No. 22-915

IN THE
Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
ZACKEY RAHIMI, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, Virginia Citizens Defense League, America's Future, and Conservative Legal Defense and Education Fund in Support of Respondent

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, Virginia Citizens Defense League, America's Future, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. *Amici* work to preserve and defend the Second Amendment rights of gun owners. Many of the *amici* have filed *amicus* briefs in numerous cases involving Second Amendment issues in an effort to aid the courts in a principled analysis of the enumerated right to keep and bear arms.

STATEMENT OF THE CASE

Respondent Zackey Rahimi had an agreed two-year protective order entered against him on February 5, 2020. Although the order was agreed to, and there was a hearing, respondent was not represented by counsel at that hearing, and he would have been

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

subject to paying the applicant's attorneys fees had he not agreed to the protective order. *See* Respondent's Brief at 3-5. Thereafter, respondent was suspected of several shootings, and on January 14, 2021, firearms were found in his room when police were executing a search warrant. *See id*. at 6. Respondent was charged and convicted of a violation of 18 U.S.C. § 922(g)(8), which prohibits an individual who is subject to certain types of restraining orders from possessing a firearm. The district court denied Respondent's motion to dismiss the indictment. *See* Petition Appendix at 78a. However, following this Court's decision in *New York State Rifle & Pistol Assn. v. Bruen*, 142 S.Ct.211 (2022), the Fifth Circuit vacated Mr. Rahimi's conviction, finding that that § 922(g)(8) "is inconsistent with the Second Amendment's text and historical understanding." *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023) ("*Rahimi*").

SUMMARY OF ARGUMENT

This Court granted review to determine whether a civil "domestic-violence" protective order, which triggers mandatory disarmament and is enforced by felony prosecutions, is permissible under the Second Amendment. The Government focuses on the alleged criminal activities of Mr. Rahimi, with five pages of detailed facts, conflating his alleged felonies with his entirely unrelated disarmament based on a civil order.

Although Texas has responsibility for addressing the alleged misdeeds of Mr. Rahimi through its criminal justice system, the Federal Government seeks the additional power to prosecute Mr. Rahimi for a

felony without reliance on the commission of any crime. More broadly than that, the Government desires the power to disarm untold thousands of Americans subject to civil protective orders, which are issued based on all manner of marital or relational discord.

Thus, the Government seeks to turn Americans who have never committed a felony into felons based on their mere act of possessing a firearm, and claims to justify this with historically unsupportable rationales. Both the Fifth Circuit and Petitioner provide excellent reasons why the Government's proffered historical record is insufficient to support 18 U.S.C. § 922(g)(8). *Amici* offer two additional arguments.

First, pre-Revolutionary laws which disarmed certain groups based on perceived or purported "dangerousness" — that is, those persons were deemed by government to be disloyal or untrustworthy — were the very reason the Second Amendment was drafted and ratified. Indeed, the Government fails to point out that the American Revolution was in large part precipitated by British gun control that stemmed from British distrust of the colonists.

As the colonists grew increasingly incensed at being targeted with new and onerous Royal enactments, British officials increasingly grew to distrust most colonists and moved, incrementally, to deprive them of access to the arms. At the same time, the colonists were well aware that, if they allowed the British to seize their firearms, eventually they could

not resist the increasingly arbitrary decrees of the Crown. Importantly, each of the early Revolutionary skirmishes was directly precipitated by British efforts at disarmament. For that reason, the Second Amendment was ratified, and declares that the "right to keep and bear arms" is absolutely "necessary for the security of a free State."

Not only were the Government's early proffered "dangerousness" analogues expressly declared outside the American constitutional tradition by ratification of the Second Amendment — they reflected an expansionist view of government power that were rejected in other Amendments as well. For example, the Government cannot deem members of certain religious orders sufficiently reliable to enjoy constitutional liberties, while distrusting others. Government cannot move against its political opponents through use of seditious libel laws, while deeming the speech of its supporters reliable. Likewise, a government that can quarter troops private homes to oppress its political opponents, another colonial experiment that led to a direct constitutional prohibition. And, while the black codes after the Civil War demonstrated the Government's distrust of certain Americans, those laws also cannot afford analogues. While they may be part of our history, they are not part of our heritage. At bottom, attempts to restrict prophylactically the rights of persons deemed by government to be untrustworthy is an affront to this Nation's entire form of government.

Second, the Government asks this Court to find relevant analogues in laws that imposed minor

penalties on offenses relating to various uses of firearms. At least twice this Court has instructed that a comparison of penalty severity is an important consideration in evaluating historical analogues. A small fine or a short period of incarceration cannot be compared to the felony treatment the Government seeks to give to those who have committed no crimes, but merely possess firearms while suffering marital or family discord. Such prophylactic group punishment is not a power with which any government can be trusted.

Additionally, a comparison of penalties should not be limited merely to maximum possible periods of incarceration, and cannot ignore the lifetime consequences of being convicted of a felony. Once a person becomes a felon, they are deprived of a wide variety of rights, including many ways to make a living or even receive government benefits. The Government's proffered historical analogues certainly had some comparatively minor penalties affixed, but they in no way are comparable to the type of Scarlet Letter affixed to a felon for violation of Section 922(g)(8).

ARGUMENT

I. THE GOVERNMENT'S "DANGEROUSNESS" ANALOGUES CONSTITUTE UNAMERICAN ATTEMPTS TO DISCRIMINATE AGAINST DISFAVORED GROUPS AND HAVE NO CONTINUING VALIDITY IN OUR HISTORICAL TRADITION.

As the Fifth Circuit observed, the rather limited universe of temporally and substantively relevant historical analogues available to evaluate 18 U.S.C. § 922(g)(8) naturally divides into three categories: dangerousness laws, going-armed laws, and surety laws. *Rahimi* at 456. This Court's metrics identified in *Bruen* for assessing the relevancy of purported historical analogues capture many of the key dissimilarities that render inapposite the three categories of laws proffered by the government in this case. *See Bruen* at 2133 (identifying "how and why the regulations burden a law-abiding citizen's right to armed self-defense" as central considerations).

For example, perceived dangerousness laws that discriminated against Native Americans,[2] Catholics, and the "disloyal" were not motivated by a desire to prevent domestic violence or, for that matter,

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[2] As to laws disarming Native Americans, such persons were not considered to be citizens, or even members of the colonies for that matter. Given the tensions between early settlers and the indigenous populations they encountered, such firearm prohibitions would be most analogous to the disarmament of enemy combatants or aliens today. *See*, *e.g.*, 18 U.S.C. § 922(g)(5).

individualized violence. Instead, these restrictions served to oppress political opponents or disfavored minorities. *See Rahimi* at 457.

But more fundamentally, "dangerousness" laws that disarmed certain groups on the basis that they were untrustworthy, unpopular, or dangerous are entirely unhelpful in determining the outer bounds of the protected rights, because such laws were precisely what the Second Amendment was ratified to prevent in the first place.

A. The Second Amendment Was Designed to Protect Disfavored Groups from Disarmament by Government.

An analysis of the government's proffered pre-revolutionary analogues requires historical context that the government fails to provide, in that the Second Amendment was proposed and ratified in *direct response* to British efforts to restrict the rights of non-loyal colonists, who were viewed as being potential subversives — a threat to the Crown — who could not be entrusted with arms.

Indeed, the colonists clearly recognized that, once they were disarmed, they would be unable to meaningfully resist the increasingly arbitrary laws being imposed by King George III. Because of their steadfast refusal to be disarmed, the early battles of the Revolutionary War — in each and every case — were precipitated not as a reaction to "taxation without representation" or some other grievance, but

rather in response to Crown efforts to restrict and control the colonists' access to arms.[3]

Sensitive to that history, the Framers thereafter incorporated the purpose of the Second Amendment into its preamble — declaring that arms were not just helpful or important, but absolutely "necessary to the security of a free State." Thus, the historical predicate for the Second Amendment was the repeated efforts by British authorities to disarm colonists perceived to be "disloyal."

As one court noted in dismissing an indictment for violation of Section 922(g)(8), laws disarming perceived "disloyal" persons are contrary to the Second Amendment's very purpose. *See United States v. Perez-Gallan*, 640 F. Supp. 3d 697, 711 (W.D. Tex. 2022). "Punishment for failing to display the proper political affiliation … was what the Second Amendment was meant to deter." That Texas court further explained that, if such analogues were somehow found useful to understand the Second Amendment, then "the history of disarming someone because of political allegiance oaths could be used to justify disarming political dissidents today." *Id.* at 711.[4]

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[3] *See* Brief Amicus Curiae of Gun Owners of America, Inc., *et al.* in *District of Columbia v. Heller* at 22-27 (Feb. 11, 2008).

[4] Likewise, *Heller* rejected "dangerousness" laws used to disarm black Americans so that they could not defend themselves. *See District of Columbia v. Heller*, 554 U.S. 570, 612 (2008) ("[B]ecause free blacks were treated as a 'dangerous population,' 'laws [were] passed … to make it unlawful for them to bear

On the contrary, the British practice of disarming persons deemed "disloyal" was explicitly barred by ratification of the Second Amendment. It is in this context that the pre-Revolutionary historical analogues offered by the government must be viewed. Indeed, by offering as analogues the very sorts of laws that the Framers of the Second Amendment wanted to prevent, the Government undermines its own position.

B. The Second Amendment Is Part of a Constitutional Mosaic that Limits the Power of Government to Deem Persons Too Dangerous or Untrustworthy to Enjoy Basic Civil Liberties.

To be sure, this case centers on the protections afforded Americans by the Second Amendment which, as noted above, was designed specifically to prevent the very sort of "dangerousness" laws on which the government now relies. But it is also helpful to consider this matter in the context of other constitutional pillars, which confirm the weakness of the government's purported historical record presented below. These constitutional provisions, taken together, establish a pattern of protections designed to prevent all manner of abuses directed against disfavored minorities or other groups of Americans deemed disloyal or dangerous by government.

Indeed, it could be said that the Framers designed our Bill of Rights to prevent recurrence of various evils

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arms.'").

suffered by the colonists (themselves often descended from persecuted minorities) at the hands of the British, and which had not been prevented by the comparably anemic English Bill of Rights.[5] In other words, the "dangerousness" laws enacted during this early time period of this country's history, and on which the government relies here, are simply not part of the American tradition, but instead represent the very abuses that our form of government was designed to eradicate.

1. First Amendment: Free Exercise of Religion.

Governments long have targeted dissenters from the prevailing religious orthodoxy. For example, at one point the Protestant majority found Catholics to be "'untrustworthy,'" and even "feared revolt, massacre, and counter-revolution." *Kanter v. Barr*, 919 F.3d 437, 457 (7th Cir. 2019) (Barrett, J., dissenting). British history reflected shifting tides of religious discrimination that has no place in our enduring traditions. Rather, "the Framers and the citizens of their time intended … to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate." *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005). Three quarters of a century ago, this Court described this pattern:

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[5] *See Bruen*, 142 S. Ct. at 2142 (discussing the English right to arms being limited to protecting Protestants only and acknowledging that this "right matured" into a true "individual right" at the Founding).

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. [*Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 8-9 (1947).]

In other words, laws enacted during this history of religious conflict, and of the sort on which the government now relies, represented one of the primary motivators for those who came to the colonies seeking to be free of such persecution: "[t]hese practices of the old world," *id.* at 9, are *precisely* what the First Amendment abrogated at the Founding and has prohibited since.

2. First Amendment: Free Speech.

The Founders enshrined the Freedom of Speech into the Constitution after bitter experiences with suppression of speech of American colonists under British rule, which "used three methods to suppress free speech: licensing, constructive treason, and seditious libel."[6] Each sort of law specifically targeted political minorities, and those who otherwise were not favored by the ruling class. Even after adoption of the First Amendment, this country briefly experimented with the suppression of seditious libel, under the Alien and Sedition Acts. The Adams' administration even arrested Benjamin Franklin's grandson and Rep. William Lyon of Vermont for criticism of the administration.[7] Jefferson and Madison "vigorously condemned [the Acts] as unconstitutional." *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964). Jefferson, upon his election to replace Adams, immediately pardoned everyone convicted under the Acts.[8] Ultimately, "[a]lthough the Sedition Act was never tested in [the Supreme] Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276.

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[6] M. Kahn, "The origination and early development of free speech in the United States: A brief overview," *Florida Bar Journal* (Oct. 2002).

[7] W. Bird, "New Light on the Sedition Act of 1798: The Missing Half of the Prosecutions," 34 LAW & HIST. REV. 541, 543 (2016).

[8] T. Jefferson, Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556.

Although the Alien and Sedition Acts were enacted shortly after ratification, they certainly could not be said to be part of our American tradition or demonstrate that similar enactments could be justified today. Rather, "the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be." *New York Times Co. v. United States*, 403 U.S. 713, 723-724 (Douglas, J., concurring) (1971).

3. Third Amendment.

Thankfully, the Third Amendment has enjoyed precious little legal application in the centuries that followed its adoption. But at the time of the Founding, it constituted a categorical rejection of distrustful and oppressive governmental actions that sought to stamp out resistance, and bully disfavored and untrusted portions of the populace into submission. The nefarious practice of quartering of soldiers in civilian homes was not original to King George III, but instead goes back to at least the Norman conquest, in which:

> [t]he involuntary quartering of soldiers was only one of many grievances suffered at the hands of the Norman soldiers who sacked and burned villages, towns and manors, and murdered, raped and robbed their inhabitants. The experience instilled in the common people a hatred and distrust of those same soldiers

> whom they viewed as their oppressors and not their protectors.[9]

Centuries later, as King George began to crack down on the growing sentiment of independence in the colonies, the British again began to use the quartering of soldiers in civilian homes as a means to monitor, discourage, and punish dissenting Patriots:

> [B]efore the Revolution, the City of Boston provided barracks for British troops only on an island in Boston Harbor from which the soldiers could not move quickly to the City in the event of an uprising or disturbance by the colonists. To remedy this strategic disadvantage, the Quartering Act of 1774 authorized the British commanders to quarter their troops wherever necessary, including the homes of the colonists.[10]

One historian aptly summarized the underlying purpose of the quartering of troops, explaining that "[o]ne of the means frequently used by tyrannical governments to worry disaffected citizens into submission was to quarter soldiers upon them, to be fed at their expense. The attempt of England to quarter troops upon the colonies was a cause of bitter

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[9] W. Fields and D. Hardy, "The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History," 35 AM. J. LEGAL HIST. 393, 397-398 (1991).

[10] *Engblom v. Carey*, 677 F.2d 957, 967 (2d Cir. 1982) (Kaufman, J., dissenting).

irritation, and culminated in ... the 'Boston massacre.'"[11]

Accordingly, the Framers enacted the Third Amendment specifically to prevent the government from using its military forces to root out and suppress dissent among its political opponents, and to "protect[] the citizen against the exercise of this terrible instrument of oppression." *Id*. The Declaration of Independence specifically listed "Quartering large bodies of armed troops among us" as one of the Americans' charges against King George.

Like other early attempts to target disfavored, dissident, or purportedly "dangerous" groups, this pre-Revolutionary practice is not a continuing part of the American experience. Rather, this sort of punitive treatment of untrustworthy subjects helped precipitate the Revolution and, accordingly, was one of the first grievances the Founders addressed in the Bill of Rights.

4. Fourteenth Amendment.

The post-Civil War Black Codes are part of our history, but not part of our heritage. They arose from a fear and distrust of emancipated blacks and newly freed slaves, on the basis that this disfavored class of persons could not fully be trusted with the full spectrum of rights and privileges of citizenship. *See Heller*, 554 U.S. at 614. Indeed, modern gun control

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[11] W. Cocker, The Government of the United States at 223 (Harper & Brothers: 1889).

has its roots in the black codes that dominated the southern States in the 19th Century. *See* Clayton E. Cramer, The Racist Roots of Gun Control, 4 KAN. J.L. & PUB. POL'Y 17, 20 (1995). Unsurprisingly, the government does not proffer this unpalatable history as "analogues" for Section 922(g)(8) as it demonstrated the government's disarmament of a purportedly "dangerous" population.

Nevertheless, such laws were designed to undermine the rights of blacks in the South, on the theory that they (armed not only figuratively with new freedoms but also literally with firearms) were untrustworthy or even dangerous to public safety. Under South Carolina's Black Codes, "marriage was prescribed for an apprentice lacking the permission of his master, the unemployed were subject to imprisonment or hard labor, [and] blacks were disallowed to engage in an occupation other than agriculture, unless a tax up to $100 was paid annually."[12] North Carolina "declared that certain blacks were incompetent witnesses and announced that intermarriages between white and blacks were void." *Id*. Other states went so far as to "enjoin[] blacks from leaving the plantation without the express permission of the master. The Florida code … permitted the whipping of blacks who broke labor contracts…." *Id*. at 603.

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[12] D. Forte, "Spiritual Equality, the Black Codes and the Americanization of the Freedmen," 43 LOYOLA L. REV. 568, 602 (1997-1998).

Under the regime created by such laws, slavery was ended largely in name only: "their contents sent waves of shock and outrage through the North," sparking a demand in Congress for the Fourteenth Amendment. *Id*. at 600. The drafters of the Amendment left little doubt that its intent was to correct the oppression of disfavored southern blacks: "[t]he Radicals soon made it clear in debate that they were determined to destroy the Black Codes and guarantee the Negro instead full citizenship and a concomitant body of civil rights."[13]

In conclusion, the discrimination that early (or even more modern) dangerousness laws sanctioned — whether based on race, religion, political affiliation, loyalty, perceived dangerousness, or otherwise — is at odds with the Constitution adopted by the Framers. Indeed, even when this country flirted with such laws again after the Civil War, additional constitutional amendments were soon ratified to correct the abuses.

The government's use of its proffered "dangerousness" analogues to restrict firearms rights thus represent a wholesale rejection our very system of government. Worse, the government's reliance on these statutes as historical analogues demonstrates that the threat to individual rights that our Constitution was designed to prevent is still present, as the federal government appears to view Americans' firearm freedoms as a threat to its exercise of arbitrary power — which is, of course, as it should be.

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[13] A. Kelly, "Fourteenth Amendment Reconsidered," 54 MICH. L. REV. 1049, 1058 (1955-1956).

II. THE HISTORICAL ANALOGUES PROFFERED BY THE UNITED STATES SUFFER FROM ONE FATAL FLAW: GROSSLY DISSIMILAR PENALTIES.

A. Penalty Severity Is a Valid Analogical Consideration.

The historical analogues proffered by the government could be disregarded entirely based solely on the "how" and "why" rationales discussed by the Fifth Circuit. *See Rahimi* at 454-55. However, these analogues all suffer another fatal flaw, as a comparison between the penalty imposed by Section 922(g)(8) and the penalties imposed by the government's supposed historical analogues reveals these enactments are, in fact, not similar at all.

The exercise of comparing the penalties of purported historical analogues to those of a modern regulation is not a new analytical tool. The *Heller* Court endorsed this method, and the *Bruen* Court reiterated its usefulness. In rebutting certain historical laws raised in dissent, the *Heller* Court pointed out that "[a]ll of them punished the discharge (or loading) of guns with a *small fine* and forfeiture of the weapon (or in a few cases a *very brief stay in the local jail*), *not with significant criminal penalties*." *Heller* at 633 (emphases added). Moreover, in a prescient nod to *Bruen*'s subsequent discussion of the "how" metric,[14] the *Heller* Court observed that "we do

[14] "Similarly, we have little reason to think that the hypothetical possibility of posting a bond would have prevented anyone from

not think that a law imposing a 5-shilling fine and forfeiture of the gun *would have prevented a person* in the founding era from using a gun to protect himself or his family from violence." *Id*. at 633-34 (emphasis added). Ultimately, the modern regulation at issue in *Heller* was entirely dissimilar as it "threaten[ed] citizens with a year in prison" — "far from imposing a minor fine." *Id*. at 634.

Likewise here, the analogues proffered by the government cannot be deemed relevant without a comparison of the severities of their punishment with the sanction for violating Section 922(g)(8).

For example, early dangerousness laws that disarmed Catholics (often pejoratively termed "Papists") imposed comparatively minimal penalties on offenders. A 1756 Virginia law that criminalized Catholic firearm ownership provided for forfeiture of arms, a fine in the amount of triple their value, and three months of confinement.[15] And wholly unlike Section 922(g)(8), this law included a self-defense exception, allowing Catholics the possibility of

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carrying a firearm for self-defense in the 19th century." *Bruen* at 2149.

[15] An Act for Disarming Papists, and Reputed Papists, Refusing to Take the Oaths to the Government (1756), THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, vol. VII, at 37 (1820).

retaining their arms "necessary … for the defence of … house or person."[16]

Laws prohibiting the sale or provision of arms to Native Americans fare no better, and are in no way comparable to Section 922(g)(8), which applies to United States citizens. In contrast, not only were Native Americans not citizens, but also they often in practical effect were deemed members of hostile nations.[17] Moreover, the penalties imposed for violation were effectively misdemeanors, not felonies. One such act from colonial Pennsylvania provided that those convicted of arming Native Americans "shall forfeit and pay the sum of five hundred pounds … be whipped with thirty-nine lashes … and be committed … to remain twelve months."[18]

As to "going-armed laws," in briefing below, the United States cited a now-familiar law from 1786 Virginia. *See* Supplemental Brief for Appellee the United States ("Supplemental Brief") at 23 n.2, *United*

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[16] *Id*. at 36.

[17] "[A]lmost every colony had laws that attempted (usually with little success) to prohibit arms trade to hostile Indian nations" because, "[a]t the time, the colonies recognized various Indian tribes as genuinely separate nations…. All nations attempt to restrict arms provision to hostile foreign nations." D. Kopel, "Red flag laws: proceed with caution," 45 LAW & PSYCH. REV. 39, 75 (2020-2021).

[18] An Act to Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians (1763), STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, vol. VI, at 320 (1899).

States v. Rahimi, No. 21-11001 (5th Cir. Aug. 9, 2022), ECF No. 109-1 (citing "Collection of All Such Acts of the General Assembly of Virginia 33 (1794)"). After the refrain that "no man, great nor small" shall "go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country," the statute provided that "no person shall be imprisoned for such offense by a longer space of time than *one month*." By way of comparison, modern crimes that can result in 30 days in jail include making prank calls, presenting a fraudulent degree, rioting, and criminal trespassing.[19] But even when considering crimes of the Founding era, the result is the same — the Virginia code on which the government relies imposed three months of labor as punishment for vagrancy. *See* Collection of All Such Acts of the General Assembly of Virginia (1794) at 194. Selling liquor without a license carried a sentence of six months. *Id*. at 212. The government's 1786 Virginia statute is thus nothing like Section 922(g)(8).

The government also referenced a Massachusetts "going-armed" statute that authorizes "commit[ting] the offender to prison, until he or she find such sureties for the peace and good behavior." *See* Supplemental Brief at 28-29. But that same Massachusetts code punished a second offense of drunkenness similarly, by being held until furnishing surety for good behavior, and allowed the same

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[19] *See* TEX. PENAL CODE § 12.22 (punishing Class B misdemeanors with confinement "not to exceed 180 days"); *Texas Crimes by Class and Punishments*, NEAL DAVIS L. FIRM, (last visited Sept. 29, 2023) (listing examples of Class B misdemeanors).

punishment for libel, a mere civil offense today. *Id*. at 51, 53. Thus, "going-armed" was at best considered and punished as a minor public nuisance, not a severe felony crime like Section 922(g)(8).[20]

Finally, all the government's proffered surety laws fail for this same lack of punitive proportionality — as this Court already observed in *Bruen*. *See Bruen* at 2149.

In stark contrast to the comparatively insignificant penalties for violation of these purported historical statutes, a knowing violation of Section 922(g)(8) today provides for fines or imprisonment "for not more than *15 years*, or both." 18 U.S.C. § 924(a)(8) (emphasis added). *See* Brief of Appellant at 11. That maximum term is 180 times the maximum incarceration possible under the 1786 Virginia going-armed statute. Section 922(g)(8), an entirely modern invention, simply cannot be justified with "analogues" that discouraged certain types of firearm use (but not the mere possession or even bearing of firearms) with comparatively minor (if not trivial) penalties.

Nor is a disproportionality analysis unique to *Heller*, *Bruen*, or *Rahimi*, as the government continues to offer the same shopworn antecedents in case after case across the country, apparently hoping that litigants will fail to reveal to courts their fundamentally different nature, and that the government's defense will fare better in the next case.

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[20] 1 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, 51 (1869) (1692 statute).

For example, some of these *amici* have been required to rebut the government's use of such analogues in their own litigation. *See*, *e.g.*, Plaintiffs' Reply to State Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction, and/or Permanent Injunction at 18, *Antonyuk v. Hochul*, No. 1:22-cv-00986-GTS-CFH (N.D.N.Y. Oct. 22, 2022), ECF No. 69 (citation omitted) ("even if these statutes were helpful, failure to muster typically resulted in a fine. The CCIA, however, enacts a far more serious penalty, depriving Sloane of his Second Amendment rights entirely until he completes the required training. There is no historical analogue for *that*.").

B. None of the United States' Purported Analogues Came Close to Imposing the Lifelong Stigma as Does a Felony Conviction Today.

The government's "analogues" generally impose minimal jail time and fines — very different from the penalties suffered from violating Section 922(g)(8) today, as discussed *supra*. When analyzed under *Bruen*'s historical framework, that distinction alone should be more than enough to show something is not quite right with Section 922(g)(8). But even that facial comparison of stated penalties does not tell the full story, as none of the historical laws cited imposed anywhere close to the same *Scarlet Letter*-style badge

of shame[21] that is borne today by those deemed felons, such as based on a violation of Section 922(g)(8).

In other contexts, this Court and other federal courts have recognized the enduring punishment that befalls convicted felons, even long after they have paid their debt to society. *See, e.g., Baldwin v. New York*, 399 U.S. 66, 69 (1970) (noting the "collateral consequences" that attach to felons as opposed to misdemeanants); *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004) ("felons … are denied the right to vote,[22] the right to bear arms, and may have significant difficulty in finding gainful employment."); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1219 (9th Cir. 2002) (noting "serious effects on personal relationships and reputation in the community"); *United States v. Sharp*, 12 F.3d 605, 608 (6th Cir. 1993) (noting state-level prohibitions on felons "acting as executors, administrators, or guardians" and "receiving or maintaining professional licenses of various kinds").[23]

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[21] *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER: A ROMANCE (1850) (exploring the puritanical ostracism and public shaming of an adulterer).

[22] Felony status also prevents a person from serving on a federal jury. *See* 28 U.S.C. § 1865(b)(5).

[23] *See also* Bruce E. May, "Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities," 71 N.D. L. REV. 187, 194 (1995) ("Under many licensing laws, the possession of a felony conviction is an automatic disqualification. In other instances, the possession of a felony conviction is evidence of the lack of moral or reputable character.").

Strikingly, "there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons. Of those, federal law imposes nearly 1,200 collateral consequences for convictions generally, and nearly 300 for controlled-substances offenses." *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184-85 (E.D.N.Y. 2016). The Department of Justice acknowledges that "significant collateral consequences … are imposed by federal law upon conviction of a felony offense."[24]

For example, status as a convicted felon forecloses certain career paths entirely. Some states prohibit felons from becoming lawyers.[25] Other states allow it, but felons face an uphill battle to prove current "good character." Medical licensure is often questionable if not foreclosed. *See*, *e.g.*, Virginia Code § 54.1-2409. Felons often cannot be hired as law enforcement officers (*see*, *e.g.*, Virginia Code § 15.2-1705). In Washington state, one can be denied a license to serve alcohol after a felony conviction. *See* RCW 66.20.310(4)(a). In Georgia, a felony bars individuals from receiving a mortgage loan originator license. *See* Ga. Code Ann. § 7-1-1004. Illinois blocks those convicted of a wide variety of felonies from being funeral directors and embalmers (225 ILCS 41/15-72), being licensed to install water wells and pumps (225

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[24] "Federal Statutes Imposing Collateral Consequences Upon Conviction," U.S. Department of Justice (Nov. 2000).

[25] *See* "Applying with a Criminal Record," *Yale Law School*, (last visited Oct. 2, 2023).

ILCS 345/15), and from receiving a roofing contractor's license (225 ILCS 335/7.1).

At the federal level, felons generally cannot serve in the military.[26] Being unable to possess firearms, felons naturally cannot become licensed firearm dealers. *See* 18 U.S.C. § 923(d)(1)(B). Noncitizens can face removal proceedings upon conviction of various felony offenses, including "firearm offenses."[27] Felony convictions can lead to problems finding federal employment[28] or maintaining a security clearance.[29] Felon status can foreclose or complicate the employment prospects of job seekers in trucking[30] or

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[26] *See* 10 U.S.C. § 504 (felons prohibited from enlistment unless an exception is granted).

[27] *See* 8 U.S.C. § 1227(a)(2) ("Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.").

[28] Federal Statutes Imposing Collateral Consequences Upon Conviction, *supra*, at 3 (felon status is "a factor in determining suitability for it, according to the Office of Personnel Management.").

[29] *See LaChance v. Jowanowitch*, 144 F.3d 792, 792 (Fed. Cir. 1998) (lost security clearance due to felony).

[30] *See* 49 C.F.R. § 383.51.

positions where care of children is involved.[31] Applicants for a pilot's license can be denied and a license can be revoked if already issued. *See* 14 C.F.R. § 61.15(a). Even Veterans Affairs disability benefits can be significantly reduced upon felony conviction.[32] Felons may not be employed by the Federal Bureau of Investigation.[33] The Securities and Exchange Act prohibits felons from registering to deal in securities. *See* 15 U.S.C. § 78c(39)(F). The list goes on and on.

Employment-related hurdles are not the only fallout from status as a convicted felon. Felons can face issues with "public housing, section 8 vouchers, Social Security Act benefits, supplemental nutritional benefits, student loans, the Hope Scholarship tax credit, and Legal Services Corporation representation in public-housing eviction proceedings." *United States v. Nesbeth* at 185 (footnotes omitted).

Consequently, a felony conviction, even after any period of incarceration, parole, or probation, is a "gift that keeps on giving." In other words, "'[f]elony status is simply not the kind of thing that one forgets.'" *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (citation omitted). Rather, it is a status that affects a person for life.

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[31] *See*, *e.g.*, *Criminal Convictions that Disqualify a Provider*, ILL. DEP'T HUM. SERVS. (last visited Sept. 29, 2023).

[32] *See Justice Involved Veterans*, Veterans Benefits Admin. (last visited Sept. 29, 2023).

[33] *See* FBI Employment Eligibility.

Thus, it is not only the astronomically increased sentence that may be imposed under Section 922(g)(8) that distinguishes it from any historical analogue the government has proffered, but also the lasting employment, societal, and other effects that felony status brings are completely unlike the minor fines or short jailtime that were associated with the regulations in the historical record identified by the government here.

No matter how laudable Congress' policy goals might have been in drafting Section 922(g)(8), there is no denying the unprecedented severity and sheer historical novelty of the statute today. It is safe to say that our Founders would have never permitted it, because they never enacted anything like it.

CONCLUSION

Unpopular cases necessitate the strictest adherence to principle. Indeed, "our Constitution is intended to prevail over the passions of the moment, and that the unalienable rights recorded in its text are not matters to 'be submitted to vote; they depend on the outcome of no elections.'" *Dr. A. v. Hochul*, 142 S. Ct. 552, 558 (2021) (Gorsuch, J., dissenting) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). As this Court has observed, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. A categorical prohibition on the mere possession of firearms as a result of a civil disposition, enforced by felony penalties, is one such policy choice that is off the table. The Fifth Circuit faithfully applied this Court's

precedents to reach the conclusion that Section 922(g)(8), in its current form, is repugnant to the original public understanding of the Second Amendment. The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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