we figured out that you had a  
16 weapon in your bedroom, you -- you -- you may  
17 have to pay for it, you know, but you're not  
18 going to go to prison for 10 or 15 years.  
19 You're not going to get felony liability.

20 I think all of those things together  
21 are incredibly important about this ban because  
22 they are -- it is not based on loss of rights of  
23 citizenship. It is applied against  
24 rights-holders. It is a total ban. And it is  
25 punishable by an incredible amount of prison

1 time.

2 JUSTICE ALITO: So let me give you  
3 this example. Suppose a state judge determines  
4 after a hearing that a man has repeatedly  
5 threatened to shoot the members of his family,  
6 has brandished the gun, has terrified them, and  
7 orders the man not -- enters a restraining order  
8 preventing that man from possessing a firearm  
9 any place, including in the home.

10 Is that constitutional?

11 MR. WRIGHT: I think the answer is  
12 probably yes if he -- I think it probably is. I  
13 would want to know more about what the  
14 historical tradition showed, but, certainly,  
15 courts have always had broad power against the  
16 people who are brought before them. And --

17 JUSTICE ALITO: So --

18 MR. WRIGHT: -- I think that would be  
19 consistent with the historical --

20 JUSTICE ALITO: So the difference you  
21 see between that order and the prosecution for  
22 -- for violating the order is the fact that the  
23 latter imposes a -- a felony punishment?

24 MR. WRIGHT: That's one difference,  
25 and it's an important difference under this

1 Court's case law.

2 Another difference is that the  
3 defendant had a real opportunity, you know, in  
4 standing before the court to say either, number  
5 one, I didn't do that or, number two, something  
6 was wrong with me, I'll never do that again.  
7 But -- and I'll move across the country so I can  
8 assure you that they will be safe, but I'm very  
9 frightened to be, you know, without my arms. So  
10 you would have a chance to entreat with the  
11 person who's putting in the restriction.

12 If the restriction itself was  
13 unlawful, the person would have a chance to  
14 appeal it to a higher authority, to an appellate  
15 court, and say this judge got it wrong, you  
16 know, this is not lawful either under the  
17 Constitution or under this state's substantive  
18 law.

19 All of those things are different in  
20 the situation that you describe, and I think  
21 they are constitutionally significant  
22 differences between that and what we have here.

23 CHIEF JUSTICE ROBERTS: So are you  
24 suggesting, if there's a sufficient showing of  
25 dangerousness, that could be the basis for

1       disarming even with respect to possession in the  
2       home?

3                   MR. WRIGHT:  Again, it's a -- it's a  
4       much closer question for me because it is -- I  
5       have yet to see a -- a historical example of  
6       that applied against a citizen.  And it would  
7       certainly be a last resort type of situation.  
8       So --

9                   CHIEF JUSTICE ROBERTS:  Well, to the  
10      extent that's pertinent, you don't have any  
11      doubt that your client's a dangerous person, do  
12      you?

13                  MR. WRIGHT:  Your Honor, I would want  
14      to know what "dangerous person" means.  At the  
15      moment --

16                  CHIEF JUSTICE ROBERTS:  Well, it means  
17      someone who's shooting, you know, at people.  
18      That's a good start.

19                  (Laughter.)

20                  MR. WRIGHT:  So -- so that's fair.  
21      I'll say this.  If a -- imagine a statute that  
22      had been written that was the "What Zackey  
23      Rahimi Has Been Accused of" statute, and very  
24      prescient legislatures, you know, way ahead of  
25      the game.



1           If you've done all of these nine  
2 things and it's proven to a constitutionally  
3 significant level of abstraction, you don't get  
4 to keep your gun, we're going to come and take  
5 it from you, and -- and you just -- sorry, you  
6 just don't. Constitutional, 100 percent.

7           JUSTICE KAGAN: I thought you just  
8 said no. I thought you said there's no history  
9 of any kind of ban for anything that doesn't  
10 relate to felonies.

11           MR. WRIGHT: And -- and -- and I -- I  
12 want to be clear that the -- there is no one  
13 that I have found anyway. I think it would stem  
14 from a court's either historical equitable  
15 powers or, you know, the rights of the  
16 government to literally protect someone from  
17 imminent danger to life and limb.

18           There are examples, some of the early  
19 justice of the peace manuals that talk about, if  
20 you see someone who is on the way to commit a  
21 crime with a weapon, you can take the weapon  
22 away from them and you don't have to institute  
23 proceedings immediately. However, you do have  
24 to institute them pretty quick after that.

25           JUSTICE BARRETT: I'm so confused,

1 because I thought your argument was that there  
2 was no history or tradition, as Justice Kagan  
3 just said, of this kind -- of -- of disarmament  
4 in this circumstance. But now it kind of sounds  
5 like your objection is just to the process.

6 Like, are you making Judge Ho's  
7 argument only?

8 MR. WRIGHT: No, Your Honor, I'm not  
9 making Judge Ho's argument only. The -- the law  
10 that's before us right now is a ban. It's a ban  
11 that's passed by a legislature. And it -- it is  
12 -- you -- you can't get around it. You -- you  
13 can't even ask the state court to say, you know,  
14 I'll accept a protection order, a stay-away  
15 order, just give me permission to keep firearms  
16 for my own self-defense. That will not prevent  
17 this ban from kicking in. And it has severe  
18 penalties that result from it, and it applies  
19 everywhere, even in the home.

20 I think all of those things together  
21 make this statute unconstitutional. I  
22 understood the question to be, what about  
23 something else? Would that be constitutional?  
24 And I think so, but we would need to know --  
25 we'd need to do a full workup on the history and

1 tradition that supported that. You know, that's  
2 -- that's something that I don't think this  
3 Court can answer in this case because there's no  
4 such law before the Court.

5 CHIEF JUSTICE ROBERTS: Well, but  
6 it -- it's a facial challenge.

7 MR. WRIGHT: Right.

8 CHIEF JUSTICE ROBERTS: And I  
9 understand your answer to say that there will be  
10 circumstances where someone could be shown to be  
11 sufficiently dangerous that the firearm can be  
12 taken from him.

13 MR. WRIGHT: Yes.

14 CHIEF JUSTICE ROBERTS: And why isn't  
15 that the end of the case?

16 MR. WRIGHT: Because --

17 CHIEF JUSTICE ROBERTS: All you need  
18 to do is show that there are circumstances in  
19 which the statute can be constitutionally  
20 applied.

21 MR. WRIGHT: Because this statute is  
22 -- it -- it doesn't take anyone's firearm from  
23 them. I mean -- I mean, that's -- that's one  
24 way that it would be different, because there is  
25 a historical tradition of separating people from

1 their firearms when there's an imminent threat  
2 of lawful violence on the way to do it.

3           And I think, again, it's consistent  
4 with the Court's traditional equitable powers  
5 that if nothing short of surrender would protect  
6 life and limb, the court's going to be able to  
7 order surrender in the same way that if the  
8 police see that someone has, you know, suicidal,  
9 they have reason to believe they're suicidal, of  
10 course, the police can go and take the firearm  
11 away from them. They can't keep it forever, and  
12 they can't put somebody in prison for 10 years  
13 because he had the firearm there.

14           JUSTICE JACKSON: So I hear you  
15 isolating bans by the legislature as opposed to  
16 circumstances in which a court might have  
17 particular facts in this way.

18           Is that what you're doing? You're  
19 sort of saying, bans by the legislature are a  
20 different thing than we have facts of imminent  
21 potential danger and someone runs to the court.  
22 There might be a history and tradition of that,  
23 but you see that as different than a ban by the  
24 legislature such as what is happening here?

25           MR. WRIGHT: Yes.

1 JUSTICE JACKSON: All right. So I  
2 guess I'm just trying to understand, maybe this  
3 is an aside, but your brief does indicate that  
4 you are aware of historical bans, laws banning  
5 firearm possession by disfavored categories of  
6 people.

7 And -- and the government talks about  
8 this as well. And so do you agree with the  
9 government that those kinds of bans we don't  
10 look at or care about when we're trying to  
11 figure out whether or not there's history and  
12 tradition here?

13 MR. WRIGHT: Yes. And I don't want to  
14 speak for my friend. I understood the  
15 government's position to be we don't look at  
16 those laws in this case. It sounds like they  
17 may still be on the table for some other person  
18 who's outside the political community.

19 I say you don't look at them at all  
20 because, number one, they're awful, they're  
21 terrible laws. We should not give credence to a  
22 suggestion that a -- a legislator in 1870 in the  
23 south -- you know, we should -- so we should not  
24 --

25 JUSTICE JACKSON: But we have a

1 history and traditions test. I -- I guess I --  
2 I'm a little troubled by having a history and  
3 traditions test that also requires some sort of  
4 culling of the history so that only certain  
5 people's history counts.

6 So what do we do with that? Isn't  
7 that a flaw with respect to the test?

8 MR. WRIGHT: Your Honor, I think what  
9 you do is the Bruen test starts with the text.  
10 And so, ultimately, historical tradition as I  
11 understand it is something the Court does to  
12 make sure its textual interpretation is correct  
13 and consistent with the original understanding  
14 of the amendment.

15 So, in the situation that you're  
16 describing, those laws, they were not people who  
17 were part of the community. They never -- they  
18 weren't seen as the people. And when these laws  
19 were challenged, including in this very Court,  
20 that was the reason. Well -- well, this Court  
21 was not dealing with a disarmament law but other  
22 laws that were -- targeted those groups.

23 JUSTICE JACKSON: So does that mean  
24 only Reconstruction Era as opposed to -- sorry,  
25 only Foundational Era as opposed to

1 Reconstruction Era sources are on the table  
2 here?

3 MR. WRIGHT: For purposes of the  
4 Second Amendment, as -- and applied against the  
5 federal government, yes, absolutely, it is only  
6 Founding Era sources and immediately after the  
7 Founding Era, so people who understood they were  
8 bound by that.

9 Like, again, I don't see these two  
10 steps of Bruen as completely separate pieces.  
11 You know, you pass the text point and you move  
12 on. The Court is trying to get at the meaning  
13 of the text, the original public meaning of the  
14 text.

15 JUSTICE JACKSON: And in your view  
16 with respect to domestic violence, are we  
17 looking for history and tradition in the  
18 Reconstruction Era about how regulation was  
19 happening in the circumstance of domestic  
20 violence or no?

21 MR. WRIGHT: I don't --

22 JUSTICE JACKSON: I mean, the  
23 government says it can be done at the level of  
24 regulation of dangerous people with respect to  
25 firearms. But you seem to be suggesting -- and

1 I think this is going back to a question that  
2 Justice Kagan asked -- that what we're looking  
3 for is Reconstruction Era sources, I suppose,  
4 that applied to the regulation of white  
5 Protestant men related to domestic violence.

6 Is that sort of the level that we are  
7 focused on when we're trying to find a history  
8 and tradition?

9 MR. WRIGHT: No, Your Honor. And --  
10 and -- and I may not have been clear before. I  
11 think it's the Founding Era and not the  
12 Reconstruction Era when we're talking about the  
13 -- the federal government.

14 JUSTICE JACKSON: I apologize, the  
15 Founding Era.

16 MR. WRIGHT: And -- and -- and it has  
17 got to be the people, someone who is -- would  
18 have been understood to be part of the people, a  
19 rights-holding citizen of the United States.

20 JUSTICE JACKSON: Right. The people  
21 doing what, though? Do we drill down further  
22 and say it's the people, which in that case did  
23 not include all the people, but, fine, we've  
24 identified the relevant people who are being  
25 regulated. Is it enough that they were being



1 regulated with respect to just dangerousness?  
2 Or are we looking for a regulation concerning  
3 this set of circumstances?

4 MR. WRIGHT: It doesn't have to be  
5 specific to domestic violence. I'm not saying  
6 that.

7 JUSTICE JACKSON: Okay.

8 MR. WRIGHT: Violence, interpersonal  
9 violence, dueling, any -- robbery. The -- so,  
10 in other words, society understood violence,  
11 understood dangerous people. Danger existed.  
12 But they rejected at every point the type of  
13 dangerousness disarmament principle that the  
14 government is advocating.

15 JUSTICE KAGAN: Do you think that the  
16 Congress can disarm people who are mentally ill,  
17 who have been committed to mental institutions?

18 MR. WRIGHT: Setting aside an  
19 enumerated powers problem, so they're in the  
20 District of Columbia or something like that,  
21 there's definitely a tradition for restricting  
22 sale or provision of weapons to the mentally ill  
23 that -- the -- all the -- all the -- all the  
24 examples that the government has cited are late.  
25 They're post-Civil War sources, I think, for

1 that. If not -- so I think maybe is the answer  
2 to the tradition.

3 JUSTICE KAGAN: I'll tell you the  
4 honest truth, Mr. Wright. I feel like you're  
5 running away from your argument, you know,  
6 because the implications of your argument are  
7 just so untenable that you have to say no,  
8 that's not really my argument.

9 I mean, it just seems to me that your  
10 argument applies to a wide variety of disarming  
11 actions, bans, what have you, that -- that we  
12 take for granted now because it's -- it's so  
13 obvious that people who have guns pose a great  
14 danger to others and you don't give guns to  
15 people who have the kind of history of domestic  
16 violence that your client has or to the mentally  
17 ill or what have you.

18 So I -- I guess -- you know, I guess  
19 I'm asking you to clarify your argument because  
20 you seem to be running away from it because you  
21 can't stand what the consequences of it are.

22 MR. WRIGHT: Your Honor, I am running  
23 away from interest balancing because I  
24 understand that that same sort of argument could  
25 have been made in Bruen, could have been made in

1 Heller, could have been made in McDonald, and,  
2 in fact, were made in all of those cases, right?

3           Legislatures have made a judgment that  
4 it is dangerous to have people carrying weapons  
5 about. Legislatures made a judgment it's  
6 dangerous for handguns specifically to be  
7 possessed. And the Court didn't defer to those  
8 late or mid-20th century judgments or even early  
9 20th century judgments about dangerousness in  
10 that scenario.

11           Instead, the Court said we are going  
12 to follow our understanding of the original  
13 public meaning of the text and -- as illuminated  
14 by the historical tradition of firearms  
15 regulation at the margins. So I -- I guess  
16 that's what I want to say, is that if there's no  
17 such tradition -- so if you couldn't -- I -- I'm  
18 supposing that we would find examples of people  
19 having firearms removed from them if they are an  
20 imminent danger to others.

21           That historical record has not been  
22 built in this case because that's not the kind  
23 of law that we have. I do believe that it's  
24 there, and I could give some additional examples  
25 where I think we could find support for that.

1 But, if not, if there were no historical support  
2 for that, we would be left with what the text  
3 says, which is you have a right to keep arms.

4 And so, in that sense, that would --  
5 that would end.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Justice Thomas, anything further?

9 JUSTICE THOMAS: Briefly. You -- just  
10 to be clear, what you're arguing, you say that  
11 the proceedings in state court -- let's assume  
12 that -- that there was no 922 consequence. What  
13 would be the effect of that order? You -- would  
14 you -- you would not be challenging that order?

15 MR. WRIGHT: Well, I wouldn't be  
16 challenging the order, but --

17 JUSTICE THOMAS: Yeah.

18 MR. WRIGHT: -- but -- but -- but Mr.  
19 Rahimi might.

20 JUSTICE THOMAS: My -- my question --  
21 the reason I'm asking you that, you made the  
22 point that that was a -- a small matter and it  
23 has huge consequences. I think you said that  
24 even if Respondent moved to another state or  
25 across the country, the consequences would be

1 the same, even though he would present no danger  
2 in Texas.

3 And just to be clear, are you --  
4 you're not challenging the state court aspect of  
5 this?

6 MR. WRIGHT: That's -- that's correct,  
7 Your Honor.

8 JUSTICE THOMAS: But solely -- and  
9 your language was it was a per se violation or  
10 automatic violation of 922, and that is your  
11 problem?

12 MR. WRIGHT: The -- the possession of  
13 firearms. It's the bootstrapping of what is a  
14 proceeding that is one-sided and does not have  
15 any kind of historical connection to the loss of  
16 citizenship rights, bootstrapping that as like a  
17 conclusive presumption to a right that the  
18 federal Constitution guarantees against  
19 Congress.

20 JUSTICE THOMAS: So there was some  
21 talk about possibly challenging this under the  
22 Due Process Clause later on or a as-applied  
23 challenge to this. How would -- how would you  
24 see that taking place if this is an automatic  
25 disarmament?

1           MR. WRIGHT: I -- I will be interested  
2 to read how it would proceed. My understanding  
3 is that you can't raise it in a 922(g)  
4 prosecution. I base that on Lewis and on what  
5 we understand Congress's intent to be in  
6 enacting these categorical bans.

7           In the state court itself, when it's  
8 been raised in state courts, they typically  
9 point to the federal statute and say, well,  
10 Congress -- you know, Congress, you know, said  
11 it's okay, so -- so, you know, if you have this  
12 kind of order, then you lose. So I think  
13 922(g)(8) plays a role in that sense.

14           And if the issue is that you have tied  
15 a larger constitutional right to sort of a  
16 smaller right, it's not clear what -- what  
17 imposes that due process requirement on the  
18 state court. And so I think that this was an  
19 agreed order because he doesn't have counsel, he  
20 doesn't have the ability to do it, and -- and --  
21 and he's ultimately willing, I guess, to -- to  
22 -- to submit, maybe to avoid the attorneys'  
23 fees, which is a way that they apparently get  
24 people to agree to these orders.

25           That would not be a fundamentally fair

1 system if it were a red flag or a disarmament  
2 provision.

3 CHIEF JUSTICE ROBERTS: Justice Alito?  
4 Justice Sotomayor?  
5 Justice Kagan?  
6 Justice Gorsuch?  
7 Justice Kavanaugh?

8 JUSTICE KAVANAUGH: One specific thing  
9 in the government's reply brief that I want to  
10 get your response to. At page 21 of the reply  
11 brief, the government notes the background check  
12 system that Congress has created to prevent the  
13 sale of firearms to prohibited persons.  
14 Domestic violence protective orders are promptly  
15 incorporated into that system. It's resulted in  
16 more than 75,000 denials, the government says,  
17 based on these protective orders in the last 25  
18 years.

19 According to the government, under  
20 your argument, that system could no longer stop  
21 persons subject to those domestic violence  
22 protective orders from buying firearms. Just  
23 want to get your response to that.

24 MR. WRIGHT: I think that's wrong for  
25 a couple of reasons, Justice Kavanaugh. First

1 of all, the same system incorporates state  
2 prohibitions against firearm possession, and so,  
3 if there is a lawful provision imposed by state  
4 law or by a judge in a court, it could be  
5 incorporated into the background check system.

6 Second, I would have to concede that  
7 there is a historical tradition of limiting who  
8 citizens, people within the community, could  
9 provide weapons to outside the community, if you  
10 will. And so it could be that that historical  
11 tradition would support a restriction on  
12 commercial sale of arms. That's an example that  
13 -- LRJ was one that's -- maybe has a different  
14 framework. So that would -- that's an argument  
15 that could be made in favor of that sort of  
16 provision or sort of background check process  
17 that would not go away with 922(g)(8).

18 And just as a highly technical matter,  
19 I understand that to be a function of 922(d)(8),  
20 which, again, is restricting what the licensed  
21 firearms dealer can do, not (g)(8), which is the  
22 restriction on possession by the citizen. This  
23 is what my client went to prison for.

24 And so I -- but, on the other hand, if  
25 you have a right to possess a firearm, then,



1 certainly, the acquisition of a firearm is  
2 closely connected to that and constitutional  
3 implications would come into play. So I just  
4 don't have a firm view on whether or not a law  
5 that operated more like some of the earliest  
6 20th century laws that sort of dealt with  
7 acquisition of firearms, that might survive  
8 constitutional scrutiny.

9 JUSTICE KAVANAUGH: So it's possible  
10 the government's correct in what it says?

11 MR. WRIGHT: It's possible? No, I  
12 don't think --

13 JUSTICE KAVANAUGH: Is that what you  
14 just said?

15 MR. WRIGHT: No, I don't think it's  
16 possible. It is possible that it would be  
17 unconstitutional to deny people the right to  
18 purchase a firearm from a licensed dealer, yes,  
19 I think that is possible.

20 But I suspect that both existing law  
21 and constitutional laws would allow many of  
22 those same people to be denied if we worked our  
23 way through the relevant provisions that are  
24 keeping them from doing it.

25 JUSTICE KAVANAUGH: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: So the restraining  
4 order prevented your client from possessing a  
5 firearm, and it also immediately suspended his  
6 handgun license. Was that unconstitutional?

7 MR. WRIGHT: Your Honor, just to take  
8 issue with the second part of the question  
9 first, that language, suspending handgun  
10 license, that's in all of these Tarrant County  
11 orders. That's part of the boilerplate --

12 JUSTICE BARRETT: But, still, it says  
13 it's ordered that his handgun license is  
14 immediately suspended.

15 MR. WRIGHT: Right.

16 JUSTICE BARRETT: So just let's --  
17 let's go with the -- with the order's language.  
18 Did that violate the Second Amendment, putting  
19 922 aside?

20 MR. WRIGHT: I think, to answer that  
21 question, then we -- we would bring the whole  
22 record, the record that was before the court and  
23 terms, and -- and the client agreed to the  
24 order. So it would be very difficult to --

25 JUSTICE BARRETT: But you're going --

1 you're going back to the process.

2 MR. WRIGHT: Right.

3 JUSTICE BARRETT: You know, she had  
4 the affidavit. Let's -- let's imagine they --  
5 they go back and forth. Let's -- let's imagine  
6 it's a more fulsome process and she actually  
7 testifies and he cross-examines her. Whatever.  
8 Let's assume there's no process problem.

9 Would it be unconstitutional then to  
10 deprive your client of his handgun license and  
11 his -- his -- prohibit him from possessing a  
12 firearm? Because I assume that -- you've said  
13 there's no analogue of -- of this kind of  
14 domestic violence thing.

15 MR. WRIGHT: Right. Or the analogue  
16 would be in terms of what courts could do  
17 through equitable powers otherwise. I think  
18 that would have to be the analogue.

19 JUSTICE BARRETT: But -- but they  
20 can't, through their equitable powers, do  
21 something that would violate the Constitution,  
22 right?

23 MR. WRIGHT: Right. Right. So, if  
24 the finding was that nothing short of surrender  
25 of firearms would prevent damage to life and

1 limb, that would be constitutional. So I -- I  
2 don't know if that answers your question or not.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: I guess I'm just  
6 trying to get a clear answer to whether or not  
7 we're looking for historical analogues related  
8 to domestic violence or something broader.

9 You -- you -- you suggested -- and  
10 your brief I'm now revisiting suggests that the  
11 government cites no laws punishing members of  
12 the American political community for possessing  
13 firearms in their own homes based on  
14 dangerousness, irresponsibility, crime  
15 prevention, violent history, or any other  
16 character trait.

17 So you just say there are no bans that  
18 relate to any of those things.

19 MR. WRIGHT: That's my understanding  
20 of the historical record that we have in this  
21 case, yes.

22 JUSTICE JACKSON: And if the  
23 government were to convince us that there was a  
24 ban related to, say, dangerousness, do you lose?  
25 I thought your point was, even if there is some

1 dangerousness tradition, it has to be about  
2 domestic violence.

3 MR. WRIGHT: That's not my point, Your  
4 Honor.

5 JUSTICE JACKSON: Okay.

6 MR. WRIGHT: That's -- that's --  
7 that's not something that we're -- people could  
8 argue that, but I don't think anybody -- none of  
9 our amici have argued that. Certainly, there's  
10 some point at which someone could be separated  
11 from a firearm.

12 This law doesn't do that at all for  
13 anyone. This is just: Can you be punished for  
14 keeping a firearm? And I think that the -- the  
15 text of the Constitution says no, the early  
16 commentators would say no at least as far as  
17 Congress doing it, and the historical tradition  
18 all say no.

19 So, in terms the level of abstraction,  
20 I don't see how this case presents that because  
21 there's just nothing, no bans. No bans against  
22 rights-holders.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Rebuttal, General?

2 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

3 ON BEHALF OF THE PETITIONER

4 GENERAL PRELOGAR: Thank you, Mr.

5 Chief Justice.

6 My friend began his argument this  
7 morning in response to a question from Justice  
8 Kagan saying that he does read Bruen to require  
9 the government to come forward with a precise  
10 historical analogue in order to justify a  
11 modern-day firearms regulation.

12 I think that is a clearly incorrect  
13 reading of Bruen. Unfortunately, it's a  
14 profound misreading that many lower courts have  
15 been adopting. And I think that it's important  
16 for the Court to understand the destabilizing  
17 consequences of that reading in the lower  
18 courts.

19 Just last week, a court invalidated  
20 Section 922(g)(1), the felon prohibition  
21 statute, on its face as applied to the most  
22 violent and horrific crimes imaginable on the  
23 theory that the government didn't have a  
24 sufficiently precise historical analogue to  
25 justify a permanent ban on felons.

1           Many courts now, several district  
2 courts, have credited as-applied challenges to  
3 Section 922(g)(1) by armed career criminals who  
4 have multiple convictions for aggravated  
5 assault, drug trafficking, armed robbery,  
6 clearly violent crimes, because we don't have a  
7 sufficient historical analogue disarming those  
8 subject to precisely those crimes at the  
9 Founding. And a court has also invalidated on  
10 its face the provision of federal law that  
11 prohibits possession of firearms with  
12 obliterated serial numbers, again, on the theory  
13 that we don't have a Founding Era analogue that  
14 is sufficiently precise that says you have to  
15 serialize firearms possession.

16           I think that those are clearly  
17 untenable results. They are profoundly  
18 destabilizing, and Bruen doesn't require them.

19           Once the Court corrects the  
20 misinterpretation of Bruen, then I think the  
21 constitutional principle is clear. You can  
22 disarm dangerous persons. And under that  
23 principle, Section 922(g)(8) is an easy case.  
24 It's an easy case for three reasons.

25           First, it requires an individualized

1 finding of dangerousness. Now I think I heard  
2 my friend to concede today that those kinds of  
3 individualized findings of dangerousness do  
4 suffice for disarmament, and he questions  
5 whether the process in state court judicial  
6 proceedings is sufficient.

7 But that ultimately is a procedural  
8 claim that should be adjudicated under the Due  
9 Process Clause, and I think that it ignores two  
10 fundamental features that are relevant here.  
11 First, the Section 922(g)(8) guarantees notice  
12 and a hearing. It only permits disarmament in  
13 those situations, so the most fundamental  
14 protection of due process is validated under  
15 this provision.

16 And, second, that there is a  
17 presumption of regularity that exists in this  
18 context. And to -- to say or suggest that all  
19 of these state court procedural orders,  
20 protective orders, are fundamentally flawed or  
21 inherently unreliable, I think, would override  
22 that presumption in this case and be profoundly  
23 unsettling for the state courts that are on the  
24 front lines here trying to protect victims of  
25 domestic violence.



1           I think as well that these principles  
2 equally demonstrate subparagraph (c)(2)'s  
3 validity. We think that there is an inherent  
4 requirement that the Court find that the threat  
5 of physical force is likely to occur in order to  
6 justify entering that kind of judicial finding,  
7 and that provides a basis to uphold Section  
8 922(g)(8) with respect to all of its  
9 applications.

10           The second reason why this is an easy  
11 case is because there is a legislative  
12 consensus. It is not just Congress, but 48  
13 states and territories share this view that  
14 armed domestic violence needs to be guarded  
15 against and that disarmament is a permissible  
16 legislative response. And so I think that  
17 further fortifies the congressional judgment.

18           And the third reason why Section  
19 922(g)(8) should be an easy case is because it  
20 does guard against a profound harm. A woman who  
21 lives in a house with a domestic abuser is five  
22 times more likely to be murdered if he has  
23 access to a gun.

24           And it's not just the harms in the  
25 home. It extends to the public and to police

1 officers as well. I was struck by the data  
2 showing that armed -- that domestic violence  
3 calls are the most dangerous type of call for a  
4 police officer to respond to in this country.  
5 And for those officers who die in the line of  
6 duty, virtually all of them are murdered with  
7 handguns.

8 Section 922(g)(8) takes account of  
9 those concerns, and, here, history and tradition  
10 confirm common sense. Congress can disarm armed  
11 domestic abusers in light of those profound  
12 concerns.

13 So we'd ask the Court to correct the  
14 Fifth Circuit's methodological errors and  
15 reverse.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 The case is submitted.

19 (Whereupon, at 11:37 a.m., the case  
20 was submitted.)

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