No. 22-915

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* FPC ACTION FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to restoring human liberty and protecting the rights enshrined in the Constitution. FPCAF conducts charitable research, education, public policy, and legal programs. The scholarship and *amicus* briefs of the Foundation's Director of Constitutional Studies, Joseph Greenlee, have been cited in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325 (2020); and *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting).

SUMMARY OF ARGUMENT

Section 922(g)(8) seeks to address a societal problem that has persisted since the 18th century. The Government, therefore, must justify it by providing distinctly similar historical regulations.

No distinctly similar historical regulations exist. Section 922(g)(8) disarms peaceable persons in addition to dangerous persons, and the Second Amendment has always prevented disarmament of peaceable persons.

The only Americans disarmed historically were dangerous persons. Both English and American tradition

[1] No counsel for any party authored this brief in any part. No person or entity other than the *amicus* funded its preparation or submission.

support firearm prohibitions for dangerous persons—disaffected persons posing a threat to the government and persons with a proven proclivity for violence. This tradition was reflected in the proposed amendments from the Constitution ratifying conventions and throughout American history. But peaceable persons have never been disarmed.

The Government contends that the Second Amendment protects only "law-abiding, responsible citizens." But that limitation is expansive, vague, malleable, and ahistorical.

Disarmament never applied to non-law-abiding or irresponsible persons who were not also dangerous—dangerousness was always the touchstone of disarmament laws. Indeed, non-law-abiding and irresponsible people were regularly permitted and even required to bear arms in early America.

Moreover, limiting the Second Amendment's scope to "law-abiding, responsible citizens" would effectively allow legislators to decide whom to exclude from the right's protections. Constitutional rights, however, are enshrined with the scope they were understood to have when the people adopted them.

That scope protects all peaceable persons. Indeed, the Government itself quoted 13 sources recognizing that "peaceable" persons could not be disarmed. But Section 922(g)(8) does just that, and thus violates the Second Amendment.

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ARGUMENT

I. Because interpersonal violence has existed since the founding, the Government must provide "distinctly similar" historical analogs.

"When the Second Amendment's plain text covers an individual's conduct," the "government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022). If "a challenged regulation addresses a general societal problem that has persisted since the 18th century," the Government must provide "a distinctly similar historical regulation addressing that problem." *Id.* at 2131. By contrast, "modern regulations that were unimaginable at the founding" require "relevantly similar" analogs. *Id.* at 2132; *see Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 103 (3d Cir. 2023) (en banc); *id.* at 138–39 (Roth, J., dissenting); *United States v. Daniels*, 77 F.4th 337, 342 (5th Cir. 2023) (recognizing the higher standard for regulations targeting longstanding problems).

Like the challenged regulations in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bruen*, 18 U.S.C. §922(g)(8) seeks to address a societal problem—interpersonal violence—that has persisted since the 18th century and is thus a regulation "the Founders themselves could have adopted to confront that problem," *Bruen*, 142 S. Ct. at 2131. The Government, therefore, bears the burden of providing "distinctly similar" historical regulations. *Id.*

Bruen identified two metrics for determining whether historical and challenged regulations are sufficiently similar: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. Here, Section 922(g)(8) satisfies the *why*—to prevent danger—but fails the *how*—by disarming peaceable persons.

II. The *only* Americans disarmed historically were dangerous persons.

The Government argues that the "[h]istorical evidence" shows that "Congress may disarm persons who are not law-abiding, responsible citizens." U.S. Br. 13. But the class of people who can be disarmed is far narrower—the *only* Americans who were disarmed historically were dangerous persons.

A. English arms prohibitions applied to disaffected and other dangerous persons.

17th-century disarmament. "English practices that prevailed up to the period immediately before and after the framing of the Constitution" may inform the American right if the practice "was acted upon or accepted in the colonies." *Bruen*, 142 S. Ct. at 2136 (quotations omitted).

While the Government argues that the English Bill of Rights "allowed the disarming of irresponsible" subjects, U.S. Br. 14, *every* example of English disarmament that the Government provides applied to

dangerous subjects, U.S. Br. at 13–16. Indeed, danger was always the justification provided for disarmament in England—even when it was based on religion or political opposition. Joseph Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, Part II, 16 DREXEL L. REV. (Forthcoming 2023).[2]

Because this Court "consider[s] th[e] history 'between the Stuart Restoration in 1660 and the Glorious Revolution in 1688' to be particularly instructive," *Bruen*, 142 S. Ct. at 2140 (quoting *Heller*, 554 U.S. at 592), this section focuses on the latter half of the 17th century.

Charles II ascended to the throne in 1660 and took immediate action to prevent insurrections. "[D]angerous persons," "disaffected persons," "Disturbers of the Peace," and "Factious and Turbulent Persons" were disarmed for "Dangerous Plotts, and Conspiracies," "barbarous Bloody and Rebellious Attempts," "insurrection[s]," and "conspiracies . . . against the peace of the kingdom" during the first two years of his reign. Greenlee, *Disarming*, at Part II.A.[3]

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[2] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4317000.

[3] "Disaffected" persons were considered dangerous. For example, an official warned in 1660 that "severall persons . . . of known disaffection . . . have furnished themselves with quantities of arms . . . to disturb the peace and tranquillitye of this our kingdom." Greenlee, *Disarming*, at Part II.A. That same year, people who had "shewn any Disaffection" were disarmed to prevent the "Trayterous designs" of those who "to that purpose have

The 1662 Militia Act authorized officials to "search for and seize all Armes" from persons judged "dangerous to the Peace of the Kingdome." 14 Charles II, ch. 3, §13 (1662). Later that year, Charles II ordered officials "to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits, and such as travel with unusual arms at unseasonable hours." CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1661–1662, at 538 (Green ed., 1861).

In 1670, after a false report of "a rising in London" in which "the factious party had killed a great many people," CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, at 236 (Green ed., 1895), Charles II ordered officials "to make strict search . . . for dangerous and disaffected persons" and "seize and secure them and their arms," *id.* at 237.

Widespread disarmament next occurred during the Popish Plot of 1678, a fictitious Catholic conspiracy to slaughter Protestants and replace Charles II with his Roman Catholic brother James. Several Catholics were executed, many were imprisoned, and others were disarmed. John Pollock, THE POPISH PLOT 196 (1903).

During the Rye House Plot of 1683, conspirators plotted to assassinate Charles II and his brother James. Officials were directed "to seize the arms of

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furnished themselves with quantities of Arms, and Ammunition." *Id.* And in 1661, an official expected to "prevent all insurrection" in his jurisdiction by "seizing arms and disaffected persons." *Id.*

those justly suspected." CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, at 89 (Daniell & Bickley eds., 1934).

Charles II's Catholic brother James (James II) succeeded Charles II in 1685. James II began disarming Protestants, who complained that "[t]he Militia, under pretence of persons disturbing the government, disarmed and imprisoned men without any cause." 5 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 54 (1809). James II's abuses led to the Glorious Revolution, in which he was replaced by his Protestant daughter, Mary, and her husband, William.

William and Mary were offered the Crown under the condition that they accept the 1689 Bill of Rights. The Bill of Rights complained that James II had subverted liberty "[b]y causing several good Subjects being Protestants to be disarmed," 1 Wm. & Mary, sess. 2, ch. 2 (1688), and to prevent such abuses from reoccurring, it ensured "[t]hat the subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law," *id.*

Catholics were not protected, however, and were soon disarmed in response to rebellions supporting James II, "for the better secureing their Majestyes Persons and Government." 1 Wm. & Mary, sess. 1, ch. 15 (1688). Blackstone conceded that the disarmament of Catholics throughout the 17th century "would be very difficult to excuse" if not considered in the context of their frequent desire to subvert the government.

4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 57 (1769). Disarmament, he explained, was necessary to "counteract" their "dangerous . . . spirit." *Id.*[4]

England's tradition was not fully incorporated into the Second Amendment. While the Crown offered dangerousness as the justification for disarmament acts, the acts were often weaponized against political opponents and dissenters from the Church of England. *See* Greenlee, *Disarming*, at Part II.A. The English Bill of Rights "stood as a protest against [the] arbitrary action of the overturned dynasty in disarming the people," Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 270 (1880), and protected Protestants from such abuses. The Second Amendment, being "adopted with some modification and enlargement from the English Bill of Rights," *id.*, protects *all* "the people" from such abuses. U.S. CONST. amend. II.

Statute of Northampton. The Government argues that the Statute of Northampton "allowed the government to disarm persons whose conduct revealed their unfitness to carry arms" and thus reflected "[t]he understanding that the government could lawfully disarm irresponsible subjects"—a tradition that allegedly

[4] Catholics continued to be disarmed in 18th-century England to prevent insurrections. Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO L. REV. 249, 260–61 (2020).

"remained intact at the time of the American Revolution." U.S. Br. 15.

Rather, the Statute of Northampton "codified the existing common-law offense of bearing arms to terrorize the people." *Bruen*, 142 S. Ct. at 2143. "[O]ne's conduct 'will come within the Act,'—*i.e.*, would terrify the King's subjects—only 'where the crime shall appear to be malo animo,' with evil intent or malice." *Id.* at 2141 (quoting *Rex v. Knight*, 90 Eng. Rep. 330, 330 (K. B. 1686)). By contrast, the Statute was not violated without "Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace." 1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 136 (1716). Thus, the Statute applied to dangerous—not merely irresponsible—criminals.

B. In colonial America, arms restrictions targeted dangerous persons.

Bruen valued colonial laws to the extent that they informed the original understanding of the Second Amendment. 142 S. Ct. at 2142–44. According to the Government, "the United States has a longstanding tradition, dating to colonial times" of "disarming persons whom legislatures have found are not law-abiding, responsible citizens." U.S. Br. 22. But the Government provides colonial laws focused only on danger.

Specifically, the Government provides two colonial laws prohibiting the carrying of arms in an offensive and terrifying manner, U.S. Br. 23 n.14 (1692

Massachusetts; 1701 New Hampshire), as well as manuals empowering "justices of the peace to confiscate the arms of persons who carried them in a manner that spread fear or terror," U.S. Br. 23. These laws applied to people who misused their arms in a dangerous manner—not merely non-law-abiding or irresponsible people.[5]

The Government's *amici* point to discriminatory laws. Professors of History and Law Br. 9-11; 97Percent Br. 6; National League of Cities Br. 15; Public-Health Researchers and Lawyers Br. 14.

While acknowledging that the "race-based exclusions" are "based on odious views and stereotypes," the Government's *amici* argue that these laws should be considered because "excluding them from consideration altogether would distort the historical record." Second Amendment Law Scholars Br. 15 n.4.

But *Bruen* makes clear that discriminatory laws cannot establish our historical tradition. This Court did not consider any historical laws requiring Blacks to acquire discretionary carry licenses to carry arms

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[5] The only other colonial-era law that the Government provides is New Netherland's 1652 law forbidding shooting "guns at Partridges or other Game" in the city of New Amsterdam. This law did not restrict possessing or carrying firearms. And as a New Netherland law that was not adopted when the British took control of the colony, it does not reflect English—not to mention American—tradition. Moreover, the law addressed dangerous conduct: namely, "firing" where "People or Cattle might perhaps be struck and injured." LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 138 (O'Callaghan ed., 1868).

when analyzing New York's discretionary licensing law for carrying arms—and many were presented to the Court. *See*, *e.g.*, Brief for *Amicus Curiae* National African American Gun Association, Inc. in Support of Petitioners at 4–11, July 16, 2021, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843.

Indeed, "this Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring) (quoting *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017)). "Why stick by . . . a practice that is thoroughly racist in its origins[?]" *Id.* at 1419 (Kavanaugh, J., concurring).

Yet even the discriminatory laws were based on danger. These restrictions applied to Blacks, American Indians, Catholics, Puritans, and Antinomians.

Blacks. Laws preventing Blacks from keeping arms "rested upon White fears that armed Blacks, especially freemen, might conspire to carry out a slave revolt." Nicholas Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 440 (3d ed. 2021). Many colonies also enacted laws designed to ensure that the community was sufficiently armed and organized to suppress slave revolts. Greenlee, *Disarming*, at Part III.A (collecting laws). There were approximately 250 slave revolts throughout early American history, and they created constant fear in many colonies. *See* Herbert Aptheker, AMERICAN NEGRO SLAVE REVOLTS 162 (1943). These revolts would

have been extremely deadly had slaves been armed, and the institution of slavery itself would have been short-lived.

Blacks could sometimes keep arms, however, if the government deemed them peaceable—and thus unlikely to engage in revolt. *See*, *e.g.*, 1806 Md. Laws 45 (allowing a "free negro or mulatto to go at large with [a] gun" with "a certificate from a justice of the peace, that he is an orderly and peacable person").

American Indians. Because American Indians were not governed by Britain, most colonial laws restricted transfers to Indians rather than possession by them. Johnson, FIREARMS, at 210–12. These restrictions were among the myriad laws aimed at preventing attacks. For the same reason, colonies regularly required arms-bearing to church, court, public assemblies, travel, and fieldwork. *Id.* at 189–91. And every colony enacted militia laws with the stated purpose of preventing or resisting Indian attacks. Greenlee, *Disarming*, at Part III.B (collecting laws).

The law closest to a possession ban was from the Dutch colony, New Netherland. It "forb[ade] the admission of any Indians with a gun . . . into any Houses" "to prevent such dangers of isolated murders and assassinations." LAWS AND ORDINANCES OF NEW NETHERLAND, at 234–35. The British did not adopt the law after taking over the colony, but in any event, it was focused on people believed to be dangerous.

Catholics. Concerns over American Catholics assisting France in a war against the British long pervaded colonial life.

After England's Glorious Revolution, rumors circulated "that the French in Canada were making preparations to invade New York, hoping, with the assistance of the Catholics in the province, to wrest it from the English." Berthold Fernow, *The Middle Colonies*, *in* 5 NARRATIVE AND CRITICAL HISTORY OF AMERICA, Part. I, at 189 (Winsor ed., 1887). Specifically, New Yorkers were concerned "that the papists within and without the government had concerted to seize Fort James, in New York, and to surrender that post and the province to a French fleet." *Id.* at 189–90. Jacob Leisler "seized the fort" so the Catholics could not, and soon took control of the province from appointees of James II, "rising to such prominence" on "a 'No Popery' cry." *Id.* at 190. While Leisler's rule was short-lived, fears over Catholic uprisings remained. After an assassination attempt on King William in 1696, "reputed papists in New York" were "disarmed and bound to give bond for good behaviour or be confined in prison." Letter from Governor Benjamin Fletcher to Lords of Trade and Plantations, June 10, 1696, *in* 15 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 15 MAY, 1696—31 OCTOBER, 1697, at 12 (Fortescue ed., 1904).

Pennsylvania and Virginia disarmed Catholics—and Maryland considered disarming Catholics—during the French and Indian War. Pennsylvania's governor worried that "the French might march in and be

strengthened by the German and Irish Catholics who are numerous here." CATHOLICITY IN PHILADELPHIA 79 (Kirlin ed., 1909). Justices of the peace petitioned Pennsylvania's governor for authority to disarm Catholics: "that the papists should Keep Arms in their Houses," they argued, leaves "the Protestants . . . subject to a Massacre whenever the papists are ready." *Id.* at 78. Echoing that concern, a Pennsylvania Lieutenant Colonel urged the militia to prevent the "Protestant Government" from being "trodden under foot by the bloody and tyrannical power of Popery." PENNSYLVANIA GAZETTE, June 13, 1754. "[N]umberless enemies amongst us," he warned, "may . . . rise . . . in rebellion." *Id.*

Pennsylvania's act disarming Catholics thus provided: "in this time of actual war . . . it is absolutely necessary . . . to quell and suppress any intestine commotions, rebellions or insurrections." 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 609 (Ray ed., 1898).

Virginia's law disarming Catholics expressly declared that, "it is dangerous at this time to permit Papists to be armed." 7 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35 (1820).

The same concerns were present in Maryland. A 1755 Maryland bill to prohibit "the Importation of German and French Papists, and Popish Priests and Jesuits," expressed a concern that "they will . . . in Case of an Attack . . . turn their Force, in Conjunction

with the French and their savage Allies, against his loyal Protestant Subjects." 52 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY, 1755–1756, at 89 (Pleasants ed., 1935).

In Maryland newspapers, "Popery" was called "a *persecuting*, *blood shedding* Religion," MARYLAND GAZETTE, Oct. 10, 1754, and "the Foundation of all our present . . . Dangers," MARYLAND GAZETTE, Oct. 17, 1754. It was argued that "Self-Preservation" requires "Laws as will put it out of the Power of the Jesuits; and their deluded Votaries, to endanger the Peace." *Id.*

In 1753, Maryland's lower house considered testimony "that the Papists very frequently said, they would wash their Hands in the Blood of Protestants." 50 ARCHIVES OF MARYLAND, at 201. In 1754, Maryland's Committee of Grievances warned that "several Papists . . . have made great Opposition to the enlisting Men . . . to repel the Invasion of the French and Indians in Alliance with them." *Id.* at 487. The Committee declared that the "Conduct and Behaviour of the Papists" required action "to secure . . . against our domestic . . . Enemies." *Id.*

The Maryland General Assembly passed a militia act "to quell and Suppress any intestine Commotions Rebellions or Insurrections" that required the confiscation of "all Arms Gunpowder and Ammunition of . . . any Papist or reputed Papist," 52 ARCHIVES OF MARYLAND, at 450, 454. But it appears that the governor never signed it. *Id.* at 474–75, 640–41.

Catholics were considered dangerous in several colonies, and the laws disarming them were intended to disarm dangerous persons.

Puritans. As the English Civil War raged in part over differences between the Anglican Church and dissenting Puritans, Virginia discriminated against Puritans in the 1640s under the governorship of Charles I's close ally William Berkeley. "[H]aving come from the royal court in 1642," Berkeley "knew that Puritans posed a serious threat to the church and to the royal government." Kevin Butterfield, *Puritans and Religious Strife in the Early Chesapeake*, THE VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY, vol. 109, No. 1, at 21 (2001).

The royal instructions for Berkeley as governor directed him to ensure that "the form of religion established in the Church of England" was observed throughout the colony and to expel anyone who refused the "Oaths of Allegiance and Supremacy." Evarts Boutell Greene, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 219 (1898). After "most refused to take" the oaths, Joseph Frank, *News from Virginny, 1644*, THE VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY, vol. 65, No. 1, at 85 (1957) (quoting May 15–22, 1645 newspaper), Massachusetts Puritan leader John Winthrop predicted that Virginia "was like to rise in parties, some for the king, and others for the Parliament," 2 John Winthrop, THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649, at 160 (Savage ed., 1826). Ultimately, "an armed conflict between the Puritans and the Berkeley camp" was averted by an

Indian attack that killed hundreds of Virginians and deterred the survivors from warring among themselves. Butterfield, *Puritans*, at 20. As a London newspaper reported:

> if the Indians had but forborne for a month longer, they had found us in such a combustion among our selves that they might with ease have cut of[f] every man . . . once we had spent that little powder and shot that we had among our selves.

Frank, *News*, at 86 (quoting May 15–22, 1645 newspaper).

Nevertheless, the conflict in Virginia remained perilous. A Puritan leader and preacher William Durand was arrested and his supporters deemed "Abettors to much sedition and Munity." THE LOWER NORFOLK COUNTY VIRGINIA ANTIQUARY, No. 2, Pt. 1, at 15 (James ed., 1897) (statement made in court in May 1648). Many Puritans were soon disarmed and banished from the colony. Charles Campbell, HISTORY OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA 212 (1860).

This episode serves as an early example of disarmament motivated by danger in America.

Antinomians. Anne Hutchinson was convicted of sedition in 1637 Massachusetts for criticizing the Puritan government's legalistic interpretation of the Bible. Hutchinson, John Wheelwright,[6] and some of

[6] Wheelwright's wife was the sister of Hutchinson's husband.

their Antinomian supporters were banished from the colony. Of those permitted to remain, seventy-five were disarmed,[7] while others who confessed their sins could keep their arms. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, at 211–12 (Shurtleff ed., 1853). The disarmament order stated that the authorities were concerned that the Antinomians might receive a revelation inspiring them to commit violence:

> Whereas the opinions & revelations of Mr Wheeleright & Mrs Hutchinson have seduced & led into dangerous errors many of the people heare in Newe England, insomuch as there is just cause of suspition that they, as others in Germany, in former times, may, upon some revelation, make some suddaine irruption upon those that differ from them in judgment, for p[re]vention whereof it is ordered, that all those whose names are underwritten shall . . . deliver . . . all such guns, pistols, swords, powder, shot, & match as they shalbee owners of, or have in their custody. . . . Also, it is ordered . . . that no man who is to render his armes by this order shall buy or borrow any guns, swords, pistols, powder, shot, or match, untill this Court shall take further order therein.

Id. at 211.

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[7] An early source lists 76 disarmed supporters, *Johnson's Wonder-Working Providence 1628–1651*, *in* 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 6 (2d Ser., 1818) (1654), but the disarmament order lists 75, 1 RECORDS OF THE GOVERNOR, at 211–12.

The reference to "Germany, in former times" was likely a reference to the Peasants' War of 1524–25, in which some leaders of the revolt claimed to be inspired by divine revelations. *See* Norman Cohn, THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MILLENNARIANS AND MYSTICAL ANARCHISTS OF THE MIDDLE AGES 248 (1957). Therefore, Hutchinson's supporters were disarmed because the "new erected government . . . feared breach of peace." *Johnson's Wonder-Working*, at 6.

C. Founding-era evidence reveals that the Second Amendment protects all peaceable persons.

1. Arms restrictions applied to enemies of the government and other dangerous persons.

"[N]ot all history is created equal"—because "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,'" founding-era history is paramount. *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35) (emphasis *Bruen*'s).

Revolutionary War loyalists. The Government argues that disarmament of loyalists during the Revolutionary War and disarmament of rebels after Shays's Rebellion "reflect the same enduring principle: The Second Amendment allows Congress to disarm individuals who are not law-abiding, responsible citizens." U.S. Br. 27. In fact, loyalists and the rebels were disarmed because they were enemies of the government in a violent conflict.

"During the course of the American Revolution, over one hundred different Loyalist regiments, battalions, independent companies or troops were formed to fight alongside the British Army against their rebellious countrymen." *A History of the King's American Regiment, Part 1*, THE ON-LINE INSTITUTE FOR ADVANCED LOYALIST STUDIES.[8] "[W]e may safely say that 50,000 soldiers, either regular or militia, were drawn into the service of Great Britain from her American sympathizers." Mark Boatner, ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 663 (3d ed. 1994). Additionally, insurrections were frequent. Greenlee, *Disarming*, at Part IV.A. Thus, authorities repeatedly stated that the reason for disarming loyalists was dangerousness:

> • Massachusetts's Congress disarmed loyalists so they could not "join with the open and avowed enemies of America" to inflict "ruin and destruction . . . against these Colonies." 2 AMERICAN ARCHIVES 793 (4th Ser., Force ed., 1839) (May 1775).
>
> • General Washington wrote to General Lee: "The Tories should be disarmed immediately though it is probable that they may have secured their arms . . . until called upon to use them against us." 4 *id.* at 895 (January 1776).
>
> • "[T]o frustrate the mischievous machinations, and restrain the wicked practices of these men" who "have taken part with our oppressors," the Continental Congress

[8] http://www.royalprovincial.com/military/rhist/kar/kar1hist.htm.

"recommended" that "they ought to be disarmed." *Id.* at 1629 (January 1776).

• Governor Trumbull wrote to General Schuyler: "I do sincerely congratulate you on . . . disarming the Tories. . . . Suppressing such enemies . . . is of very great importance." *Id.* at 899 (January 1776).

• Translator James Deane informed the Six Nations that loyalists were disarmed because they "were preparing themselves for war against us—that they had procured arms, and would attack us with the first favourable opportunity." *Id.* at 855 (January 1776).

• New York's Congress deemed it "absolutely necessary, not only for the safety of the . . . Province, but of the United Colonies in general, to take away the arms and accoutrements of the most dangerous among [the loyalists]." 5 *id.* at 1504 (May 1776).

• New Jersey's Congress, because "a number of disaffected persons have assembled . . . preparing, by force of arms . . . to join the British Troops for the destruction of this country," disarmed "these dangerous Insurgents." 6 *id.* at 1636 (July 1776).

• Pennsylvania noted "the folly and danger of leaving arms in the hands of Non-Associators" when it disarmed them. 2 *id.* (5th. Ser.) at 582–83 (September 1776).

• New Jersey empowered its Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous

> to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess." 1777 N.J. Laws 90, ch. 40 §20 (September 1777).
>
> • Pennsylvania determined that "it is very improper and dangerous that persons disaffected . . . shall possess . . . any firearms," so it "empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state." THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782) (April 1779).[9]

Disarmament during the war served the additional purpose of supplying arms to unarmed patriot troops. Americans faced a perilous arms shortage during the war that rendered many soldiers weaponless, and the loyalists' confiscated arms addressed the shortage. Greenlee, *Disarming*, at Part IV.C.

After the war, America's first Secretary of State, Thomas Jefferson, defended confiscating loyalists' property (including arms): "It cannot be denied that *the state of war* strictly permits a nation to seize the property of it's enemies[.]" Letter from Thomas Jefferson to George Hammond, May 29, 1792, *in* 3 THE WORKS OF THOMAS JEFFERSON 369 (Washington ed., 1884) (emphasis added).

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[9] Allowing people to swear loyalty on affirmation accommodated people whose religious convictions precluded oath-taking, such as Quakers.

As Jefferson emphasized, the disarmament laws were wartime measures from desperate governments on the brink of destruction—they were not models for constitutional rights. *Cf. Bruen*, 142 S. Ct. at 2152 n.26 (Discounting wartime laws because there was "little indication that these military dictates were designed to align with the Constitution's usual application during times of peace."). Indeed, General Lee demonstrated the lack of concern for rights—or morality—when he proposed that a better alternative to disarming the loyalists was "to secure their children as hostages." 5 AMERICAN ARCHIVES, 4th Ser., at 1385. At most, therefore, Revolutionary War disarmament is relevant only to the extent that it continued the tradition of disarming dangerous persons.

Shays's Rebellion. In Shays's Rebellion, armed bands in 1786 Massachusetts attacked courthouses, the federal arsenal in Springfield, and other government properties, leading to a military confrontation with the Massachusetts militia on February 2, 1787. *See generally* John Noble, A FEW NOTES ON THE SHAYS REBELLION (1903). After the rebellion was defeated, Massachusetts pardoned individuals who bore "arms against the authority and Government of this Commonwealth" or aided the rebellion, under the condition that they "deliver up their arms" to the government and wait three years to reclaim them. 1787 Mass. Acts 555–56 (Acts & Laws, January Session, passed February 16, 1787). But the rebels were ultimately permitted to reclaim their arms within four months. 1787 Mass. Acts 13–14 (Resolves, June Session).

Ratification proposals. Three proposals from the Constitution ratifying conventions addressed who may be barred from possessing arms. Only New Hampshire's was approved by a majority of its convention. It provided, "Congress shall never disarm any Citizen, unless such as are or have been in actual Rebellion." 28 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378 (Kaminski et al. eds., 2017).

In Massachusetts, Samuel Adams's proposal ensured "that the said constitution be never construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 *id.* at 1453. In the founding era, "peaceable" meant the same as today: nonviolent. Being "peaceable" is not the same as being "law-abiding," because the law may be broken nonviolently. Samuel Johnson's dictionary defined "peaceable" as "1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent." 2 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773) (unpaginated). Thomas Sheridan's dictionary defined "peaceable" as "Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 438 (2d ed. 1789). According to Noah Webster's dictionary, "peaceable" meant "Not violent, bloody or unnatural." 2 Noah Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated). This Court relied on Johnson, Sheridan, and

Webster in defining the Second Amendment's text in *Heller*.[10]

Although not approved by a majority, many Massachusetts convention members ratified the Constitution with the understanding that Adams's amendments would follow. *See* 6 DOCUMENTARY HISTORY, at 1476 (John Hancock: "I give my assent to the Constitution in full confidence that the amendments proposed will soon become a part of the system."). And Adams's supporters later celebrated the Second Amendment as the adoption of Adams's proposal. *Id.* at 1453–54.

A third proposal came from Pennsylvania's "Dissent of the Minority." Of the 23 members of Pennsylvania's 69-member convention who voted against ratification, 21 signed the Dissent. 2 *id.* at 617. It proposed amendments, including that "no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." *Id.* at 624.

No evidence suggests that "crimes committed" included nonviolent crimes; the only discussion of what the proposal included said it covered insurrectionists.[11]

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[10] For Johnson, *see Heller*, 554 U.S. at 581 ("arms"), 582 ("keep"), 584 ("bear"), 597 ("regulate"). For Sheridan, *see id.* at 584 ("bear"). For Webster, *see id.* at 581 ("arms"), 582 ("keep"), 584 ("bear"), 595 ("militia").

[11] Pennsylvania reverend Nicholas Collin, under the pseudonym "Foreign Spectator," wrote: "Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of

Since disarmament laws traditionally focused on danger, "crimes committed" likely covered violent crimes, while "real danger of public injury" provided a catchall for violence not covered by the law.[12]

None of the 10 states that ratified the Constitution after the Dissent of the Minority was published—including New Hampshire and Massachusetts—proposed an amendment allowing nonviolent persons to be disarmed. And Samuel Adams apparently interpreted the Dissent of the Minority as protecting peaceable persons—including nonviolent criminals—from disarmament. According to Bostonian Jeremy Belknap, "it is supposed A[dams] had a copy" of the Dissent of the Minority and based his amendments on it, because his amendments "proposed to guard against" the "*very things*" the Dissent of the Minority "objected to." 5 *id.* at 820. Adams's proposal forbade disarmament for anyone but dangerous persons. 6 *id.* at 1453.

All the evidence suggests that the Dissent of the Minority was not advocating for the first-ever prohibition for non-dangerous crimes or conduct. If so, that view was limited to *some* dissenters in the *minority* of *one state*'s convention. But the more reasonable interpretation is that the Dissent of the Minority covered only violent crimes.

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the union should be competent for the disarming of both." *No. XI*, FEDERAL GAZETTE, Nov. 28, 1788.

[12] *E.g.*, three men who confessed to raping a child in 1641 avoided the death penalty because Massachusetts law did not expressly proscribe such conduct. Winthrop, HISTORY, at 45–48.

Therefore, although the Government claims that the proposals "reveal a common conception that the government may disarm those who are not law-abiding, responsible citizens," U.S. Br. 18, the proposals instead "confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses," *Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (quotations omitted).

Offensive carry. Two states passed laws in the founding era forbidding carrying arms in a terrifying manner. Virginia in 1786 punished the conduct with forfeiture of the arms and up to one month's imprisonment. A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 33 (1794). Massachusetts in 1795 imprisoned someone who could not find "sureties for his Keeping the Peace," but did not confiscate arms. 1795 Mass. Acts 436.

2. Nonviolent criminals and other irresponsible people were expressly permitted and often required to keep arms.

The Government asserts that the founding-era history "reveal[s] a common conception that the government may disarm those who are not law-abiding, responsible citizens." U.S. Br. 18. But the Government provided no examples of anyone disarmed for being irresponsible or breaking the law who was not also

dangerous.[13] What is more, founding-era law often protected and even required arms possession by irresponsible and non-law-abiding people.

Upon completing their sentence, people convicted of crimes not only had the right to keep and bear arms, but able-bodied males were *required* to keep and bear arms under state and federal militia acts. *See* 2 BACKGROUNDS OF SELECTIVE SERVICE: MILITARY OBLIGATION: THE AMERICAN TRADITION, Parts 1–14 (Vollmer ed., 1947) (compiling colonial- and founding-era militia acts). While militia laws sometimes provided exemptions for people employed in certain professions, *see*, *e.g.*, 1 Stat. 271, §2 (1792) (federal Uniform Militia Act providing exemptions for elected officials, post officers, stage-drivers, ferrymen, inspectors, pilots, and mariners), no militia law in the colonial or founding eras ever provided an exemption based on prior incarceration or crimes committed. Thus, free able-bodied men previously convicted of crimes virtually always possessed arms in early America.

Additionally, several colonial- and founding-era laws expressly protected the arms of criminals. In 1786 Massachusetts, estate sales were held to recover funds stolen by corrupt tax collectors and sheriffs. But it was

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[13] The Government cites laws that "made forfeiture part of the penalty for offenses such as unsafe storage of guns or gunpowder." U.S. Br. 23. But these laws did not prevent anyone from possessing or carrying arms. Moreover, by regulating "unsafe" practices, the laws addressed dangerous conduct.

forbidden to include "arms" in the sales. 1786 Mass. Acts 265.

Laws exempting arms from civil action recoveries—which undoubtedly benefited some irresponsible persons—existed since 1650 in Connecticut. THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY 1665, at 537 (Trumbull ed., 1850). Maryland and Virginia enacted similar exemptions. 13 ARCHIVES OF MARYLAND, at 557 (1692 Maryland); 30 *id.* at 280 (1715 Maryland); 3 Hening, STATUTES, at 339 (1705 Virginia); 4 *id.* at 121 (1723 Virginia).

The federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, §1 (1792).

D. Nineteenth-century arms prohibitions applied to slaves and freedmen, while lesser restrictions focused on dangerous persons.

While 19th-century evidence "is instructive," it does "not provide as much insight into [the Second Amendment's] original meaning as earlier sources." *Heller*, 554 U.S. at 614. Accordingly, "we must . . . guard against giving postenactment history more weight than it can rightly bear." *Bruen*, 142 S. Ct. at 2136.

Discriminatory laws. Many 19th-century restrictions on arms possession were discriminatory bans on slaves and freedmen. *See*, *e.g.*, 1851 Ky. Acts 296 §12; 1863 Del. Laws 332 §7. As explained above, these are not valid analogs. Nonetheless, as Horace Greeley explained in 1867, "[i]t was not deemed compatible with public safety that blacks should be allowed to keep and use arms like white persons." James Parton, THE LIFE OF HORACE GREELEY, EDITOR OF THE NEW YORK TRIBUNE 535 (1869).

Tramps. Tramps—typically defined as males begging for charity outside their home county—were restricted in the latter half of the century. Tramping was not a homebound activity, so the restrictions did not prohibit keeping arms in the home.

California in 1856 disarmed "dangerous and suspicious persons," including tramps, "common drunkards," and "common prostitutes," "who go armed, and are not known to be peaceable and quiet persons, and who can give no good account of themselves." 2 THE GENERAL LAWS OF THE STATE OF CALIFORNIA FROM 1850 TO 1864, INCLUSIVE 1076–77 (Hittell ed., 1868). At least 13 other states restricted tramps from bearing arms. U.S. Br. 25 n.18.

Ohio's Supreme Court upheld Ohio's restriction because "the constitutional right to bear arms . . . was never intended as a warrant for vicious persons to carry weapons with which to terrorize others." *State v. Hogan*, 63 Ohio St. 202, 218–19 (1900). Leaving no doubt that tramps were considered dangerous persons,

the court called "the genus tramp" "dangerous," "a public enemy," and "a thief, a robber, often a murderer," who uses "vicious violence" to "terroriz[e] the people"—including "unprotected women and children." *Id.* at 215–16.

Indeed, tramps were "an object of fear," who were "accused . . . of every conceivable crime" and "probably the most common and widespread of all nineteenth-century bogeymen." Lawrence Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 102 (1993).

Persons of unsound mind and intoxicated persons. As the Government notes, some laws restricted the acquisition or carry of certain weapons by persons who were intoxicated or of unsound mind. U.S. Br. 24–26. As the Kansas Supreme Court noted, persons of unsound mind were considered dangerous: "Can it be said that a Winchester rifle or repeating shotgun, placed in the hands of an insane or incompetent person, is not a weapon that is inherently dangerous to himself and his associates? The answer is obvious." *Parman v. Lemmon*, 119 Kan. 323, 244 P. 227, 229 (1925) (Discussing 1883 restriction on transfers of weapons "to any person of notoriously unsound mind." 1883 Kan. Sess. Laws 159). Likewise, the Missouri Supreme Court noted that a law forbidding intoxicated persons to carry certain weapons was intended to prevent "[t]he mischief to be apprehended from an intoxicated person." *State v. Shelby*, 2 S.W. 468, 469 (1886).

Rebels. In 1867, Kansas forbade "any person who has ever borne arms against the Government" from carrying certain arms. 1867 Kan. Sess. Laws 25.

Surety laws. Several states enacted laws requiring people likely to endanger the public to find sureties before carrying arms. *Bruen*, 142 S. Ct. at 2148 n.23 (collecting laws). According to the Government, "[t]hose laws, too, confirm that irresponsible individuals were subject to special restrictions[.]" U.S. Br. 24. But these laws did not hinge on mere responsibleness; they applied only to people who created "fear [of] an injury, or breach of the peace." *Bruen*, 142 S. Ct. at 2148. That is, they applied to persons who posed a danger. Moreover, these laws did not restrict anyone who found a surety, nor did they prohibit possession by anyone who failed to find a surety.

Restrictions in the 19th century therefore continued the earlier tradition of targeting dangerous persons.

E. Limiting the scope of the right to "law-abiding, responsible citizens" is ahistorical and could unjustly deprive countless Americans of a fundamental right.

The American tradition ensures that a "free citizen, if he demeans himself peaceably, is not to be disarmed." John Holmes, THE STATESMAN, OR PRINCIPLES OF LEGISLATION AND LAW 186 (1840). Indeed, despite advocating for a far narrower scope of the right, the

Government's brief thoroughly demonstrates that peaceable persons were traditionally protected. *See*, *e.g.*, U.S. Br. 17–18, 19–21, 26 (Quoting 13 sources recognizing that "peaceable" persons cannot be disarmed). By asking this Court to limit the right to "law-abiding, responsible citizens," the Government seeks a drastic reduction of a fundamental right and a dramatic expansion of traditional government power.

As the Fifth Circuit noted, the "malleable scope" that the Government advocates for would allow the Government to disarm even nonviolent non-law-abiding people and anyone the Government deems irresponsible. Pet. App. 11a. The Fifth Circuit identified speeders, political nonconformists, nonrecyclers, and owners of internal combustion engine vehicles as examples. *Id.* The en banc Third Circuit recognized that "the phrase 'law-abiding, responsible citizens' is as expansive as it is vague," and could exclude from the right "those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine," as well as "every American who gets a traffic ticket." *Range*, 69 F.4th at 102. Moreover, "the modifier 'responsible,' . . . renders the category hopelessly vague. In our Republic of over 330 million people, Americans have widely divergent ideas about what is required for one to be considered a 'responsible' citizen." *Id.*

"At root," the Government's approach "devolves authority to legislators to decide whom to exclude" from the right's protections. *Id.* That approach runs head-on into this Court's repeated assurances that

"'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.'" *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35) (emphasis *Bruen*'s).

"More than just model citizens enjoy the right to bear arms." *Daniels*, 77 F.4th at 342 (quotations and brackets omitted). Instead, as the history above reveals, all peaceable persons are protected by the right.

III. Section 922(g)(8) is not distinctly similar to historical regulations because it disarms peaceable persons.

Historically, only dangerous persons could be disarmed. But Section 922(g)(8)'s applications are not limited to dangerous persons. Because it applies to peaceable persons as well, it contradicts our nation's tradition of firearm regulation and violates the Second Amendment.

Section 922(g)(8) prohibits firearm possession if three conditions exist:

1) a court issues an order after notice and a hearing, 18 U.S.C. §922(g)(8)(A);

2) the order restrains the individual from "harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child," §922(g)(8)(B); and

3) the order "includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child," §922(g)(8)(C)(i), *or* "explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury," §922(g)(8)(C)(ii).

Someone can be disarmed based solely on the content of the order, with no regard for the individual's actual conduct. In such cases, no history of dangerous behavior or even a likelihood of future dangerous behavior is required. Nothing, therefore, prevents a peaceable person from being disarmed under Section 922(g)(8) if an overbroad order contains the restrictions in §922(g)(8)(B) & (C)(ii).

Overbroad orders are common. Mutual protection orders, for example, often restrain the victim in addition to the abuser. Some judges "see mutual orders as an easy way to keep their dockets clear while still issuing an order to protect the [victim]." Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1055 (1992). Victims may enter them voluntarily to streamline the process, avoid violent reactions from their abusers, or ensure that they receive the protection order they need. *See id.*

Moreover, protection orders are often "easy to get." Scott Lerner, *Combating Orders-of-Protection Abuse in*

Divorce, 95 Ill. B.J. 590, 591 (2007). "The facts have become irrelevant," the former president of the Massachusetts Women's Bar Association stated, "[e]veryone knows that restraining orders . . . are granted to virtually all who apply, lest anyone be blamed for an unfortunate result. . . . In many [divorce] cases, allegations of abuse are now used for tactical advantage." Elaine M. Epstein, "*Speaking the Unspeakable,"* MASS. B. ASS'N NEWSL., vol. 33, June–July 1993, at 1. Thus, "[t]he potential for abuse" in protection order cases "is tremendous." David Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 RUTGERS L. REV. 1009, 1014 (2005); *see also* Peter Slocum, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 SETON HALL L. REV. 639, 653–54 (2010) (providing examples demonstrating the ease of receiving a protection order).

Finally, some protection orders have no expiration and may be permanent. *See*, *e.g.*, N.J. Stat. Ann. §2C:25-29.

The Second Amendment requires a finding that the person disarmed is dangerous. Section 922(g)(8) does not require any such finding. Moreover, the law is broad, vulnerable to abuse, and in practice disarms peaceable persons—sometimes permanently.

There are no distinctly similar historical regulations to Section 922(g)(8). A law that disarms nondangerous persons contradicts our nation's tradition of

firearm regulation and thus violates the Second Amendment.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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