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 FOR AMICUS CURIAE THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the Nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the USCCB include the protection of the dignity and wellbeing of vulnerable and disadvantaged persons who live under threat of violence, and the proper development of this Court's jurisprudence in that regard.

SUMMARY OF ARGUMENT

In *New York State Rifle & Pistol Association* v. *Bruen*, 142 S. Ct. 2111 (2022), the Court announced a historical-tradition test for firearm regulations. Under *Bruen*, history "evinces" tradition but is not identical to it, and the constitutionality of gun regulations is to be determined by analogy to the past. How to remain faithful to tradition in the modern age is a question with which amicus has deeply engaged. Accordingly, amicus proposes that the form of analogical reasoning this Court ultimately adopts in determining whether a gun

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its counsel, made any monetary contribution to the preparation or submission of this brief.

regulation is consistent with this Nation's historical tradition should resemble the criteria followed by leaders in the Church to reconcile the development of doctrine with the obligation to remain faithful to tradition. These criteria focus in relevant part on *continuity of principles* between tradition and the modern articulation of doctrines.

The basic principles of social order, reflected in various ways in this Nation's historic legal traditions and in Catholic Social Teaching, include the government's role in promoting the common good by protecting human life and dignity. *See, e.g.*, U.S. Conf. of Catholic Bishops, *Seven Themes of Catholic Social Teaching* (2005), https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/seven-themes-of-catholic-social-teaching. Governments also have a corresponding duty to exhibit a special concern for the poor and vulnerable and to limit private rights when necessary to protect the common good. And the principle of subsidiarity—which holds that higher-order societies should support and not supplant lower-order societies—requires the state to respect private institutions such as the family and, when necessary, to provide families with due support in the case of domestic strife. These principles are reflected in this Nation's legal tradition, including as it relates to firearm regulation and regulation of domestic affairs.

Regardless of how generally the principles of our tradition are construed in light of history, the constitutionality of 18 U.S.C. § 922(g)(8) is clear: uniquely dangerous individuals can lose their right to keep and bear arms. Section 922(g)(8) reflects a modern congressional application of that principle in the context of domestic violence and exercises Congress's legitimate authority to disarm those who have demonstrated—to the

satisfaction of a judicial fact-finder—that they pose a unique danger to those close to them and to the common good.

ARGUMENT

I. CONSISTENCY WITH TRADITION IS A DISTINCT INQUIRY FROM PURE HISTORICAL COMPARISON

A. *Bruen* Recognized A Tradition Test

In *New York State Rifle & Pistol Association* v. *Bruen*, this Court clarified that the constitutionality of a legal restriction on the possession or use of firearms turns on whether "the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. 2111, 2126 (2022). The role of historical analysis under this test is to determine whether historical precedent "*evinces* a comparable tradition of regulation[,]" not whether the restriction has a "historical *twin*." *Id.* at 2131-2133 (first emphasis added).

The Court thus recognized that history is evidence of a tradition, and *consistency with tradition* is the touchstone of constitutionality. This method of determining whether a regulation is consistent with the Second Amendment's guarantee of the right to keep and bear arms is similar to the approach followed in enforcing other fundamental rights, most notably the First Amendment's Establishment Clause, which is evaluated with reference to the clause's "original meaning and history" rather than "adorn[ing] the Constitution with rules not supported by its terms *and the traditions undergirding them*." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428, 2430 n.6 (2022) (emphasis added); *see also American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring) ("Consistent with the Court's case law, the Court today

applies a *history and tradition* test in examining and upholding the constitutionality of the Bladensburg Cross." (emphasis added)). As these cases and the analysis in *Bruen* itself show, history is evidence of tradition but not identical to it.

B. A Modern Regulation May Be Consistent With Tradition If It Adheres To Traditional Principles

How, then, should the Court determine whether a modern approach to regulation, different in particulars from what has come before, is consistent with an older tradition? This question is a familiar one to amicus. The Church is instructed to "stand firm and hold fast to the traditions" handed down as its patrimony. *New Am. Bible (Revised Edition)*, 2 Thess. 2:15. The Church has long grappled with its duty to preach timeless truths while also determining how its internal affairs and engagement with the world ought to be regulated in light of and consistent with tradition. This experience may be helpful to this Court as it decides the framework for assessing whether a modern firearm regulation is consistent with our Nation's legal tradition.

Leaders such as St. John Henry Newman and Pope Benedict XVI have explored the relationship of the Church's twin responsibilities "to transmit the doctrine, pure and integral, without any attenuation or distortion" and "to dedicate ourselves with an earnest will and without fear to that work which our era demands of us…." Pope Benedict XVI, *Address of His Holiness to the Roman Curia* (Dec. 22, 2005) (quoting Pope St. John XXIII, *Address on the Occasion of the Solemn Opening of the Most Holy Council* (Oct. 11, 1962), in *The Documents of Vatican II* 715 (Abbott ed., 1966)). Pursuing both aims requires distinguishing "genuine

developments" of doctrine or legitimate "reform," by which the timeless truths of the Catholic faith are articulated to modern listeners in continuity with tradition, from "corruptions" or "rupture" divorced from fundamental principles. *Id.*; *see also* St. John Henry Newman, *An Essay on the Development of Christian Doctrine* 169 (1909).

Newman taught that genuine developments of doctrine reflect "continuity of principles" and do not "contradict and reverse the course of doctrine which has been developed before them." Newman, *Essay*, at 179, 199. "Thus the *continuity or the alteration of the principles* on which an idea has developed" helps to distinguish "between a true development and a corruption." *Id.* at 185. However, "considerable alteration of proportion and relation, as time goes on, in the parts or aspects of an idea" is not inconsistent with faithful development. *Id.* at 173.

Popes St. John XXIII and Benedict XVI likewise taught that "[t]he substance of the ancient doctrine of the deposit of faith is one thing, and the way it is presented is another." Pope Benedict XVI, *Address* (quoting Pope St. John XXIII, *Address* in *The Documents of Vatican II* 715). In order to respond to modern challenges, the Church has articulated "new definition[s]" in certain contexts, leading to a "discontinuity" in contingent matters but not in principles:

> [A] discontinuity had been revealed but in which, after the various distinctions between concrete historical situations and their requirements had been made, the continuity of principles proved not to have been abandoned.
>
> It is precisely in this combination of continuity and discontinuity at different levels that the

> very nature of true reform consists. In this process of innovation in continuity we must learn to understand more practically than before that the Church's decisions on contingent matters … should necessarily be contingent themselves, precisely because they refer to a specific reality that is changeable in itself. It was necessary to learn to recognize that in these decisions *it is only the principles that express the permanent aspect*, since they remain as an undercurrent, motivating decisions from within. On the other hand, *not so permanent are the practical forms that depend on the historical situation and are therefore subject to change.* Basic decisions, therefore, continue to be well-grounded, whereas the way they are applied to new contexts can change.

Id. (emphases added).

Consistency with tradition thus depends more on faithful application of fundamental principles than on overt similarities between contingent applications to particular historical contexts.

II. The Tradition Supports Laws Protecting Human Life And Dignity, Particularly Of Vulnerable Persons

Under *Bruen*, firearms restrictions must be consistent with the Nation's historical tradition of such regulations. Since consistency with tradition requires continuity of principles, this Court should take into account the basic principles of social order embodied in the Constitution and that the Nation's traditions have sought to uphold. These principles include promoting the common

good by upholding human life and dignity and showing special care for the weak and vulnerable.

Like the Church's teachings, the United States' foundational documents have recognized these general principles as basic to social and governmental order. The Constitution, which was "ordain[ed] and establish[ed]" to "promote the general Welfare," affirms the role of government in promoting the common good of the governed community. U.S. Const., preamble. The Church similarly affirms that "the common good is the reason that the political authority exists." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 168 (2004) ("*Compendium*"). Likewise, both the Church and the Declaration of Independence affirm that all people are created equal and that their rights come from God. *Compare Libertatis Conscientia (Instruction on Christian Freedom and Liberation)* ¶ 73, Cong. for the Doctrine of the Faith (Mar. 22, 1986) ("*Libertatis Conscientia*") (noting that "natural rights and duties" flow from "the dignity of each individual, created in God's image") *with The Declaration of Independence* para. 2 (U.S. 1776) ("[A]ll men are created equal" and "endowed by their Creator with certain unalienable Rights"). These "fundamental rights … 'precede any society because they flow from the dignity granted to each person as created by God.'" Pope Francis, Encyclical Letter *Fratelli Tutti* ¶ 124 (Oct. 3, 2020) (quoting U.S. Conf. of Catholic Bishops, Pastoral Letter Against Racism, *Open Wide Our Hearts* (Nov. 2018)).

Each person must nevertheless exercise fundamental rights responsibly. The Church teaches that all people should "contribute to the common good of society at all its levels." *Libertatis Conscientia* ¶ 73. "Thus the Church does not hesitate to condemn *situations* of life that are injurious to man's dignity and freedom." *Id.*

¶ 74. States have a corresponding duty to promote the common good by establishing a social order that directs individuals toward the responsible exercise of their rights. "Awareness of man's freedom and dignity, together with the affirmation of the inalienable rights of individuals and peoples, is one of the major characteristics of our time. But freedom demands conditions of an economic, social, political, and cultural kind that make possible its full exercise." *Id.* ¶ 1. "Every human being has the right to live with dignity and to develop integrally; this fundamental right cannot by denied by any country." Pope Francis, *Fratelli Tutti* ¶ 107. "To ensure the common good, the government of each country has the specific duty to harmonize the different sectoral interests with the requirements of justice." *Compendium* ¶ 169.

A. Violence Against Intimate Partners Offends The Dignity Of The Person And Undermines The Basic Institution Of Society

As governments seek to exercise their function to promote the common good, "the poor, the marginalized and in all cases those whose living conditions interfere with their proper growth should be the focus of particular concern." *Compendium* ¶ 182. This is because the primacy of the common good implies "[the principle of] th[e] universal destination of … goods"—the right of all persons to share in the goodness of the Earth "under the leadership of justice and in the company of charity."[2]

[2] "In the beginning God entrusted the earth and its resources to the common stewardship of mankind to take care of them, master them by labor, and enjoy their fruits. The goods of creation are destined for the whole human race." *Catechism of the Catholic Church* § 2402, at 577 (2d ed. 2019). "*Political authority* has the right and

Pastoral Constitution on the Church in the Modern World (*Gaudium et Spes*) ¶ 69 (1965). The station of marginalized persons poses a unique challenge to the faithful application of the principle of the universal destination of goods because such persons are most likely to be deprived of their portion of "humanity's common patrimony." *Compendium* ¶¶ 179, 182.

"Doubly poor are those women who endure situations of exclusion, mistreatment and violence, since they are frequently less able to defend their rights." Pope Francis, Apostolic Exhortation *Evangelii Gaudium* ¶ 212, at 165 (Nov. 24, 2013). Accordingly, governments have substantial flexibility to address the needs of particularly vulnerable persons in law, including the survivors of domestic violence and those at risk of violence. In light of these principles, it is proper for the state, acting in accord with the principle of subsidiarity,[3] to provide "juridical assistance" to more basic social institutions such as the family to prevent domestic violence from undermining this foundational institution of society. *Compendium* ¶ 186.

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duty to regulate the legitimate exercise of the right to ownership for the sake of the common good." *Id.* § 2406, at 578.

[3] "[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good." Pope St. John Paul II, Encyclical Letter *Centesimus Annus* § 48 (May 1, 1991).

B. Families Enjoy Some Autonomy From State Interference In Service Of The Common Good, But Domestic Violence Cries Out For State Intervention

The Church has consistently taught across millennia that "[t]he family is the *original cell of social life*. It is the natural society in which husband and wife are called to give themselves in love and in the gift of life." *Catechism of the Catholic Church* § 2207, at 533 (2d ed. 2019) ("*Catechism*"). "[T]he social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family … [,] which stem[s] from human nature itself and [has its] own autonomy, always with a view to the common good." Pope St. John Paul II, Encyclical Letter *Centesimus Annus* § 13 (May 1, 1991). There are therefore "necessary limits to the State's intervention and on its instrumental character, inasmuch as the individual, the family and society are prior to the State, and inasmuch as the State exists in order to protect their rights and not stifle them." *Id.* § 11; *see also* Pope Leo XIII, Encyclical Letter *Rerum Novarum* ¶ 12 (May 15, 1891) (describing the family as "a true society, and one older than any State" that has "rights and duties peculiar to itself which are quite independent of the State").

But the Church also proclaims that "[*h*]*uman life is sacred*," *Catechism* § 2258, at 544, that "violence against another person in any form fails to treat that person as someone worthy of love," and that violence instead impermissibly "treats the person as an object to be used," U.S. Conf. of Catholic Bishops, *When I Call for Help* (2002), https://www.usccb.org/topics/marriage-and-family-life-ministries/when-i-call-help-pastoral-response-domestic-violence. For these reasons, domestic "[v]iolence in any form—physical, sexual, psychological, or verbal—

is sinful." *Id.* (quotation marks omitted). Pope Francis has denounced "the shameful ill-treatment to which women are sometimes subjected, domestic violence and various forms of enslavement which, rather than a show of masculine power, are craven acts of cowardice. The verbal, physical, and sexual violence that women endure in some marriages contradicts the very nature of the conjugal union." Pope Francis, Apostolic Exhortation *Amoris Laetitia* ¶ 54, at 43 (Mar. 19, 2016). It is "fundamental that nonviolence be practiced before all else within families," which requires "an end to domestic violence and to the abuse of women and children." Pope Francis, *Message for the Celebration of the Fiftieth World Day of Peace* § 5 (Jan. 1, 2017).

The principle of subsidiarity, which holds that it is a "disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do," recognizes the autonomy of the family and other institutions of civil society while acknowledging that this autonomy is not unlimited. Pope Pius XI, Encyclical Letter *Quadragesimo Anno* ¶ 79 (1931). The Church teaches that "neither the State nor any society must ever substitute itself for the initiative and responsibility of individuals and of intermediate communities *at the level on which they can function*, nor must they take away the room necessary for their freedom." *Libertatis Conscientia* ¶ 73 (emphasis added). By the same token, "serious social imbalance or injustice," such as when violence creates dysfunction within the family, can lead to a situation "where only the intervention of the public authority can create conditions of greater equality, justice and peace." *Compendium* ¶ 188. "In any case, the common good correctly understood, the demands of which will never in any way be contrary to the defence and promotion of the primacy of the person and

the way this is expressed in society, must remain the criteria for making decisions concerning the application of the principle of subsidiarity." *Id.*

III. The Tradition Of Firearm Regulation In The United States Permits Disarming Dangerous Individuals To Protect The Vulnerable

Rights, including Second Amendment rights, are "not unlimited, just as the First Amendment's right of free speech [is] not." *District of Columbia* v. *Heller*, 554 U.S. 570, 595 (2008); *see also id.* ("Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."). This holding, and the tradition of legitimate regulations on the possession and use of firearms, are consistent with the principles of a good society outlined above: a respect for individual rights in service of the common good; a healthy subsidiarity that respects legitimate spheres of autonomy so long as they promote human flourishing; and a special concern to protect the poor and vulnerable.

A. Protecting The Innocent Is A Proper Consideration In Firearm Regulation

This Court has recognized that the "core" of the Second Amendment right is "self-defense," and has extolled the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Recognition of this right can promote the common good, as the Church has recognized that "[l]egitimate defense can be not only a right but a *grave duty for one who is responsible for the lives of others*" and that "[t]he defense of the common good *requires* that an unjust aggressor be rendered unable to cause harm." *Catechism*

§ 2265, at 545-546 (emphasis added); *see also The Summa Theologiae of St. Thomas Aquinas*, II-II, 64.7 (2d rev. ed. 1920) (identifying circumstances under which private citizens and public officials may use force in self-defense and when "acting for the common good").

But "[t]he right to use force for purposes of legitimate defence is associated with the duty to protect and help innocent victims who are not able to defend themselves from acts of aggression." *Compendium* ¶ 504; *cf.* U.S. Const. amend. II (a goal of the Second Amendment is to promote the "security of a free State"). "[I]ndividual rights, when detached from a framework of duties which grants them their full meaning, can run wild, leading to an escalation of demands which is effectively unlimited and indiscriminate." Pope Benedict XVI, Encyclical Letter *Caritas in Veritate* § 43 (2009). The right to keep and bear arms can thus be limited in situations where possession of arms is unusually likely to harm innocent victims instead of helping, such as when the possessor has demonstrated a willingness to engage in unjustifiable violence.

Amicus accordingly recognizes the role that the duty to protect the innocent, and specifically victims of domestic violence, plays in the context of firearm regulation. "All of us must do more to end violence in the home and to find ways to help victims break out of the pattern of abuse. As bishops, we support measures that control the sale and use of firearms and make them safer (especially efforts that prevent their unsupervised use by children or anyone other than the owner), and we reiterate our call for sensible regulation of handguns." U.S. Conf. of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration* (2000), https://www.usccb.org/resources/responsibility-rehabilitation-and-restoration-catholic-perspective-crime-and-criminal#scriptural.

Amicus has also advocated for "robust support" for "law enforcement agencies so that they can better investigate, neutralize, and hold accountable those who commit acts of domestic violence," and supports "measures to remove weapons, especially firearms, from persons who are deemed by courts to be threats to the people around them." U.S. Conf. of Catholic Bishops, *Letter to the Committee on the Judiciary Regarding Reauthorization of the Violence Against Women Act* (Apr. 3, 2019).

B. Founding Era Firearm Regulations Sought To Protect The Vulnerable

As noted, the Second Amendment is concerned primarily with "'the right of law abiding, responsible citizens to use arms' for self-defense." *Bruen*, 142 S. Ct. at 2131. Accordingly, the Nation's historical tradition of firearm regulation includes many provisions focused on preventing those deemed a danger to others from possessing firearms. For example, laws passed in New Hampshire in 1759 and Massachusetts in 1795 "forbade carrying arms in an aggressive and terrifying manner." Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 262 (2020). Similarly, "[a] 1736 Virginia legal manual allowed for confiscation of arms, providing that a constable 'may take away Arms from such who ride, or go, offensively armed, in Terror of the People' and may bring the person and their arms before a Justice of the Peace." *Id.*

Further, the "[d]ebates from the Pennsylvania, Massachusetts and New Hampshire ratifying conventions, which were considered 'highly influential' by the Supreme Court in *Heller* ... confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses." *Binderup* v.

Attorney Gen., 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments). After Pennsylvania's ratifying convention, the Anti-Federalists proposed the following: "'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.'" Greenlee, 20 Wyo. L. Rev. at 267 (emphasis added). In Massachusetts, Samuel Adams's proposed right to bear arms, which "was celebrated by his supporters as ultimately becoming the Second Amendment," guaranteed that "the said constitution be never construed ... to prevent the people of the United States *who are peaceable citizens*, from keeping their own arms." *Id.* at 265-266 (emphasis added; ellipsis in original). Comparing definitions in Samuel Johnson's, Thomas Sheridan's, and Noah Webster's dictionaries at the time, "peaceable" was understood in the Founding era "as meaning nonviolent." *Id.* at 266. Although the above proposals did not "ma[ke their] way into the Second Amendment," they may still "'indicate some common if imprecise understanding at the Founding regarding the boundaries of a right to keep and bear arms.'" *Kanter* v. *Barr*, 919 F.3d 437, 455 (7th Cir. 2019) (Barrett, J., dissenting) (quoting Marshall, *Why Can't Martha Stewart Have A Gun*?, 32 Harv. J.L. & Pub. Pol'y 695, 713 (2009)). Indeed, they appear to be "[t]he most germane evidence available," and such proposals "directly support[] the conclusion that the founding generation did not understand the right to keep and bear arms to extend to certain categories of people deemed too dangerous to possess firearms" and "the debates from the ratifying conventions point strongly toward a limit on

Second Amendment rights centered on dangerousness." *Binderup*, 836 F.3d at 367-368 (Hardiman, J., concurring in part and concurring in the judgments).

Following ratification of the Constitution, state legislatures continued to restrict firearm possession by individuals deemed a threat to others. One example of a categorical restriction is surety statutes, which "typically targeted only those threatening to do harm." *Bruen*, 142 S. Ct. at 2148. Surety laws show that the right to possess a firearm could be burdened on a "showing of 'reasonable cause to fear an injury, or breach of the peace.'" *Id.* (quoting Mass. Rev. Stat., ch. 134, § 16 (1836)). The purpose of surety laws was to prevent violence to others. *See* 4 Blackstone, *Commentaries on the Laws of England* 248-249 (1769) ("preventive justice is … preferable in all respects to punishing justice"; "This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. … [T]he caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen").

The result is that the Second Amendment, while embodying "certain guaranties and immunities which we had inherited from our English ancestors," has also "from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897); *see also Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) ("Properly interpreted, the Second

Amendment allows a 'variety' of gun regulations."). One recognized exception is the government's power to disarm persons who are not "law-abiding, responsible citizens.'" *Heller*, 554 U.S. at 635. American legal tradition thus demonstrates that "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety." *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting).

C. The Regulation Of Firearms To Prevent Domestic Violence Is Consistent With The Second Amendment's Traditional Understanding

Early American traditions also embodied the principle of caring for vulnerable women and children and preserving the family unit from violence, although the means of addressing such violence and the extent to which the government was willing to intrude into family autonomy varied. New England colonies—Rhode Island, Connecticut, and New Hampshire—punished spousal abuse as assault and battery. Pleck, *Criminal Approaches to Family Violence, 1640-1980*, 11 Crime & Just. 19, 25 n.1 (1989). The Puritans in Massachusetts Bay Colony also "attacked family violence with the combined forces of community, church, and state." *Id.* at 22. The Massachusetts Bay Colony enacted "the first law against wife abuse anywhere in the Western world" as part of its criminal code. *Id.* Under that code, "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assalt." *Massachusetts Colony 1890*, in *The Body of Liberties of 1641*, at 32, 51 (1890). In addition to maintaining magistrate courts, the New England colonies also established church courts that occasionally tried cases of wife abuse, cruelty to children, and child neglect. And the Puritans depended on the positive

virtue of community "meddling," that is, "[n]eighbors watch[ing] each other informally for signs of aberration, which were often reported to the minister or local constable." Pleck, 19 Crime & Just. at 22. Magistrates in turn believed that such "holy watching" by community members would deter any further violence. *Id.* at 25.

Although some colonies had taken steps to address spousal abuse, it is true that through the early 1800s, certain states unjustly recognized that husbands had a purported right to physically chastise their wives. *See, e.g.*, *Bradley* v. *State*, 1 Miss. (Walk.) 156, 157 (1824); *State* v. *Black*, 60 N.C. (Win.) 266, 267 (1864). *But see* Siegel, "*The Rule of Love*," 105 Yale L.J. 2117, 2124 (1996) ("'[T]he right of chastising a wife is not claimed by any man; neither is any such right recognized by our law.'" (quoting Reeve, *The Law of Baron and Femme; of Parent and Child; of Guardian and Ward; of Master and Servant; and of the Powers of Courts of Chancery* 65 (1816)).[4] This "power of correction" existed at common law and was grounded in the doctrine of marital unity. Siegel, 105 Yale L.J. at 2122-2123 & n.16. According to this doctrine, the "legal existence of the woman [was] suspended" and the husband bore the responsibility—and potentially the legal liability—for his wife's behavior. *Id.* The husband could therefore "'give his wife moderate correction.'" *Id.* at 2123 (quoting 1 Blackstone, *Commentaries* 444). Such power "'was confined within

[4] Reeve—who authored America's first treatise on family law—was skeptical of the marital unity doctrine and the "continuing authority" of the chastisement privilege. *Siegel*, 105 Yale L.J. at 2124. Reeve cautioned that it was "difficult to ascertain, with exactness, what power the husband has over the person of his wife." *Id.* (quotation marks omitted). Indeed, the practice of wife beating was not frequently addressed in antebellum judicial opinions. *Id.* at 2124-2125.

reasonable bounds, and the husband was prohibited from using any violence to his wife.'" *Id.* (quoting 1 Blackstone, *Commentaries* 444).

Blackstone characterized this "right" or "privilege" as largely outdated "'in the politer reign of Charles [II]'" but still exerted in lower classes. Siegel, 105 Yale L.J. at 2124. The prevalence of this "right" in the colonies and states is disputed, *id.*, but even where it was recognized, it was "somewhat curtailed or moderated," Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence*, 32 T. Jefferson L. Rev. 31, 33 (2009).

Blackstone accordingly stated the principle that "the husband was prohibited from using any violence to his wife," and based this on the writ of *supplicavit*, which permitted a wife to petition the court for protection if her husband threatened bodily harm. Siegel, 105 Yale L.J. at 2123. "'By the terms of the writ, a wife could'" request that the court require the husband to provide a guarantee or security bond "'that he will not do, or cause to be done, any harm or evil to her body, other than licitly and reasonably pertains to a husband for ruling and chastising his wife.'" *Id.* Early American courts appeared to also recognize the writ of *supplicavit*, with at least one court granting it. *Id.* at 2125 & n.25 (citing *Prather* v. *Prather*, 4 S.C. Eq. (Des.) 33 (1809)).[5]

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[5] Then-Professor Joseph Story opined that the writ, brought in equity, was "rarely now used as the remedy at the common law is in general adequate." Story & Redfield, *Commentaries on Equity Jurisprudence* § 1476, at 733 (10th ed. 1870); *see also* Bispham & McCoy, *Principles of Equity* § 582, at 871 (10th ed. 1922) ("This writ has gone almost completely out of use, as the same end is now fully attained by proceedings at common law, by which security for breach of the peace is exacted.").

By the mid-to-late-1800s, more states began criminalizing forms of "wife beating," Pleck, 19 Crime & Just. at 30, but courts still remained reluctant to "interfere with family government in trifling cases," *State* v. *Rhodes*, 61 N.C. (Phil.) 453, 459 (1868) (per curiam); *see also* Pleck, 19 Crime & Just. at 35 ("The desire to respect family privacy and to safeguard the traditional rights of parents to discipline their children was far greater than the fear of social disorder or the desire to control the lives of the poor.").

Toward the end of the nineteenth century, as the fear of crime surged, a renewed desire to charge the government with enforcing morality resurfaced. Responses to dealing with spousal abuse continued to evolve. Pleck, 19 Crime & Just. at 35-40. For instance, wife-beating was criminalized and punished by the whipping post, but by the early twentieth century, criminal prosecution was disfavored, and family court judges believed that "social casework methods were more efficient, human, and better suited to handling the complicated dynamics of abusing families." *Id.* at 44-45.

Although interest in addressing family violence through the judicial system has waxed and waned, in recent decades, society developed a greater appreciation of the danger posed by intimate partner abusers and linking the once-"private" acts to public safety risks. "In this country, now, it is a distinctively minority and losing view to treat the home as beyond public scrutiny, and violence behind the veil of privacy." Minow, *Between Intimates and Between Nations*, 50 Case W. Res. L. Rev. 851, 852 (2000). Courts likewise acknowledged that "no matter how you slice [the] numbers, people convicted of domestic violence remain dangerous to their spouses and partners." *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting). They also acknowledged that "women in battering

relationships are often 'hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognize the danger.'" *United States* v. *Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016) (Kavanaugh, J.).

D. Section 922(g)(8) Is Constitutional Under The Court's Tradition Test

The foregoing history shows that the United States has traditionally protected spouses and children from abusive intimate partners or parents, though the modern day recognizes the need to do so more fully. The history also reveals that, since the Founding era, firearms have been regulated to protect the vulnerable from the risk of violence at the hands of those who have shown themselves willing to engage in it.

Section 922(g)(8) is thus entirely consistent with these principles. The law targets only those who have demonstrated a propensity for violence in violation of their duty to possess and use weapons responsibly and is narrowly tailored to prevent violence to specific individuals who have already demonstrated their need for governmental intervention by petitioning for a restraining order from a state court. This sort of individualized protection respects the rights of law-abiding gun owners and is analogous to early laws restricting those deemed a threat to others from bearing arms. *See* Greenlee, 20 Wyo. L. Rev. at 265-267.

Moreover, the law respects the autonomy of the family by intervening in domestic affairs only after a court has found—subject to due-process requirements—that a reasonable chance of intra-family violence exists. *See* 18 U.S.C. § 922(g)(8)(C) (requiring a judicial finding

that "such person represents a credible threat to the physical safety of such intimate partner or child" or otherwise "explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury"). A judicial finding that a person "represents a credible threat" to a partner or child means that the person has been adjudged as dangerous and "demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting). As for the second criterion under Section 922(g)(8)(C)(ii)—that the order prohibit the use or threat of physical violence—Congress assumed that under state laws, such court orders would not issue unless they were "not contested or evidence credited by the court reflected a real threat or danger of injury to the protected party by the party enjoined." *United States* v. *Emerson*, 270 F.3d 203, 262 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002). And while the underlying restraining order proceeding may have been civil, surety laws at the Founding also only required a civil proceeding.

The tradition of firearm regulation in the United States thus permits laws that respect fundamental rights in service of the common good, support families, and protect the vulnerable. Under these traditional standards, this Court should uphold Section 922(g)(8).

IV. The Fifth Circuit's Analysis Confused History For Tradition And Made Questionable Policy Assumptions

The opinions below did not follow this Court's guidance in searching for a historical analogue to Section 922(g)(8). Rather, they sought a twin, which is not the correct standard under *Bruen*. Moreover, the opinions

made multiple flawed assumptions regarding restraining orders.

A. The Opinions Below Incorrectly Looked For A Historical Twin Instead Of Identifying Traditional Principles

In holding Section 922(g)(8) unconstitutional, the Fifth Circuit analyzed three separate classes of historical firearm regulations—English disarmament of dangerous persons, colonial "going armed" laws, and surety laws—and concluded that each class, considered separately, did not provide sufficient historical justification for the statute. Pet. App. 17a. The Fifth Circuit treated the history of these classes of laws not as varied evidence shedding light on the metes and bounds of "the relevant tradition of regulation," *Bruen*, 142 S. Ct. at 2149 n.25, but as three separate proposed comparators. Pet. App. 17a.

When the three classes of laws cited by the Fifth Circuit are properly considered as evidence of the relevant traditional principles, they plainly support narrow and targeted regulations such as Section 922(g)(8).

Dangerous-person and going-armed laws. After considering various English, colonial, and early state laws that disarmed classes of persons deemed dangerous, the Fifth Circuit stated that the "purpose of laws disarming 'disloyal' or 'unacceptable' groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse.'" Pet. App. 20a. Likewise, the Fifth Circuit distinguished laws against "'going armed to terrify the King's subjects'" and their American analogues in part because they applied to "threat[s] to

society generally, rather than to identified individuals." *Id.* 21a, 24a.

This distinction is unfounded. The genuine protection of political and social order is not truly a separate aim from protecting the vulnerable individuals whose moral claim on society is most pressing. Both objectives serve the overarching goal of government to "contribute to the common good of society at all levels," *Libertatis Conscientia* ¶ 73, by upholding human dignity and specifically defending the innocent from violence. *See Catechism* § 2265, at 545-546. There is no meaningful distinction between the health of society at large and that of its fundamental constituents—individuals, marriages, and families—and no such distinction exists in the principles expressed in our Nation's legal tradition. Accordingly, Section 922(g)(8) is consistent with these laws' tradition of disarming people who have shown a proclivity to engage in violence.

Surety laws. The Fifth Circuit took a similarly improper approach to surety laws, distinguishing them because Section 922(g)(8) applies for the duration of the restraining order, while historic surety laws allowed the accused to post a bond and retain the right to carry weapons. This distinction is questionable as well, in part because the historical option of posting a bond was meaningless for people unable to pay.

Read together, the surety laws and dangerous-person laws illuminate an overall tradition supporting the statute. Surety laws (like the writ of *supplicavit*) provided a civil mechanism for identifying dangerous persons and sought to protect individuals at heightened risk of gun violence by limiting the rights of such dangerous persons to carry firearms. The dangerous-person laws discussed above provided that dangerous persons could

be disarmed regardless of whether they could provide a surety. When these historical laws are viewed together as a whole, the core features of Section 922(g)(8) find support in Founding-era law. The Fifth Circuit's divide-and-conquer approach does not fairly determine the content of our Nation's tradition, and this Court should clarify that the tradition as a whole is the point of comparison, not individual historical laws considered in a vacuum.

This approach is faithful to *Bruen*, which asked "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified" to determine the consistency of our legal tradition with the challenged enactment. 142 S. Ct. at 2133. Reviewing the tradition reveals comparable burdens and comparable justifications for burdening the right to keep and bear arms, indicating that Section 922(g)(8) is consistent with the principles supporting our Nation's traditional firearm laws. Accordingly, the statute is facially constitutional under the Second Amendment.

B. The Concurrence Below Also Made Flawed Assumptions Regarding Restraining Orders

Contrary to suggestions offered by the concurring judge in the Fifth Circuit, Pet. App. 29a-41a (Ho, J., concurring), obtaining a restraining order is hardly a simple task, and the grant of such orders is by no means assured. Victims of abuse may be unable to afford filing fees or counsel, particularly when their finances are controlled by their abusers. *Nwoye*, 824 F.3d at 1138 ("[B]atterers often isolate their victims and exert financial control over them…."); Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic*

Violence but Mutual Protective Orders Are Not, 67 Ind. L.J. 1039, 1044 (1992).

Additionally, the process of seeking a restraining order is itself complex and frustrating to victims of domestic abuse, many of whom are low income or are minorities. *See* Purvin, *At the Crossroads and in the Crosshairs*, 54 Soc. Probs. 188, 190 (2007); Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 63 & n.262 (2006).

That there may be instances of attorneys seeking civil protective orders as leverage in divorce proceedings or courts granting mutual protective orders, Pet. App. 37a (Ho, J., concurring) (quoting Suk, 116 Yale L.J. at 62 n.257) does not change the analysis. The granting of requests for protective orders is far from a foregone conclusion. If anything, some courts err on the side of denying restraining orders, sometimes going so far as to minimize or dismiss the abuse endured by victims. When one woman—who had been abused for twenty-five years—sought a protective order after her husband threw a golf ball at her son, the judge denied the petition and reportedly told the woman that she was "the type who requested an order one day and asked to have it rescinded the next." Topliffe, 67 Ind. L.J. at 1051.

> The judge [also] suggested that she provoke a more serious incident in order to make sure that her case was strong enough to support the [restraining order]. She said, "I guess I need a knife in my back or at least to be bleeding profusely from the head and shoulders to get a[restraining order]." The judge told her, 'That's just about it.'"

Id. In another case, a woman seeking a protective order asserted that her husband had poured lighter fluid on her and set her on fire. The judge responded by

singing—in open court—"You light up my wife" to the tune of "You Light Up My Life." *Id.*

Although not all hearings are as egregious, vulnerable women nonetheless routinely encounter skepticism and bias that in turn "contributes to the judicial system's failure to afford the protection of law to victims of domestic violence." Topliffe, 67 Ind. L.J. at 1050.

Finally, while the Fifth Circuit concurrence emphasized the importance of criminal convictions, Pet. App. 34a, it failed to consider the importance of civil remedies in protecting and empowering victims of abuse—remedies consistent with the longstanding tradition of disarming dangerous persons. Victims may not want their abuser jailed or criminally charged if he is their only source of support. Topliffe, 67 Ind. L.J. at 1048. They may also fear retaliation if they file criminal charges. *Id.* Thus, civil orders can provide victims with some semblance of autonomy. *Id.*; *see also* Sack, 32 T. Jefferson L. Rev. at 31; Suk, 116 Yale L.J. at 62. What is more, civil orders can protect victims when the available evidence—which is frequently only the victim's own testimony—cannot support the higher burden required for conviction. Topliffe, 67 Ind. L.J. at 1048.

* * *

As the Church teaches, and this Nation's historical traditions demonstrate, the right to bear arms is not an unqualified license that must leave vulnerable family members to live in fear. Abused victims are precisely the people whom a just government is tasked with protecting. The Second Amendment does not stand as a barrier to their safety.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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