No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZACKEY RAHIMI,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE PROFESSORS OF HISTORY AND LAW IN SUPPORT OF PETITIONER

TODD C. ZUBLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington DC 20037
(202) 663-6636

MARK D. SELWYN
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
(650) 858-6000
mark.selwyn@wilmerhale.com

JOSHUA A. VITTOR
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue
Suite 2400
Los Angeles, CA 90071
(213) 443-5300

REBECCA E. S. PRITZKER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8874

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INTEREST OF *AMICI CURIAE*

Amici curiae are 18 professors of English and American history and law who have studied the history of criminal law, firearm use and regulation, and domestic violence in the United States, as well as Founding Era constitutionalism.[1] Their scholarship has been published by major university presses and in leading law journals, awarded numerous prizes, and cited in opinions of the U.S. Supreme Court and Courts of Appeals and various state courts.

Amici's interest in this appeal arises from the great importance Second Amendment case law has placed upon a proper historical understanding of the scope of the right to keep and bear arms and of traditional firearms regulations. Given that case law, it is critical that this Court is presented with accurate and reliable accounts of the relevant history and traditions. As historians with extensive expertise about the relevant time periods and events, *amici* are well situated to assist the Court in properly evaluating the historical record relevant to this case. In addition to canvassing the relevant published primary sources and secondary scholarship, the brief makes reference to a wealth of unpublished primary sources that have not heretofore figured in lower court interpretations of the Second Amendment, but are vital to understanding the way law actually functioned and evolved throughout American history.

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[1] A complete list of *amici* is included in the appendix to this brief. No counsel for a party authored the brief in whole or in part. No person, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1994, responding to concerns about gun violence between family members and intimate partners at home, Congress passed 18 U.S.C. § 922(g)(8). Section 922(g)(8) prohibits a person from possessing a firearm if that person is subject to a restraining order, issued by a court after a hearing, pursuant to a determination that the person poses a credible threat to the physical safety of an intimate partner or child.

Last year, this Court held that the constitutionality of contemporary gun regulations under the Second Amendment turns on the degree to which such laws fit within the history and tradition of firearm regulation. *See New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S.Ct. 2111 (2022).

There is a longstanding American tradition of regulating firearms possession by people who are perceived to be dangerous or otherwise threaten to disrupt the public peace. The tradition of curtailing the right to keep and bear arms of those perceived as threats to public safety and peace dates back to the common law, and continued through the colonial and Founding Eras. In some cases, dangerousness was evidenced by acts of violence, such as those who participated in Shays' Rebellion. But actual violence was not a prerequisite to disarmament; the perceived *potential* for violence to others or disruption to the social order was enough.

Perceived dangerousness is not static—it evolves over time, and certainly some historical indicia of threats to the public peace would be considered troubling or even repugnant today. But under "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S.Ct. at 2126, dangerousness has always been a basis for restricting gun ownership. *See, e.g.*, Blocher & Carberry,

Historical Gun Laws Targeting "Dangerous" Groups and Outsiders, Duke Law School Public Law & Legal Theory Series No. 2020-80, at 11-12 (2020) ("*Dangerous Groups*"). Measured under *Bruen*'s standard—*i.e.*, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense," 142 S.Ct. at 2133—§ 922(g)(8)'s temporary disarmament of individuals who, after receiving due process, have been specifically found by a court to be dangerous imposes a far lower burden on Second Amendment rights than the preemptive and permanent disarmament of entire categories of people thought to be dangerous (without being given any due process) that is amply supported by the American historical tradition.

Evaluating how firearms and domestic violence were regulated in 1791 requires a deep understanding of the common law and contemporary local customs, since the relevant evidence is not always found exclusively in statutes and other forms of positive law. "Most judges in colonial America, particularly local, received no formal training and relied on legal manuals and practical experience to learn the law." Brewer, *By Birth of Consent* 369 (2005).

Regarding domestic violence, the common law principle of coverture gave husbands legal authority over their wives. Because they also acquired legal responsibility for their wives' actions, husbands were permitted to "correct[]" or "chastise[]" their wives. 1 Blackstone, *Commentaries on the Laws of England* (1769) 444. But this principle was subject to both limitation and criticism at the time of the Founding. *See id.* at 444-445 (the "power of correction was confined with reasonable bounds" and "a wife may now have security of the peace against her husband"); *cf.* Letter from Abigail Adams to John Adams (Mar. 31, 1776) ("Do not put such unlimited

power into the hands of the Husbands. Remember all Men would be tyrants if they could."). History dating back to before the nation's founding reflects some degree of social oversight and regulation of domestic violence to protect the public peace. Such efforts were typically handled as a matter of local jurisdictions through longstanding common law forms.

But regardless of the extent to which *domestic violence* was recognized as a general societal problem in the late eighteenth century, *domestic gun violence* was *not* so recognized. This is because firearms were neither as numerous nor as lethal as they are today. Guns also were very rarely involved in domestic disputes. The overwhelming percentage of spousal homicides were committed using fists, feet, and other types of close-at-hand objects (*e.g.*, rocks, sticks, etc.) rather than firearms. With advances in ease of use and lethality, and changes in cultural norms, guns became far more common in cases of domestic abuse. Changes relating to guns and the regulation of domestic violence coincided: as the tools of domestic violence became more practical and lethal, the means of regulating domestic violence shifted from the local level to the state and federal level.[2]

ARGUMENT

I. THE AMERICAN HISTORY AND TRADITION OF RESTRICTING GUN POSSESSION OF DANGEROUS INDIVIDUALS

There is a consistent history and tradition of many American colonies, states, territories, and municipalities imposing broad prohibitions on dangerous individuals

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[2] Perceived dangerousness was one basis for constitutional disarmament; *amici* do not contend—nor does history support—that it is a *necessary* condition.

possessing dangerous weapons—including firearms—to prevent harm to the public and to protect the civil order.

A. The Common Law Roots Of The American Tradition Of Disarming Dangerous People

The American history and tradition of restricting the use of dangerous weapons to prevent terror and protect civil order is grounded in centuries of English statutory and common law. As is well known, the Statute of Northampton provided that "no Man … [shall] come before the King's Justices … with force and arms, nor bring no force in affray of the peace … ." 2 Edw. 3, ch. 3 (1328). *See, e.g.*, *Chune* v. *Piott*, 80 Eng. Rep. 1161 (K.B. 1615) (noting that using weapons to terrorize the public was grounds for arrest—and, by extension, disarmament—under the Statute of Northampton).

Statutory regulation was part of a broader, more entrenched English legal tradition, in which virtually all criminal enforcement was done locally by justices of the peace who, following the prevailing legal manuals of the day, were empowered to preserve the public order, including by restricting the right to possess dangerous weapons. *See, e.g.*, Keble, *An Assistance to the Justices of the Peace for the Easier Performance of Their Duty* 224 (1683) ("[I]f any person … shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places … then any Constable … may take such Armour from him … and may also commit him to the Goal."); 1 Burn, *The Justice of the Peace and Parish Officer* 14 (1756) (if any justice "find any person in arms, contrary to the form of the statute, he may seize the arms, and commit the offender to prison …."). This authority extended to the granting of sureties of the peace, or peace bonds, which imposed conditions on dangerous

individuals (including in the context of domestic violence) under penalty of imprisonment.[3]

B. Founding Era Disarmament Of Dangerous Individuals

Protecting the public peace continued to motivate American society into the Founding Era, as reflected both in the legislative history of the Constitution and in American historical practices with respect to firearms before and after the Second Amendment.

At the state constitutional ratification conventions, delegates discussed and proposed amendments that restricted possession of firearms by individuals considered to pose a threat to public safety. For example, the minority proposal from the Pennsylvania state convention would have allowed disarming individuals who posed "real danger of public injury": "[N]o law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."[4] The Massachusetts proposal took a similar position, protecting gun rights for only "peaceable citizens": "And that the said Constitution be never construed to authorize Congress to ... prevent the people of the United States, *who are peaceable citizens*, from keeping

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[3] *See* 2 Burn, *The Justice of the Peace and Parish Officer* 467 (1756) ("[W]herever a person has just cause to fear, that another will burn his house, or do him a corporal hurt, as by killing or beating him … he may demand the surety of the peace against such person …."); Amussen, "*Being Stirred to Much Unquietness": Violence and Domestic Violence in Early Modern England*, 6 J. Women's History 70-89 (1994).

[4] *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents* (Dec. 12, 1787), *reprinted in* 2 Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971).

their own arms."[5] And the New Hampshire proposal allowed the disarmament of those who had demonstrated that they were not peaceable by having been part of a rebellion: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[6]

Although the language of these proposals was not ultimately included in the Second Amendment, they are nonetheless primary evidence of how the Founders conceived of the right to keep and bear arms. The Pennsylvania proposal was made by Anti-Federalists—those most suspicious of federal power—and all three proposals framed the right in more individualistic terms than the institutional militia context of other similar proposals. Yet even *these* proposals recognized that the right to keep and bear arms presumed an ability to enact reasonable limitations to protect public safety, including the disarmament of individuals perceived to be dangerous. *See Kanter* v. *Barr*, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting) ("[T]hese three proposals … are most helpful taken together as evidence of the scope of [F]ounding-[E]ra understandings regarding categorical exclusions from the enjoyment of the right to keep and bear arms."). Thus, across the constitutional spectrum, from radical Anti-Federalists to ardent Federalists, there was agreement that disarming those perceived to be dangerous was consistent with a right to keep and bear arms. Given the often-contentious nature of the

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[5] *See Massachusetts Ratifying Convention* (Jan. 31, 1788), *reprinted in* 2 Schwartz, *The Bill of Rights: A Documentary History* 675, 681 (1971) (emphasis added).

[6] Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1891).

disagreements between these factions during ratification, this level of accord is noteworthy.

Turning to the historical practices that preceded and followed the adoption of the Second Amendment, many states enacted legislation that *preemptively* disarmed people who were considered to pose dangers to themselves, others, or to the public at large. Some of these restrictions disarmed people who opposed or were neutral regarding the American Revolution. Journals from the Continental Congress describe the fierce commitment to this disarmament effort:

> Resolved, That it be recommended to the several assemblies, conventions, and councils or committees of safety of the United Colonies, *immediately to cause all persons to be disarmed within their respective colonies, who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies, against the hostile attempts of the British fleets and armies …* .[7]

With the possible exception of Rhode Island, every state in the early Republic followed the Continental Congress's lead and disarmed loyalists and non-associators (*i.e.*, colonists who refused to take an oath of allegiance or support volunteer military associations).[8]

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[7] 4 *Journals of the Continental Congress, 1774-1789*, at 205 (Ford ed., 1906) (emphasis added); *see also* 1 *Journals of the American Congress: From 1774 to 1788 in Four Volumes* 285 (1823).

[8] *See, e.g.*, 1776 Pa. Laws 11, § 1; 1777 Pa. Laws 61, ch. 21, §§ 2, 4; 1777 Va. Laws, ch. 3, in 9 *Hening's Statutes at Large* 281, 281-282 (1821); 1777 N.C. Sess. Laws 231, ch. 6, § 9; 1777 N.J. Laws 90, ch. 40, § 20; *see also* DeLay, *The Myth of Continuity in American Gun Culture* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4546050.

Massachusetts, for instance, adopted near-identical language to that discussed at the Continental Congress.[9]

George Washington spoke on this very point to the Pennsylvania Council of Safety in 1776, where he emphasized that an individual's right to bear arms ought to depend on the extent to which society could trust that person with such weapons:

> Instead of giving any Assistance in repelling the Enemy, the Militia have not only refused to obey your general Summons and that of their commanding Officers, but I am told exult at the Approach of the Enemy and our late Misfortunes. I beg leave to submit to your Consideration whether such people are to be intrusted with Arms in their Hands? If they will not use them for us, there is the greatest Reason to apprehend they will against us, if Oppertunity offers. But even supposing they claimed the Right of remaining Neuter, in my Opinion we ought not to hesitate a Moment in taking their Arms, which will be so much wanted in furnishing the new Levies.[10]

Such statements and disarmament provisions show that any individual right to keep and bear arms for self-defense was not unbounded and was always subject to potential disarmament regulations based on dangerousness to others or to society writ large, even in the absence of any direct unlawful act by a gun owner.

Many states also disarmed individuals based on specific religions, political views, ethnicities, or other

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[9] 1775-1776 Mass. Acts ch. 21, at 479.

[10] *From George Washington to the Pennsylvania Council of Safety*, Founders Online (Dec. 15, 1776), http://founders.archives.gov/documents/Washington/03-07-02-0276 (visited Aug. 20, 2023).

categories perceived by the state governments at the time as threatening to the public order. Some of these laws prohibited selling arms to American Indians and those from outside the jurisdiction.[11] Other laws targeted Catholics.[12] Still others targeted slaves and freed black people.[13] Even pacifist groups such as the Quakers were disarmed due to their refusal to pay taxes, and the perception that they therefore threatened the social order.[14] These restrictions undermine any historical view that the right to bear arms precluded the ability of the state to protect society against individuals perceived as dangerous and preserve social order.

Some of these regulations would obviously be repugnant today for the prejudices they embody. But although the specific individuals and groups viewed as dangerous or not law abiding were defined by the values of those with political power in the eighteenth century, and despite profound cultural changes in American society

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[11] *See, e.g.*, 1631 Va. Acts 173, Act 46; Act of Dec. 1, 1642, Public Records of the Colony of Connecticut 79 (1850); 1757-1768 Md. Acts 53, ch. 4, § 3; 1763 Pa. Laws 319; 1639 N.J. Laws 18; *Charters and General Laws of the Colony and Province of Massachusetts Bay* 133, § 2 (1814); Duke of York's Laws, 1665-75, 1 *Colonial Laws of New York from the Year 1664 to the Revolution* 40-41 (1896); *Charter to William Penn, and Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700*, at 32 (1879).

[12] *See, e.g.*, 52 *Archives of Maryland* 454 (Pleasants ed., 1935); 1756 Va. Laws, ch. 2, in 7 *Hening's Statutes at Large* 26, 35 (1820); 5 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 627 (statute from 1759).

[13] *See, e.g.*, Leaming & Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New Jersey* 341 (2d ed. 1881); 1715 Md. Laws 117, ch. 26, § 32; 1740 S.C. Acts 168, § 23.

[14] *See* Hamburger, *Religious Freedom in Philadelphia*, 54 Emory L.J. 1603, 1610-1615, 1621 (2005).

and law, the underlying principle that allowed persons perceived to be dangerous (and therefore able to be disarmed) has not changed. If the analysis mandated by *Bruen* is to be a good-faith historical analysis, modern gun regulations must be measured against the actual American tradition of gun regulation—which included ample flexibility for governments to preemptively and permanently disarm people thought be dangerous in order to keep the peace. *See Kanter*, 919 F.3d at 451 (Barrett, J., dissenting) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."); *see also* Blocher & Carberry, *Dangerous Groups* 12 ("Whether or not such laws would violate modern *Fourteenth* Amendment doctrine, they might also be relevant to the issues that matter for *Second* Amendment analysis, including the breadth of the government's power to regulate guns. Answering that question means considering the array of gun regulations at the Founding … even those whose specific targets are no longer relevant, desirable, or even constitutional." (emphases added)).

C. Late Eighteenth-, Nineteenth-, And Twentieth-Century Firearm Restrictions Premised On Dangerousness

Americans' commitment to protect the public peace and prevent terror to the people by regulating dangerous individuals' rights with respect to dangerous weapons continued for the next century, into Reconstruction and beyond.

1. Disarmament laws

In the new Republic, as part of broader institutional changes through which states began extending their authority into areas of public regulation, including criminal

law, previously left to local jurisdictions, states began to pass statutes restricting firearm possession based on whether people were peaceable, and of sound mind and character. The logical extension of regulating dangerousness, these laws took the form of denying firearms purchase or possession to those with traits deemed potentially harmful.

Specifically, many states and localities prohibited firearms sales to or possession by intoxicated people and drug addicts, and minors, none of whom was considered fit to purchase or possess guns.[15] Chicago, for instance, established that "no person within said city shall sell to or in any manner furnish a minor with any gun, pistol, revolver, or other fire-arms[.]"[16]

Some governmental authorities, likewise, prohibited firearm sales to or possession by those considered

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[15] 1878 Miss. Laws 175, ch. 46, § 2; Holmes, *The Charter and Code of the Ordinances of Yazoo City, Mississippi* § 297, at 174 (1908); 1911 Del. Laws 28-29, ch. 15, § 3; Lindsley, *The Municipal Code of the City and County of Denver* § 1447, at 674 (1917); 1856 Ala. Acts 17, No. 26, § 1; 1856 Tenn. Acts 92, ch. 81, § 2; Bullock & Johnson, *The General Statutes of the Commonwealth of Kentucky*, art. 29, § 1, at 359 (1873); 1875 Ind. Laws 59, ch. 40, § 1; 1876 Ga. Laws 112, No. 128 (O. No. 63.), § 1; 1878 Miss. Laws 175, ch. 66, §§ 1-2; Hockaday, *Revised Statutes of the State of Missouri* 224, § 1274 (1879); 1881 Del. Laws 987, ch. 548, § 1; 1881 Ill. Laws 73, § 2; 1882 Md. Laws 656, ch. 424, § 2; 1882 W. Va. Acts 421-422, ch. 135, § 1; 1883 Kan. Sess. Laws 159, ch. 105, §§ 1-2; 1883 Wis. Sess. Laws 290, ch. 329, §§ 1-2; 1884 Iowa Acts and Resolutions 86, ch. 78, § 1; 1890 La. Acts 39, No. 46, § 1; 1890 Wyo. Sess. Laws 140, § 97; Act of July 13, 1892, ch. 159, § 2, 27 Stat. 116, 116-117 (federal legislation applying to D.C.); 1893 N.C. Public Laws & Resolutions 468, ch. 514, § 1.

[16] *Proceedings of the Common Council of the City of Chicago for the Municipal Year 1872-1873*, at 113-114 (1874).

to have mental illness[17] and those considered "disorderly," or as "tramps" or "vagrants."[18] Florida, for example, established that "it shall be unlawful for any person or persons to sell, hire, barter, lend or give to any person or persons of unsound mind any dangerous weapon, other than an ordinary pocket-knife."[19] As had been true under common law and in the early Republic, individuals who were perceived to pose a danger, not be law abiding, or lacking the requisite capacity to use arms responsibly could be disarmed by the state.

2. Offensive-use prohibitions against causing terror

After the Revolution and into the nineteenth century, many states either passed Northampton-style statutes that prohibited causing terror to the public or affirmed the general principles established in the Statute of Northampton. For instance, Massachusetts continued to make it a crime for anyone to "ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Acts 436, ch. 2.[20] Delaware also provided that any justice of the peace could arrest and bind "all who go armed offensively to the terror of the people." 1852 Del. Laws 733, ch. 97, § 13. New

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[17] McClellan, *A Digest of the Laws of the State of Florida*, ch. 80 § 13, at 429 (1881).

[18] *See*, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 908-909 (1866); 1879 Conn. Pub. Acts 394, ch. 59, § 4; 1880 N.Y. Laws, vol. 2, ch. 176, § 4, at 297; Campbell, *Revised Code of Statutes and Laws of Mississippi*, ch. 77, § 2964, at 772 (1880).

[19] McClellan, *A Digest of the Laws of the State of Florida*, ch. 80, § 13, at 429.

[20] *See also* 1786 Va. Laws 33, ch. 21; 1801 Tenn. Laws 260-261, ch. 22, §6; 1821 Me. Laws 285, ch. 76, §1.

Mexico passed a law prohibiting "any person [to] carry about his person, either concealed or otherwise, any deadly weapon"; repeat offenders were required to serve a jail term "not less than three months." 1859 N.M. Laws 94, § 2.

3. Surety laws

In the post-Revolutionary period, states began writing common law practices into statutory law, including the adoption of surety laws, which required individuals deemed to be dangerous to post a surety or face imprisonment (and thereby disarmament as well). These laws were consistent with the authority still exercised by post-Revolutionary justices of the peace, which reached back to England and the British North American colonies.

For instance, in 1801, Tennessee enacted the following surety law regulating the use of pistols and other dangerous weapons:

> That if any person or persons shall publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person, it shall be the duty of any judge or justice, on his own view, or upon the information of any other person on oath, to bind such person or persons to their good behavior, and if he or they fail to find securities, commit him or them to jail, and if such person or persons shall continue so to offend, he or they shall not only forfeit their recognizance, but be liable to an

> indictment, and be punished as for a breach of the peace, or riot at common law.[21]

Importantly, the surety laws were not a *de facto* permit scheme. On the contrary, these laws *preemptively* forbade the offensive conduct and threatened imprisonment and, hence, disarmament for failure to comply.[22] Surety laws are representative of an ongoing and consistent trend to condition or limit the right to keep and bear arms based on the extent to which an individual was perceived to be dangerous to others or to peaceful society.[23]

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[21] 1801 Tenn. Laws 260-261 ch. 22, § 6; *see also* 1786 Va. Laws 33, ch. 21; 1821 Me. Laws 285, ch. 76, § 1; 1836 Mass. Laws 750, ch. 134, § 16; 1838 Wis. Laws 381, § 16; 1841 Me. Laws 709, ch. 169, § 16; 1851 Minn. Laws 528, ch. 112, § 18; 1852 Del. Laws 733, ch. 97, §§ 12-13; 1853 Or. Laws 220, ch. 17, § 17; 1859 N.M. Laws 94, §§ 1-2; 1870 S.C. Laws 403, No. 288, § 4; 2 Bissell, *The Statutes at Large of the State of Minnesota* 1025 (1873).

[22] *See generally* Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328-1928*, 55 U.C. Davis L. Rev. 2545 (2022).

[23] *Bruen* expressed skepticism that surety laws were actually enforced. *See* 142 S.Ct. at 2149. This skepticism is misplaced, in part because it was premised on the absence of "recorded case[s]" establishing enforcement. *Id.* In fact, surety regimes, or the system of peace warrants and recognizances on which such laws were based, were frequently enforced. As discussed below, *see infra* at 22-23, domestic violence was frequently prosecuted via peace warrant, analogous to a surety, which often led to criminal prosecution. *See* Edwards, *The People and Their Peace* 180-181; *id.* at 181 n.23 (collecting cases). For instance, historical court records show over 20 examples of peace-recognizance / surety cases between 1798 and 1801 in just one county—Albermarle County, Virginia (the home of Thomas Jefferson). These records were reviewed by *amicus* Professor Laura Edwards, who confirmed that procedures in that county conformed to the procedures outlined in the justices' manuals. Edwards & Cooper, *The Sounds of Silence*, Duke Center for

4. Licensing laws

States and localities in the late-nineteenth century also limited the right to carry arms in public to those who could demonstrate good moral character and other indicia of lawfulness and peacefulness. States thereby denied the right to those deemed dangerous. These laws took different forms, variously reserving licenses only for "law-abiding" individuals,[24] for people found "proper" to carry weapons,[25] for "peaceable" individuals,[26] and for individuals with "good moral character" generally. Scandia, Kansas, for example, allowed its citizens to carry dangerous weapons only if they qualified as a "person engaged in a lawful occupation and of good moral character."[27] Portland, Maine similarly authorized concealed carry only to those applicants showing

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Firearms Law Blog (Aug. 18, 2023), https://firearmslaw.duke.edu/2023/08/the-sounds-of-silence-an-examination-of-local-legal-records-reveals-robust-historical-regulation-of-the-public-peace/.

[24] *See, e.g.*, Ordinances of the Mayor, Aldermen and Commonalty of the City of New York, in force January 1, 1881, ch. 8, art. 27, § 265 (1881) (permit to carry pistol can be issued if "applicant is a proper and law-abiding person").

[25] *See, e.g.*, Laws of Nebraska Relating to the City of Lincoln, Revised Ordinances 210 (1895) (allowing mayor to issue permits to carry concealed weapons to those he deems "proper").

[26] *See, e.g.*, San Francisco Municipal Reports for the Fiscal Year 1874-5, Ending June 30, 1875, Order No. 1,226 Prohibiting the Carrying of Concealed Deadly Weapons (1875) (allowing police to issue license to carry a concealed weapon to a "peaceable person, whose profession or occupation may require him to be out at late hours of the night, to carry concealed deadly weapons for his protection").

[27] Scandia Journal (Scandia, Kansas) (Jan. 5, 1894) (publishing Ordinance No. 79 § 6).

"good moral character, whose business or occupation requires the carrying of such weapons for protection."[28]

Relatedly, and in line with earlier periods, many Southern and Western states ratified constitutional provisions that framed the right to keep and bear arms as subject to state regulation, particularly to protect the peace and prevent crime. For instance, Texas's constitution stated that "the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tex. Const., art. I § 23 (1876). Likewise, Tennessee's constitution established that "the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const., art. I, § 26 (1870). Governments acted on this power by imposing licensing schemes that required individuals to obtain permission to carry dangerous weapons in public.[29]

As the foregoing demonstrates, regulation of firearms took various forms in the early Republic and subsequent decades. But as each type of statute makes

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[28] *Auditor's Fifty-First Annual Report of the Receipts and Expenditures of the City of Portland* 153 (1910).

[29] *See, e.g.*, Revised Ordinances of Salt Lake City, Utah, ch. 26, § 14 (1888) ("Any person who shall carry … any concealed deadly weapon, without the permission of the mayor … , shall, upon conviction, be liable to a fine not exceeding fifty dollars."); Revised Ordinances and Rules of the Council of the City of Holton, Kansas, Ordinance No. 169—An Ordinance Relating to Public Offenses, §§ 18-21 (1888) ("It shall be unlawful for any person within this city to carry upon his person a pistol … or other deadly weapon concealed or otherwise … provided … that the mayor of this city may, for a good cause shown by any person engaged in legitimate business, when he deems it necessary for the safety of such person or his business, give to such person a written permit attested by his signature, and the seal of the city, to carry deadly weapons for his or her defense.").

plain, the legislatures have consistently exercised the authority to disarm and otherwise regulate the use of firearms by individuals perceived to be dangerous.

II. The Evolving American History Of Regulating Domestic Violence And Firearms

America's history of firearm regulation is fundamentally a history of regulating perceived dangerousness and threats to the public peace by both groups and individuals. The same is true of the history of domestic violence regulation.

A. *Bruen*'s Methodology For Analyzing The Historical Regulation Of Societal Problems

The Court held in *Bruen* that the government must demonstrate that a gun regulation is "consistent with this Nation's historical tradition of firearm regulation." 142 S.Ct. at 2126. The Court noted that a modern regulation need not be "a dead ringer for historical precursors." *Id.* at 2133. But the Court also stated that when a challenged regulation "addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 2131.

As an initial matter, however, the absence of a "distinctly similar historical regulation" may be of only limited relevance because of three important historical considerations. *First*, inferring modern limits on government regulation based on an absence of "directly similar historical regulations" is fraught in the area of domestic violence, particularly given that the principles of coverture limited married women's individual rights and

made it impossible for them to act in their own names in the eighteenth century. Domestic violence was recognized as a social problem in the late eighteenth century, largely because it unsettled the institution of marriage, considered foundational to eighteenth-century society. But to freeze the ability to regulate domestic violence today based on the historical regulations in existence more than two centuries ago would negate the important changes that now allow married women to act in their own names in the law and ignore the significant evolution over time in the nature and extent of use of guns for domestic violence. *See* Blocher & Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. Rev. 101, 131 (forthcoming 2023) (while "the common law did view aggravated acts of domestic violence as a threat to 'political and social order' … this tradition of regulation has evolved in form, both because of changes in the technology and availability of firearms and because of changes in our understanding of women's citizenship").

Second, the absence of a "distinctly similar historical regulation" may be the result of historical, societal, and political factors entirely unrelated to any concern that such a regulation would be inconsistent with the right to keep and bear arms. Legislatures do not necessarily legislate to the full extent of their authority, and a government may decline to enact a particular regulation for any number of reasons having nothing to do with constitutional concerns.[30]

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[30] *Johnson* v. *Transportation Agency*, 480 U.S. 616, 671-672 (1987) (Scalia, J., dissenting) ("[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [legislative] intent from the failure to enact legislation.").

The failure to enact a particular regulation to address a societal problem may be the result of other issues, including political disagreements, implementation difficulties, and political indifference to the societal problem, as well as a legislative judgment that the societal problem was better addressed at the time in a different manner. Indeed, as noted above, legislatures at the time of the Founding traditionally delegated enforcement of the public peace to local authorities. None of those reasons implies that the regulation was not enacted because it was thought to be *constitutionally* impermissible. *See, e.g.*, *Dobbs* v. *Jackson Women's Health Org.*, 142 S.Ct. 2228, 2255 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean anyone thought the States lacked the authority to do so."); *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 913 (1995) (Thomas, J., dissenting) ("[T]he fact that more States did not adopt congressional property qualifications does not mean that the Qualifications Clauses were commonly understood to be exclusive; there are a host of other explanations for the relative liberality of state election laws."); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting) ("[W[here the government conduct at issue was *not* engaged in at the time of adoption," an inference of unconstitutionality is permitted if "there is ample evidence that the *reason* it was not engaged in is that it was thought to violate the right embodied in the constitutional guarantee.").

Third, the historical record is often incomplete as to how both domestic violence and firearms were regulated in the eighteenth century. Many relevant historical legal records resist rapid analysis because they are neither published nor digitized. They reside in manuscript form in state and private archives, and must be manually

searched, in person. These local records are particularly important when it comes to domestic violence, because such acts were most often handled in local jurisdictions by magistrates (or, in the rare cases that made it to county or district courts, by judges) who did not issue written decisions. *See* Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* 180 (2009). Thus, an analysis of only the statutory law and extant case law from the late eighteenth century cannot fully capture the manner in which governments regulated either domestic violence or the possession of firearms. To focus on colony-level or state-level statutes to the exclusion of other forms of law distorts the past and would incorrectly assume that silence in the statutory code equaled untrammeled gun rights in this context. Under these circumstances, to assign significant weight to "the lack of a distinctly similar historical regulation," *Bruen*, 142 S.Ct. at 2131, would create an asymmetry, favoring gun rights without historical justification.

B. Founding Era Regulation Of Domestic Violence

Domestic abuse was subject to some regulation in the late eighteenth century, even though social and cultural norms allowed husbands broad authority over their wives. Certain New England colonies enacted laws against spousal abuse. Other New England colonies (Rhode Island, Connecticut, and New Hampshire) punished spousal abuse "as assault and battery, although there was no specific statutory provision against it." Pleck, *Criminal Approaches to Family Violence 1640-1980*, 11 Crime & Just. 19, 25 n.1 (1989).

The regulation of domestic abuse, however, was most often handled like most other threats to domestic order—under the common law, not via statutory regulation. Between the enactment of the Pilgrim statute against wife beating in 1672 and the Tennessee law against wife beating in 1850, no laws against family violence were enacted. *See* Pleck, 11 Crime & Just. at 29.

Under the prevailing common law in the Founding Era, local jurisdictions treated domestic violence as a disruption of the peace. *See* Edwards, *The People and Their Peace*, *supra*, at 183 ("Since the maintenance of quiet, orderly households was central to the community, husbands who beat their wives could be charged with disrupting the peace.").[31] To warrant legal action, however, the "[b]rutality had to reach beyond the discretionary authority all husbands could exercise to upset the good order of the community at large." *Id.* at 182. Women who were victims of violence by their husbands could obtain a "peace warrant" from a magistrate. *Id.* Such warrants, similar in function to the English recognizances and the post-revolutionary surety statutes, "brought husbands under public scrutiny by forcing them to post bond to keep the peace toward their wives"—"ensuring public monitoring of the situation and promising penalties for further abuse." *Id.* at 180 & n.22. Notably, peace warrants were often issued preemptively, based on the threat of future violence; actual violent behavior was not required. *See*, *e.g.*, Grimké, *The South Carolina Justice of Peace* 451-452 (3d ed.

[31] *See also* Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 Early Am. Studies 223, 237 (2007).

1810).[32] If the abusive husband failed to post the required bond, he would be imprisoned, thereby depriving the abuser of both his liberty and his weapons.[33] Imprisonment was often the only effective way of disarming domestic abusers; simply removing a firearm—an unlikely tool to perpetrate the abuse to begin with—would not meaningfully address the threat. Importantly, these legal mechanisms were implemented by justices of the peace using well-established common-law procedures. By contrast, modern due process considerations offer far greater protection for individual rights of gun owners and others charged with domestic violence.

But regardless of the extent to which domestic violence was recognized as a societal problem in the late eighteenth century, domestic *gun* violence was *not* recognized as a societal problem, because firearms were not typically involved in interpersonal violence between spouses. Founding-Era firearms were cumbersome, slow, and inaccurate—not what one could quickly and impulsively use for violence typically committed in the heat of the moment. Satia, *Empire of Guns: The Violent Making of the Industrial Revolution* 228-229 (2018) ("Most homicides took place during heated arguments or brawls; those involved took recourse to whatever was at hand. Hence the prevalence of knives, sticks, stones,

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[32] *See also* Haywood, *The Duty and Office of Justices of the Peace, Sheriffs, Coroners, Coroners, Constables, According to the Laws of State of North Carolina* 28-32 (1800).

[33] *See, e.g.*, Edwards, *The People and Their Peace*, *supra*, at 107-111, 180-186; Cashwell, *To Restore Peace and Tranquility to the Neighborhood: Violence, Legal Culture and Community in New York City, 1799-1827*, at 57-58 (2019); Cole, *Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore*, in *Over The Threshold: Intimate Violence In Early America* 148-169 (Daniels & Kennedy eds., 1999).

pitchforks, and axes, or simply hands and feet. The sheer inefficiency of eighteenth-century guns may have made them less appealing instruments of violent emotional gratification.").[34] Studies indicate that most household homicides therefore were committed using household or other nearby types of objects rather than firearms, with only a small fraction of spousal homicides during the Founding Era being committed with firearms.[35]

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[34] Satia, *Empire of Guns*, *supra*, at 229 (Guns "simply had different connotations—like bows, which were understood as a weapon of ambush and were not used in murder, either. When anger raged, an intimate form of violence was threatened and demanded; the gun removed violence to too impersonal a distance, in this time and place. The very nature of the slow, mechanical process for loading and triggering made it a weapon of cool threat rather than hot-blooded violence."); *id.* at 9 ("For the British, the gun's mechanical power … made it the weapon of the property holder and the property thief but not of the enraged—such as rioters, who, even within gun factories, preferred rocks and torches, or angry lovers who preferred the sanguinary release of the knife, the former more anonymous and the latter more intimate than the violence permitted by pistol.").

[35] Roth, *American Homicide* 115-116 (2009) ("Marital murderers seldom used more than their fists or feet. Sometimes they picked up whatever was at hand—a stick, a stone, a tool. Guns required preparation and a degree of premeditation."); Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, in *A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 113, 117 (Tucker et al. eds., 2019) ("Family and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand," which were not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists.").

The Founding generation therefore did not consider, and had no reason to consider, passing a law specifically targeting a domestic abuser's right to possess firearms, because a strong causal nexus between domestic abuse and guns did not exist. *See generally* Roth, *American Homicide* 108-138. But as guns have increased in lethality and prevalence, so too has the frequency with which they are used by domestic abusers. *See generally* Campbell et al., *Risk Factors for Femicide in Abuse Relationships*, 3 Am. J. Pub. Health 1089 (2019); *see also* Roth, *American Homicide* at 285.

As the cumbersome flintlock pistol of the Founding Era gave way to the revolver in the middle of the nineteenth century and then to semiautomatic handguns in the twentieth century, firearms became far more accurate, rapid, and lethal. *See* Dupuy, *The Evolution of Weapons and Warfare* 92, 286-289 (1980) (demonstrating that firearms became more than ten times more lethal from the beginning to the end of the nineteenth century); *see also* Miller & Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. Davis L. Rev. 2495, 2509-2513 (2022) (showing that changes in the lethality of weapons over time clearly have impacted the degree of risk that they posed to the public). In addition, since the Founding Era, the *prevalence* of handguns in American households has increased roughly tenfold, and their use in homicides has increased nearly fivefold. *See* Monkkonen, *Homicide: Explaining America's Exceptionalism*, 111 Am. History Rev. 76, 84 (2006); Newton & Zimring, *Firearms & Violence in American Life*, National Comm'n on the Causes and Prevention of Violence 17, 172 (1969); Zimring, *Firearms and Violence in American Life—50 Years Later*, 2020 Crim. & Pub. Pol'y 1359, 1367 (2020).

Today, the presence of a firearm in a domestic dispute increases the likelihood that domestic abuse turns

deadly by at least five-fold. *See* Campbell et al., *Risk Factors for Femicide in Abuse Relationships*, 93 Am. J. Pub. Health 1089, 1092 (2019). And more than half of all women murdered annually in the United States are killed by intimate partners. Websdale et al., *The Domestic Violence Fatality Review Clearinghouse: Introduction to a New National Data System with a Focus on Firearms*, 6 Injury Epidemiology 1, 1 (2019); *see also* Kiesel, *Domestic Violence: Law, Policy, and Practice* 566 (2007) ("The statistics on guns and domestic violence provide shocking evidence on how deadly this combination is for women.").

Domestic gun violence was not a "general societal problem" in "the 18th century." *Bruen*, 142 S.Ct. at 2131. Due to the tremendous increase in the commonality, convenience, and lethality of guns, domestic gun violence is, without question, a general societal problem today.

C. Section 922(g)(8) And The Evolution Of Domestic Violence Regulation

Since domestic gun violence is not "a general societal problem that has persisted since the 18th century," *Bruen*, 142 S.Ct. at 2131, the absence of a regulation that directly targeted guns in this context is not evidence that the statute is unconstitutional, *id.* at 2133. "[W]hen legislatures seek to … impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or a tradition of banning such weapons or imposing such regulations," *Heller* v. *District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (Easterbrook, C.J.) *(*"[T]the legislative role did not end in 1791."). Instead, the Court must analyze "*how* and

why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S.Ct. at 2133 (emphases added). Moreover, "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach," since the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* at 2132.

Section 922(g)(8) fits comfortably within the robust history of restricting firearm possession (how) by those perceived as dangerous or as threats to civilized, peaceful society (why). Section 922(g)(8) imposes a much lower burden on the right to armed self-defense and contains far more safeguards to ensure that disarmament on grounds of dangerousness is not misused as a pretext. Instead of disarming a person without any due process, as was done in the past, those subject to § 922(g)(8)'s restrictions are entitled to due process: the statute restricts possession only by those who have been found to have engaged in domestic violence—indisputably dangerous conduct—after fair notice and an opportunity to be heard.[36] It is also a temporary restriction that lifts as soon as the predicate restraining order is extinguished.

CONCLUSION

Bruen's analogical method explicitly endorses legislatures' authority to enact public safety laws that evolve with modern threats of gun violence, provided such laws regulate firearms in the similar manner and for the similar reasons that dangerous weapons were regulated

[36] Section 922(g)(8) applies only to a person subject to a court order that "was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate." 18 U.S.C. § 922(g)(8).

historically. Section 922(g)(8) is analogous to historical statutes restricting gun use based on other categories of perceived dangerousness and threats to peaceful society. Moreover, the historical record makes clear that if domestic violence in the eighteenth century had been strongly linked to firearms, such violence could have and almost certainly would have been regulated as a threat to the public peace. Because the statute is consistent with the nation's history and tradition of firearm regulation, it passes constitutional muster under the standard established in *Bruen*.

Respectfully submitted.

TODD C. ZUBLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington DC 20037
(202) 663-6636

MARK D. SELWYN
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
(650) 858-6000
mark.selwyn@wilmerhale.com

JOSHUA A. VITTOR
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue
Suite 2400
Los Angeles, CA 90071
(213) 443-5300

REBECCA E. S. PRITZKER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8874

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APPENDIX

APPENDIX

Amici are the following professors of English and American history and law:

Mary Sarah Bilder – Founders Professor of Law, Boston College Law School

Holly Brewer – Burke Chair of American Cultural and Intellectual History and Associate Professor of History, University of Maryland

Saul Cornell – Paul and Diane Guenther Chair in American History, Fordham University

Brian DeLay – Preston Hotchkis Chair in the History of the United States and Associate Professor, University of California at Berkeley

Laura F. Edwards – Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Princeton University

Jonathan Gienapp – Associate Professor of History, Stanford University

Paul Halliday – Julian Bishko Professor of History and Professor of Law, University of Virginia

Tim Harris – Munro, Goodwin, Wilkinson Professor of European History, Brown University

Henrik Hartog – Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Emeritus, Princeton University

Tim Hitchcock – Professor of Digital History, University of Sussex

David Konig – Emeritus Professor of Law and History, Washington University in St. Louis

Jack Rakove – William Robertson Coe Professor of History and American Studies, Stanford University

Randy Roth – College of Arts & Sciences Distinguished Professor, The Ohio State University

Priya Satia – Raymond A. Spruance Professor of International History and Professor of History, Stanford University

Simon Stern – Professor of Law and English, University of Toronto

Stephen Taylor – Professor of Early Modern British History, Durham University

William Treanor – Executive Vice President, Dean of the Law Center, Paul Regis Dean Leadership Chair, and Professor of Law, Georgetown University Law Center

Jennifer Tucker – Professor of History, Director, Center for the Study of Guns and Society, Wesleyan University