No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE SECOND AMENDMENT FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Second Amendment Foundation ("SAF"), is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every State of the Union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. Amicus Curiae has an intense interest in this case because many firearms owners in the United States are subject to civil restraining orders which deny them their fundamental constitutional right to keep and bear arms, in a manner that does not comport with "the Second Amendment's text, as informed by history." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

SUMMARY OF ARGUMENT

Laws disarming British loyalists during the Revolutionary War ("Loyalist Laws") effectuated wholesale disarmament of individuals who refused to swear allegiance to the new Republic or who actively fought against the patriot cause. These Laws were adopted by the newly independent American States and their localities in a military, wartime context and had a military, wartime purpose. In contrast, 18 U.S.C. § 922(g)(8), which also effectuates wholesale disarmament of certain individuals—the statute

[1] No counsel for any party authored the brief in whole or in part. Only *amicus curiae* funded its preparation and submission.

prohibits the possession of firearms by persons subject to domestic violence restraining orders—operates in a strictly civilian, peacetime context.

Review of "founding-era historical precedent," *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008)—or lack thereof—reveals that § 922(g)(8) lacks *any* "well-established and representative historical *analogue*" from the Founding Era or prior. *Bruen*, 142 S. Ct. at 2133 (emphasis in original). To the extent any laws adopted during or immediately leading up to the Founding disarmed an entire category of people, such wholesale disarmament was limited to those individuals who fell under the umbrella of the Loyalist Laws because they posed a threat[2] to the success of the patriot cause in the Revolutionary War. Loyalist Laws stand alone as the only example of wholesale disarmament of individual citizens during or immediately preceding the Founding Era.

This brief explores the Loyalist Laws, contrasts them with other types of relevant Founding Era firearms laws (none of which effectuated wholesale disarmament of individuals), and explains why the Loyalist Laws are not analogous to § 922(g)(8). Since the Loyalist Laws arose in a context entirely divorced from any civilian or peacetime considerations, they are not a proper analogue to § 922(g)(8). Moreover, given the lack of any other analogous firearms

[2] As discussed below, such individuals were deemed a threat to the patriot cause for a variety of reasons, including actual or threatened use of force against the New Republic, or failure to swear an oath of allegiance.

regulations from the Founding Era, it is clear that § 922(g)(8) is not "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. Accordingly, § 922(g)(8) violates the Second Amendment right of the people to keep and bear arms as set forth in *Heller*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Bruen*.

ARGUMENT

I. The Proper Analytical Framework For Determining Whether There Are Any Historical Analogues Relevant to The Regulation of Firearms Possessed by Persons Subject to Domestic Violence Restraining Orders

A. The Proper Analytical Standards

"*Heller* . . . demands a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. at 2118. Consistent with this demand, and because "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," *Heller*, 554 U.S. at 582,"the government must affirmatively prove that its firearm 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. To carry its burden, the government must point to "historical precedent . . . [that] evinces a comparable tradition of regulation." *Id.* at 2131-32 (internal quotation marks omitted). "[W]e are not obliged to sift the historical materials

for evidence to sustain [§ 922(g)(8)]. That is [the Government's] burden." *United States v. Rahimi*, 61 F. 4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), (quoting *Bruen*, 142 S. Ct. at 2150).

The government need not identify a "historical *twin*"; rather, a "well-established and representative historical *analogue*" suffices. *Bruen*, 142 S. Ct. at 2133 (emphasis in original). In *Bruen*, this Court identified two metrics for comparison of analogues proffered by the government against the challenged law: "*how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* (citing *McDonald*, 561 U.S. at 767, and *Heller*, 544 U.S. at 599) (emphasis added). "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." *Id.* (internal quotation marks and emphasis omitted). The key question is whether the challenged law and proffered analogue are at least "relevantly similar." *Bruen*, 142 S. Ct. at 2132.

Here, the relevant questions are how § 922(g)(8) burdens the right to armed self-defense, why it burdens that right, and whether it is relevantly similar to any historical analogue. Comparison to the Loyalist Laws is instructive in answering these questions.

B. The Proper Analytical Timeframe

Beyond identification of appropriate analogues, it is also imperative that this Court look to the proper historical period to ascertain what similar laws, or historical analogues, were in existence that the Government may rely upon to justify § 922(g)(8).

The Founding Era is the proper historical period for the *Bruen* analysis. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 142. S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634-35) (emphasis added). The Second Amendment was adopted in 1791. This Court has explained that 1791 is the controlling time for interpreting the Second Amendment. *See*, *e.g.*, *Heller*, 554 U.S. at 625 (concluding with "our adoption of the original understanding of the Second Amendment"); *Gamble v. United States*, 139 S. Ct. 1960, 1975-76 (2019) (explaining *Heller* sought to determine "the public understanding in 1791 of the right codified by the Second Amendment"); *Bruen*, 142 S. Ct. at 2132 (Second Amendment's "meaning is fixed according to the understandings of those who ratified it").

The Government may prefer that this Court look to the ratification of the Fourteenth Amendment in 1868, or some or all of the rest of the 19th century, as the controlling time for interpretations of the relevant history. But that is improper because "when it comes to interpreting the Constitution, *not all history is created equal*." *Bruen*, 142 S. Ct. at 2137

(emphasis added). Therefore, this Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."[3] *Id.*

Here, since the Loyalist Laws were adopted during and around the time of the Revolutionary War, close in time to the Founding, they fall within the appropriate time period under the *Bruen* analysis.

II. The Loyalist Laws

During the Revolutionary War, loyalists were pervasive and posed a severe threat to the very existence of the patriot cause. Throughout the War, "we may safely say that 50,000 soldiers, either regular or militia, were drawn into the service of Great Britain from her American sympathizers." Mark M. Boatner III, Encyclopedia of the American Revolution 663 (3d ed. 1994). Out of this staggering number, "over one hundred different Loyalist regiments,

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[3] In *Bruen*, this Court acknowledged "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Second Amendment was adopted in 1791. 142 S. Ct. at 2138. But the Court, importantly, did not question its own precedent that adopted the "original understanding of the Second Amendment," *Heller*, 554 U.S.at 625, and "the public understanding in 1791 of the right codified by the Second Amendment," *Gamble*, 139 S. Ct. at 1975; *see also* Mark W. Smith, *Attention Originalists: The Second Amendment was adopted in 1791, not 1868*, 31 HARV. J. L. & PUB. POL'Y (PER CURIAM) 1 (Dec. 7, 2022).

battalions, independent companies or troops were formed to fight alongside the British army against their rebellious countrymen." *A History of the King's American Regiment, Part 1*, THE ON-LINE INSTITUTE FOR ADVANCED LOYALIST STUDIES (Dec. 15, 1999), http://www.royalprovincial.com/military/rhist/kar/kar1hist.htm. In New York alone, for example, the magnitude and ubiquity of the loyalist problem were enormous. Letter from B.P. to the Earl of Dartmouth, Dec. 20, 1775, *in* 4 AMERICAN ARCHIVES 359 4th Ser., (Peter Force ed., 1846). "[T]here must have been at least 15,000 New York loyalists in the British army and navy, and at least 8,500 loyalist militia, making a total in that state of 23,500 loyalist troops." Alexander Clarence Flick, *Loyalism in New York During The Revolutionary War* 112 (1901). In comparison, the number of patriot troops from New York (considering both regular troops and militia members) totaled approximately 41,633. *Id.* at 113.

"Loyalists were thus commonly treated as enemy combatants." Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearms Prohibitions*, 16 DREXEL L. REV. 53 (2023) (forthcoming). As historian Alexander Flick observed, armed loyalists, both in New York and elsewhere, "were extremely dangerous." *Id.* at 55 (citing Flick, *Loyalism in New York During The Revolutionary War* at 100). "So numerous and dangerous were the loyalists . . . that regulations must be adopted to control them, or the whole cause might be lost." Flick, *Loyalism in New York During The Revolutionary War* at 60.

Accordingly, on January 2, 1776, the Continental Congress endorsed large-scale loyalist disarmament. Greenlee, *Disarming the Dangerous: The American Tradition of Firearms Prohibitions* at 63 (citing 2 AMERICAN ARCHIVES, 4th ser., at 1629). The Congress "recommended to the different Assemblies, Conventions, and Committees or Councils of Safety in the United Colonies" that "they ought to be disarmed." *Id.*

Action had occurred on this dire matter at the State (Colonial) and local level even before the Continental Congress's resolution. New York's Provincial Congress, citing "the immutable laws of self-defense," first disarmed loyalists on September 1, 1775:

> Whereas attempts have been made to promote discord among the inhabitants of this Colony, and to assist and aid the Ministerial Army and Navy . . . and as the immutable laws of self-defence and preservation justify every reasonable measure entered into to counteract or frustrate such attempts:
>
> . . . .
>
> Resolved, That if any person shall be found guilty, before the Committee of any City or County in this Colony, of having furnished the Ministerial Army or Navy (after the date of this Resolution) with Provisions or other necessaries, contrary to any Resolution

> of the Continental or of this Congress, such person or persons, so found guilty thereof, upon due proof thereof, shall be disarmed . . . .
>
> 3 AMERICAN ARCHIVES, 4th ser., at 573.

On May 11, 1776, the Provincial Congress amended its militia act to declare it "absolutely necessary, noy only for the safety of the . . . Province, but of the United Colonies in general, to take away the arms and accoutrements of the most dangerous among them [loyalists]." 5 AMERICAN ARCHIVES, 4th ser., at 1504. In June, 1776, the Congress also resolved that "his Excellency General Washington be, and he is hereby, requested to take the most speedy and effectual measures to disarm and secure all such persons." 6 AMERICAN ARCHIVES 4th ser., at 1427.

Elsewhere, Massachusetts had reacted to the loyalist threat even earlier. On May 8, 1775, nineteen days after the Battles of Lexington and Concord, Massachusetts's Provincial Congress disarmed loyalists so they could not "join with the open and avowed enemies of America" and inflict "ruin and destruction . . . against these Colonies." 2 AMERICAN ARCHIVES, 4th ser., at 793. Within a fortnight, the Worcester County Committee in Massachusetts declared it "highly expedient" that all individuals who "[have] been aiding or abetting to the cursed plans of a tyrannical ruler and an abandoned Ministry, should be disarmed, and rendered incapable as possible of

doing further material mischief to this distressed province." *Id.* at 700-01.

In July 1776, New Jersey's Congress took action after "a number of disaffected persons ha[d] assembled . . . preparing by force of arms . . . to join British Troops for the destruction of this country" and "disarmed these dangerous Insurgents." 6 AMERICAN ARCHIVES, 4th ser., at 1636. Shortly thereafter, New Jersey augmented its disarmament powers in September 1777, when it granted its Council of Safety the authority "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess." 1777 N.J. Laws 90, ch. 40 §20 (Sept. 1777).

Pennsylvania followed suit in September 1776, disarming loyalists while taking note of "the folly and danger of leaving arms in the hands of Non-Associators." 2 AMERICAN ARCHIVES, 4th ser., at 582-83. In April 1779, Pennsylvania further increased its disarmament efforts, determining that "it is very improper to and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms," and thus the state "empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state." THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782) (April 1779).

Several States took a different approach to ensuring that firearms were not held by loyalists, requiring oaths or affirmations of loyalty to the patriot cause to secure a citizen's rights. This trend was initiated by a recommendation from the Continental Congress made on March 14, 1776, which urged provincial legislatures to disarm all persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies." 4 *Journals of the Continental Congress*, 201-05, (1776) (Washington D.C.: Government Printing Office, 1906) (Mar. 1776).

For example, those who refused or otherwise did not make such an oath in the Commonwealth of Virginia were disarmed and were additionally held to be "incapable to holding any office in this state, serving on juries, suing for any debts, electing or being elected, or buying lands, tenements, or hereditaments." Act of May 1777, ch. 3, 9 *Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619*, at 281, (William W. Hening ed., 1821).

Unsurprisingly, neighboring States followed suit. Pennsylvania's Test Act of 1777 supplemented already rigorous disarmament laws (cited *supra*), by requiring all white men over eighteen years old to swear an oath declaring allegiance to the commonwealth, abandoning all allegiance to the British monarchy, and promising to do nothing injurious to the freedom and independence of the

State. Act of June 13, 1777, § 3, 9 The Statutes at Large of Pennsylvania from 1652-1801 110, 112 (William Stanley Ray ed., 1903). In addition to prohibiting those refusing the test from voting, holding office, serving on juries, suing, and transferring land, this act also ordered them disarmed. *Id.*

North Carolina joined this trend with its Act for ascertaining the Oath of Allegiance and Abjuration, passed in November 1777. An Act to Amend an Act for declaring what Crimes and Practices Against the State shall be Treason, and what shall Be Misprison of Treason, and providing Punishments adequate to Crimes of both Classes, and for preventing the Dangers which may arise from Persons disaffected to the State, 1777 N.C. Sess. Laws 84, 89 (1777). Under this legislative act, North Carolinians who failed or refused to take the oath or affirmation were:

> adjudged incapable and disabled in Law [sic] to have, occupy or enjoy, any Office, Appointment, License, or Election of Trust or Profit, civil, or Military, within this State, and shall not be capable of being elected to, or aiding by their Votes to elect another to be a Member of Assembly. . . and shall be disabled to prosecute any Suit at Law of Equity, or to be a Guardians, Executors, or Administrators, or capable of any Legacy, or Deed of Gift of Lands, and shall be disabled from taking any Lands

> by Descent or Purchase, or conveying Lands to others for any Term longer than for one year, and shall not keep Guns or other Arms within his or their house.

Id.

Elsewhere, Maryland placed a particular emphasis on this type of Loyalist Law, legislating that

> "George Plater and John Hall, Esqrs., be a committee, and repair as soon as maybe to Somerset county, and there take such measures as may unite that county with the other counties of this province; that they direct all persons who shall on good grounds appear to them to be disaffected, to be disarmed, and any disaffected persons to be taken into custody and sent to the council of safety, as they may think proper; that they have powers to make such regulations and orders as may in their judgment best secure obedience to the resolves of the convention, and peace and good order in that county; that major Price, the independent companies, and the militia, be subject to the control and orders of the said committee, and that they report their proceedings to the next convention.

26 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE CONVENTIONS OF THE

PROVINCE OF MARYLAND, 175 (1774-1776). This law was supplemented by a 1777 law requiring "every free male person within this state, above eighteen years of age, unless a quaker, a menonist, or dunker, shall, on or before the first day of March next, take, repeat, and subscribe, the oath of fidelity and support to this state. . ." 203 Hanson's Laws of Maryland 187 (1777).

Loyalist Laws were enacted during the Revolutionary War in order to disarm potentially dangerous enemy combatants that posed a direct threat to the newly independent United States and the patriot cause fighting to preserve this independence that had been so boldly declared in the Declaration of Independence adopted on July 4, 1776. Although Loyalist Laws took on different forms and employed varying methods to effectuate the confiscation of loyalist firearms, they were undoubtedly common and widespread. However, these extreme measures were dictated by military exigency rather than considerations of civilian justice.

III. Civilian, Peacetime Laws During and Prior to The Founding Era Effectuated at Most Limited or Partial Disarmament, Consistent with the Founding Generation's Reverence for the Right to Keep and Bear Arms

Outside of the military and wartime context (other than discriminatory laws targeting purported dissidents such as Catholics) even where laws from the Founding Era or decades immediately preceding

permitted disarmament in some limited or partial form, they bore no resemblance to the categorical disarmament imposed by the Loyalist Laws—or for that matter, the categorical disarmament imposed by 18 U.S.C. § 922(g)(8). Indeed, "no law forbade the disarmed individual from *immediately acquiring new arms*," Greenlee, *Disarming the Dangerous: The American Tradition of Firearms Prohibitions* at 71-72 (emphasis added), and no civil law permitted authorities to effectuate wholesale seizure of all firearms possessed by an individual or a wholesale disarmament of that individual. To the extent disarmament occurred, it was limited or partial.

For example, several laws during or prior to the Founding Era prohibited hunting at particular times or in particular places. Penalties for illegal hunting included, in some instances, forfeiture of the *individual* firearm used in the hunt, not a permanent removal of the rights belonging to the hunter. *See, e.g.*, Ordinance of the Director And Council of New Netherland Against Firing At Partridges Or Other Game Within The Limits Of New Amsterdam, 1652 N.Y. Laws 138 (Prohibiting hunting game with firearms while inside the city or fort, on pain of forfeiting the gun and a fine); An Act to Amend An Act Entitled "An Additional Act To An Act, Entitled, An Act To Prevent Killing Deer at Unseasonable Times, And For Putting A Stop To Many Abuses Committed By White Persons Under Pretense Of Hunting", ch. 13, 1768 N.C. Sess. Laws 168 (Prohibiting certain people from hunting, under penalty of fine and forfeiture of the firearm); 1 Private and Special

Statutes of the Commonwealth of Massachusetts 259 (1805) (1790 Massachusetts) (Requiring armed trespassers on Naushon Island to forfeit their arms for the protection of local sheep). "[T]hese laws involved the isolated disarmament of the firearm involved in the offense, not a ban on possession." *Range v. Att'y Gen. United States of Am.*, 53 F.4th 266, 281 n.25 (3d Cir. 2023), *overruled by Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (en banc). Although these laws disarmed individuals (to a very limited extent), they did not impose any restrictions on obtaining additional firearms, nor did they restrict the ownership of other, separate arms.

Another kind of "disarmament" laws before, during, and after the Founding Era were the so-called "surety" laws, whereby those who committed firearms offenses were in fact not disarmed at all, but instead had to enlist the backing of one or more sureties to ensure good behavior. For example, in 1759, New Hampshire persons "who shall go armed offensively" were not released "until he or she finds such surities [sic] of the peace and good behavior." Acts and Laws of His Majesty's Province of New-Hampshire in New England 2 (1759). A post-Founding example that nonetheless illustrates how the surety process worked is Welling's Case, 47 Va. 670 (Va. Gen Ct. 1849):

> The County court has authority to require a party to enter into a recognizance to keep the peace . . . . In February 1848, Edward *Welling*, with two sureties, entered into a recognizance

> before a justice of the peace of the county, with condition to appear at the next term of the County Court of *Wood,* and in the meantime to keep the peace toward all persons in the Commonwealth, and especially toward *Edward Taggart* . . . . The cause was then tried, and the Court required the defendant to enter into a recognizance, with sureties, to keep the peace for one year from that day.

Thus, surety laws did not actually effectuate disarmament, but instead were designed to keep the peace.

In 1803, St. George Tucker, a Virginia Anti-Federalist and influential legal scholar of the Founding Era, discussed the arms language of the Constitution. William Blackstone & St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia*, (Philadelphia: William Young Birth and Abraham Small, 1803). Tucker's commentary, which has informed firearms policymaking since its publication,[4] sharply criticized the restrictive English arms laws and expressed his hope that in the newly formed United States of America, "the people will never cease to regard the right of keeping and bearing arms as the surest pledge

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[4] Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006).

of their liberty." *Id.* at 3:414. Tucker pointed out the continued failure of the English Bill of Rights, even calling it so weak that "the right of keeping arms is effectually taken away," and pointing out that England was restricting the rights of its own citizens "under the specious pretext of preserving the game." *Id.* at 2:143.

Tucker's scholarship highlights the prevailing view of the Founding Generation, which clearly opposed categorical disarmament of citizens, as had been carried out in England. Indeed, during and prior to the Founding Era, the right to keep and bear arms in America was cherished as "the true palladium of liberty." *Id.* at App. 300. As this Court noted in *Heller*, "nine States adopted Second Amendment analogues" between 1789 and 1820. 554 U.S. at 602. The fact that seven of these nine constitutional protections "enacted immediately after 1789 . . . protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right." *Id.* at 603.

Moreover, even well before the Second Amendment was adopted, State and Colonial leaders enshrined the right to keep and bear arms in their constitutions or charters. For example, the Pennsylvania Constitution of 1776 provided that "the people have a right to bear arms for the defence [sic] of themselves and the state." Pa. CONST. of 1776, art. XIII (amended); *see also* Vt. CONST. of 1777, art. XV ("That the people have a right to bear arms for the defence [sic] of themselves and the State; and, as

standing armies, are dangerous to liberty, they ought not to be kept up"); R.I. Charter of 1663 (Separately protecting the right to exercise in arms and the right to encounter, expulse, expel and resist intruders by force of arms).

Given the reverence for the right to armed self-defense that pervaded American legislation both during and prior to the Founding Era, it is unsurprising that certain modern firearm restrictions such as 18 U.S.C. § 922(g)(8) lack any historical analogue as required by *Bruen*—such civilian laws simply did not exist in eighteenth century America because disarmament was at odds with the prevailing belief that the right to keep and bear arms was sacrosanct.

IV. 18 U.S.C. § 922(g)(8) is Without Historical Analogue Because the Loyalist Laws Were Military, Wartime Measures

Having reviewed the other potential Founding Era analogues, the final step is analysis of the "how" and "why" of 18 U.S.C. § 922(g)(8) versus the "how" and "why" of the Loyalist Laws. *Bruen*, 142 S. Ct. at 2133 ("*how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right.") *Id.* (citing *McDonald*, 561 U.S. at 767, and *Heller*, 544 U.S. at 599). 18 U.S.C. § 922(g)(8) burdens the right to self-defense by *effectuating a wholesale ban on possession*, applicable to the targeted individual personally *and* that individual's firearms

and ammunition. The "how" is therefore analogous to the "how" of the Loyalist Laws.

But the "why" of 18 U.S.C. § 922(g)(8) and the Loyalist Laws are not analogous. 18 U.S.C. § 922(g)(8) burdens the right to self-defense in order to mitigate the perceived danger of individuals subject to domestic violence restraining orders, in a civilian, peacetime context. The reasons behind the Loyalist Laws were completely different. The Loyalist Laws served two purposes: disarming enemy combatants in the Revolutionary War *and* arming those fighting for the American cause. "Disarmament during the war served the express purpose of neutralizing potential enemy combatants. It also served the express purpose of supplying arms to unarmed patriot troops." Greenlee, *Disarming the Dangerous: The American Tradition of Firearms Prohibitions* at 65. Indeed, not only did Loyalist Laws disarm enemy combatants, as discussed at length in Section III *supra*, these Laws in many instances put confiscated firearms to good use by arming patriot troops or militiamen.

Redistribution of firearms confiscated from loyalists to unarmed American soldiers occurred in substantial part at the urging of Generals George Washington and Charles Lee. *Id.* at 66-67. At their behest, the Continental Congress recommended that the nascent States (Colonies) "apply the Arms taken from [disaffected] persons in each respective Colony, in the first place, to the arming the Continental Troops raised in said Colony . . . ." 5 AMERICAN ARCHIVES, 5th ser., at 1385. Ultimately, "[m]any

governments followed the Congress's recommendations, and confiscated arms became a critical source of weapons for the patriots." Greenlee, *Disarming the Dangerous: The American Tradition of Firearms Prohibitions* at 68.

This redistributive policy was implemented in New York, Pennsylvania, and Maryland, and by the Continental Congress. *See e.g.*, 6 AMERICAN ARCHIVES, 4th Ser., at 1324 (New York Provincial Congress, May 21, 1776: directing officers to Westchester County to obtain "such good Arms, fit for Soldiers' use, as they have collected by disarming disaffected persons"); 5 AMERICAN ARCHIVES, at 1075–76 (New York Committee of Safety explaining to General Washington that "the arms that have been taken from the disaffected inhabitants" were being collected and that they "hope for some supply from that source"); 5 AMERICAN ARCHIVES, at 1409–10 (New York Committee of Safety establishing process to distribute confiscated arms to patriot troops); 5 AMERICAN ARCHIVES, 4th Ser., at 1480 (New York Committee of Safety resolving not to disband troops for want of arms at General Washington's request, and directing Washington to apply to the Committee for confiscated arms from disaffected persons); 6 AMERICAN ARCHIVES, 4th ser., at 906–07 (Berks County, Pennsylvania) ("three freemen shall be chosen by the inhabitants of every Township . . . to collect the Arms from the disaffected persons and non-Associators . . . and . . . each County shall take care that the said recommendation of Congress be effectually put in execution"); 4 AMERICAN ARCHIVES,

4th Ser., at 1744 (Baltimore County Committee reporting the type and amount of arms confiscated to be redistributed to troops); 2 AMERICAN ARCHIVES, 5th Ser., at 583 (explaining the merits of disarmament of Loyalists in view of the "danger of leaving arms in the hands of Non-Associators," and in response to "the great demand for the best arms we could procure to put into the hands of the Militia from the country, who were ready and willing to march to the camp, but had no arms to take with them"); *id.* (reporting that "the good effects of it [disarmament] were suddenly perceived, for the Militia were furnished with several hundred stand of good arms in consequence thereof").

The military, wartime "whys" behind the Loyalist Laws, which stand in stark contrast to the civilian, peacetime "why" behind 18 U.S.C. § 922(g)(8), have also been confirmed by this Court, in State constitutions, and in various secondary sources. In *Bruen*, this Court considered the example of a Reconstruction Era military Order applicable to the Second Military District (North and South Carolina), which limited the "carrying [of] deadly weapons, except by officers and soldiers in the military service of the United States." 142 S. Ct. at 2152, n. 26. The Court observed that there was "little indication that these military dictates were designed to align with the Constitution's usual application during times of peace." *Heller* also recognized this distinction when it held that the right to keep and bear arms "was clearly an individual right, having nothing whatever to do with service in a militia." 554 U.S. at 593. This distinction between military and civilian firearms

regulation and use aligns with the Second Amendment analogues contained in State constitutions cited *supra*, which were unconnected to military service. Additionally, as Professor of History Robert Churchill noted, to the extent certain groups have been categorically disarmed, it has been "on the basis of allegiance, not on the basis of faith." *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, L. & HIST. REV. 139, 157 (Spring 2007) (citing Virginia's 1756 "disarmament of all those refusing the test of allegiance"); *see also NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) ("American legislators had determined that permitting [those who refused to swear an oath of allegiance] to keep and bear arms posed a potential danger.").

Consistent with this well-recognized distinction between individual rights and military considerations, the Loyalist Laws were enacted in a military, wartime context out of a real and quantifiable concern that loyalists were best treated as enemy combatants who posed a significant threat to the military success of the patriot cause. Indeed, outside of the context of the Revolutionary War, Founding-era lawmaking bodies did not impose any "virtue-based restrictions on the right [to keep and bear arms]." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). When the laws of the Founding Era are taken as a whole, it becomes clear that there was an overarching intent that

citizens would have the right to keep and bear arms, outside of the Loyalist Laws and discriminatory laws relating to dissidents, both of which arose during periods of conflict. Indeed, as the Fifth Circuit recently observed, examples of disarmament in the Founding Era or earlier "fall into two general buckets," *United States v. Daniels*, 77 F.4th 337, 344 (5th Cir. 2023), with a few other types of limited or partial disarmament occasionally appearing in the historical record (such as the aforementioned hunting laws). As to those "buckets":

> *First*, states barred political dissidents from owning guns during period of conflict. Many American states, for instance, disarmed those who failed to take an oath of allegiance during the Revolutionary War. *Second*, both British and American governments disarmed religious minorities—especially Catholics.

Id. (internal citations omitted). Indeed, "[a]lmost all the laws disarming dissidents were passed during wartime or periods of unprecedented turmoil." *Id.* at 351. As the Fifth Circuit further observed in *Daniels*:

> Founding-era governments did not disarm Loyalists because they were thought to lack self-control; it was because both [dissidents and Loyalists] were viewed as potential threats to the integrity of the state. The same was true

> of religious minorities — the perceived threat was as much political as it was religious.

Id. (internal citations omitted).

In the face of this overwhelming evidence, Petitioner's Brief makes multiple *ipse dixit* assertions that the Loyalist Laws are historically analogous to 18 U.S.C. § 922(g)(8). Brief for the United States at 7, 22-27, and 43. Rather than acknowledge the sweeping contextual differences between the Loyalist Laws and § 922(g)(8), Petitioner merely asserts that the United States has a long tradition of disarming "persons whom legislatures have found are not law-abiding, responsible citizens" *Id.* at 22. However, it is critical to consider that the people who were disarmed by the Loyalist Laws were wholly uninterested in the rights and privileges enjoyed by those embracing the newly independent United States, as evidenced by their continued loyalty to the British Crown. *See* pp. 6-7, *supra*. Loyalists were considered to be "traitors (or enemy aliens) and potential combatants." Brief for Zackey Rahimi at 24. As such, the Loyalist Laws sought to neutralize the threat of enemy combatants, rather than to restrict the rights of Americans.

In summary, the Loyalist Laws unequivocally indicated widespread legislative intent to disarm *only* people who were a threat to the patriot cause during the Revolutionary War. 18 U.S.C. § 922(g)(8) is inconsistent with this intent because it has a very

different "why" than the Loyalist Laws, which existed strictly to guarantee the survival of the patriot cause and the newly-minted United States served by that cause.

CONCLUSION

Under *Bruen*, "the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. at 2127. With respect to 18 U.S.C. § 922(g)(8), the government cannot identify any appropriate analogue in order to carry its burden because the Loyalist Laws were the only laws that effectuated a wholesale ban on possession, applicable to the targeted individual personally and that individual's firearms and ammunition. Since the Loyalist Laws were strictly military, wartime measures imposed against those who were actual or suspected enemy combatants in the Revolutionary War, they are not analogous to § 922(g)(8).

Accordingly, the Court should affirm the decision below.

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Respectfully Submitted,

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