No. 22-915

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ZACKEY RAHIMI, RESPONDENT

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

BRIEF OF UNITED STATES SENATOR RICHARD BLUMENTHAL, REPRESENTATIVE MIKE THOMPSON, AND 169 OTHER U.S. SENATORS AND REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are 171 members of Congress who believe that gun safety laws, such as 18 U.S.C. 922(g)(8), are essential tools for protecting victims of domestic violence, ensuring public safety, and preserving other constitutional rights. Amici consider it crucial that both state and federal legislatures maintain the flexibility to address public safety threats with common-sense policy solutions that are permissible under the Second Amendment. As democratically elected representatives, amici have a particular interest in ensuring that the judicial branch continues to give necessary deference to legislative judgments, especially when those judgments concern complex policy issues and implicate the safety of the public. Further, amici are keenly aware of the acute dangers posed by firearms to victims of domestic violence, and they believe that restrictions on firearm ownership for individuals subject to domestic violence protective orders are consistent with the Second Amendment's text and historical understanding.

The names of individual amici are listed in the Appendix.[1]

SUMMARY OF ARGUMENT

The Second Amendment protects the right of individuals to keep and bear arms, subject to certain restrictions. Those restrictions are crucial to ensuring that, while responsible and law-abiding individuals are able to exercise

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to fund its preparation or submission.

their Second Amendment rights, the public is kept safe from the scourge of gun violence. This is particularly acute in the context of domestic violence: as this Court has already recognized, often "the only difference between a battered woman and a dead woman is the presence of a gun." *United States* v. *Castleman*, 572 U.S. 157, 160 (2014) (citation omitted). The Fifth Circuit's erroneous application of the standard announced in *New York State Rifle & Pistol Association* v. *Bruen*, 142 S. Ct. 2111 (2022), infringes on Congress's considerable legislative authority to pass common-sense gun legislation. The judgment below should be reversed.

First, this Court has made clear for centuries that Congress enjoys considerable deference to pass the legislation it sees fit. While the judicial branch is responsible for ensuring that legislation is compatible with the Constitution, laws are only sparingly deemed unconstitutional. Where there is a potential conflict between a statute and the Constitution, this Court seeks to harmonize the two, not simply strike the statute down. The Second Amendment context is no different—it is flexible enough to tolerate a number of gun regulations in keeping with Congress's traditional legislative authority.

Second, the Fifth Circuit's decision in *United States* v. *Rahimi*, 61 F.4th 443 (2023), represents the realization of legal commentators' worst fears about the impact of *Bruen* on legislatures' ability to address public safety challenges. The *Rahimi* court's insistence on an exact historical match for Section 922(g)(8) is contrary to this Court's pronouncements in *Bruen* and in prior Second Amendment decisions. If allowed to stand, this reasoning would allow courts to substitute their policy judgments for

those of Congress. As a result, the Fifth Circuit's approach would unduly shackle Congress to the past, rendering it unable to develop innovative solutions for the benefit of the public.

Moreover, such a result would place the Second Amendment analysis far out of step with how courts treat other constitutional rights. In the Fourth, Seventh, and Eighth Amendment contexts, for example, courts do not demand the identification of an exact historical match in order to uphold the constitutionality of a statute. Indeed, those constitutional rights have been applied to a variety of circumstances that would have been unrecognizable at the Founding yet comport with the traditions of those amendments as understood at the ratification of the Bill of Rights.

Third, if the Fifth Circuit's erroneous decision is not corrected, this Court (and already overburdened district courts) will be inundated with Second Amendment challenges to all sorts of widely accepted gun laws that this Court has suggested are well within the bounds of the Second Amendment. That deluge has already begun. This Court must stem the tide if it does not want courts to relitigate *Bruen* for years to come.

ARGUMENT

I. CONGRESS HAS BROAD AUTHORITY TO LEGISLATE FOR THE BENEFIT OF THE AMERICAN PEOPLE

The Constitution grants Congress broad discretion to legislate for the betterment of our nation. This wide-ranging authority is firmly grounded in the text of Article I, which establishes Congress as a co-equal branch of gov-

ernment in the constitutional design and sets forth its considerable legislative powers. See U.S. Const. Art. I. And "Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'" *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 325 (2015) (alteration in original) (quoting U.S. Const. Art. I, § 8).

For centuries, this Court has recognized that, consistent with Congress's Article I authority, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see also *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."); *Gamble* v. *United States*, 139 S. Ct. 1960, 1982 (2019) (Thomas, *J.*, concurring) (citing *Osborn*).

In recognition of the broad authority that the Constitution grants Congress, this Court has sought to avoid interfering with Congress's legislative judgments. As this Court has previously remarked, courts "have no authority to second-guess Congress" on policy matters. *Husted* v. *A. Philip Randolph Institute*, 138 S. Ct. 1833, 1848 (2018). Indeed, "the proper role of the judiciary" is "to apply, not amend, the work of the People's representatives," even if "reasonable people can disagree with how Congress balanced the various social costs and benefits." *Henson* v.

Santander Consumer USA Inc., 582 U.S. 79, 90 (2017); see also, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

Of course, Congress's authority is restricted insofar as it may not pass laws that are unconstitutional. But declaring a statute unconstitutional is exceedingly rare and may only occur where a court has no other option. Indeed, this Court has recently explained that "[w]hen legislation and the Constitution brush up against each other, [its] task is to seek harmony, not to manufacture conflict." *United States* v. *Hansen*, 143 S. Ct. 1932, 1946 (2023); see also *United States* v. *Butler*, 297 U.S. 1, 67 (1936) (noting that where a statute is challenged as unconstitutional, this Court "naturally require[s] a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress"). In other words, separation-of-powers principles call on courts to *reconcile* any potential conflict between statutes and the Constitution, not to seek to invalidate statutes at every turn. "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp powers constitutionally forbidden it." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

And in the rare instances when a particular statute conflicts with the Constitution, Congress plainly does not lose its authority to pass any future legislation in that policy area. Recognizing the common-sense notion that Congress must have a sufficiently broad framework within which to legislate, this Court has previously acknowledged "the need for workable standards and sound judicial and legislative administration," favoring rules that "draw[] clear lines for courts and legislatures alike." *Bartlett* v. *Strickland*, 556 U.S. 1, 17 (2009) (plurality opinion); see also *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197, 206 (1991) (describing benefits of the clear statement rule, which "ought to be of assistance to the Congress and the courts in drafting and interpreting legislation").

The Second Amendment context is no different. As *Bruen* makes clear, "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2133 (2022). Indeed, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Id.* at 2162 (Kavanaugh, *J.*, concurring) (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 636 (2008)).

Section 922(g)(8) is one of those permissible gun regulations. It was Congress's well-founded concern that firearms threatened the lives of the abused that motivated its passage. In 1994, when this Section was made law, Congress found that "domestic violence [was] the leading cause of injury to women in the United States between the ages of 15 and 44," and that "firearms are used by the abuser in 7 percent of domestic violence incidents." Violent Crime Control & Law Enforcement Act of 1994,

H.R. Rep. No. 711, 103d Cong., 2d Sess., 391 (1994) (Conf. Rep.). As one of the sponsors of the original bill noted, an "article in the New England Journal of Medicine found that if there is a gun present in the house, a woman who has been physically abused in a previous family fight is almost five times more likely to be murdered or involved in a fatal shooting." Press Release, Senator Paul Wellstone, To the Conferees: Adopt Crime Bill Domestic Violence Provisions (June 28, 1994). Based on these findings, Congress determined that "individuals with a history of domestic abuse should not have easy access to firearms." H.R. Rep. No. 711, 103d Cong., 2d Sess., at 391. In short, "[t]here simply is no rational reason whatsoever to allow persons who have been deemed a clear and present danger to another person * * * to have a gun." 139 Cong. Rec. 30579 (1993) (statement of Sen. Chafee).

As explained in further detail below, the Fifth Circuit's erroneous reading of *Bruen* that invalidates this well-reasoned gun regulation creates precisely the "regulatory straightjacket" that this Court has warned against and infringes on Congress's sphere of legislative authority.

II. THE FIFTH CIRCUIT'S FLAWED READING OF *BRUEN* UNDULY HINDERS CONGRESS'S ABILITY TO LEGISLATE

A. *Rahimi* Is A Dangerous Distortion Of *Bruen*

Given the well-established principle that Congress is vested with considerable legislative authority, many legal commentators expressed significant concern in the wake of *Bruen* that—despite language in *Bruen* to the contrary—the lower courts would implement that decision in

a way that would hamstring Congress's ability to pass common-sense firearm regulations that protect Americans.[2]

And the potential problem was not just that legislatures would be unable to determine in advance whether gun legislation was lawful. Analogical tests can "raise[] serious problems of administrability and invite[] judicial discretion and ideology to seep into decision-making." *After the Highland Park Attack: Protecting Our Communities from Mass Shootings Before the S. Comm. on the Judiciary*, 117th Cong. 8 (2022) (statement of Joseph Blocher), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Blocher%20-%202022-07-20.pdf [https://perma.cc/Q65H-RMCF]. In other words, without further guidance from this Court, "the fate of gun laws w[ould] depend more than ever on the whims of federal judges" employing "an 'I know it when I see it' approach to historical analogy." Joseph Blocher & Darrell A.H. Miller, *A Supreme Court Head-Scratcher: Is a Colonial Musket 'Analogous' to an AR-15?*, N.Y. Times (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html [perma.cc/B7MK-UKH3].

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[2] Over 150 members of Congress warned this Court in *Bruen* that its decision could threaten legislatures' longstanding efforts to protect public safety in the face of emerging threats. See Br. of United States Senators Charles E. Schumer, Kirsten Gillibrand and 150 Other U.S. Senators and Representatives as Amici Curiae Supporting Respondents at 5-7, 8-11, *New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843). Amici continue to be concerned that those fears have been borne out by the significant litigation that has arisen on the heels of *Bruen* and believe that *Bruen* should be overturned.

This is a concern that this Court has already recognized. In the Fourth Amendment case *Riley* v. *California*, this Court rejected California's offered limiting principle "under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart." 573 U.S. 373, 400 (2014). This Court reasoned that "an analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records," forcing courts to decide difficult questions like whether "an email [is] equivalent to a letter." *Id.* at 401. This analogue test was dismissed because it would "keep defendants and judges guessing for years to come." *Ibid.* (quoting *Sykes* v. *United States*, 564 U.S. 1, 34 (2011) (Scalia, *J.*, dissenting)).

The Fifth Circuit's opinion in *Rahimi* is those worst fears realized. It more than injects uncertainty (for both Congress and judges alike) into whether a particular firearms regulation is likely to be viewed as constitutional—it is "illustrat[ive]" of "how judges weaponize *Bruen* to invalidate laws that are consistent with the nation's traditions of weapons regulation." Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere From Weapons Threats Under* Bruen, 98 N.Y.U. L. Rev (forthcoming Dec. 2023) (manuscript at 6), https://ssrn.com/abstract=4355024 [perma.cc/H22K-AT6W].

This Court should reverse in order to rein in lower courts' errors, rectify this misreading of *Bruen*, and clarify the applicable test. *Bruen* was clear that the Second Amendment framework does not require a court to find "a historical *twin*," and that "even if modern-day regulation is not a dead ringer for historical precursors, it may be analogous enough to pass constitutional muster." 142

S. Ct. at 2133 (emphasis in original). But the Fifth Circuit ignored that direction. Instead of recognizing that the law has always allowed legislatures to disarm those who are not "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, the *Rahimi* court embarked on a hunt for the perfect match, discarding all of the historical analogues one by one on the purported basis that they were different from Section 922(g)(8) in some way. Finding no exact match, it held that Section "922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *Rahimi*, 61 F.4th at 461 (quoting *Bruen*, 142 S. Ct. at 2133).

That "divide-and-conquer" approach to historical gun regulations overlooks centuries of legislative and judicial consensus that the Second Amendment allows legislatures to disarm individuals who are not "responsible"—here, that pose a danger to others. See U.S. Br. 27-29, 43. Section 922(g)(8) is no outlier, whether compared with the past or the present. See *id.* at 22-27 (recounting history of laws disarming individuals considered not to be law-abiding and responsible), 34-35 (describing statutes in at least 48 jurisdictions enabling restrictions on gun possession by persons subject to protective orders). Rather, the statute is consistent with the Founding-era understanding that "Congress may disarm persons who are not law-abiding, responsible citizens." *Id.* at 13.

Moreover, the Fifth Circuit's deeply flawed reasoning threatens to encroach on the traditional role of the legislature, substituting the policy preferences of judges for those of democratically elected representatives. This Court has long recognized that as a wholly improper use of judicial authority. See *Osborn*, 22 U.S. (9 Wheat.) at 866. Indeed, "[t]he Fifth Circuit's claim that [Section]

922(g)(8) lacks antecedents is a classic exemplar of courts hiding behind the analogical method to choose amongst arms regulation in ways that are not compelled by *Bruen* itself and are instead ventriloquizing historical sources with their own values." Blocher & Siegel, 98 N.Y.U. L. Rev. (manuscript at 33).

That misreading must be corrected by this Court. Allowing the *Rahimi* court's distortion of *Bruen* to stand will tie legal protections for survivors of domestic abuse to an era in which protective orders did not exist, law enforcement consciously avoided intervening in domestic violence, and firearms technology was less developed (and lethal) than it is today. See U.S. Br. 40-41. In order to avoid the "regulatory straightjacket" that *Bruen* specifically forbids, 142 S. Ct. at 2133, clarity regarding the appropriate methodology that courts must use in evaluating Second Amendment claims "is important and urgent as legislatures attempt to address the astonishing rise in gun deaths" while courts are simultaneously "faced with a rising tide of Second Amendment cases." Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. (forthcoming 2023) (manuscript at 38), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408228 [perma.cc/6YNK-D89B]; see also Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 Duke L.J. (forthcoming 2023) (manuscript at 40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545 [perma.cc/UK7E-MPQX] (arguing that "tying the hands of today's legislators" on the basis of a historical absence of gun regulation "seems particularly problematic"); pp. 17-19, *infra*.

Bruen made clear that the "Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain *reasonable, well-defined restrictions*." 142 S. Ct. at 2156 (quoting *Heller*, 554 U.S. at 581) (emphasis added). Congress must be able to enshrine those reasonable restrictions—like keeping firearms out of the hands of those who have committed domestic violence—in legislation in order to protect those who are threatened. Nothing in *Bruen* forbids this outcome. See *Bruen*, 142 S. Ct. at 2157 (Alito, *J.* concurring) ("[W]e [have not] disturbed anything that we said in *Heller* or *McDonald* v. *Chicago* * * * about restrictions that may be imposed on the possession or carrying of guns." (citation omitted)). And in *Heller*, this Court recognized that Congress must be able to pass gun legislation that keeps firearms out of the hands of dangerous people in order to keep the public safe. In that case, this Court made clear that the Second Amendment does not prevent "prohibitions on the possession of firearms by felons and the mentally ill," *Heller*, 554 U.S. at 626-627, and that this did not purport to be an "exhaustive" list, *ibid.* Section 922(g)(8) fits well within that established tradition of public safety legislation. *Rahimi* contravenes the Second Amendment doctrine of this Court and invades the province of Congress. It should be reversed.

B. The *Rahimi* Court's Reading Of *Bruen* Places The Second Amendment Out Of Step With Other Constitutional Rights

In addition to stretching this Court's Second Amendment precedent beyond all recognizable limits and usurping Congress's traditional role by turning judges into legislators, *Rahimi* suffers from another doctrinal problem. If not reversed, the Fifth Circuit's approach would also

place Second Amendment doctrine far out of step with how other constitutional rights are analyzed.

As this Court noted in *Bruen*, the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees." 142 S. Ct. at 2156 (citation omitted). Indeed, this Court made clear in *Bruen* that nothing in the decision was intended to create a special playbook for Second Amendment claims, only that "judges frequently tasked with answering these kinds of historical, analogical questions" for other types of claims now "do the same for Second Amendment claims." *Id.* at 2134. And as part of the analysis in *Bruen*, this Court looked to other constitutional rights in support of its conclusion. *Id.* at 2156. This Court should do so again here. A review of other constitutional rights for which this Court looks to history demonstrates that the *Rahimi* court's search for a precise historical analogue has gone far awry.

For example, in the Eighth Amendment context, this Court has explained that the Framers understood the Excessive Fines Clause to concern "payment to a sovereign as punishment for some offense," that is, the clause was directed at "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265, 267 (1989). But this Court has recognized that the Excessive Fines Clause's original focus on criminal fines does not mean that it only applies in that context. Instead, this Court held that the protections of the Clause extend to criminal forfeiture, see *Alexander* v. *United States*, 509 U.S. 544, 558-559 (1993) (describing criminal forfeiture as "no different, for Eighth Amendment purposes, from a

traditional 'fine' "), and civil *in rem* forfeiture, see *Austin* v. *United States*, 509 U.S. 602, 610, 618 (1993).

Indeed, in *Austin*, this Court did not attempt to find a precise historical match for the civil forfeiture scheme at issue. Instead, the analysis was pitched at a higher level of generality. Ultimately, this Court held that civil *in rem* forfeiture was subject to the Eighth Amendment because "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." 509 U.S. at 618.

Similarly, this Court has held that the protections of the Fourth Amendment—even as originally understood—can be adapted to new situations unanticipated by the Founders. In *Kyllo* v. *United States*, this Court remarked that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." 533 U.S. 27, 33-34 (2001). As part of its analysis finding that thermal imaging of a home constituted a search, this Court reasoned that this sort of updating of constitutional protections "assure[d] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 34.

The Court's reasoning on this score has been consistent. In *United States* v. *Jones*, this Court explained the Fourth Amendment's historical "concern for government trespass upon the areas * * * it enumerates" applied equally when the trespass and the protected area were novel—in that case, an installation of a GPS on an automobile. 565 U.S. 400, 404, 406 (2012). In *Riley*, it considered the Fourth Amendment as "the founding generation's response to the reviled 'general warrants' and 'writs

of assistance' of the colonial era" in concluding that "[t]he fact that technology now allows an individual to carry [private] information in his hand does not make the information any less worthy of the protection for which the Founders fought." 573 U.S. at 403. And in *Carpenter* v. *United States*, it recognized that the historical understanding at the time of the Fourth Amendment's adoption counseled in favor of applying the Amendment's protections against technology that could subject "the privacies of life against arbitrary power." 138 S. Ct. 2206, 2214 (2018) (citation and internal quotation marks omitted).

This Court also relies on a "historical test" for the Seventh Amendment's jury-trial right, with its analysis shaped by the "right which existed under the English common law when the Amendment was adopted." *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (citations and internal quotation marks omitted). And yet again, when determining whether the Seventh Amendment requires that a question be decided by a jury, this Court does not search for a precise historical match. Rather, it asks first whether the cause of action "either was tried at law at the time of the founding or is at least analogous to one that was," and then "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Ibid.* Moreover, if the historical record is unclear, this Court then "look[s] to precedent and functional considerations." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999). Consistent with this approach, it has held that the right to a jury trial applies to a range of civil contexts that were unknown at the founding. These include actions seeking backpay and benefits for a breach of a union's duty of fair representation, see *Chauffeurs, Teamsters & Helpers*,

Local No. 391 v. *Terry*, 494 U.S. 558, 573-574 (1990), even though "[a]n action for breach of a union's duty of fair representation was unknown in 18th-century England"—indeed, "collective bargaining was unlawful" then, *id.* at 565-566. The Seventh Amendment has also been extended to government suits seeking civil penalties for Clean Water Act violations, see *Tull* v. *United States*, 481 U.S. 412, 425, 427 (1987); and regulatory takings suits under 42 U.S.C. 1983, see *Del Monte Dunes*, 526 U.S. at 709, 720-721.

In short, this Court has long upheld modern statutes, even under doctrinal tests that look to history and tradition, because constitutional rights are flexible enough to allow for the lived experience of the twenty-first century and beyond. This understanding is wholly in line with this Court's pronouncement in *Heller* that Second Amendment analysis does not require courts to be unduly tethered to a bygone era: "Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, * * * the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 582. If allowed to stand, the *Rahimi* decision would upset longstanding constitutional modes of analysis, preventing Congress from any innovation to preserve public safety.

III. COURTS WILL BE INUNDATED BY *BRUEN* CHALLENGES IF THE FIFTH CIRCUIT'S DECISION STANDS

Amici's concern that the Fifth Circuit's decision would intrude on Congress's traditional legislative role is not unfounded. *Bruen* has already opened the door to hundreds of Second Amendment challenges to well-accepted gun legislation. But the Fifth Circuit's decision would throw the door wide open for litigants to undo a wide range of widely-accepted firearms regulations on the ground that there is no exact historical match. Litigants are already using that same rationale to challenge a myriad of uncontroversial statutes. If allowed to persist, the mode of reasoning employed by the Fifth Circuit will generate a wave of litigation that will burden the courts and hamper legislatures' ability to address public safety needs.

Since *Bruen*, the lower courts have been inundated with Second Amendment challenges. And many of these challenges threaten gun regulations that this Court has long accepted, such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-627; accord *McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, *J.*, concurring). One commentator identified 312 federal court decisions addressing Second Amendment challenges in the year following *Bruen*. See Charles, 73 Duke L.J. (manuscript at 49-54).

This figure will only grow as pending litigation marches forward and some federal and state courts apply

the Fifth Circuit's flawed approach. To take a single example, one court held that the statute prohibiting possession of a firearm with an altered, obliterated, or removed serial number was unconstitutional, because it found no historical evidence that serial marks were required on firearms in 1791. See *United States* v. *Price*, 635 F. Supp. 3d 455, 463-464 (S.D. W. Va. 2022) (holding 18 U.S.C. 922(k) unconstitutional). Indeed, litigants are targeting a host of well-established gun regulations on the same cramped reading of *Bruen* employed by the Fifth Circuit. See Charles, 73 Duke L.J. (manuscript at 53) (listing categories of post-*Bruen* challenges).

And the Fifth Circuit's cramped reading of *Bruen* continues apace. Citing to its previous opinion in *Rahimi*, in another Second Amendment case, the Fifth Circuit yet again discarded the Government's argument that Congress has always been able to place gun restrictions on those deemed "dangerous." See *United States* v. *Daniels*, No. 22-60596, 2023 WL 5091317, at *13-14 (Aug. 9, 2023). Instead, the Fifth Circuit posited, "the government must show that a historical danger-based disarmament is analogous to the challenged regulation." *Id.* at *14.

This wave of challenges will certainly swell absent further clarification about legislatures' ability to enact common-sense gun regulations. As Judge Higginson of the Fifth Circuit explained in *Daniels*, it is "increasingly apparent * * * that courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry." 2023 WL 5091317, at *17 (Higginson, *J.*, concurring).

Without correction, "any further reductionism of *Bruen* will mean systematic, albeit inconsistent, judicial dismantling of the laws that have served to protect our

country for generations," and "will constrain the ability" of legislatures to address the scourge of gun violence. *Daniels*, 2023 WL 5091317, at *20 (Higginson, *J.*, concurring). "This state of affairs will be nothing less than a Second Amendment caricature, a right turned inside out, against freedom and security in our State." *Ibid.*

To avoid this outcome, this Court should take the opportunity in this case to underscore that *Bruen* does not require a "historical *twin*," 142 S. Ct. at 2133, and that Congress remains able to pass legislation that protects the safety of the American people.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2023

APPENDIX

APPENDIX – LIST OF MEMBERS OF THE UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES

The following members of the United States Senate and House of Representatives join in this brief:

U.S. Senate

Majority Leader Charles E. Schumer (New York)
Senator Tammy Baldwin (Wisconsin)
Senator Richard Blumenthal (Connecticut)
Senator Cory A. Booker (New Jersey)
Senator Benjamin L. Cardin (Maryland)
Senator Christopher A. Coons (Delaware)
Senator Richard J. Durbin (Illinois)
Senator Dianne Feinstein (California)
Senator Kirsten E. Gillibrand (New York)
Senator Mazie K. Hirono (Hawaii)
Senator Tim Kaine (Virginia)
Senator Edward J. Markey (Massachusetts)
Senator Patty Murray (Washington)
Senator Bernard Sanders (Vermont)
Senator Jeanne Shaheen (New Hampshire)
Senator Chris Van Hollen (Maryland)
Senator Peter Welch (Vermont)
Senator Sheldon Whitehouse (Rhode Island)
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