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 97PERCENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CONSTANCE VAN KLEY
Counsel of Record
RYLEE SOMMERS-FLANAGAN
UPPER SEVEN LAW
1 N. Last Chance Gulch
Helena, MT 59601
(406) 306-0330
constance@uppersevenlaw.com

August 2023

TABLE OF CONTENTS

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 4

I. Section 922(g)(8) imposes restrictions on firearms possession that are close analogues to historical restrictions 4

A. Historically, the government disarmed individuals likely to commit violence 4

B. Temporarily disarming individuals subject to domestic violence restraining orders is consistent with founding era restrictions on Second Amendment rights 10

II. Due process does not require a criminal proceeding prior to disarmament 15

A. Temporary forfeiture of the right to possess weapons is not punishment and does not trigger criminal procedural protections 16

B. Prior to a deprivation of liberty or property, the core due process requirements are—at most—notice and an opportunity to be heard 19

C. Section 922(g)(8) relies only on domestic violence restraining orders that provide notice and an opportunity to be heard 23

III. Threats to public and individual safety demand flexible solutions that respect Second Amendment rights 25

Conclusion 27

TABLE OF AUTHORITIES

CASES PAGE(S)

Allen v. Illinois, 478 U.S. 364 (1986) 16

Cox v. New Hampshire,
312 U.S. 329 (2015)... 26

Cummings v. Premier Rehab Keller, PLLC,
142 S. Ct. 1562 (2022) 27

Dent v. West Virginia, 129 U.S. 114 (1889)...... 20

Dist. of Columbia v. Heller,
554 U.S. 570 (2008) 4–6, 11, 13, 26

Grannis v. Ordean, 234 U.S. 385 (1914)........... 20

Hamdi v. Rumsfeld, 542 U.S. 507 (2004).......... 20

Hernández v. Mesa, 140 S. Ct. 735 (2020)........ 27

Hudson v. United States,
522 U.S. 93 (1997)... 16

Jacobson v. Massachusetts,
197 U.S. 11 (1905)... 14

Kansas v. Hendricks,
521 U.S. 346 (1997) 16–18

Kanter v. Barr, 919 F.3d 437
(7th Cir. 2019) 2, 6, 9

McDonald v. Chicago, 561 U.S. 742 (2010) 6

Montana v. Egelhoff, 518 U.S. 37 (1996)...........19

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)..23

Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856)...........21

Near v. Minnesota, 283 U.S. 697 (1931) 27

N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) 4, 7, 8, 10, 11, 14

Obergefell v. Hodges, 576 U.S. 644 (2015)........18

Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. 29 (H. L. 1758) 18

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 20, 21

Patterson v. New York, 432 U.S. 197 (1977)...19

United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) 3, 7, 10, 11, 13–15, 18

United States v. Ward, 448 U.S. 242 (1980)......16

W. Coast Hotel v. Parrish, 300 U.S. 379 (1937)..26

Wrenn v. Dist. of Columbia,
864 F.3d 650 (D.C. Cir. 2017) 8

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952).. 26

STATUTES

1 Acts & Resolves, Public & Private,
of the Province of the Massachusetts Bay,
52–53 (1869) (1692 statute) 12, 13

9 Hen. III, ch. 39... 21

18 U.S.C. § 922(g)(8)(A) 3

28 Edw. 3 ch. 3 (1354) 21

1776 Penn. Laws 11, § 1...................................... 9

1778 Penn. Laws 123, ch. LXI §§ 1–3........... 6, 14

1779 Penn. Laws 193, §§ 4–5......................... 6, 14

1856 Tenn. Acts 92, ch. 81, §§ 2–3....................... 7

1866 Ala. Penal Code 63 7

1878 Miss. Laws 175-76, ch. 46, §§ 2–3 .... 6, 7

1881 Fla. Laws 87, ch. 3285, §§ 1–2 .... 6, 7

1883 Kan. Sess. Laws 159, ch. 106, §§ 1–2 ..... 6, 7

1883 Wis. Sess. Laws 290 6

1888 Ind. Rev. Stat. §§ 1986–87 6

1890 La. Acts 39, § 1 6

An Act . . . for Disarming Persons who Shall Not Have Given Attestations of Allegiance & Fidelity, 1779 Penn. Laws 193, §§ 4–5 6

An Act for the Further Security of the Government; 1778 Penn. Laws 123, ch. LXI, §§ 1–3 6

Mass. Gen. Laws 484 (1776) 9

Mass. Rev. Stat., ch. 134, § 16 (1836) 8

N.C. Pub. Laws 355, 355-56, ch. 198, § 2 7

Revised Code of the State of Virginia: Collection of All Such Acts of the General Assembly of Virginia, of a Public & Permanent Nature, as Are Now in Force, 554 (1819) (1786 statute) 12

Tex. Code Crim. P. §§ 17.292–17.293 23

Tex. Fam. Code Ann. § 81.009 24

Tex. Fam. Code Ann. § 82.021 24

Tex. Fam. Code Ann. §§ 82.041–82.043 24

Tex. Fam. Code Ann. §§ 83.001–83.006 23

Tex. Fam. Code Ann. §§ 84.001–84.004 24

Tex. Fam. Code Ann. § 85.001 24

Tex. Fam. Code Ann. §§ 85.001–85.006 23

Tex. Fam. Code Ann. § 85.026 24

Tex. Fam. Code Ann. § 87.001 24

<u>OTHER AUTHORITIES</u>

6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000) 5

Catherine F. Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law,* 21 Hofstra L. Rev. 801 (1993) 18

Commentaries 1:139 (1765) 13

Donald E. Wilkes Jr., *Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603–1625*, 54 Am. J. Legal Hist. 200 (2014) 22

Edward Coke, *The Second Part of the Institutes of the Laws of England,* 46 (3d ed. 1669) 21

Edward J. Eberle, *Procedural Due Process: The Original Understanding,* 4 Constitutional Commentary 293 (1987) 22, 23

Eugene Volokh,
The Commonplace Second Amendment,
73 N.Y.U. L. Rev. 793 (1996) 4

Frederick Pollock & Frederick William
Maitland, *The History of English Law*,
592 (1889)..22

G.A. Gilbert, *The Connecticut Loyalists*,
4 Am. Historical Rev. 273, 282 (1899)..............9

John C. Ball, *The Deterrence Concept in*
Criminology and Law, 46 J. Crim. L.
Criminology & Police Sci. 347 (1955) 17

Joseph G.S. Greenlee, *The Historical*
Justification for Prohibiting Dangerous
Persons from Possessing Arms,
20 Wyo. L. Rev. 249 (2020) 8, 9

Keith Jurow, *Untimely Thoughts: A*
Reconsideration of the Origins of
Due Process of Law,
19 Am. J. Legal Hist. 265 (1975). 21

Max Crema & Lawrence Solum, *The Original*
Meaning of "Due Process of Law" in the Fifth
Amendment, 108 Va. L. Rev. 447 (2022).......22

Michael Siegel, MD, MPH, Kathleen Grene,
Amani Dharani, *Finding the Common*
Ground on Gun Safety: Part One:
Research Findings Executive Summary,
19 Am. J. Legal Hist. 11 (2022). 25, 26

Nathan Levy, Jr, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 19 Am. J. Legal Hist. 265 (1975)..21, 22

Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012). 20

Nathanial Breading, et al, *The Address & Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents* (Dec. 12, 1787)..5

Paul J. Larkin Jr.,, *The Lost Due Process Doctrines*, 66 Cath. U. L. Rev. 293 (2017).....24

Robert Emmett Burns, *Due Process of Law: After 1890 Anything; Today Everything— A Bicentennial Proposal to Restore Its Original Meaning*, 35 DePaul L. Rev. 773 (1986). 22

William Rawle, *A View of the Constitution of the United States of America* 126 (2d ed. 1829)..8

INTEREST OF *AMICUS CURIAE*[1]

97Percent is a bipartisan group of gun owners and non-gun owners focused on finding common-sense solutions for gun violence while respecting Second Amendment rights. Its name derives from a 2018 Quinnipiac University poll, which showed that 97% of Americans support universal background checks—a policy that, despite near-unanimous support, has not been codified into federal law.

As an organization that meets Americans, including gun owners, where they are on gun policy, 97Percent is interested in research-backed solutions, not ideology. Thus, it is deeply invested in preserving opportunities for legislation that Americans agree on—such as temporarily restricting abusers' access to guns, keeping firearms out of the hands of individuals at high risk of imminent violence, and implementing fast and effective background check laws.

97Percent agrees with Petitioner that the Court should reverse the decision below. Because of its expertise and interest in balancing gun owners' rights with public safety, 97Percent writes separately to address: (1) the need for appropriate and robust due process protections for gun owners; and (2) the need for bipartisan political solutions to gun violence. These issues are of primary importance to 97Percent, which is committed equally to Second Amendment rights and public safety.

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed any money to fund its preparation or submission.

SUMMARY OF ARGUMENT

The individual right to bear arms is premised on the inviolate right of self-defense. How strange, then, that it could be used to invalidate a provision that protects victims of domestic violence from those most likely to kill them.

Today and throughout American history, the right to bear arms has extended only to those who exercise it for lawful ends. Firearms may be kept from "those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). In the founding era, the government disarmed those likely to use guns for other than "peaceable" ends. So too today. 18 U.S.C. § 922(g)(8) disarms only those likely to use guns for violence—and only at the time when violence is likeliest to occur. The restriction flows directly from historical precedent.

Because means-end scrutiny does not apply to purported Second Amendment violations, the analysis centers on how a particular deprivation occurs rather than on the government's interest. When is a restriction justified by an individual's demonstrated propensity for violence or by a threat of violence? And how can governments make the call fairly, in a manner that respects both the primacy of the constitutional right and the need for individual and public safety?

In his concurrence below, Judge Ho wrote, "We must protect citizens against domestic violence. And we can do so without offending the Second Amendment framework set forth in *Bruen*." *United*

States v. Rahimi, 61 F.4th 443, 467 (5th Cir. 2023) (Ho, J., concurring). *Amicus* agrees—indeed, its mission is to find solutions for gun violence that respect the Second Amendment and gun owners. *Amicus* disagrees, however, with Judge Ho's proposed approach, which would require the initiation of criminal process prior to any temporary restrictions on gun possession.

Instead, the Second Amendment requires that gun owners receive the due process protections generally available to citizens facing a civil deprivation: notice and an opportunity to be heard. These are precisely the protections that Congress built into § 922(g)(8), which applies <u>only</u> to those subject to a domestic violence restraining order, and <u>only</u> following a "hearing after which such person received actual notice, and at which such person had an opportunity to participate." 18 U.S.C. § 922(g)(8)(A). Respondent Zackey Rahimi was banned temporarily from possessing guns, following a hearing that comported with these due process requirements. Thus, his conviction under § 922(g)(8)—and the provision itself—stands.

Nearly all gun owners possess and use guns responsibly, in contrast to Rahimi. Those who choose to exercise their Second Amendment rights understand that the right, like any, is not unconditional. Consistent with previous generations, today's gun owners broadly support limiting the franchise to those who will not use it to sow violence.

ARGUMENT

I. Section 922(g)(8) imposes restrictions on firearms possession that are close analogues to historical restrictions.

A long history, both predating and following ratification of the Bill of Rights, supports disarming individuals who are demonstrably at risk of using firearms for violent ends, particularly during times when that risk is highest. Such restrictions on gun possession are "historical analogue[s]" to § 922(g)(8), even if they are not "historical twin[s]." *N.Y. State Rifle Ass'n & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022). Section 922(g)(8) disarms only those likely to use guns for violent ends, and—even then—only when the gun violence is likely to occur. Domestic abusers are not constitutionally entitled to possess guns when their possession presents a demonstrated risk to another's life.

A. Historically, the government disarmed individuals likely to commit violence.

The right to bear arms is not absolute. *Bruen*, 142 S. Ct. at 2128 ("[L]ike most rights, the right secured by the Second Amendment is not unlimited.") (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). It never has been. To determine its bounds, the Court generally has examined the Second Amendment in light of its original dual purposes: self-defense and protection against tyranny. *Heller*, 554 U.S. at 594, 598–600; *see generally* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1996).

In *Heller*, the Court excavated the Second Amendment. Relying especially on three contemporaneous state constitutional proposals—from New Hampshire, Pennsylvania, and Massachusetts—the Court concluded that the Second Amendment "unequivocally referred to individual rights." *Heller*, 554 U.S. at 604. Two of these same constitutional proposals—the two that most directly shaped our Second Amendment—show that the individual rights extended only to their lawful exercise.

In Pennsylvania, the Anti-Federalist minority proposed a "highly influential" right to bear arms, *ibid.*, that included language limiting both the right and the state's power to restrict it: "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," Nathanial Breading, et al., *The Address & Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents* (Dec. 12, 1787). And in Massachusetts, Samuel Adams proposed a similar provision, intending to ensure that the Massachusetts Constitution never be "construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." 6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000) (emphasis added); *see Heller*, 554 U.S. at 604 (referring to Adams's proposal).

Thus it is no surprise that, throughout American history, groups of people have been prevented from purchasing and possessing firearms

based on perceptions of dangerousness. In the founding era, "[s]laves and Native Americans . . . were thought to pose . . . immediate threats to public safety and stability and were disarmed as a matter of course." *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting). And governments regularly not only forbade sales to but even confiscated guns from citizens unwilling to swear allegiance to their government. *Id.* at 457–58; *see, e.g.*, An Act . . . for Disarming Persons who Shall Not Have Given Attestations of Allegiance & Fidelity, 1779 Penn. Laws 193, §§ 4–5; An Act for the Further Security of the Government, 1778 Penn. Laws 123, ch. LXI, §§ 1–3; Act of Mar. 14, 1776, ch. VII, 1775–1776 Mass. Act at 31–32, 35.

Race-based disarmament is disgraceful, of course, and has no place in the modern era. *See, e.g.*, *McDonald v. Chicago*, 561 U.S. 742, 845–50 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Heller*, 554 U.S. at 614–16. But the historical takeaway is clear: "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety." *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting).

Even as the criteria for identifying dangerous persons changed, the notion that some groups were too dangerous to possess firearms held true through Reconstruction. States commonly prohibited the sale of firearms to minors and their possession by minors. *See, e.g.*, 1890 La. Acts 39, § 1; 1883 Kan. Sess. Laws 159, ch. 106, §§ 1–2; 1883 Wis. Sess. Laws 290; 1881 Fla. Laws 87, ch. 3285, §§ 1–2; 1888 Ind. Rev. Stat. §§ 1986–87; 1878 Miss. Laws 175–76, ch. 46,

§§ 2–3; 1856 Tenn. Acts 92, ch. 81, §§ 2–3. States also barred the sale of guns to the mentally ill, 1883 Kan. Sess. Laws 159, ch. 106, §§ 1–2 ("any person of notoriously unsound mind"); 1881 Fla. Laws 87, ch. 3285, §§ 1–2 ("persons of unsound mind"), the intoxicated, 1878 Miss. Laws 175–76, ch. 46, §§ 2–3; 1866 Ala. Penal Code 63, and "tramps." N. Car. Pub. Laws 355, 355–56, ch. 198, § 2.

Surety laws, codified in "[m]any jurisdictions . . . either before ratification of the Bill of Rights or in early decades thereafter," likewise are meaningful analogues to § 922(g)(8). *Rahimi*, 61 F.4th at 459. By showing "just cause to fear" injury or property destruction, a person could "demand surety of the peace"; if the party against whom the surety "was demanded refused to post surety, he would be forbidden from carrying a weapon in public absent special need." *Ibid.* (citing *Bruen*, 142 S. Ct. at 2148–49). So while laws banning firearms for certain groups show a history of categorical disarmament based on dangerousness to the public, historical surety laws show that individualized assessments of dangerousness also were common. Certain restrictions on firearms "were meant to protect an identified person . . . from the risk of harm posed by another individual." *Id.* at 459–60. Further, they were meant to restrict Second Amendment rights at times of heightened need, when individuals were likelier to abuse firearms to commit acts of violence.

Leading up to and contemporaneous with ratification of the Bill of Rights, no fewer than ten jurisdictions adopted surety laws. *Bruen*, 142 S. Ct. at 2148 & n.23. These laws presumed a right to carry

publicly that justifiably could be burdened by "a specific showing of 'reasonable cause to fear an injury, or breach of the peace.'" *Id.* at 2148 (quoting Mass. Rev. Stat., ch. 134, § 16 (1836)). "[C]ircumstances giving just reason to fear that [an individual] purposes to make an unlawful use of [arms]" was sufficient cause for a surety demand. *Ibid.* (quoting William Rawle, *A View of the Constitution of the United States of America* 126 (2d ed. 1829)). That is, they "burdened someone reasonably accused of posing a threat." *Wrenn v. Dist. of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).

Founding-era surety laws are probative of two points. First, governments commonly burdened the Second Amendment rights of individuals likely to exercise those rights to cause direct harm to other, identifiable victims. Second, surety laws operated to restrict rights for a limited time, even when the gun possessor was not subject to other grounds for disarmament.

Like surety laws, other historical firearms restrictions temporarily disarmed individuals at a time of heightened danger. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 268–69 (2020) (summarizing arguments against permanent disarmament of nonviolent felons). After Shays' Rebellion in 1786, Massachusetts instituted conditions for pardons. Act of Feb. 17, 1787, ch. VI, 1787 Mass. Acts 555. To secure a pardon, a rebel was required not only to affirm his allegiance to the state but also to surrender all arms to the state for a period of three years. *Id.* at 556.

Massachusetts's approach to disarming and restoring gun rights to rebels was far from novel. In the revolutionary era, Massachusetts and the other colonies disarmed those "who are notoriously disaffected to the cause of America, or who have not associated and refuse to associate to defend by arms these United Colonies." *See* Act of March 14, 1776, ch. VII, 1775–1776, Mass. Acts. 31–35. But—consistent with its treatment of participants in Shays' Rebellion—Massachusetts also restored Second Amendment rights, "by the order of . . . the general court" or "the committees of correspondence, inspection or safety" initially tasked with disarmament. Mass. Gen. Laws 484 (1776). Connecticut took the same approach, and "disarmed 'inimical' persons only 'until such time as he could prove his friendliness to the liberal cause.'" Greenlee, 20 Wyo. L. Rev. at 268 (quoting G.A. Gilbert, *The Connecticut Loyalists*, 4 Am. Historical Rev. 273, 282 (1899)); *see also* 1776 Penn. Laws 11, § 1 (providing that "non-associators" would receive "receipts" for their arms).

In sum, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). All the more when restrictions on possession are time-limited.

B. Temporarily disarming individuals subject to domestic violence restraining orders is consistent with founding era restrictions on Second Amendment rights.

"[A]nalogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Bruen*, 142 S. Ct. at 2133. Although domestic violence restraining orders are the product of modern laws that recognize women's political rights—and obviously did not exist in the founding era—this is not fatal to the government's authority to disarm domestic abusers.

As the Fifth Circuit explained, *Bruen* "distilled two metrics for courts to compare the Government's proffered analogues against the challenged law: how the challenged law burdens the right to armed-self defense and why the law burdens the right." *Rahimi*, 61 F.4th at 454; *see Bruen*, 142 S. Ct at 2133 (courts should consider "whether modern and historical regulations impose a comparable burden on the right of armed self-defense" and "whether that regulatory burden is comparably justified"). But the court below failed to apply analogical reasoning at the appropriate level of generality, demanding that a single category of historical laws encompass both the how and the why.

The Fifth Circuit's analytical error in rejecting historical analogues is two-fold. First, it demanded a "twin," rather than an "analogue," as to each category, applying a too-specific analysis of § 922(g)(8) when *Bruen* demands reasoning by analogy. *See Bruen*, 142 S. Ct. at 2133. Second, it refused to review historical

regulations comprehensively, isolating each potential analogue and dismissing it without considering the interaction between distinct historical laws that restricted Second Amendment rights.

"[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Bruen*, 142 S. Ct. at 2133. *Heller*, through the lens of *Bruen*, provides a helpful example: laws in place at the Founding prohibited carrying "'firearms in sensitive places' . . . —*e.g.*, legislative assemblies, polling places, and courthouses." *Ibid.* (quoting *Heller*, 554 U.S. at 646). Thus, "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Ibid.* Analogical reasoning does not limit the application of general principles simply because modern legislatures are concerned with seemingly new variations on the theme of violence.

The Fifth Circuit would accept only a category that shared four "key features" of § 922(g)(8):

> (1) forfeiture of the right to possess weapons (2) after a civil proceeding (3) in which a court enters a protective order based on a finding of a 'credible threat' to another specific person, or that includes a blanket prohibition on the use, of threatened use, of physical force, (4) in order to protect that person from 'domestic gun abuse.'

Rahimi, 61 F.4th at 455. Under the Fifth Circuit's framing, no "*new* and analogous" applications are

possible because the framing inserts modern sensibilities—concern for domestic violence—and modern procedural innovations—domestic violence restraining orders—into its demand for analogues.

A fair approach would consider whether historical restrictions involved (1) forfeiture of the right to possess weapons (2) after a civil proceeding (or absent a proceeding) (3) when a government official determined that a specific individual presents a threat (4) to another specific individual. And historical restrictions, reviewed holistically, provide more than adequate grounds to uphold § 922(g)(8).

Taking each of these more reasonable features in turn reveals how § 922(g)(8) follows from historical precedent. First, government has long imposed restrictions involving the forfeiture of the right to possess weapons. Governments disarmed persons deemed dangerous, *supra* pp. 6–9, unpatriotic, *supra* p. 6, and rebellious, *supra* pp. 8–9. And individuals in Massachusetts, New Hampshire, and Virginia forfeited their rights to possess firearms when they carried firearms in a threatening manner. 1 Acts & Resolves, Public & Private, of the Province of the Massachusetts Bay, 52–53 (1869) (1692 statute); Acts & Laws of His Majesty's Province of New-Hampshire: In New-England, with Sundry Acts of Parliament, 17 (1771) (1701 statute); Revised Code of the State of Virginia: Collection of All Such Acts of the General Assembly of Virginia, of a Public & Permanent Nature, as Are Now in Force, 554 (1819) (1786 statute).

Second, there is no historical support for the line the Fifth Circuit draws between criminal and civil

proceedings. *See Rahimi*, 61 F.4th at 455 n.7; *id.* at 461–67 (Ho, J., concurring); *see also infra* pp. 17–19. Blackstone described the right to bear arms as that of "having arms for their defence, suitable to their condition and degree, and such as are allowed by law. . . . [The right] is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and law are found insufficient to restrain the violence of oppression." Commentaries 1:139 (1765) (emphasis added); *see Heller*, 554 U.S. at 593–94 (noting Blackstone's influence in the founding era).

Consistent with Blackstone's conception, states disarmed those who displayed weapons to sow fear, resulting in forfeiture without criminal process—"upon view of such justice, confession of the party, or legal proof of the offense." Acts & Laws of His Majesty's Province of New-Hampshire: In New-England; with Sundry Acts of Parliament, 17 (1771) (1701 statute); *accord* 1 Acts & Resolves, Public & Private, of the Province of the Massachusetts Bay, 52–53 (1869) (1692 statute) ("upon view of such justice or justices, confession of the party or other legal conviction of any such offence"). Nor was criminal conviction—or even a civil proceeding—required to disarm categories of persons deemed dangerous or unsympathetic to the state. *See supra* pp. 7–8. Even the Fifth Circuit recognized that "surety laws required only a civil proceeding, not a criminal conviction." *Rahimi*, 61 F.4th at 460.

Third, Second Amendment rights were restricted based on government officials' determinations that specific individuals posed a

threat. The New Hampshire and Massachusetts "going armed" laws serve as examples here, too, but there are more. Those who refused to swear allegiance to their government were disarmed because they were found dangerous—and they were not even entitled to a day in court. *See, e.g.*, 1779 Penn. Laws 193, §§ 4–5; 1778 Penn. Laws 123, ch. LXI, §§ 1–3; Act of March 14, 1776, ch. VII, 1775–1776 Mass. Act at 31–32, 35. These historical provisions are all the more relevant given the temporary nature of domestic violence restraining orders.

Finally, specific threats to individuals' lives always have been taken seriously. No constitutional right protects an individual who uses his liberty to deprive another of her life. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) ("There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."). Historical surety laws gave recourse to those who felt that their lives were in danger. As the court below acknowledged, "[T]hey were 'comparably justified,' in that they were meant to protect an identified person (who sought surety) from the risk of harm posed by another identified individual (who had to post surety to carry arms)." *Rahimi*, 61 F.4th at 459–60 (quoting *Bruen*, 142 S. Ct. at 2133).

In sum, the government historically has disarmed individuals without initiating criminal proceedings when those individuals posed a threat to others' lives. And it has done so using a variety of legal mechanisms, tailoring procedural requirements to the risk of harm.

II. Due process does not require a criminal proceeding prior to disarmament.

The Court has never held that the initiation of criminal proceedings is necessary to limit an individual's Second Amendment rights. Nor do historical laws support such a limitation. Nonetheless, in a footnote, the Fifth Circuit panel wrote:

> The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. In crafting the Bill of Rights, the Founders were plainly attuned to preservation of these protections. *See* U.S. Const. amend. IV; U.S. Const. amend. V; U.S. Const. amend. VI; U.S. Const. amend. VIII. It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process.

Rahimi, 61 F.4th at 455 n.7. Judge Ho separately picked up the thread, arguing that only following a criminal proceeding can a dangerous person may be disarmed. *Id.* at 431–67 (Ho, J., concurring).

The line drawn between criminal and civil proceedings is unsupported by the same historical laws the Fifth Circuit rejected as analogues. *Supra* pp. 12–14. And that is not all. The proposed approach is inconsistent with both historical and modern conceptions of due process. Applying the correct framework, § 922(g)(8) stands. The temporary deprivation of a liberty interest—whether expressly

mentioned in the Constitution or not—does not require criminal conviction.

A. Temporary forfeiture of the right to possess weapons is not punishment and does not trigger criminal procedural protections.

Criminal procedural protections are available only when (1) the proceedings are, as a matter of statutory construction, in fact criminal proceedings, *see Allen v. Illinois*, 478 U.S. 364, 368 (1986), or (2) "a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the government's] intention' to deem it 'civil,'" *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). Although § 922(g)(8) establishes a criminal offense, it is predicated on a civil protection order, issued only after notice and an opportunity to be heard.

Whether criminal process is required therefore depends on whether disarmament of domestic abusers is "so punitive" as to require criminal process. *Ibid.* A criminal statute will implicate "either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* at 361–62. But, because "all civil penalties have some deterrent effect," a sanction need not be "'solely' remedial (*i.e.*, entirely nondeterrent)" to avoid enhanced criminal procedural protections. *Hudson v. United States*, 522 U.S. 93, 102 (1997) (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

Plainly, the primary purpose of disarming domestic abusers is to mitigate the risk to the abused. Risk mitigation is not retributive: it does not "affix culpability for prior criminal conduct." *Hendricks*, 521 U.S. at 362. Nor does it serve a primarily deterrent function. It certainly does nothing to advance general deterrence. *See* John C. Ball, *The Deterrence Concept in Criminology and Law*, 46 J. Crim. L. Criminology & Police Sci. 347, 347 (1955) ("Deterrence is usually defined as the preventive effect which actual or threatened punishment of offenders has upon potential offenders."). While specific deterrence overlaps considerably with risk mitigation, when "future dangerousness" is shown, and "protecting the community from harm" is the primary goal of a loss of liberty—even the complete and involuntary restraint of physical freedom, as in the contexts of incarceration and civil commitment—deterrence is secondary to risk mitigation. *Hendricks*, 521 U.S. at 358, 363. "Far from any punitive objective," the "duration" of the restriction on Second Amendment rights is "linked to the . . . purpose of the [restriction]"—to disarm the person until he is "no longer . . . a threat to others." *Id.* at 363.

Individuals subject to domestic violence restraining orders lose multiple constitutionally protected liberty interests. In addition to forfeiting their Second Amendment rights, such individuals are restrained from traveling freely and associating with family members, including not only current or former romantic partners but also the restrained person's own children. And yet, the Fifth Circuit did not blink before concluding that such restrictions, applied to Mr.

Rahimi—"restraining [him] . . . from going within 200 yards of his ex-girlfriend or her family (including their child)"—are plainly lawful and enforceable." *Rahimi*, 61 F.4th at 449 n.2 (emphasis added). Rightly so. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law*, 21 Hofstra L. Rev. 801, 905–09 (1993) (collecting cases rejecting constitutional challenges to domestic violence restraining orders).

So why would disarmament trigger criminal procedural protections, in contrast to the loss of other constitutionally protected interests? The distinction cannot be attributable to the Second Amendment itself, which neither refers to a specific process nor has required criminal process as a historical matter. *See supra* pp. 4–9. And it would not be consistent with the Court's treatment of other constitutionally protected interests.

Take, for example, civil commitment. For centuries, "[s]tates have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Hendricks*, 521 U.S. at 357. The loss of physical freedom to the civil detainee is no less severe than to the criminal detainee, and the freedom from physical restraint is constitutionally protected, but criminal process does not attach. *See Obergefell v. Hodges*, 576 U.S. 644, 725–26 (2015) (Thomas, J., dissenting) (describing original meaning of "liberty" within the due process clause as "freedom from physical restraint"); *see also Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36–37 (H. L. 1758)

(Wilmot, J.) (those confined following civil process—"[p]ersons who are bailed, paupers in hospitals or workhouses, madmen under commissions of lunacy, or confined by parish officers, under the Vagrant Act of 17 Geo. II."—"are all under a lawful confinement"). While disarmament is a restraint on liberty, it does not follow that criminal protections are in order.

B. Prior to a deprivation of liberty or property, the core due process requirements are—at most—notice and an opportunity to be heard.

While the government bears the burden of establishing analogues for modern laws restricting Second Amendment rights, the burden flips when an individual challenges the adequacy of particular procedures. "It is not the State which bears the burden of demonstrating that its rule is 'deeply rooted,' but rather [the challenger] who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996) (Scalia, J., for the plurality) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Thus, if the touchstone of Rahimi's challenge is, in fact, due process, the burden falls on him to show that criminal proceedings must be initiated to trigger disarmament.

Rahimi cannot meet that burden. As a threshold matter, Rahimi did not even attempt to; the criminal/civil due process theory is the Fifth Circuit's, not Rahimi's. But even if the issue had been raised properly below, the challenge could not succeed. At

most, the due process clause requires notice and an opportunity to be heard. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed.") (internal citations omitted).

"The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting). Thus, "[d]etermining whether common-law procedures for awarding punitive damages can deny 'due process of law' requires some inquiry into the meaning of that majestic phrase." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J. concurring in the judgment); *see also Dent v. West Virginia*, 129 U.S. 114, 123 (1889) ("[I]t may be difficult, if not impossible, to give to the terms 'due process of the law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden.").

The phrase "due process of law" "existed in the English customary constitution for at least four hundred years" before the Bill of Rights was ratified. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1721–22 (2012). "Due process" is commonly traced to an English statute of 1354: "That no Man of what Estate or Condition that he be, shall he put out of Land or Tenement, nor taken nor imprisoned, nor

disinherited, nor put to death, without being brought in Answer by due Process of the Law." 28 Edw. 3 ch. 3 (1354). By the time of the founding, the phrase had been inextricably linked to Magna Carta's guarantee:

> No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.

9 Hen. III, ch. 39; *see* Edward Coke, *The Second Part of the Institutes of the Laws of England*, 46 (3d ed. 1669) ("[B]y the law of the land means by the due course and process of the law."); *Haslip*, 499 U.S. at 29 (Scalia, J., concurring in the judgment) ("The American colonists were intimately familiar with Coke."); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta.").

The 1354 English statute was understood to mean that judgment and execution cannot be rendered against any party "unless and until he was brought personally before the court by the appropriate writ." Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am. J. Legal Hist. 265, 267 (1975). Thus, early English "process" disputes centered on how to haul the defendant into court so that he would have an opportunity to defend himself. *See, e.g.*, Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power*

Doctrine, 78 Yale L. J. 52, 60 (1968); Donald E. Wilkes Jr., *Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603–1625*, 54 Am. J. Legal Hist. 200, 219 (2014); *see also* Frederick Pollock & Frederick William Maitland, *The History of English Law*, 592, 594–95 (1899) ("One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavour to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy. . . . Our law would not give judgment against one who had not appeared.").

Modern scholarship that focuses on the original meaning of the due process clause therefore questions whether modern conceptions of the Due Process Clause demand too much. *See* Max Crema & Lawrence Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 451–52 (2022) ("The phrase 'due process of law' had a very precise and restricted meaning: the Clause is limited to legally required 'process' in what is today a narrow and technical sense of that word."); Robert Emmett Burns, *Due Process of Law: After 1890 Anything; Today Everything—A Bicentennial Proposal to Restore Its Original Meaning*, 35 DePaul L. Rev. 773, 810 (1986) ("The difference between original procedural due process and post-1890 due process is that before 1890 there was constitutional due process whenever there was notice or a trial under the applicable law of the jurisdiction."); Edward J. Eberle, *Procedural Due Process: The Original*

Understanding, 4 Constitutional Commentary 293, 342–59 (1987) (discussing the development of due process doctrine pre-Reconstruction).

C. Section 922(g)(8) relies only on domestic violence restraining orders that provide notice and an opportunity to be heard.

There is no need, however, to determine the outer limits of the Due Process Clause to resolve this case. The deprivation of Rahimi's Second Amendment rights—like that of any person convicted under § 922(g)(8)—came only after notice and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950) ("[A]t a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Because he was not subject to criminal repercussions, Rahimi was due no criminal process. *See supra* pp. 16–18. Accordingly, Rahimi was not entitled to enhanced procedural protections prior to his disarmament.

Consider, nonetheless, the robust due process protections available to Rahimi when the restraining order issued. Texas law authorizes three forms of domestic violence restraining orders—emergency protective orders, Tex. Code Crim. P. §§ 17.292–17.293, temporary *ex parte* orders, Tex. Fam. Code Ann. §§ 83.001–83.006, and final protective orders, Tex. Fam. Code Ann. §§ 85.001–85.006. Because § 922(g)(8) may apply only to those who received notice and a hearing, only final protective orders may serve as antecedent to conviction. Rahimi

was served personally—service by publication is disallowed, *id.* §§ 82.041–82.043—and the court legally could not hold the hearing unless 48 hours had elapsed following proper service, *id.* §§ 84.001–84.004. Rahimi had the right to file an answer, but he was not obligated to do so. *Id.* § 82.021. After a hearing in which Rahimi participated, the Court issued a restraining order, necessarily finding that family violence actually had occurred and likely would occur again. *Id.* § 85.001. The order stated "in boldfaced type, capital letters, or underlined" that Rahimi was prohibited from possessing firearms. *Id.* § 85.026. Rahimi had the opportunity to request review of the order, *ibid.*, seek modification, *id.* § 87.001, and appeal, *id.* § 81.009.

By no means are peaceable citizens' Second Amendment rights weaker as a result of disarming violent citizens following notice and an opportunity to be heard. "[T]he law [within the meaning of Article 39 of Magna Carta] serves two complementary functions: it grants government officials the legitimacy to exercise the powers of their office and, in so doing, to restrict the freedom of individuals, while also reining in the power government officials may exercise in the performance of their duties." Paul J. Larkin Jr., *The Lost Due Process Doctrines*, 66 Cath. U. L. Rev. 293, 337 (2017). The due process protections inherent in domestic violence restraining order proceedings do not undermine the significance of the Second Amendment. Rather, they give full credit to the liberty interests involved and appropriately recognize that the compelling need for public safety may temporarily outweigh the interests of the individual.

III. Threats to public and individual safety demand flexible solutions that respect Second Amendment rights.

Now, as at the founding, most gun owners are responsible and law-abiding; most gun owners expect the same from their fellow citizens. Thus, gun owners overwhelmingly support reasonable laws that prevent people likely to commit violence from accessing guns. Indeed, 76.9% of gun owners support prohibiting gun possession by people subject to a domestic violence restraining order—the very law Rahimi challenged. Michael Siegel, MD, MPH, Kathleen Grene, Amani Dharani, *Finding the Common Ground on Gun Safety: Part One: Research Findings Executive Summary*, 11 (2022).[2]

Because guns always have been dangerous, the government always has regulated their possession and use. Legislation that gives full consideration to both gun rights and public safety is politically viable and constitutionally permissible. For example, over two-thirds of gun owners support red flag laws—laws that temporarily disarm a gun owner who poses a demonstrable threat of violence. *Ibid.* It is certainly possible to imagine red flag laws that would violate the Second Amendment. But legislative processes can and will respond to the many voters who care deeply about their freedoms and their rights to self-defense. *Amicus* has researched support among gun owners for particular legislative policies and found that the risk of unlawful deprivations motivates concerned citizens. Thus, gun owners are more likely to support red flag

---

[2] *Available at* https://perma.cc/C3HY-PQZN.

laws when they include one or more of the following provisions: fines for those who seek to disarm others dishonestly; a protocol for speedy, inexpensive Second Amendment restorations; due process hearings; the right to keep firearms with a designated friend or family member; and limitations on who may request that firearms be removed. *Id.* at 15.

Courts, of course, are the ultimate backstop against Second Amendment violations. But, unlike legislatures, they cannot find and enact workable solutions for modern problems, just as they did not interfere with legislation regulating firearms until "the question . . . present[ed] itself" in the form of a "law totally ban[ning] handgun possession in the home." *Heller*, 554 U.S. at 626, 628. So long as legislative solutions do not trigger Second Amendment concerns by disarming peaceable, law-abiding citizens, the government must be able to tailor solutions that further the public safety without unduly burdening Second Amendment rights.

Because the Court cannot enact these solutions itself. The Constitution "diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Given the compelling need to consider both public safety and individual liberty, legislatures are best situated to find solutions that strike the appropriate balance. *See W. Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) ("the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people"); *see also Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)

("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."). Too heavy a hand threatens both public safety and the separation of powers, "arrogating legislative power" from both Congress and the states. *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1574 (2022) (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 741 (2020)).

Responsible gun owners care deeply about their Second Amendment rights. And they recognize that those rights are not absolute. The government may disarm individuals who would use their liberty to disturb the peace and threaten the lives of others.

CONCLUSION

Section 922(g)(8) is constitutional.

Respectfully submitted,

CONSTANCE VAN KLEY
Counsel of Record
RYLEE SOMMERS-FLANAGAN
UPPER SEVEN LAW
1 N. Last Chance Gulch, Ste. 5
Helena, MT 59601
(406) 306-0330
constance@uppersevenlaw.com

August 18, 2023