No. 22-915

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

ZACKEY RAHIMI,
RESPONDENT,

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Congress exceeded its constitutional authority when it enacted 18 U.S.C. § 922(g)(8).

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BRIEF IN OPPOSITION

Respondent Zackey Rahimi disagrees with the Government and its amici about the meaning of the Second Amendment to the Constitution, the effect of the recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and the extent of Congress's power to decide who can (and who cannot) possess a firearm within the home. But it is too early to work through those disputes in the Supreme Court.

Bruen overturned the lower courts' "'two-step' framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny." 142 S. Ct. at 2125. The Court specifically criticized the pre-*Bruen* tendency to "defer to the determinations of legislatures" when evaluating firearm regulations. *Id.* at 2131. The Court even named a decision upholding 18 U.S.C. § 922(g)(8) under means-end scrutiny as an example of what *not* to do. *See id.* at 2127 n.4 (citing *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010)).

As the Court surely anticipated, lower courts are now hard at work applying the new historical framework and revaluating firearm restrictions that were previously upheld under intermediate scrutiny and deference to legislative judgment. Many important cases have been argued and await decisions. *See*, e.g., Order Requesting Supplemental Briefing, *United States v. Quiroz*, No. 22-50834 (5th Cir. Feb. 16, 2023) (identifying unsettled questions about the *Bruen* framework in an appeal about § 922(n), which prohibits receiving a firearm while under indictment). Eleven months after *Bruen*, the circuit courts have issued just three precedential

decisions evaluating federal firearms bans after *Bruen*—and one of those has already been withdrawn and reargued. *See* Pet. App. 1a–41a (holding 18 U.S.C. § 922(g)(8) unconstitutional after *Bruen*); *see also Range v. Attorney Gen.*, 53 F.4th 262, 282–85 (3d Cir. 2022) (upholding § 922(g)(1), felon-in-possession, after *Bruen*), *reh'g en banc granted, opinion vacated*, 56 F.4th 992 (3d Cir. 2023); *United States v. Sitladeen*, 64 F.4th 978, 983–87 (8th Cir. 2023) (upholding § 922(g)(5)(A), unlawfully-present-noncitizen-in-possession, after *Bruen*).

The Fifth Circuit's decision was a faithful application of *Bruen* "based on the historical record compiled by the parties," 142 S. Ct. at 2130 n.6, and it does not conflict with any precedential decisions from the other courts of appeal or state supreme court. Though the Government may have raised additional historical laws in this Court,[1] none of them resembles § 922(g)(8). The Government's amici are chiefly concerned with defending state laws and advancing empirical claims that were never discussed below, and that don't figure into *Bruen*'s analysis.[2] The Court should deny the petition.

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[1] Many of the laws cited in the petition were not directly cited below. *Compare* Pet. 8–10 (citing, e.g., New Hampshire, Pennsylvania, and Virginia statutes from 1777 and an 1866 order from South Carolina's military governor) *with* U.S. C.A. Supp. Br. vi.–ix & U.S. C.A. 28(j) (Aug. 31, 2022) (omitting any reference to 1777 laws or military governor orders).

[2] To take just one example, four of the seven amicus briefs cite or discuss a 2017 study comparing firearm laws and homicide rates among various states. *See* Gun V. & Domestic V. Prev. Br. 23; Tex. Advoc. Proj. Br. 16; Ill. & D.C. Br. 16; NYCLA Br. 5 (all citing Caroina Díez, et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the U.S.*, 167 Annals of Internal Med. 536 (2017)). That study found no significant association between intimate-partner

STATEMENT

Title 18, Section 922(g)(8) prohibits the mere possession of firearms or ammunition by anyone subject to certain types of restraining orders. If the protective order includes the requisite language, *see* § 922(g)(8)(B), (C), a respondent who simply possesses a gun faces up to ten or fifteen years in federal prison. The federal ban applies regardless of whether he keeps the gun locked in his bedroom or brandishes it at others; whether he resides with the movant or lives in another home (or even another state); whether or not the movant alleges previous violence or misuse of guns; and whether or not the order expressly forbade firearm possession.[3]

This law would have been unthinkable to the founding generation and to most of the Congresses convened in our nation's history. But beginning in the 1930s,

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homicide and state laws like 18 U.S.C. § 922(g)(8) that merely prohibit possession of a firearm by someone subject to a restraining order without separately providing for confiscation or surrender and storage. Díez, *supra*, 539. None of the amicus briefs mention that finding, but surely it would be worth considering when evaluating whether the decision below urgently requires immediate review in this Court. Many times, the amicus briefs make firm causal claims based on correlation studies that expressly disclaim or limit any causal interpretation. *See*, e.g., *id.* at 542 (noting limitations of the study that were not discussed in the amicus briefs). Time and space constraints preclude a full response to all those briefs. *But see Bruen*, 142 S. Ct. at 2131 (instructing courts to disregard all "interest balancing" and focus exclusively on history and tradition). Pet. App. 1a (disregarding the "laudable policy goal" motivating § 922(g)(8)).

[3] This ignores Congress's carve-outs for, e.g., military and police. *See* 18 U.S.C. § 925(a)(1), (2). Those exceptions cast at least some doubt on the supposition that anyone covered by § 922(g)(8) cannot be trusted to keep even a hunting rifle locked in a closet.

Congress asserted much more authority over everything—including firearms—than the founders anticipated. The Congress that enacted § 922(g)(8) did not understand that its power to regulate guns was limited in the ways described by *Bruen*. In fact, § 922(g)(8) was a direct outgrowth of the view that the Second Amendment did *not* protect an individual's right to possess a firearm for self-defense disconnected from militia service.

A. Legal Background

Many in the founding generation believed the first ten amendments were "unnecessary" because "the rights in question are reserved by the manner in which the federal powers are granted." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 Writings of James Madison 269, 271 (G. Hunt ed. 1904). But Congress ultimately adopted, and the States ultimately ratified, a Bill of Rights that included an unqualified right to possess weapons:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., amend. II.

Beginning in the late 1930s—around 140 years after ratification—and continuing through the mid-1990s, many judges and many members of Congress expressed a much broader view of Congressional powers and a much narrower view of the Second Amendment. *See United States v. Lopez*, 514 U.S. 549, 556 (1995) (discussing "an era of Commerce Clause jurisprudence" beginning in 1937 "that

greatly expanded the previously defined authority of Congress under that Clause")[4]; *see also United States v. Miller,* 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a [short-barrel shotgun] has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."). Federal firearms laws enacted during this period—and the cases interpreting them—reflected and typified the 20th-century, maximalist view of Congress's power.

The first federal law banning large swaths of the population from possessing firearms appeared in 1968. Pub. L. 90-951, tit. VII, § 1202(a), 82 Stat. 236 (1968). One might think that such a momentous shift in the federal government's understanding of its own power would be marked by hearings, debate, and study. One would be wrong. The predecessor to § 922(g)'s possession prong was a "last-minute" amendment to the 1968 crime bill, "hastily passed, with little discussion, no hearings and no report." *United States v. Bass*, 404 U.S. 336, 344 (1971). It banned "felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship." 82 Stat. 236.

[4] The Commerce Clause provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3.

Senator Russell Long conceived of possession ban in reaction to the assassinations of President Kennedy in 1963 and Dr. Martin Luther King, Jr., in 1968. 114 Cong. Rec. 14773 (1968). Long recognized that his contemporaries and predecessors in Congress harbored "a constitutional doubt that the Federal Government could outlaw the mere possession of weapons." *Id.* at 13868. But Long thought there was an easy way around that problem: Congress could "simply (find) that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce." *Id.* at 13869.

After he proposed the amendment, his colleagues agreed to add it to the Senate's version of the crime bill for the sole purpose of studying it further while in conference with the House. Some were openly skeptical. Senator John McClellan asked, "Can we, under the Constitution, deny a man the right to keep a gun in his home?" 114 Cong. Rec. 14774. He worried that the possession prohibition "may go too far." *Id.* Senator Peter Dominick agreed: "I believe there are a number of instances in which it would be going too far to say that a man could no longer participate in duck shooting or pheasant shooting. . . . I have a feeling that perhaps we have gone too far, but perhaps this matter can be worked out in conference." *Id.* at 14774–75. Senator Thomas Dodd was "a little uneasy about" the federal government banning mere possession: "[W]e will study it. I do not believe it would do any harm." *Id.* at 14774. On May 23, 1968, the Senate agreed to Long's amendment on a voice vote. *Id.* at 14775.

Twelve days later, on June 5, Sirhan Sirhan shot Senator Robert Kennedy. The next day, the House agreed to the Senate amendments, including Senator Long's gun-possession ban. President Johnson signed the law.

Congress expanded the list of prohibited possessors when it enacted § 922(g)(8) in 1994. The amendment was a small part of a sprawling crime bill. *See* Pub. L. 103-322, tit. XI, § 110401(c), 108 Stat. 2014–15 (1994). Other provisions of the bill drew more scrutiny in the press and Congress itself, including the "semiautomatic assault weapons" ban, §§ 110101–110106, 108 Stat. 1996–2010, and the federal civil-rights remedy for gender-motivated violence, § 40302, 108 Stat. 1941–1942, *held unconstitutional by United States v. Morrison*, 529 U.S. 598 (2000).

Senator Paul Wellstone and Representative Guy Torricelli were the first to propose a gun ban for people subject to domestic violence restraining orders in 1993. Their companion bills would have banned gun possession for anyone subject to a protective order issued "in a case involving the use, attempted use, or threatened use of physical force against" "a spouse, former spouse, domestic partner, child, or former child of the person," and only if the order required the person "to maintain a minimum distance from the person so described." S. 1570, 103d Cong. § 3 (1993), reprinted at 139 Cong. Rec. 25490; *see also* H.R. 3301, 103d Cong. (1993).

But Congress did not adopt the Wellstone / Torricelli bill; it chose instead the much broader language first proposed by Senator John Chafee. *See* 139 Cong. Rec. 28487 (1993) (Amendment 1169 to S. 1607, 103d Cong. (1993)). Senator Chafee was a passionate defender of gun control and did not believe the Second Amendment

protected an individual right to own firearms for self-defense. He sponsored a bill that same term to ban *anyone* from possessing a handgun. S. 892, 103d Cong. (1993). On May 5, 1993, arguing in support of that bill, he called individual-rights interpretation "one of the great frauds that is perpetrated on the American public":

> As a matter of fact, Mr. President, there has never been a Federal court in the United States of America that has interpreted this otherwise. No Federal court has ever said that a community or a city or a State or the Federal Government cannot regulate the possession of weapons, whether it is assault rifles, whether it is handguns, or whatever the firearm is. So I think it is time that we get the true meaning of the second amendment out to the public, so the public may understand that it does not in fact provide for any individual constitutional right to carry a gun.

139 Cong. Rec. 9310 (1993); *see also id.* at 14736–14737 (arguing, based on *Miller*, that the Second Amendment does not protect individual rights and that the phrase "the people" means something different in the Second Amendment than it means in the Fourth Amendment).

B. Disputed and Undisputed Facts

Mr. Rahimi raised a "facial challenge" to 18 U.S.C. § 922(g)(8)—in other words, he argued that the law was unconstitutional "consider[ing] only the text of the statute itself, not its application to the particular circumstances of an individual." Pet. App. 12a (quoting *Freedom Path, inc. v. Internal Revenue Serv.*, 913 F.3d 503, 508 (5th Cir. 2019)). And, as explained below, he has admitted all the facts necessary to bring his conduct within the reach of § 922(g)(8), at least as the statute has been interpreted by lower courts.

Unfortunately, the petition clouds the issue by referring to several disputed allegations that have nothing to do with his motion to dismiss or the elements of § 922(g)(8). As this Court has repeatedly recognized, "at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Mathis v. United States*, 579 U.S. 500, 512 (2016) (quoting *Descamps v. United States*, 570 U.S. 254, 270 (2013)). Many of those allegations are at issue in ongoing criminal proceedings in Texas state court.

The Government has not contested the Fifth Circuit's decision to analyze § 922(g)(8) based on its elements, and it has not suggested that any of these non-elemental allegations make Mr. Rahimi subject to § 922(g)(8) if the Constitution forbids its application in most other cases. The Government has never argued that Mr. Rahimi is subject to any other firearms disability. Presumably, the petition recounts these extraneous allegations because they paint Mr. Rahimi in an unfavorable light.

On February 5, 2020, a family court judge in Tarrant County, Texas, issued an agreed protective order against Mr. Rahimi and in favor of a former girlfriend with whom he shares a child. 5th Cir. ROA 12–18. Mr. Rahimi's agreed protective order included boilerplate findings matching the requirements of § 922(g)(8)(B), (C)(i), and (C)(ii). 5th Cir. ROA 13–14.

On January 14, 2021, Arlington, Texas Police searched Mr. Rahimi's home and found a .45 caliber pistol, a .308 caliber rifle, and a copy of the protective order in his

bedroom. Mr. Rahimi did not share that home with the alleged victim named in his protective order. The Government has never contended that either weapon fell outside the scope of the Second Amendment. Both firearms were manufactured outside Texas. The record contains no other evidence connecting those guns to interstate commerce.

C. Procedural History

Before his Texas charges could be resolved, federal authorities indicted Mr. Rahimi for violating § 922(g)(8). The indictment alleged only one offense—Mr. Rahimi's possession of the handgun and the rifle in his bedroom on the day of the search. Mr. Rahimi moved to dismiss the indictment, specifically arguing that Second Amendment claims should be evaluated under a historical framework rather than means-end scrutiny then-prevalent among the lower courts. The district court denied the motion and accepted his guilty plea. The court sentenced him to serve 73 months in federal prison and ordered the sentence to run concurrent with some anticipated state sentences and consecutive to others.

Mr. Rahimi appealed, continuing to press his claim that § 922(g)(8) exceeded Congress's power. As the petition explains, the Fifth Circuit initially affirmed, but vacated that decision after *Bruen*. Applying *Bruen*'s historical framework, the Fifth Circuit held that § 922(g)(8) is unconstitutional.

REASONS TO DENY THE PETITION

I. THIS COURT'S REVIEW WOULD BE PREMATURE.

A. *Bruen* is less than a year old.

This Court decided *Bruen* on June 23, 2022, overruling the "'two-step' framework for analyzing Second Amendment challenges" which the lower courts had adopted. *Bruen*, 142 S. Ct. at 2125. Under that framework, appellate courts upheld novel firearm laws out of excessive deference "to the determinations of legislatures." *Id.* at 2131. Many federal and state firearm regulations must now be re-analyzed in the wake of this new guidance. A successful constitutional challenge to a seldom-prosecuted gun crime is not an emergency. If the lower courts diverge in their interpretation of *Bruen*, the Court may have to intervene. But it need not do so every time a gun owner prevails in a constitutional challenge.

This Court only "rarely" grants certiorari to refine or clarify an important constitutional issue within the first year. *Dodd v. United States*, 545 U.S. 353, 359, (2005). Lower courts are just beginning to grapple with *Bruen*, and the decision's recency is reason enough to deny certiorari.

This Court's opinions and practice repeatedly emphasize the importance of "percolation"—"the independent evaluation of a legal issue by different courts." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984). Percolation is critical when the Court will confront "frontier legal problems." *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting); *see also Calvert v. Texas*, 141 S.

Ct. 1605, 1606 (2021) (Sotomayor, J., concurring) ("The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review."); *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring) ("[B]ecause further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now.") Percolation "may yield a better informed and more enduring final pronouncement by this Court." *Evans*, 514 U.S. at 24 n.1 (Ginsburg, J., dissenting).

Even a short delay would provide the Court with substantial insight about how the lower courts will apply *Bruen*. The en banc Third Circuit heard argument on February 15, 2023, in a Second Amendment challenge to the felon-in-possession ban, § 922(g)(1), and the parties are awaiting a decision. *See Range v. Attorney Gen.*, 53 F.4th 262 (3d Cir. 2022), *reh'g granted*, 56 F.4th 992 (3d Cir. 2023). The Eighth Circuit rejected a Second Amendment challenge to § 922(g)(5)(A), which bans firearm possession for noncitizens without permission to reside in the United States. *United States v. Sitladeen*, 64 F.4th 978, 985 (8th Cir. 2023), *reh'g denied* (May 10, 2023). More decisions will surely follow.

This Court has denied premature certiorari petitions raising constitutional questions even after the respondent agreed the lower courts erred. For example, in *Wooden v. United States*, 142 S. Ct. 1063 (2022), this Court resolved a 6-2 circuit split over the meaning of the Armed Career Criminal Act's "occasions clause." *Id.* at 1069–74; *see* 18 U.S.C. § 924(e)(1). The Court's resolution of that statutory issue strongly

suggests (if not outright implies) that the "occasions" issue must be submitted to a jury rather than resolved by a sentencing judge. *See id.* at 1068 n.3 (reserving judgment on that question). Every circuit to decide the issue before *Wooden* held that a sentencing judge could decide whether predicate crimes occurred on different occasions.

The Government, in its more typical role as respondent in this Court, recently "agree[d] that the different-occasions inquiry requires a finding of fact by a jury or an admission by the defendant." U.S. Br. Opp. at 4, *Daniels v. United States*, No. 22-5102 (U.S. filed Nov. 21, 2022); *see also* U.S. Br. Opp. at 7, *Reed v. United States*, No. 22-336 (U.S. filed Dec. 12, 2022), available at 2022 WL 17669652; U.S. Mem. Opp. at 1–2, *Enyinnaya v. United States*, No. 22-5857 (U.S. filed Dec. 19, 2022). The Government also agreed that the constitutional question "is important, recurring, and may eventually warrant this Court's review." *Reed* Opp., 2022 WL 1766952, at *7. Yet despite agreeing that every circuit courts to address the important constitutional issue got it wrong, the Government successfully argued in all those cases that "review in this Court only months after *Wooden* would be premature." *Id.* That logic applies with even greater force here. *Wooden* was decided on March 7, 2022, a few months before *Bruen*.

B. There is no conflict of authority.

The Fifth Circuit was the first—and so far the only—Court of Appeals to address the question presented after *Bruen*. The Government nonetheless claims that the decision below conflicts with two pre-*Bruen* decisions: *United States v. Boyd*, 999

F.3d 171 (3d Cir. 2021), and *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011). It asserts that these decisions "remain good law today." Pet. 14. But that is far from clear. If the Third and Eighth Circuits adhere to those holdings and uphold § 922(g)(8) after *Bruen*, then that would give rise to a conflict that might eventually justify certiorari. That hasn't happened yet.

There is plenty of reason to think those courts will come to a different answer after *Bruen*. Both decisions typify the post-*Heller*, pre-*Bruen* consensus that courts must defer to legislatures to limit and regulate the right to bear arms. *See Bena*, 664 F.3d at 1184 ("At least some applications of § 922(g)(8), therefore, 'promote the government's interest in public safety consistent with our common law tradition.'"); *Boyd*, 999 F.3d at 185 ("Boyd bears the burden of showing that § 922(g)(8) imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."). And both decisions relied on abrogated, pre-*Bruen* decisions. *See Boyd*, 999 F.3d at 188 (citing *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020)).

Bruen also reallocated the burden of persuasion and proof as to the constitutionality of a firearms ban. *Boyd* assumed § 922(g)(8) was constitutional and placed the burden of rebutting that assumption on the defendant. *See Boyd*, 999 F.3d at 185 ("Boyd bears the burden of showing that § 922(g)(8) imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.") (internal quotation omitted). Under *Bruen*, the "Government bears the burden of proving the Constitutionality of its actions." 142 S. Ct. at 2130 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)); *see also id.* 2135 ("[T]he the

burden falls on [state officials] to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation.").

Bruen also clarified what the Government had to show to justify a law like § 922(g)(8). The inquiry is "fairly straightforward . . . when a challenged regulation addresses a general society problem that has persisted since the 18th century." *Id.* at 2131. In such a case, *Bruen* demands *specific* historical regulations contemporaneous with the founding. Its detailed comparison of the New York proper cause law and the historical enactments proffered in support thereof puts the constitutionality of § 922(g)(8) in a much different light. It would be hard to justify decisions like *Bena* and *Boyd* after *Bruen*.

In a few months, we will know more about the Third Circuit's post-*Bruen* Second Amendment jurisprudence. *Range* is about § 922(g)(1), not (g)(8), but it is likely to shed light on the vitality of *Boyd*. Until then, it is simply speculation to assume that the court would adhere to *Boyd* or any other pre-*Bruen* precedent now that this Court has clarified the proper analysis.

II. THE GOVERNMENT'S CLAIM OF URGENCY IS OVERSTATED AND BELIED BY ITS OWN PRACTICES.

A. This Court has refused to review decisions invalidating federal statutes where the invalidity arises from recent Supreme Court precedent.

The Government argues that the Court should grant certiorari "because the Fifth Circuit held an important federal statute unconstitutional on its face." Pet. 13. And it is true that the Court has sometimes noted that factor as a reason it granted certiorari. *See*, e.g., *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019) ("As usual when a

lower court has invalidated a federal statute, we granted certiorari."); *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding . . . invalidated a portion of an Act of Congress, we granted certiorari.").

But that is only one side of the story. The Court has also declined to hear cases where a court of appeals held a federal statute unconstitutional. E.g. *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017) (holding 18 U.S.C. § 922(g)(1) unconstitutional under the Second Amendment as applied to two defendants); *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009) (holding 47 U.S.C. § 231 facially unconstitutional under the First Amendment); *Wilson v. Nat'l Labor Relations Bd.*, (6th Cir. 1990) (holding 29 U.S.C. § 169 facially unconstitutional under the First Amendment).

The Court does not usually explain why it denies certiorari. But many denials involve a situation like this one—where the invalidity of a federal statute becomes obvious after this Court overturns intermediate precedent. *See*, e.g., *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695–96 (D.C. Cir. 2010), *cert. denied sub. nom.*, 562 U.S. 1003 (2010) (holding 2 U.S.C. § 441a(a)(1)(C) & 441a(a)(3) unconstitutional after *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)); *Lieu v. Fed. Election Comm'n*, No. 19-5072, 2019 WL 5394632, at *1 (D.C. Cir. Oct. 3, 2019), *cert. denied*, 141 S. Ct. 814 (2020) (same); *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1336 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (holding 18 U.S.C. § 1304 unconstitutional after *44 Liquormart, Inc. v. Rhode Island*,

517 U.S. 484 (1996)); *ACORN v. Edwards*, 81 F.3d 1387, 1393–94 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (holding 42 U.S.C. § 300j–24(d) unconstitutional after *New York v. United States*, 505 U.S. 144 (1992)).

B. The Government charges fewer than 50 people per year under § 922(g)(8) nationwide.

Given the petition's warnings of "exceptional importance," "significant disruptive consequences," and "[t]ens of millions of Americans" touched by domestic violence at some point during their lives, and the request for a decision on the petition "before [the Court] recesses for the summer," Pet. 15–16, one might expect to find that § 922(g)(8) prosecutions make up a significant piece of the Government's gun-control agenda. The numbers say otherwise.

Public data suggests the Government prosecutes fewer than 50 people per year for violations of § 922(g)(8), nationwide. According to one study, the Government investigated 952 people for potential violations of § 922(g)(8) between 2000 and 2016—an average of 56 per year. Emily Tiry et al., *Prosecution of Federal Firearms Offenses 2000-16* at 5, Table 2 (Urban Institute Oct. 2021).[5] For purposes of comparison, the Government investigated 126,580 people for potential violations of § 922(g)(1) (felon-in-possession) during that same period. *Id.* Some of those investigated were never charged or convicted. A search of the Sentencing

[5] Available at https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf (accessed May 28, 2023).

Commission's monitoring datafile yields 707 defendants sentenced for violating § 922(g)(8) for fiscal years 1999–2022—fewer than 30 per year, nationwide.

The Government warns of "the suspension of criminal prosecutions under Section 922(g)(8) in the nine judicial districts within the Fifth Circuit," but doesn't say how many were "suspen[ded]." Pet. 15. It can't be very many. The same Sentencing Commission data file includes no § 922(g)(8) defendants in three Fifth Circuit districts (Middle and Eastern Districts of Louisiana and Northern District of Mississippi) and just 46 defendants in the remaining six districts over 24 years (Fiscal Years 1999–2022). So, in an average year, the Fifth Circuit's decision would "suspend" two prosecutions per year, assuming those defendants could not be charged with something else.

To the extent that prosecutions have been suspended, it is not because of *Rahimi*, but because of *Bruen*. Even before the Court of Appeals decided this case, at least one district judge in the Fifth Circuit held § 922(g)(8) unconstitutional under *Bruen*. *See United States v. Perez-Gallan*, No. PE:22-CR-427, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

Suspended or not, the scant effort made by DOJ to prosecute cases under § 922(g)(8) casts serious doubt on its current claim that the law is a critical tool to combat domestic violence.

Further, the Government has apparently never promulgated any "regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in subsection (d)(8) or (g)(8) of section 922" in nearly 30 years.

18 U.S.C. § 926(a)(3). Section 922(g)(8) itself does not separate protective-order respondents from their guns—it simply commands them not to possess those guns while the order persists. Thus far, the Government has not provided for temporary storage of firearms for someone who wants to comply with § 922(g)(8) but does not want to sell or give away a gun or collection of guns. This is not what one would expect if everyone covered by § 922(g)(8) posed an imminent danger of violent homicide.

III. THE FIFTH CIRCUIT'S JUDGMENT WAS CORRECT.

A. The Government failed to rebut *Bruen*'s presumption of unconstitutionality.

1. Section 922(g)(8) criminalizes conduct protected by the plain text of the Second Amendment.

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129–30. Section 922(g)(8) effects a categorical ban on "keep[ing] and bear[ing]" firearms. The statute prohibits the mere possession of firearms, even at the defendant's own home, and even if the parties to the restraining order live in separate homes or cities. "Nor does any party dispute that" the § 922(g)(8) ban applies to "weapons 'in common use' today for self-defense," like rifles and handguns. *Bruen*, 142 S. Ct. at 2134 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

What the parties dispute is *who* has a right to keep and bear arms. The text of the Second Amendment provides the answer:

> A well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed.

U.S. Const., amend. II (emphasis added). Contrary to Senator Chafee's argument in 1993, whenever the Constitution uses "the people," it means citizens and members of the political community. *Compare Heller*, 554 U.S. at 580–81, *with* 139 Cong. Rec. 14736–14737.

The Second Amendment, along with the First, Second, Fourth, Ninth, and Tenth Amendments, refers to "the people." Within the Constitution, "the people" is a "term of art"—wherever it occurs, "the term unambiguously refers to all members of the political community, *not an unspecified subset*." *Heller*, 554 U.S. at 580–81 (emphasis added); accord *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990) (The term "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."). The Second Amendment right—no less than the others mentioned above—"belongs to all Americans." *Heller*, 554 U.S. at 581. The Government offers no textual argument to the contrary. And of course it is the text of the Amendment that "the people" of the United States ultimately ratified through their elected representatives and delegates.

According to the Government, the Second Amendment right *does not* belong to all members of the American political community. Instead, the Government argues, the Second Amendment only protects "*law-abiding, responsible* citizens." Pet. 10, 14

(emphasis added) (quoting *Heller*, 554 U.S. at 635). Nothing in the text of the Second Amendment supports that view.[6]

Heller stated that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. And *Bruen* repeatedly noted that the plaintiffs, who challenged New York restrictions on carrying handguns in public, were "law-abiding citizens." 142 S. Ct. at 2122, 2125, 2131, 2133, 2134, 2138, 2150, 2156. But both *Bruen* and *Heller* stressed that the *text* of the Second Amendment controls the outcome of these questions, not "judges' assessments" about the utility of protecting the right for any particular person. *Bruen*, 142 S. Ct. at 2129; *Heller*, 554 U.S. at 634.

Besides that, *Bruen* very explicitly recognized that the presumption of unconstitutionality applies "*[w]hen the plain text of the Second Amendment* covers an individual's conduct." 142 S. Ct. at 2129–30 (emphasis added). The Government's proposed limiting language is not found in the text of the Amendment. If there is any tension between this Court's shorthand description of what, or whom, the Second Amendment protects and the actual text of the amendment, obviously the text

[6] As then-Judge Barrett persuasively explained, it is "analytically awkward" "to say that certain people fall outside the Amendment's scope," especially when they are Citizens who were *formerly* covered by the Amendment. *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting). This is true for concrete categories of people (e.g., convicted misdemeanants), and it is *especially* true for abstract categories of people like "responsible" and "law-abiding" citizens. The Government has not pointed to a single historical antecedent for a law completely disarming "irresponsible" citizens, nor those who maintained their position within the political community but failed to abide by a law other than a capital crime. In fact, the historical record shows that these categories of people *maintained* their right to arms.

prevails. *Compare Heller*, 554 U.S. at 635 (The Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*.") (emphasis added), *with Bruen*, 142 S. Ct. at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms.").

Lacking any textual support in the Second Amendment for its effort to restrict the scope of the right to a subset of the political community, the Government relies on various proposals and precursors. The ratification debates saw multiple proposals to protect the firearm rights of some, but not all, American citizens. But we are not bound by mere proposals. The Founders rejected those proposals in favor of an unqualified right belonging to all of "the people." Pet. App. 20a (None of the limited proposals "became part of the Second Amendment as ratified.").

If the founding generation had intended to protect a right to bear arms for only *some* of the citizens, or to make that right subject to Congressional judgment about who should be trusted with firearms, they could have saved themselves a lot of trouble. They already had a ready-made template in England's 1689 Declaration of Rights:

> That the Subjects *which are Protestants*, may have Arms for their Defence *suitable to their Conditions*, and *as allowed by Law*.

Heller, 554 U.S. at 593 (emphases added) (quoting 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441). That provision "has long been understood to be the predecessor to our Second Amendment." *Id.* Even 100 years after its adoption, this provision was so well known to James Madison that he mentioned its shortcomings "[i]n his notes

for a speech introducing what became the Bill of Rights." Stephen Halbrook, *The Founders' Second Amendment* 251 (2d ed. 2019) (quoting Notes for a Speech in Congress, June 8, 1779, 12 *The Papers of James Madison* 193 (Charles F. Hobson, et al. eds. 1979)). Among the "fallacies" that Madison identified in the Declaration of Rights were its status as a mere Act of Parliament, vulnerable to repeal at the whim of Parliament, and its limitation to *a mere subset* of the citizenry, namely protestants. *Id.*

The "American drafters" of the Bill of Rights "adopted some English rights verbatim," but "the language of the two pronouncements on arms differs markedly and importantly." Joyce Malcolm, *To Keep and Bear Arms* 136 (1994). "The American language is much broader" than its British predecessor, in part because it "claims for 'the people'—presumably regardless of their religion, state, or condition—a right to keep and carry weapons that the government, or at least the federal government, must not breach, unless one restricts the entire right to members of a well-regulated militia." *Id.* at 137.

The founding generation understood that the English Declaration gave the government *too much* power to disarm its subjects under the pretense of combatting lawbreaking. St. George Tucker—attorney, judge, law professor, and former patriot militia officer—edited "the most important early American edition of Blackstone's Commentaries." *Heller*, 554 U.S. at 594; *see* Halbrook, *supra*, at 310. In his own notes, Tucker contrasted the expansive Second Amendment, which applied to all citizens "without any qualification as to their condition or degree," with the narrower English

guarantee. Halbrook, *supra*, at 310 (quoting 1 William Blackstone, *Commentaries* 143 n.40 (St. George Tucker ed. 1803)). The English government could seize people's guns to enforce (or on the pretense of enforcing) hunting laws. Halbrook, *supra*, at 311 (quoting page 300 of Tucker's Appendix to the Blackstone *Commentaries*). The American Bill of Rights, by contrast, did not "permit *any* prohibition of arms to the people." Holbrook, *supra*, at 312 (quoting 1 Blackstone, *supra*, at 315–16).

Some proposals *in America* would have protected only some citizens' rights to own guns. In Pennsylvania, 46 delegates voted to ratify the Constitution and 23 delegates voted not to ratify it without a separate bill of rights. Halbrook, *supra*, at 194. Those who lost the vote published a "dissent," and that dissent included a demand for a separate bill of rights. *Id.* One of those proposed amendments would have protected the people's right to own and carry firearms, but that right could be lost "for crimes committed" or "danger of public injury":

> 7. That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and 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*; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.

Halbrook, *supra*, at 194 (emphasis added, internal citation omitted). And in the Massachusetts convention, Samuel Adams proposed a slightly different formulation of the right: "peaceable" citizens could never be disarmed:

> And that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms . . . ."

Halbrook, *supra*, at 205 (emphasis added) (internal citation omitted).

The petition cites both of these unsuccessful proposals as evidence that the Second Amendment is similarly limited. Pet. 9. Yet Adams's proposal—like the Pennsylvania Dissenters' earlier suggestion—failed to secure majority support even within the single convention in which it was proposed. Halbrook, *supra*, at 205–06. New Hampshire delegates also suggested a separate exception: "Congress shall never disarm any citizen, *unless such as are or have been in actual rebellion*." Halbrook, *supra*, at 213 (emphasis added).

The most important thing to know about the "limiting language" proposed in Pennsylvania, Massachusetts, and New Hampshire, is that it "did not find its way into the Second Amendment." *United States v. Skoien*, 614 F.3d 638, 648 (7th Cir. 2010) (Sykes, J., dissenting); accord Pet. App. 20a–21a. Some other state conventions *did* vote in favor of individual-rights amendments, including amendments protecting the right to weapons of self-defense. But they all suggested amendments *without* Pennsylvania's and Massachusetts's limiting language.

The same is true of state constitutions: of the 24 states who had joined the Union by 1830, 12 had constitutional safeguards protecting the right of "the people," "citizens," or "free men" to bears arms in self-defense. Ala. Const. of 1819, art. I, § 23; Conn. Const. of 1818, Declaration of Rights § 17; Ind. Const. of 1816, art. I, § 20; Ky. Const. of 1799, art. X, § 23; Ky. Const. of 1792, art. VI, § 23; Me. Const. of 1820, art. I, § 16; Miss. Const. of 1817, art. I, § 23; Mo. Const. of 1820, art. XIII, § 3; N.C. Const. of 1776, Declaration of Rights art. XVII; Ohio Const. of 1802, art. VII, § 20; Pa. Const.

of 1790, art. IX, § 21; Pa. Const. of 1776, Declaration of Rights art. VIII; Tenn. Const. of 1796, art. XI, § 26; Vt. Const. of 1793, ch. 1, art. XVI; Vt. Const. of 1786, ch. 1, art. XVIII; Vt. Const. of 1777, ch. 1, art. XV.

Seven other states recognized the existence of the militia and broadly defined its potential members. Ga. Const. of 1777, art. XXXV; Ill. Const. of 1818, art. V, § 1; La. Const. of 1812, art. III, § 22; Md. Const. of 1776, Declaration of Rights § 25; N.H. Const. of 1784, art. I, § 24; N.Y. Const. of 1822, art. VI, § 5; N.Y. Const. of 1777, art. XL; Va. Const. of 1777, Bill of Rights § 13. None included a limitation to "law-abiding" or "peaceable" people.

When Congress got to work on the Bill of Rights, no version of the Second Amendment included the limiting language proposed in Pennsylvania, Massachusetts, or New Hampshire (or in the petition). No one suggested that the right should be limited to "peaceable," "law-abiding," or "responsible" citizens. In fact, there is contemporaneous evidence that such a proposal would have been rejected. As *Heller* recognized, 554 U.S. at 589, James Madison's "original draft of the Second Amendment" included a "conscientious-objector clause":

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: *but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.*

Halbrook, *supra*, at 252 (emphasis added); *see also Heller*, 554 U.S. at 589 (quoting this same draft). Massachusetts Representative Elbridge Gerry vigorously objected to the freedom-of-conscience provision *because* it might give the Government too much power to decide who could be disarmed:

> This declaration of rights, I take it, is intended to secure the people against the mal-administration of the government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. *They can declare who are those religiously scrupulous, and prevent them from bearing arms*.

Halbrook, *supra*, at 266 (emphasis added) (quoting 11 *Documentary History of the First Federal Congress of the United States of America* 1286 (Bickford et al. eds. 1992)). The Senate later deleted the conscientious objector clause, and both houses adopted the final version of the amendment that was ratified by the states. Halbrook, *supra*, at 274, 278.

This history shows that the Founders knew how to adopt a more limited right (if they had wanted), and even had access to language *proposing* more limited guarantees. They could have followed the English Declaration and guaranteed a right to bear arms "as allowed by Law," which would give Congress the same power that the British Parliament had to decide who should be trusted with guns. They could have taken Samuel Adams's suggestion and protected only "peaceable" citizens' right to keep guns. They even could have provided for a revocable right that could be lost upon conviction of a crime, presentation of danger, or participation in rebellion, as the Pennsylvania Dissenters or New Hampshire majority suggested.

None of those proposals made the final cut. *See Skoien*, 614 F.3d at 648 (Sykes, J., dissenting). The text ultimately adopted and ratified "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. The "plain text of the Second Amendment" offers protection to all of the "people,"

not just those deemed "law-abiding" or "responsible" by the Government. Section 922(g)(8) is presumed unconstitutional.

2. The Government cannot show that § 922(g)(8) is consistent with the history and tradition of gun regulation in the United States.

Because the plain text of the Second Amendment covers the conduct prohibited by § 922(g)(8), the Government bears a heavy burden here—it "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127. That burden is even heavier because § 922(g)(8) "addresses a general societal problem that has persisted since the 18th century," and yet no one attempted to disarm domestic abusers as a class during the first two centuries of our nation's existence. *Id.* at 2131.

This Court's task is "straightforward" because § 922(g)(8) addresses a "general social problem that has persisted since the 18th century." *Bruen*, 142 S. Ct. at 2131. "[E]arlier generations" addressed the problem of domestic abuse "through materially different means." *Id.* The Government does not dispute any of that. This is "evidence" that § 922(g)(8)—a "modern regulation"—"is unconstitutional." *Id.*

The founding generation utilized a variety of tools to address intimate partner violence, but none of them even resembled the complete disarmament contemplated by § 922(g)(8). Five states recognized domestic violence as grounds for divorce. *See, e.g.*, 1 *Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807* at 301 (1807) (statute enacted Mar. 16, 1786) (". . . for the cause of extreme cruelty"); *see also Hill v. Hill*, 2 Mass. 150, 150 (1806) (equating "extreme

cruelty" with "actual assault").[7] There were also criminal sanctions: "In colonial New England, domestic violence offenders might be brought before a magistrate, bound over, and sentenced to a variety of punishments that often included public shaming. Whipping, a fine, the stocks, or some combination of these penalties appear to have been the most common sentences for wife beaters." Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 Penn St. L. Rev. 337, 346 (2015). The penalty for intimate-partner homicide was death. *Id.* at 348. The Government cannot say that the founding generation was unaware of domestic violence as a social problem. The Founders could have adopted a complete ban on firearms to combat intimate-partner violence. They didn't.

The Government has yet to "identify a well-established and representative historical *analogue*" to § 922(g)(8). *Bruen*, 142 S. Ct. at 2133. It has pointed to several *dissimilar* regulations that say nothing about intimate partner violence and do not involve total nationwide deprivations of the right to keep firearms at home for self-defense. Because the Government has utterly failed to carry its burden, this Court's task is "fairly straightforward": it should strike down § 922(g)(8) as facially unconstitutional. *Bruen*, 142 S. Ct. at 2131.

Here, as in *Bruen*, the Government asserts that surety laws will meet its burden. "In the mid-19th century, many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public."

[7] Similar laws were enacted in New Hampshire (Feb. 17, 1797), New Jersey (Dec. 2, 1794); Rhode Island (1798), and Pennsylvania (Sept. 19. 1785).

Bruen, 142 S. Ct. at 2148. That time period might be relevant to the original public meaning of the Fourteenth Amendment, at issue in *Bruen*, but it came a long time after ratification of the Second Amendment in 1791, which is the time frame that matters here. *Id.* at 2137–38.

To whatever extent they are relevant to the Second Amendment, the surety laws could not save New York's public carry regulation, even though they pertained directly to the right of public carry. Those laws placed a much smaller burden on the right to own arms for self-defense than § 922(g)(8):

§ 922(g)(8)	**Surety Laws**
A total ban.	Not a ban; only required a bond. *Bruen*, 142 S. Ct. at 2148.
Bans public carry, private carry, and even private possession in the defendant's bedroom.	Only affected carrying in public. *Id.* Person could still possess at home.
Imposed by Congress, without regard for the evidence presented in any specific case.	Imposed by a magistrate or other official based on the specific evidence presented.
No exception.	Could avoid the bond if defendant could show a "special need for self-defense."
Can persist for years.	Cannot "exceed[ ] six months." *Id.*
Nationwide statute, enforced by the federal government.	Possibly never enforced. *Id.*

Without any other *specific* historical regulation to serve as an analogue, the Government relies on an alleged tradition permitting total bans on firearm possession by people the Government deems "dangerous." Pet. 8–9. As an initial matter, it is not at all clear that this is an appropriate level of generalization for *Bruen*'s purposes. One could just as easily say that there is a tradition of disarming people that the Governing authorities wanted to disarm. That "tradition" is the very practice the Second Amendment intended to curtail.

More importantly, none of those laws were similar to § 922(g)(8). They did not impose a years-long nationwide ban on all firearm possession against citizens who retained all other rights of full civic participation. They did not threaten imprisonment up to ten years or fifteen years for keeping a gun in the bedroom. They did not condition the deprivation on the findings of a judge while depriving that judge of the ability to make exceptions or even allow firearm possession.

While many scholars and some judges classify the laws discussed by the Government as disarming "dangerous" people,[8] the laws did not disarm individuals entitled to the full benefits of citizenship. And they did not disarm individuals to avoid private violence. The founding generation understood the threat of private violence, including specifically private violence against intimate partners. It never chose to address either of those threats with a complete ban on possessing firearms like § 922(g)(8).

B. For durable goods like firearms that can be lawfully possessed and lawfully moved among the states, previous movement in commerce does not give Congress the perpetual right to regulate or ban their possession within the home.

The outcome under *Bruen* seems obvious enough. But there is another, related reason why § 922(g)(8) conflicts with the original understanding of the Constitution: namely, Congress has no enumerated power allowing it to forbid and punish the

[8] E.g., *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting). Many use that label to distinguish those historical laws from modern laws banning gun possession by people convicted of nonviolent crimes. That is a dispute for another day. For now, it is enough that the *specific* laws identified the Government are not similar enough to § 922(g)(8) to carry the Government's burden under *Bruen*.

possession of durable goods like firearms within the home merely because the items moved across state lines at some point in the past.

Recall that Congress was initially uncertain that it had the power, "under the Constitution, [to] deny a man the right to keep a gun in his home." 114 Cong. Rec. 14774. Yet that is the conduct at issue here—Mr. Rahimi possessed two guns in his own bedroom. The record shows only one connection between that conduct and interstate commerce—the weapons "were not manufactured in Texas." 5th Cir. ROA 68.

The federal government's enumerated powers are "few and defined," while the powers which remain in the state governments are "numerous and indefinite." *Lopez*, 514 U.S. at 552 (citing The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961)). Without limits on federal regulatory power, our nationwide regulation would become "for all practical purposes . . . completely centralized" in a federal government. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935). One of the enumerated powers granted to Congress is "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3.

As this Court explained in *Lopez*, the commerce power "is subject to outer limits." 514 U.S. at 557. Congress can regulate three general categories of activity with this power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce." *Lopez*, 514

U.S. at 558–59 (citations omitted). The commerce power does *not* authorize regulation of a purely local, non-economic activity like "possession of a gun in a school zone." *Id.* at 560. The Court held that the original version of 18 U.S.C. § 922(q) (the Gun-Free School Zones Act) exceeded Congress's powers:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. The Government proffered various ways in which gun possession might affect commerce, this Court held these theories would go too far:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564.

Admittedly, § 922(g) requires proof that the gun be possessed "in or affecting commerce." Referring to similar language in the § 922(g)'s predecessor, *Lopez* suggested that Congress would have the power to forbid an act of possession that actually affected commerce. *Lopez*, 514 U.S. at 561 (discussing *Bass*, 404 U.S. at 337) (Section 922(q) "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.")

Lopez failed to mention this Court's decision in *Scarborough v. United States*, 431 U.S. 563 (1977), which upheld a federal conviction for firearm possession because the firearms had previously moved in interstate commerce. *Id.* 574–77. "*Scarborough*, as the lower courts have read it, cannot be reconciled with *Lopez* because it reduces the constitutional analysis to the mere identification of a jurisdictional hook like the one in" § 922(g). *Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, J., dissenting from denial of certiorari)). There is little or nothing beyond Congress's reach if any stray detritus of interstate commerce permits it to commandeer a traditional area of state control.

Many judges recognize that "*Scarborough* is in fundamental and irreconcilable conflict with the rationale of the United States Supreme Court in [*Lopez*]." *United States v. Kuban*, 94 F.3d 971, 977 (5th Cir. 1996) (DeMoss, J., dissenting); *see also United States v. Kirk*, 105 F.3d 997, 1015 n.25 (5th Cir. 1997) (en banc) (Jones, J., on why she would reverse); *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., concurring); *United States v. Patterson*, 853 F.3d 298, 301–02 (6th Cir. 2017); *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002); *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006) (collecting cases). As these opinions argue, the power to prohibit possession of an item that has previously moved in interstate commerce is effectively a general police power. It allows Congress to reach acts like possession that have little or nothing to do with commerce, let alone interstate commerce, for reasons that have nothing to do with standardizing or

protecting commerce occurring across state lines. And most importantly, it leaves essentially nothing as the exclusive province of state regulation.

The Government will probably argue that this is a separate claim outside the scope of its question presented, and that Mr. Rahimi did not press the argument below. But the Court cannot address the Second Amendment question without probing the founders' and the ratifiers' understanding of Congressional authority. The Second Amendment was originally intended to bind only the national government, and none of the purported analogues cited by the Government are federal statutes with nationwide application. The founding generation could not imagine a law like § 922(g)(8) because it never endowed Congress with the power to forbid possession of a gun inside a citizen's home.

"This Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and Mr. Rahimi may defend the Fifth Circuit's judgment on any ground "appearing in the record." *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435, (1924). This is simply another argument in favor of the result below. *See Jennings v. Stephens*, 574 U.S. 271, 276–77 (2015). At a minimum, the argument provides another reason to deny certiorari.

The Fifth Circuit recently denied rehearing en banc in a case where the defendant did argue § 922(g) exceeded Congress's enumerated powers. Seven judges dissented, three of them joining a written opinion. *See United States v. Seekins*, 52 F.4th 988, 989 (5th Cir. 2022) (Ho, J., dissenting from denial of reh'g en banc, joined by two other Judges) ("If the only thing limiting federal power is our ability to

document (or merely speculate about) the provenance of a particular item, the Founders' assurance of a limited national government is nothing more than a parchment promise."). The appellant in *Seekins* filed a petition for certiorari (No. 22-6853). This Court will consider *Seekins* at its June 15 conference.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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