

## Essay

# Trouble's *Bruen*: The Lower Courts Respond

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New York State Rifle & Pistol Ass'n v. Bruen revolutionized the understanding of how Second Amendment cases are to be adjudicated. Rejecting the tiered-scrutiny analysis around which the lower courts had coalesced since the 2008 Heller decision, the Court instructed courts to look to history and tradition after it was determined that state or federal regulations limited activities that fell within the protections afforded by the Second Amendment's text. Justice Thomas's opinion, however, left open significant questions about how the history-and-tradition method is to operate in practice. The Court recently held oral arguments in United States v. Rahimi, in which the justices will have an opportunity to provide answers to some of those questions, should it choose to do so. In many ways, Rahimi is a good vehicle for the Court to fill in the lacunae created by Bruen, which the lower courts have struggled with in the last two years. Using Rahimi as our point of departure, we will summarize the case, highlight what we think are the significant open questions the Court should address, and then look at how the courts of appeals have answered those questions. While our approach here is largely descriptive, we do include some opinions about what the correct answers to those open questions are.

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## INTRODUCTION

*New York State Rifle & Pistol Ass'n v. Bruen*<sup>1</sup> revolutionized the understanding of how Second Amendment cases are to be adjudicated. Rejecting the tiered-scrutiny analysis around which the lower courts had coalesced since the 2008 *Heller* decision,<sup>2</sup> the Court instructed courts to look to history and tradition after it was determined that state or federal regulations limited activities that fell within the protections afforded by the Second Amendment's text.<sup>3</sup> As we noted in an earlier article, however, Justice Thomas's opinion left open significant questions about how, exactly, the history-and-tradition method was to operate in practice.<sup>4</sup> Because *Bruen* took a wrecking ball to nearly fifteen years of lower court Second Amendment jurisprudence, it was unlikely the Court would be able to retire to the clouds after its decision, as it did following its inevitable incorporation of the right in *McDonald*,<sup>5</sup> decided two years after *Heller*.

And, sure enough, the Court recently held oral arguments in *United States v. Rahimi*, in which the Justices will have to decide whether a federal law disarming persons subject to a domestic violence protection order violates the Second Amendment, as the Fifth Circuit Court of Appeals held.<sup>6</sup> In many ways, *Rahimi* is a good vehicle for the Court to fill in the lacunae created by *Bruen*, which the lower courts have struggled with in the last two years.<sup>7</sup> Using *Rahimi* as our point of departure, we will summarize the case, highlight what we think are the significant open questions the Court should address, and then look at how lower courts—specifically, the courts of appeals—have answered those questions. As we noted earlier, the courts' approaches have

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1. 597 U.S. 1 (2022).

2. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

3. See Brannon P. Denning & Glenn H. Reynolds, *Retconning Heller: Five Takes on New York State Rifle & Pistol Association, Inc. v. Bruen*, 65 WM. & MARY L. REV. 79, 86–91 (2023) (summarizing the *Bruen* decision).

4. See *id.* at 102–09 (discussing the test Justice Thomas articulated and what questions were left unanswered, including the question of what would satisfy the *Bruen* test).

5. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

6. 61 F.4th 443 (2023), *cert. granted*, 143 S. Ct. 2688 (2023).

7. See Denning & Reynolds, *supra* note 3, at 109–25 (discussing *Bruen*'s disruption of consensus among the lower federal courts).

been eclectic to say the least.<sup>8</sup> While our approach here is largely descriptive, we do include some opinions about what the correct answers to those open questions are. In a coda, we also take a brief look at the oral arguments in *Rahimi*—held after much of this Article was written—to see whether the Court telegraphed any of its thinking.

### I. UNITED STATES V. RAHIMI: A SUMMARY

Zackey Rahimi is not a nice person.<sup>9</sup> He is, in fact, a living embodiment of Justice Felix Frankfurter's observation that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."<sup>10</sup> *United States v. Rahimi* is all about the extent to which one may be not very nice without losing one's constitutional rights.<sup>11</sup> In this Part, we summarize the Fifth Circuit's decision in that case, which reversed the conviction of the defendant under the federal law prohibiting possession of firearms by someone subject to a domestic violence protection order,<sup>12</sup> and which found that the law violated the Second Amendment under *Bruen*'s prescribed history-and-tradition methodology.<sup>13</sup>

*Rahimi* will be the first post-*Bruen* case that the Supreme Court will hear and its second major Second Amendment case in as many years.<sup>14</sup> It provides a convenient jumping off point for a more in-depth discussion of *Bruen*'s unresolved questions and its analytical framework, over which courts of appeals have divided in the year following *Bruen*.<sup>15</sup> After summarizing the case, we highlight the unanswered questions raised by the panel's

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8. See *id.* at 111–25 (discussing the lower courts' various applications of *Bruen*, including invoking exceptions, resisting the changes brought by *Bruen*, making good-faith attempts to apply *Bruen*, and exercising "uncivil disobedience" in opposing the expansion of gun rights).

9. See *Rahimi*, 61 F.4th at 448–49 (noting Rahimi's alleged criminal behavior).

10. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

11. 61 F.4th. at 448–49, 461 (protecting Rahimi's Second Amendment rights, despite the fact that Rahimi was involved in five shootings, selling narcotics, and allegedly assaulting his ex-girlfriend).

12. 18 U.S.C. § 922(g)(8).

13. 61 F.4th at 461.

14. *Id.* at 443 (decided in 2023 and certiorari granted the same year); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

15. See *supra* note 8 and accompanying text.

opinion; in subsequent Parts, we canvass how other courts of appeals have answered those questions.

#### A. THE OPINION

The defendant, Zackey Rahimi, was involved in multiple shootings in Texas during 2020 and 2021, including one incident in which he shot a customer to whom he had just sold drugs and a separate apparent road rage incident.<sup>16</sup> In yet another case, he shot at a law enforcement officer.<sup>17</sup> He also fired shots into the air at a Whataburger after a friend's credit card was declined.<sup>18</sup> He was identified as a subject in the shootings, and when officers executed a search warrant of his home, they recovered a rifle and pistol; Rahimi admitted to being in possession of them despite being the subject of a domestic violence protective order that explicitly forbade him to possess firearms.<sup>19</sup> He eventually pled guilty but appealed, arguing that 18 U.S.C. § 922(g) is unconstitutional after *Bruen*.<sup>20</sup>

The Fifth Circuit first addressed what might be termed *Bruen* Step One—whether the “Second Amendment’s plain text covers an individual’s conduct,” triggering a presumption that “the Constitution . . . protects that conduct.”<sup>21</sup> As it has in a number of cases,<sup>22</sup> the Government argued that Second Amendment rights belonged only to “law-abiding, responsible citizens,”<sup>23</sup> and that such citizens were “the people” to whom the Amendment’s guarantees extended.<sup>24</sup> On the Fifth Circuit’s reading, however, *Bruen*’s reference to law-abiding citizens was a shorthand way of distinguishing the people to whom the Second Amendment applied from those traditionally stripped of rights mentioned in

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16. *Rahimi*, 61 F.4th at 448–49.

17. *Id.* at 448.

18. *Id.* at 448–49. We told you, he’s not a nice man.

19. *Id.* at 449.

20. *Id.* at 450.

21. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022).

22. *See infra* Part II.A (describing multiple cases in which, during *Bruen* Step One, the Government contended that dangerous and non-law-abiding citizens do fall under “the people” protected by the Second Amendment).

23. *Rahimi*, 61 F.4th at 451 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

24. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed.” (emphasis added)).

what we have termed the *Heller* safe harbor.<sup>25</sup> Rahimi, the court noted, fell into none of those groups mentioned in the safe harbor.<sup>26</sup>

The panel rejected the Government's argument that Rahimi's order of protection "remove[d] him from the political community within the amendment's scope."<sup>27</sup> The order was the result of a civil proceeding, and while suspected of crimes at the time, he had not been convicted of any.<sup>28</sup> The Fifth Circuit criticized the Government's position that an individual could "be readily divested" noting that the idea "turn[ed] the typical way of conceptualizing constitutional rights on its head. And the Government's argument reads the Supreme Court's 'law-abiding' gloss so expansively that it risks swallowing the text of the amendment."<sup>29</sup> The panel further faulted the Government's argument for admitting of "no true limiting principle. Under the Government's reading, Congress could remove 'unordinary' or 'irresponsible' or 'non-law-abiding' people—however expediently defined—from the scope of the Second Amendment."<sup>30</sup> Speeders, the political unorthodox, even non-electric car drivers, the court posited, might be at risk of losing the right to keep and bear arms.<sup>31</sup> Rahimi, it concluded, "while hardly a model citizen, is nonetheless among 'the people' entitled to the Second Amendment's guarantees, all other things equal."<sup>32</sup>

Turning to the history-and-tradition question, the court recited the language from *Bruen* approving of the use of historical analogies if an on-all-fours example of a firearm restriction cannot be found in history.<sup>33</sup> Focusing on the "how" and "why" of the

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25. See *Rahimi*, 61 F.4th at 452 ("*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated. *Bruen*'s reference to 'ordinary, law-abiding' citizens is no different." (citation omitted)). For a discussion of the *Heller* safe harbor, see *infra* Part II.B.

26. *Rahimi*, 61 F.4th at 452.

27. *Id.*

28. *Id.*

29. *Id.* at 452–53.

30. *Id.* at 453.

31. *Id.*

32. *Id.*

33. *Id.* at 453–54 (noting the Government's burden is to identify a "historical analogue," not necessarily a "historical twin" (quoting N.Y. State Rifle &

statute in order to evaluate the strength of the Government's analogies, the court enumerated the four "key features of the statute":

- (1) [F]orfeiture of the right to possess weapons
- (2) after a civil proceeding
- (3) in which a court enters a protective order based on a finding of a "credible threat" to another specific person, or that includes a blanket prohibition on the use, or threatened use, of physical force,
- (4) in order to protect that person from "domestic gun abuse."<sup>34</sup>

To the court, "[t]he first three aspects go to *how* the statute accomplishes its goal; the fourth is the statute's goal, the *why*."<sup>35</sup>

For its part, the Government offered three groups of historical analogues: "(1) English and American laws . . . providing for disarmament of 'dangerous' people, (2) English and American 'going armed' laws, and (3) colonial and early state surety laws."<sup>36</sup> (As we shall see, these are familiar arrows in the Government's quiver.)<sup>37</sup> The Fifth Circuit rejected each in turn.

In the first category, the Government cited the English Militia Act of 1662, which empowered officers of the Crown to disarm those deemed "dangerous to the Peace of the Kingdom."<sup>38</sup> It also cited "laws in several colonies and states that disarmed classes of people considered to be dangerous, specifically including those unwilling to take an oath of allegiance, slaves, and Native Americans."<sup>39</sup> Because the Militia Act was a product of the Stuarts' efforts to disarm their political opponents and was the impetus for the right of Protestants to keep and bear arms in the English Bill of Rights, the court concluded that it could hardly be "a forerunner of our Nation's historical tradition of firearm

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Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022))). The court completed the rest of Step One concluding that the rifle and pistol were indeed "arms" in common use and that they and his keeping of them fell within the plain text of the Second Amendment. *Id.* at 454.

34. *Id.* at 455 (footnote omitted).

35. *Id.*

36. *Id.* at 456.

37. See *infra* Part II.C (reviewing the historical analogues used by the Government and which are accepted by the courts when discussing *Bruen* Step Two).

38. *Rahimi*, 61 F.4th at 456 (quoting Militia Act 1662, 13 & 14 Car. 2 c. 3, § 13 (Eng.)).

39. *Id.*

regulation.”<sup>40</sup> Indeed, it was the 1689 right that was the inspiration for the Second Amendment itself.<sup>41</sup>

As for the colonial and early laws that disarmed “dangerous people”—enslaved people, Native Americans, and the disloyal—they “may well have been targeted at groups excluded from the political community—i.e., written out of ‘the people’ altogether—as much as they were about curtailing violence or ensuring the security of the state.”<sup>42</sup> Nevertheless, the panel decided they were inapposite because such groups were disarmed to preserve social and political order, not to protect “an identified person from the threat of ‘domestic gun abuse’ posed by another individual.”<sup>43</sup> The court likewise dismissed proposed measures offered in state ratifying conventions that qualified the right to keep and bear arms by denying it to convicted criminals and others who were a public menace.<sup>44</sup> Whatever probative value they might have regarding “the scope of firearm rights at the time of ratification” neither became part of the Second Amendment and cannot override its text.<sup>45</sup>

The panel next addressed the Government’s analogy of § 922(g) to the offense of “going armed to terrify the King’s subjects.”<sup>46</sup> “This common law offense persisted in America,” the court noted, “and was in some cases codified,” citing laws in the Massachusetts Bay Colony, Virginia, and colonial laws in New Hampshire and North Carolina.<sup>47</sup> Here, too, the Fifth Circuit panel found several reasons to doubt their relevance to the law under which Rahimi was convicted. First, it thought the examples too few; in fact, most of these laws were all amended to

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40. *Id.*; see also JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 30 (1994) (noting that the Stuart dynasty marked the return to a monarchical government in England during the 1600s).

41. See MALCOLM, *supra* note 40, at 135, 142–43 (discussing the English Bill of Rights’ heavy influence on the American Bill of Rights).

42. *Rahimi*, 61 F.4th at 457.

43. *Id.* (citation omitted).

44. See *id.* (discussing states with such laws but finding ways to find them inapplicable).

45. *Id.*

46. See *id.* at 457–59 (discussing this “ancient criminal offense” and its persistence in America and in three colonies and the state of Virginia whereby the government could sometimes disarm the offenders).

47. *Id.* at 457–58.

remove provisions that provided for the forfeiture of weapons.<sup>48</sup> Second, those subject to forfeiture had been tried and convicted, not “merely . . . civilly adjudicated to be a threat to another person,” whereas Rahimi’s hearing proceeded “without counsel or other safeguards that would be afforded him in the criminal context.”<sup>49</sup> Finally, “[t]he ‘going armed’ laws, like the ‘dangerousness’ laws . . . , appear to have been aimed at curbing terroristic or riotous behavior . . . rather than to identified individuals.”<sup>50</sup> Moreover, § 922(g) covers “every party to a domestic proceeding . . . who, with no history of violence whatever, becomes subject to a domestic restraining order that contains boilerplate language that tracks [the statute].”<sup>51</sup>

Finally, the court addressed surety laws—those laws requiring the posting of a peace bond by someone alleged to be a threat to a specific individual or the surrender of weapons if the subject of the surety refused to post bond.<sup>52</sup> While clearly analogous to the “why,”<sup>53</sup> the surety laws failed on the question of “how” because surety laws, which called for temporary disarmament unless bond was posted and once posted, “did not prohibit public carry, much less possession of weapons,” whereas “§ 922(g) works an absolute deprivation of the right, not only publicly to carry, but to *possess* any firearm, upon entry of a sufficient protective order.”<sup>54</sup>

The court concluded by acknowledging that it had previously held that the benefits of protecting potential victims of domestic violence from harm, on balance, outweighed the burdens on the subjects of protective orders’ Second Amendment rights,

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48. *See id.* at 458 (noting that early on Massachusetts and Virginia removed forfeiture as a penalty and that North Carolina never provided for forfeiture).

49. *Id.* at 459.

50. *Id.*

51. *Id.*

52. *See id.*

At common law, an individual who could show that he had “just cause to fear” that another would injure him or destroy his property could “demand surety of the peace against such person.” . . . If the party of whom the surety was demanded refused to post surety, he would be forbidden from carrying a weapon in public absent special need.

*Id.* (citation omitted).

53. *Id.* at 460 (“Put simply, the *why* behind historical surety laws analogously aligns with that underlying § 922(g)(8).”).

54. *Id.*

but noted that *Bruen* demanded a different analysis, and that, in its opinion, the Government failed to meet its burden.<sup>55</sup>

#### B. *BRUEN'S* UNANSWERED QUESTIONS

To a remarkable degree, *Rahimi* highlights a number of questions we had about the original *Bruen* decision itself. These questions, moreover, are ones that have cropped up with frequency in the courts of appeals, as discussed in Part II. They include:

How Does *Bruen* Step One Work? What is the scope of the right and who is entitled to exercise it? Does “the people” to whom the right extends include only “law-abiding” or “virtuous” citizens? Are there weapons or accessories that can be excluded from “arms”?

The Status of the *Heller* Safe Harbor. Does the safe harbor come in at *Bruen* Step One? Or is the safe harbor comprised of dicta that needs to be subject to an independent history-and-tradition analysis?

History, Tradition, and Analogies. What is the relevant historical baseline for looking at regulatory analogues? At what level of abstraction should analogies be pitched? What are acceptable numerators and denominators for assessing how widespread a regulation was? Conversely, how are outliers to be assessed?

These and other questions have bedeviled the courts of appeals, producing disparate results in a number of lower court cases. We'll take a closer look at these questions, and the courts' treatment of them, in the next Part.

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55. *Id.* at 461. Judge Ho concurred, offering a preemptive apology for the court's decision. He noted that other constitutional rights—like the exclusionary rule—produce social costs too. *See id.* at 462 (Ho, J., concurring). He said that, given *Bruen*, the panel had no choice but to apply the history-and-tradition test in good faith. *See id.* at 462–63. Criminals, he observed, should be incarcerated, not simply disarmed. *Id.* at 463. He also observed that protective orders in domestic cases can be used tactically “and issued without any actual threat of danger.” *Id.* at 465. Once requested, elected judges are unlikely to refuse their issuance. *See id.* at 466. Finally, to the extent that mutual protective orders are often entered, it might put one spouse at risk and unable to defend herself. *See id.* at 466–67.

## II. THE QUESTIONS IN THE COURTS

A. HOW DOES *BRUEN* STEP ONE WORK?

According to the *Bruen* opinion, when confronted with a Second Amendment challenge to a firearm regulation, a reviewing court must first determine whether “the Second Amendment’s plain text covers an individual’s conduct.”<sup>56</sup> We call this *Bruen* Step One. If the Second Amendment does apply, “the Constitution presumptively protects that conduct,” and the court then proceeds to the history-and-tradition inquiry in which the government must demonstrate that the regulation “is consistent with the Nation’s historical tradition of firearm regulation” (*Bruen* Step Two).<sup>57</sup>

While *Bruen* Step One seems straightforward, the courts of appeals have flagged a number of issues that need to be settled in this first step. For example, what sorts of ancillary or penumbral rights—such as the right to purchase ammunition or establish a gun range where people can gain shooting proficiency—might be covered?<sup>58</sup> In *Oakland Tactical Supply, LLC v. Howell Township*,<sup>59</sup> the Sixth Circuit remanded a case involving a Michigan township’s ordinance effectively banning the establishment of outdoor, long-range shooting ranges.<sup>60</sup> It wrote, “[w]e are unable to apply [the *Bruen* test] based on the record and arguments currently before us.”<sup>61</sup> The court instructed the district court to first decide “whether Oakland Tactical’s proposed course of conduct is covered by the plain text of the Second Amendment” before moving on to the history-and-tradition step.<sup>62</sup>

More pressing—and possibly central to the outcome in *Rahimi*—is the question of who composes “the people” to whom

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56. N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 24 (2022).

57. *Id.*

58. See Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 249–50 (2012) (discussing how courts have treated ancillary rights, including a Tennessee court’s inclusion of the right to purchase arms and ammunition in its state constitution’s right to arms and the Seventh Circuit’s interpretation of the Second Amendment as including the right to practice at a firing range).

59. No. 21-1244, 2022 U.S. App. LEXIS 21744 (6th Cir. Aug. 5, 2022).

60. *Id.* at \*1–2 (remanding with instructions that the district court consider Oakland Tactical’s claim in light of *Bruen*).

61. *Id.* at \*5.

62. *Id.* at \*5–6.

the right to keep and bear arms is guaranteed? Does it extend only to “law-abiding” citizens? Responsible citizens? Does the term exclude persons who have proved themselves to be “dangerous” in some way? The courts of appeals have taken a number of different approaches; some in fairly obvious attempts to avoid the difficulties attending *Bruen*’s second step. Hewing to its pre-*Bruen* case law,<sup>63</sup> the Eighth Circuit recently reaffirmed that illegal aliens were not members of “the people” possessed of Second Amendment rights.<sup>64</sup> The panel seized on the characterization of the *Bruen* plaintiffs as being “law-abiding” to conclude that *Bruen* required no reexamination of its earlier holding.<sup>65</sup> “*Bruen*,” the court wrote, “does not command us to consider only ‘conduct’ in isolation and simply assume that a regulated person is part of ‘the people.’ To the contrary, *Bruen* tells us to begin with a threshold question: whether the person’s conduct is ‘covered by’ the Second Amendment’s ‘plain text.’”<sup>66</sup> The court claimed it did that in its earlier case, concluding confidently (and perhaps a little defiantly)<sup>67</sup> that “just as *Bruen* does not cast doubt on [our earlier] interpretation of ‘the people,’ neither does it disavow [our earlier] ‘scope of the right’ approach.”<sup>68</sup>

The Sixth Circuit likewise concluded that *Bruen* Step One preserved one of its earlier precedents which held that sentencing guidelines providing for an enhancement for possessing firearms in connection with a drug offense did not violate the Second Amendment.<sup>69</sup> The earlier case held that the right to keep and

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63. See *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (affirming the district court’s denial of Flores’s motion to dismiss because Second Amendment protections do not extend to illegally present aliens).

64. *United States v. Sitladeen*, 64 F.4th 978, 985 (8th Cir. 2023).

65. See *id.* at 984–86 (citing the Fourth Circuit’s holding that illegal aliens are not “law-abiding” and concluding that *Flores* is binding even after *Bruen*).

66. *Id.* at 987 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022)).

67. See *id.* (conceding that the earlier interpretation “may or may not be correct” but standing behind its holding that “unlawful aliens are not part of ‘the people’ to whom the protections of the Second Amendment extend” unless and until “the Supreme Court or our *en banc* court determines otherwise”).

68. *Id.*; see also *Miller v. Smith*, No. 22-1482, 2023 U.S. App. LEXIS 1506, at \*3 (7th Cir. Jan. 20, 2023) (remanding a challenge to state restrictions on possession and storage by foster home caretakers and home day care licensee for *Bruen* analysis).

69. See *United States v. Greeno*, 679 F.3d 510, 520 (6th Cir. 2012) (holding that the enhancement at issue “is consistent with the historical understanding

bear arms did not extend to possession for unlawful purposes and the Sixth Circuit later noted in *Burgess* that *Bruen* “referred repeatedly to the rights of *law-abiding* citizens.”<sup>70</sup> Thus, it concluded, *Bruen* “did not disturb that [earlier] holding.”<sup>71</sup>

The Seventh Circuit also—at least implicitly—adopted what might be called the “virtue model” of the Second Amendment. In *United States v. Holden*,<sup>72</sup> Judge Frank Easterbrook reversed a district court’s grant of a motion to withdraw a guilty plea to a charge of making a false statement intending to deceive someone regarding the lawfulness of a firearm sale and its subsequent dismissal of the indictment on the grounds that statute was unconstitutional.<sup>73</sup> Easterbrook stated flatly that “[g]overnments may keep firearms out of the hands of dangerous people who are apt to misuse them.”<sup>74</sup> He added, “[i]ndeed, one might think that the very act of lying to obtain a firearm implies a risk that the weapon will be misused.”<sup>75</sup>

An almost equal number of courts of appeals, however, have rejected the notion that “the people” does not include felons or other alleged unlawful users of firearms. In *Range v. Attorney General*,<sup>76</sup> for example, an en banc panel of the Third Circuit held that a nearly thirty-year-old conviction for food stamp fraud

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of the right to keep and bear arms, which did not extend to possession of weapons for unlawful purposes”); see also *United States v. Burgess*, No. 22-1110/22-1112, 2023 U.S. App. LEXIS 873, at \*14 (6th Cir. Jan. 13, 2023) (stating that “*Bruen* did not disturb” the holding from *Greeno*).

70. *Burgess*, 2023 U.S. App. LEXIS 873, at \*14.

71. *Id.* The Tenth Circuit similarly decided that *Bruen* did not disrupt one of its earlier decisions. See *Vincent v. Garland*, 80 F.4th 1197, 1203–04 (10th Cir. 2023) (Bacharach, J., concurring). Judge Bacharach noted that the Tenth Circuit earlier upheld the ban on firearm possession by felons based on the *Helmer* safe harbor in *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009). *Vincent*, 80 F.4th at 1203–04 (Bacharach, J., concurring). Noting that courts were divided on the historical support for the felon-in-possession ban, the court justified its continued reliance on *McCane* on the grounds that *Bruen* “did not indisputably and pellucidly contradict or invalidate our precedent in *McCane*.” *Id.* at 1204.

72. 70 F.4th 1015 (7th Cir. 2023).

73. See *id.* at 1016–18 (discussing the holding of the district court and reversing it); see also 18 U.S.C. § 922(n) (making it unlawful for anyone indicted for a crime with a potential punishment of over one year in prison to ship or receive a firearm).

74. *Holden*, 70 F.4th at 1017.

75. *Id.* at 1018.

76. 69 F.4th 96 (3d Cir. 2023).

that could have resulted in five years imprisonment, but for which the defendant received probation, could not constitutionally be the basis for a lifetime ban from possessing a firearm.<sup>77</sup> In so doing, the panel explicitly rejected the argument that the defendant's prior conviction removed him from "the people" entitled to Second Amendment rights.<sup>78</sup> First, the court noted that *Heller's* references to "law-abiding, responsible citizens" were dicta because "the criminal histories of the plaintiffs in *Heller*, *McDonald*, and *Bruen* were not at issue in those cases."<sup>79</sup> Second, given the multiplicity of references to "the people" elsewhere in the Constitution, "to conclude that Range is not among 'the people' for Second Amendment purposes would exclude him from those rights as well," unless "the meaning of the phrase 'the people' varies from provision to provision[, which the] Court in *Heller* suggested it does not."<sup>80</sup> Third, just because someone has Second Amendment rights does not mean that they might not be lawfully stripped of those rights.<sup>81</sup> Finally, the panel noted that the phrase "law-abiding, responsible citizens" is as expansive as it is vague.<sup>82</sup> The court expressed confidence "that the Supreme Court's references to 'law-abiding, responsible citizens' do not mean that every American who gets a traffic ticket is no longer among 'the people' protected by the Second Amendment."<sup>83</sup> The panel found the word "responsible" even less illuminating. "In our Republic of over 330 million people," it wrote, "Americans have widely divergent ideas about what is required for one to be considered a 'responsible' citizen."<sup>84</sup>

As it had in *Rahimi* itself,<sup>85</sup> the Fifth Circuit likewise rejected the virtue model of the Second Amendment in *United*

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77. *Id.* at 106 (holding that, despite Range's conviction based on his false statements made to obtain food stamps, he was nevertheless protected by the Second Amendment).

78. *Id.*

79. *Id.* at 101.

80. *Id.* at 102.

81. *See id.* (agreeing with other courts' reasoning that the people have the right to arms *and* the legislature may constitutionally remove that right for certain groups of people).

82. *Id.*

83. *Id.*

84. *Id.* There is a petition for certiorari pending in the U.S. Supreme Court at the time of this writing. Petition for Writ of Certiorari, *Garland v. Range*, No. 23-374 (Oct. 5, 2023).

85. *See supra* text accompanying notes 27–32.

*States v. Daniels*.<sup>86</sup> In *Daniels*, the court held unconstitutional the application of 18 U.S.C. § 922(g)(3),<sup>87</sup> which prohibits possession of a firearm by a user of a controlled substance, as applied to the defendant.<sup>88</sup> “More than just ‘model citizen[s]’ enjoy the right to bear arms,” it wrote.<sup>89</sup> As the Fifth Circuit understood the references to “law-abiding citizens,” it was simply “hint[ing] that Congress and state legislatures have greater latitude to limit the gun liberties of the lawless. But, as a general rule, limitations on the Second Amendment come from the traditionally understood restrictions on the right to bear arms, not because ordinary citizens are categorically excluded from the privilege.”<sup>90</sup>

We think that an interpretation of “the people” that categorically excludes the “non-law-abiding” cannot be the correct one. Adopting that reading would strip rights from criminal defendants that were drafted precisely for their protection.<sup>91</sup> We agree with the courts that have held that simply recognizing that one has an individual right does not mean that right cannot be regulated or stripped under certain circumstances.

Another open question at *Bruen* Step One is the scope of the “arms” to which the Second Amendment extends. The Court—at least implicitly—held that it extends to non-lethal arms when it unanimously overturned a Massachusetts Supreme Judicial Court opinion that the Amendment was not implicated by a state law banning the possession of tasers and other types of stun

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86. 77 F.4th 337 (5th Cir. 2023).

87. *Id.* at 355.

88. 18 U.S.C. § 922(g)(3).

89. *Daniels*, 77 F.4th at 342 (alteration in original).

90. *Id.* at 343; *see also* *United States v. Jackson*, 85 F.4th 468, 473 (8th Cir. 2023) (Stras, J., dissenting from the denial of rehearing en banc) (“The right to bear arms belongs to ‘the people’—the virtuous, the non-virtuous, and everyone in between.”); *cf.* *Teter v. Lopez*, 76 F.4th 938, 949 n.9 (9th Cir. 2023) (striking down Hawaii’s ban on butterfly knives; rejecting the State’s argument that it could ban weapons “associated with criminals” because neither criminals nor their preferred weapons were protected by the Second Amendment by noting that “Hawaii’s ban is not limited to criminals”; and reserving the question of “whether criminals are included among ‘the people’ referenced [in] the Second Amendment’s text”).

91. It would be passing strange to exclude “non-law-abiding” citizens from “the people” whose “persons, houses, papers, and effects” are protected against unreasonable searches and seizures by the Fourth Amendment or whose right not to self-incriminate is guaranteed by the Fifth Amendment. U.S. CONST. amends. IV–V.

guns.<sup>92</sup> Likewise, the Ninth Circuit held that knives were protected by the Second Amendment and struck down Hawaii's ban on butterfly knives.<sup>93</sup> In its *Bruen* Step One analysis, it concluded that "bladed weapons facially constitute 'arms' within the meaning of the Second Amendment."<sup>94</sup> The court noted that, historically, bladed weapons have been regarded as "arms" and were thus presumptively protected by the Second Amendment.<sup>95</sup> It rejected Hawaii's argument that butterfly knives are "dangerous and unusual" weapons that fell outside the Second Amendment's protection.<sup>96</sup> "The butterfly knife is simply a pocketknife with an extra rotating handle," it wrote.<sup>97</sup>

Again, these outcomes seem obviously correct. Any interpretation of "arms" that would exclude either non-lethal weapons or knives is strained to the point of being obtuse. We strongly suspect that the Massachusetts high court and the Hawaii court were motivated less by sincere belief in the validity of their analysis and more about opposition to the Second Amendment, the *Heller* and *McDonald* decisions, or both.

Another question is the status of the *Heller* safe harbor and—if it remains—whether that analysis occurs in Step One or whether each of the "presumptively lawful" regulations mentioned in it must be subject to the history-and-tradition analysis in *Bruen* Step Two? It is to that question that we turn in the next Section.

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92. See *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016) (per curiam) (rejecting the Massachusetts Supreme Judicial Court's explanation for holding that the Second Amendment does not extend to stun guns because it is inconsistent with Supreme Court precedent, notably *Heller*). See generally Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199 (2009) (discussing bans on nonlethal weapons and their Second Amendment implications).

93. *Teter*, 76 F.4th at 942.

94. *Id.* at 949.

95. See *id.* (lumping "bladed weapons" in with firearms as fitting in the definition of "arms" as "[w]eapons of offence").

96. *Id.* ("[W]e . . . reject Hawaii's argument that the purported 'dangerous and unusual' nature of butterfly knives means that they are not 'arms' as that term is used in the Second Amendment.").

97. *Id.* at 950. It also dismissed the State's efforts to link them with criminal activity, noting that "[c]ommon sense tells us that *all* portable arms are associated with criminals to some extent, and the cited conclusory statements simply provide no basis for concluding that these instruments are not commonly owned for lawful purposes." *Id.*

## B. THE STATUS OF THE *HELLER* SAFE HARBOR

*Heller* famously included the admonition that:

[N]othing in our opinion should be taken to cast doubt on 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.<sup>98</sup>

Justice Scalia characterized those prohibitions—which we dubbed the *Heller* safe harbor<sup>99</sup>—as “presumptively lawful regulatory measures” and emphasized that the list did “not purport to be exhaustive.”<sup>100</sup> *McDonald* endorsed those limitations.<sup>101</sup> The safe harbor’s status is left uncertain after *Bruen*. While Justice Kavanaugh seemed at least implicitly to endorse it,<sup>102</sup> Justice Thomas’s majority opinion hinted that only those parts of the safe harbor that could satisfy the history-and-tradition step would apply.<sup>103</sup>

The courts of appeals have split on this question as well. The Eighth Circuit’s opinion in *United States v. Jackson*, for example, sustained the federal felon-in-possession ban in part based on the assumption that the safe harbor was still good law.<sup>104</sup> Quoting the safe harbor, the court continued: “The decision in *Bruen*, which reaffirmed that the right is ‘subject to certain reasonable, well-defined restrictions’ did not disturb those statements or cast doubt on the prohibitions.”<sup>105</sup>

98. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

99. Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248 (2009) (labeling “Justice Scalia’s categorical exclusions” in *Heller* the “*Heller* safe harbor”).

100. *Heller*, 554 U.S. at 627 n.26.

101. *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting the *Heller* safe harbor, adding “[w]e repeat those assurances here”).

102. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 80 (2022) (Kavanaugh, J., concurring) (“Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.” (quoting *Heller*, 554 U.S. at 636)).

103. See Denning & Reynolds, *supra* note 3, at 108 (noting that the majority’s treatment of the “‘sensitive places’ exception” indicated that Justice Thomas would be open to revising the safe harbor provisions in general).

104. 69 F.4th 495, 505 n.3, 505–06 (8th Cir. 2023) (upholding the felon-in-possession ban and referencing the safe harbor provision from *Heller*).

105. *Id.* at 501–02 (citing *Bruen*, 597 U.S. at 70); see also, e.g., *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023) (“The longstanding prohibition on possession of firearms by felons is constitutional, and the district court properly denied the motion to dismiss.”).

The Seventh Circuit, however, declined to rely on the safe harbor in a case challenging the application of the felon-in-possession statute to a defendant whose background included a single, twenty-four-year-old mail fraud conviction.<sup>106</sup> The Government argued that the continued viability of the *Heller* safe harbor obviated the need for *Bruen*'s history-and-tradition test.<sup>107</sup> The court disagreed. "Nothing allows us to sidestep *Bruen* in the way the government invites."<sup>108</sup> It conceded that "the Court seemed to find no constitutional fault with a state requiring a criminal background check before issuing a public carry permit," but "in no way did the Court suggest that its observation resolved cases" like the one before it.<sup>109</sup> The court concluded that "[w]e must undertake the text-and-history inquiry the Court so plainly announced and expounded upon at great length," and remanded the case to the district court.<sup>110</sup>

The safe harbor was one of the most controversial aspects of *Heller* and potentially the most difficult to square with *Bruen*'s history-and-tradition approach. Even at the time, commentators criticized its carve-outs for being out-of-step with the majority's otherwise self-consciously originalist analysis.<sup>111</sup> It was, they suggested, Justice Scalia at his most faint-hearted; harsher critics might have described his approach there not so much as "faint-hearted originalism"<sup>112</sup> as "chicken-hearted." While that is probably uncharitable, the tension in *Heller* between the safe harbor and the rest of the opinion is only heightened by *Bruen*.

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106. *Atkinson v. Garland*, 70 F.4th 1018 (7th Cir. 2023).

107. *Id.* at 1022 ("[T]he government would have us avoid a *Bruen* analysis altogether. Invoking *Heller* . . . , it urges us to uphold [the law] based on oft-quoted dicta describing felon-in-possession laws as 'presumptively lawful.'" (quoting *Heller*, 554 U.S. at 627 n.26)).

108. *Id.*

109. *Id.*

110. *Id.* In her dissent, Judge Wood assumed that, in light of *Bruen*, the *Heller* safe harbor "alone is not enough to resolve" this case. *Id.* at 1028 (Wood, J., dissenting).

111. See, e.g., Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009) (arguing that the *Heller* safe harbor exceptions are not grounded in originalist sources); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1368 (2009) ("[*Heller*] will stand as a monument to a peculiar kind of jurisprudence, which might charitably be called half-hearted originalism.").

112. Lund, *supra* note 111, at 1368 n.79.

Justice Thomas tried to relax the tension by attempting to demonstrate that the sensitive places mentioned in the safe harbor had at least some solid historical analogues.<sup>113</sup> But it is unlikely some of the others—the ban on possession by felons, for example—would fare as well. This has real implications for *Rahimi*. On the one hand, we find it difficult to believe that the Court would allow the Fifth Circuit’s decision to stand, given what we know about guns and domestic violence, not to mention Rahimi’s own demonstrated unfitness to possess guns. However, if the Court simply allows the safe harbor to exist alongside the history-and-tradition approach and makes no attempt to reconcile them, then whatever promise *Bruen* held for a more robust Second Amendment will likely prove illusory as lower courts shoehorn various regulations into one or other of the “presumptively lawful” categories, as they often did during the post-*Heller/McDonald* interregnum.<sup>114</sup> Worst case, with the safe harbor provisions available, hostile judges could countenance bootstrapping analogies in *Bruen*’s second step that would in fact narrow the scope of the right to keep and bear arms. But we think this, too, is unlikely. As we note below, the oral argument in *Rahimi* hints that the Court will find some historical basis for disarming persons found to be “dangerous.”<sup>115</sup>

### C. HISTORY, TRADITION, AND ANALOGIES IN THE COURTS OF APPEALS

Under the *Bruen* test, a court must first evaluate whether a statute implicates Second Amendment rights.<sup>116</sup> Then, if it does, the question is whether the restrictions on gun ownership, carry, or use are consistent with long-standing American traditions of firearms regulation.<sup>117</sup>

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113. Denning & Reynolds, *supra* note 3, at 102 (“Justice Thomas posited that there will be some ‘fairly straightforward’ applications of text and history that will provide relatively easy answers to particular questions.”).

114. See, e.g., Denning & Reynolds, *supra* note 99, at 1247–57 (discussing how, in the wake of *Heller*, the lower courts fit a number of regulations into the safe harbor, including prohibiting the possession of a firearm with prior convictions of domestic violence, with illegal drug use, and on the grounds of the Post Office).

115. See *infra* Part III.

116. N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 24 (2022).

117. *Id.*

This two-step analysis is straightforward enough on its face, but judges are still left with work to do. In this Section, we look at a number of different courts of appeals cases wrestling with how to perform the *Bruen* two-step. While we are not sure the courts always get the right answer, they do seem to be attempting to apply *Bruen* in good faith, especially when it comes to finding historical analogies if a law on point is not available.

A good example of a court going through this process can be found in *NRA v. Bondi*.<sup>118</sup> *Bondi* involved a challenge to a Florida statute banning the sale of firearms to eighteen-to-twenty-year-old citizens.<sup>119</sup> The statute banned sale to, but not gift to or possession by, citizens in the covered age range.<sup>120</sup> In an opinion by Judge Rosenbaum, the Eleventh Circuit followed the *Bruen* two-step analysis to conclude that the Florida statute did not violate the Second Amendment.<sup>121</sup> The court's analysis illustrates both the operation of the *Bruen* analysis, and the ways in which a court can exercise considerable flexibility in its employment.

#### 1. Which Second Amendment?

The first question that the court addressed was which Second Amendment was controlling: the original meaning as adopted in 1791, or the Second Amendment as understood by the framers of the Fourteenth Amendment in 1868?<sup>122</sup> The court chose the latter, explaining:

The *Bruen* Court did not need to decide the question because it read the historical record to yield the conclusion that “the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry”—the specific Second Amendment right at issue there. Yet even if that is true

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118. *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir. 2023).

119. The Marjory Stoneman Douglas High School Public Safety Act was named after a high school that featured a notorious mass shooting. *Id.* at 1320; FLA. STAT. § 790.065(13) (2023).

120. FLA. STAT. § 790.065(13) (2023) (“A person younger than 21 years of age may not purchase a firearm.”).

121. *Bondi*, 61 F.4th at 1332 (“Because Florida’s Act is at least as modest as the firearm prohibitions on 18-to-20-year-olds in the Reconstruction Era and enacted for the same reason as those laws, it is ‘relevantly similar’ to those Reconstruction Era laws. And as a result, it does not violate the Second Amendment.” (citation omitted)).

122. *Id.* at 1322–23 (beginning its analysis by deciding whether to rely on the original meaning of the Second Amendment when originally adopted by the United States or when adopted by the states when the Fourteenth Amendment was ratified).

for public carry, “the core applications and central meanings of the right to keep and bear arms . . . were very different [in the two periods].”<sup>123</sup>

Concluding that “the more appropriate barometer is the public understanding of the right when the States ratified the Fourteenth Amendment and made the Second Amendment applicable to the States,” the court chose to adopt the Fourteenth Amendment ratification period as its guideline.<sup>124</sup> The court “assume[d] without deciding that the Second Amendment’s plain text covers persons between eighteen and twenty years old when they seek to buy a firearm.”<sup>125</sup> The real question, thus, was whether a ban on firearms purchases by eighteen-to-twenty-year-olds was consistent with the American tradition of firearms regulation.<sup>126</sup> The court answered in the affirmative.<sup>127</sup>

## 2. What Regulations?

Examining a number of Reconstruction-era firearms laws, it concluded that:

Here, “a well-established and representative historical analogue” exists for Florida’s challenged law. In fact, the historical record shows that regulations from the Reconstruction Era burdened law-abiding citizens’ rights to armed self-defense to an even greater extent and for the same reason as the Act does. In other words, at *Bruen*’s second step, Florida has satisfied its burden as to both the “how” and the “why.”<sup>128</sup>

One can quibble—or even more than quibble—with some of the court’s analysis along the way. The opinion is rather facile in its treatment of whether eighteen-to-twenty-year-olds today count as “minors” as compared to an era when the age of majority was universally twenty-one years of age. (And the court seemed to treat college “students” and “minors” interchangeably, treating *university regulations* that disarmed *students* at the University of Georgia and the University of Virginia as effectively

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123. *Id.* at 1323 (first alteration in original) (citation omitted).

124. *Id.*

125. *Id.* at 1324.

126. *Id.* at 1325 (“Given our assumption that the Second Amendment’s plain text provides some level of coverage for (a) 18-to-20-year-olds who seek (b) to buy firearms, we move on to *Bruen*’s second analytical step.”).

127. *Id.* at 1331 (“[T]he Marjory Stoneman Douglas High School Public Safety Act ‘is consistent with this Nation’s historical tradition of firearm regulation.’” (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022))).

128. *Id.* at 1325 (citation omitted).

identical to *statutes* that disarmed *minors*.)<sup>129</sup> Likewise, the Eleventh Circuit described the Federal Militia Act of 1792, which required males eighteen to twenty to show up for militia service, as imposing “mustering obligations,” while omitting that those obligations included a requirement to possess arms and ammunition as specified by Congress.<sup>130</sup> The court is correct, of course, that an *obligation* to possess arms is not the same as a *right* to possess them,<sup>131</sup> but the Militia Act’s federal statutory obligation is certainly inconsistent with the notion that states could (or would) override the federal obligation to possess arms and ammunition by statute. In addition, while the opinion cites pre-Reconstruction statutes disarming eighteen-to-twenty-year-olds in varying degrees, it is impossible not to note that there were also many statutes disarming Black people during the same period.<sup>132</sup>

Nonetheless, whatever one may think of the particulars of Judge Rosenbaum’s analysis, there is no question that he followed the analytical approach specified by *Bruen*.

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129. *Id.* at 1327 (stating that the regulations disarming university students “were similar, if not identical,” to statutes that disarmed minors).

130. *Id.* at 1331–32. The Militia Act of 1792 established a “uniform militia throughout the United States,” consisting of every able-bodied male citizen between the ages of eighteen and forty-five, and provided:

That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271.

131. *Bondi*, 61 F.4th at 1331 (“The fact that federal law obliged 18-to-20-year-olds to join the militia does not mean that 18-to-20-year-olds had an absolute right to buy arms.”).

132. *See, e.g., Frein v. Pa. State Police*, 47 F.4th 247, 255 (3d Cir. 2022) (describing multiple instances of states denying Black people the right to keep and bear arms prior to the Civil War).

### 3. Which Analogies?

The analogy between statutes disarming eighteen-to-twenty-year-olds and a statute disarming eighteen-to-twenty-year-olds is pretty close. Such is not always the case, however. In *Atkinson v. Garland*,<sup>133</sup> the Seventh Circuit was less comfortable addressing the federal felon-in-possession statute, which bans those convicted of felonies (and certain misdemeanors) from possessing firearms.<sup>134</sup> The defendant Atkinson had been convicted of a nonviolent felony (mail fraud) twenty-four years earlier and, after maintaining an otherwise clean record for twenty-four years, desired to own a gun.<sup>135</sup>

Rejecting the Government's argument that "the plain text of the Second Amendment does not cover felons," a claim the court characterized as being made "without any historical analysis,"<sup>136</sup> the court was also unwilling to adopt Atkinson's claim that "history supports disarming only 'dangerous' persons with convictions for 'violent' felonies," or, alternatively, that he could not be disarmed without "an individualized assessment of the danger that he poses."<sup>137</sup> Instead, the Seventh Circuit remanded the case to the district court for analysis under the *Bruen* guidelines, saying that:

Aided by the parties' briefing and the benefits of the adversarial process, the district court is best suited to conduct the required analysis in the first instance. . . . Before we resolve the question before us, the parties should have a full and fair opportunity to develop their positions before the district court . . . . Our review, which all agree is inevitable, will be better for what transpires on remand in the district court.<sup>138</sup>

The court also identified a number of questions that might focus analysis on remand, including:

1. Does § 922(g)(1) address a "general societal problem that has persisted since the 18th century?" If this problem existed during a relevant historical period, did earlier generations address it with similar or "materially different means?"
2. What does history tell us about disarming those convicted of crimes generally and of felonies in particular? Among other sources, the parties could look to commentary from the Founders, proposals emerging

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133. 70 F.4th 1018 (7th Cir. 2023).

134. 18 U.S.C. § 922(g)(1).

135. *Atkinson*, 70 F.4th at 1021–22.

136. *Id.* at 1022.

137. *Id.* at 1023.

138. *Id.*

from the states' constitutional ratifying conventions, any actual practices of disarming felons or criminals more generally around the time of the Founding, and treatment of felons outside of the gun context (to the extent this treatment is probative of the Founders' views of the Second Amendment). When considering historical regulations and practices, the key question is whether those regulations and practices are comparable in substance to the restriction imposed by § 922(g)(1). To answer the question, the district court and the parties should consider how the breadth, severity, and the underlying rationale of the historical examples stack up against § 922(g)(1).

3. Are there broader historical analogues to § 922(g)(1) during the periods that *Bruen* emphasized, including, but not limited to, laws disarming "dangerous" groups other than felons? The parties should not stop at compiling lists of historical firearms regulations and practices. The proper inquiry, as we have explained, should focus on how the substance of the historical examples compares to § 922(g)(1).

4. If the district court's historical inquiry identifies analogous laws, do those laws supply enough of a historical tradition (as opposed to isolated instances of regulation) to support § 922(g)(1)? On this front, the parties should provide details about the enforcement, impact, or judicial scrutiny of these laws, to the extent possible.

5. If history supports Atkinson's call for individualized assessments or for a distinction between violent and non-violent felonies, how do we define a non-violent or non-dangerous felony? And what evidence can a court consider in assessing whether a particular felony conviction was violent? For instance, can a court consider the felony conviction itself, the facts of the underlying crime, or sentencing enhancements? *Bruen* shows that these distinctions should also have firm historical support.<sup>139</sup>

"We recognize," the court concluded:

[T]hat asking these questions is easier than answering them. . . . In the end, the district court . . . will have to give the best answer available to whether the government has carried its burden of "affirmatively prov[ing] that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."<sup>140</sup>

*Atkinson* is useful in the way that it outlines the steps that should be taken in assessing a claim under *Bruen*. While some might suspect it of being "uncivily obedient"<sup>141</sup> in terms of the depth and complexity of the questions raised, in truth the

139. *Id.* at 1023–24 (citations omitted).

140. *Id.* at 1024 (third alteration in original) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022)).

141. See, e.g., Brannon P. Denning, *Can Judges Be Uncivily Obedient?*, 60 WM. & MARY L. REV. 1, 39–53 (2018) (discussing judicial uncivil obedience); Denning & Reynolds, *supra* note 3, at 120–25 (citing examples of post-*Bruen* uncivil obedience in lower court opinions).

analysis is no more complex or difficult than what the courts have been faced with in cases dealing with free speech, obscenity, or reproductive rights over the past decades. The earliest examples of this analysis may seem daunting, but it is likely that with experience courts will find the process much more straightforward.

It is also worth noting that *Atkinson* treats the Founding era as the relevant period for assessing these questions, presumably because, unlike the state statute in *NRA v. Bondi*, § 922(g)(1) is a federal statute, making the attitudes of the framers of the Fourteenth Amendment irrelevant. To the extent that this becomes the norm, we may see modestly less strict regulation of state laws on firearms under the Second Amendment than of federal laws, because there was simply more time for analogous regulations to be enacted between the adoption of the Second Amendment and that of the Fourteenth.

#### 4. More Analogies

In *Frein v. Pennsylvania State Police*, the question concerned the keeping of arms.<sup>142</sup> Eric Matthew Frein committed “cold-blooded murder,” using a .308-caliber rifle.<sup>143</sup> While he was evading arrest, the police got a warrant to search his parents’ home.<sup>144</sup> They found no weapons in that caliber, but seized the parents’ entire firearms collection comprising twenty-five rifles, nineteen pistols, and two shotguns.<sup>145</sup> None were in .308 caliber.<sup>146</sup>

Frein was arrested, tried, and convicted.<sup>147</sup> None of the guns seized from the parents were introduced into evidence, as they had nothing to do with the crime.<sup>148</sup> When the trial was over, the parents sought return of the weapons, and the police refused.<sup>149</sup> As far as the police were concerned, having originally seized the

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142. 47 F.4th 247, 250 (3d Cir. 2022).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

weapons under a valid warrant, they were free to keep them as long as desired.<sup>150</sup>

In the Third Circuit, the Second Amendment question revolved around the parents' right to "keep" arms.<sup>151</sup> As directed by *Bruen*, the court looked at the history of arms seizures and arms ownership before concluding that the couple's Second Amendment right to keep arms had been violated.<sup>152</sup>

First, the court found that the Second Amendment was implicated: "The Second Amendment's text protects a person's right to keep his own guns for self-defense."<sup>153</sup> Furthermore, "[t]he government may not 'infringe[]' on this right. That guarantee, of course, forbids 'destroy[ing]' the right by banning gun ownership. But it also forbids lesser 'violat[ions]' that 'hinder' a person's ability to hold onto his guns."<sup>154</sup>

By way of analogy, the court noted, limiting the number of people who may physically attend a church, even if they are not prohibited from worshipping, is nonetheless an infringement on First Amendment religious freedom.<sup>155</sup> Likewise, a law that lets a chaplain into an execution but forbids him from praying out loud, or a law that criminalizes flag burning without regulating spoken or written words.<sup>156</sup>

As for history, the court briefly recounted the history of gun seizures by the Stuart kings in England that led to the adoption of the right to arms provision in the English Bill of Rights, and the history of gun seizures by Crown authorities in Colonial America.<sup>157</sup> These seizures inspired both the American Revolution and the Second Amendment itself.<sup>158</sup> And, it pointed out, the

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150. *Id.* at 251.

151. *Id.* at 253 ("The Second Amendment guarantees 'the right of the people to keep and bear Arms.' According to the parents, the officials validly *seized* their guns under a warrant, but violated that right by *refusing to return* them." (quoting U.S. CONST. amend. II)). There was also an extensive takings discussion, and a state-law due process issue, neither of which is relevant here. *Id.* at 250–51.

152. *Id.* at 253–56.

153. *Id.* at 254.

154. *Id.* (second, third, and fourth alternation in original) (citations omitted).

155. *Id.*

156. *Id.*

157. *Id.* at 255.

158. *Id.*

Fourteenth Amendment was enacted in part in response to gun seizures that disarmed free Black people during Reconstruction:

[T]he Fourteenth Amendment's ratifiers understood that it would stop gun seizures. Before the Civil War, black people had been denied citizenship and, with it, the right "to keep and carry arms." Though *Dred Scott* fell with the Confederacy, Southerners kept seizing the freedmen's guns. In Mississippi, white militias "seized every gun and pistol found in the hands of the (so called) freedmen," insisting that state law did not recognize their right to arms. So too in South Carolina, where a former federal official reported similar seizures to Congress. As one senator put it, "the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description."

In response, the federal government took pains to explain to freedmen that "no military or civil officer ha[d] the right or authority to disarm" them. Against this backdrop, Congress passed the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1871 to protect all citizens' constitutional rights, including the right to arms. The Fourteenth Amendment was designed to secure that right as well.<sup>159</sup>

Various "narrow historical exceptions" did not justify holding onto the parents' guns.<sup>160</sup> The government may confiscate guns from those who have been convicted of serious crimes, but the parents here had "neither been convicted of any crime nor committed any dangerous act."<sup>161</sup>

Likewise, the government may seize and forfeit guns used to commit a crime, but in this case the guns were seized under a warrant, and the guns hadn't been used in any crime. As the court explained:

[T]hat warrant was tied to the son's trial; as explained, its immunity ran out by the time the parents sued. And the government has not gotten and cannot get another warrant because it admits there is no probable cause. So the parents had the right to keep the guns that they had lawfully bought and still lawfully owned. When the government took the parents' guns and refused to return them, it burdened that right.<sup>162</sup>

The Government responded that the Second Amendment protects a right to own a gun, but not any specific gun, so that so long as the parents were free to purchase additional firearms

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159. *Id.* (second alteration in original) (citations omitted).

160. *Id.*

161. *Id.* at 256.

162. *Id.*

their rights had not been violated.<sup>163</sup> The court was unimpressed:

We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere. Just as those seizures and retentions can violate the First Amendment, seizing and holding on to guns can violate the Second.<sup>164</sup>

The Eighth Circuit took a different approach in *United States v. Jackson*, turning back a Second Amendment challenge to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1).<sup>165</sup> Jackson argued that the statute was unconstitutional on its face under *Bruen* and also unconstitutional as applied because his prior felony conviction was for a nonviolent drug offense.<sup>166</sup>

In upholding the statute, the Eighth Circuit surveyed the history of gun seizures rather differently than did the Third Circuit in *Frein*, above. The court stated:

History shows that the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of people. . . .

Restrictions on the possession of firearms date to England in the late 1600s, when the government disarmed non-Anglican Protestants who refused to participate in the Church of England, and those who were “dangerous to the Peace of the Kingdom.” Parliament later forbade ownership of firearms by Catholics who refused to renounce their faith. . . .

In colonial America, legislatures prohibited Native Americans from owning firearms. . . . In the era of the Revolutionary War, the Continental Congress, Massachusetts, Virginia, Pennsylvania, Rhode Island, North Carolina, and New Jersey prohibited possession of firearms by people who refused to declare an oath of loyalty. . . .

. . . .

If the historical regulation of firearms possession is viewed instead as an effort to address a risk of dangerousness, then the prohibition on possession by convicted felons still passes muster under historical analysis. Not all persons disarmed under historical precedents—not all Protestants or Catholics in England, not all Native Americans, not all

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163. *Id.* (“Pushing back, the government cites other authority suggesting that seizures do not burden Second Amendment rights as long as citizens can ‘retain[] or acquir[e] other firearms.’” (alteration in original) (citations omitted)).

164. *Id.*

165. *United States v. Jackson*, 69 F.4th 495, 505–06 (8th Cir. 2023) (concluding that § 922(g)(1)’s prohibition on possession of firearms by felons is within the historical tradition of gun seizures and thus is constitutional).

166. *Id.* at 501.

Catholics in Maryland, not all early Americans who declined to swear an oath of loyalty—were violent or dangerous persons. . . . But if dangerousness is considered the traditional *sine qua non* for dispossession, then history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons. Legislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed. . . .

Congress enacted an analogous prohibition in § 922(g)(1) to address modern conditions.<sup>167</sup>

The court also cited a number of (pre-*Bruen*) federal statutes as evidence that Congress may disarm groups of people based on a generalized assessment that it is undesirable for them to be armed.<sup>168</sup> But what is most notable is the Eighth Circuit's reliance on the precise sort of English and colonial disarmament statutes that the Third Circuit in *Frein* said were the basis of the individual right to arms in the Second Amendment.<sup>169</sup> To the

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167. *Id.* at 502–04 (citations omitted). The court also dismissed the importance of individual dangerousness by noting that most felons disarmed under the statute would not be individually dangerous:

According to published data, a rule declaring the statute unconstitutional as applied to all but those who have committed “violent” felonies would substantially invalidate the provision enacted by Congress. The most recent available annual data show that only 18.2 percent of felony convictions in state courts and 3.7 percent of federal felony convictions were for “violent offenses.”

*Id.* at 502 n.2.

168. *Id.* at 504–06 (discussing several statutes that demonstrate how “legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms”).

169. *Compare id.* at 502 (citing numerous examples of historical disarmament statutes as evidence that the felon-in-possession statute is consistent with the historical tradition), *with* *Frein v. Pa. State Police*, 47 F.4th 247, 254–55 (3d Cir. 2022) (citing historical disarmament statutes to show that opposition to these statutes formed the basis for the constitutional right to bear arms). Interestingly, the *Jackson* court's analysis of those older disarmament statutes repeatedly cites disgraced historian Michael Bellesiles, whose fraudulent book, *Arming America*, had its prize rescinded due to research misconduct. Robert F. Worth, *Prize for Book Is Taken Back from Historian*, N.Y. TIMES (Dec. 14, 2002), <https://www.nytimes.com/2002/12/14/business/prize-for-book-is-taken-back-from-historian.html> [<https://perma.cc/VU32-XAKC>] (“Professor Bellesiles resigned from Emory in October after an independent panel of scholars strongly criticized his work. Their 40-page report accused him of ‘unprofessional and misleading work’ and said that at times it ‘does move into the realm of falsification.’”). The works cited in *Jackson* are not the works that led to Bellesiles's downfall, but the citations are nonetheless notable. *See also* James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J.

Eighth Circuit in *Jackson*, on the other hand, those mass-disarmament programs were proof that legislatures have wide discretion to disarm groups they deem unreliable, untrustworthy, or undesirable.<sup>170</sup>

The Ninth Circuit case of *United States v. Alaniz* employed a similar analysis to a similar challenge to the United States Sentencing Guidelines.<sup>171</sup> Alaniz was convicted of felony drug trafficking.<sup>172</sup> Because a number of firearms were found in his home at the time of arrest, he was subjected to a “dangerous weapon enhancement.”<sup>173</sup> Alaniz challenged the guideline under *Bruen*.<sup>174</sup>

Applying the *Bruen* two-step test, the Ninth Circuit found that the Second Amendment was implicated.<sup>175</sup> Determining whether there were historical analogues to the sentence enhancement provision—obviously, nothing like the Sentencing Guidelines themselves existed at the time of the Founding—the court noted that the analogue “need not be a ‘historical twin.’”<sup>176</sup> Instead it invoked a “history and tradition of regulating the possession of firearms during the commission of felonies involving a risk of violence.”<sup>177</sup> Finding that the sale of illegal drugs was such a felony, the court upheld the sentence.<sup>178</sup> Analogies presented by the Federal Government included enhanced penalty for burglary when the defendant possessed a weapon and a New Jersey statute that punished the possession and exhibition of a

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2195 (2002) (reviewing MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000)).

170. *Jackson*, 69 F.4th at 504 (“[H]istory supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society.”).

171. *United States v. Alaniz*, 69 F.4th 1124, 1126 (9th Cir. 2023) (“This case requires us to consider whether United States Sentencing Guidelines (“U.S.S.G.”) § 2D1.1(b)(1), which provides for an enhancement of the Guidelines calculation if a defendant possessed a dangerous weapon at the time of a felony drug offense, is constitutional under the Second Amendment . . .”).

172. *Id.*

173. *Id.*

174. *Id.* at 1127.

175. *Id.* at 1129 (“We assume, without deciding, that step one of the *Bruen* test is met.”).

176. *Id.* at 1128 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 30 (2022)).

177. *Id.* at 1129.

178. *Id.* at 1130.

firearm during the robbery of a postal worker.<sup>179</sup> These, said the court, were “relevantly similar”: “The analogues show a longstanding tradition of enhancing a defendant’s sentence for the increased risk of violence created by mere possession of a firearm during the commission of certain crimes. Drug trafficking fits squarely within that category of crimes.”<sup>180</sup>

But—underscoring the split in the circuits on whether law breakers were excluded from the Second Amendment—the Fifth Circuit in *United States v. Daniels* engaged in a very different sort of analysis.<sup>181</sup> Patrick Daniels was an “unlawful user” of marijuana.<sup>182</sup> The Government presented no evidence that he was intoxicated when he was arrested, and provided no information on when he might last have used the drug.<sup>183</sup> Nonetheless, a jury convicted him of violating 18 U.S.C. § 922(g)(3), which makes it illegal for anyone who is “an unlawful user of or addicted to any controlled substance” to possess any firearm.<sup>184</sup> The question before the Fifth Circuit was whether Daniels’s conviction violated the Second Amendment.<sup>185</sup>

The district court had held that Daniels was not part of “the people” protected by the Second Amendment, as his drug use meant he was not a “law abiding, responsible citizen.”<sup>186</sup> Regardless, the district court found that § 922(g)(3) was a longstanding gun regulation of the sort that *Heller* had found presumptively lawful, akin to bans on gun ownership by felons and the mentally ill.<sup>187</sup> The Fifth Circuit found that the statute was unconstitutional as applied to Daniels.<sup>188</sup> In reaching this conclusion, the court observed that:

Because historical gun regulations evince the kind of limits that were well-understood at the time the Second Amendment was ratified, a

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179. *Id.* at 1129.

180. *Id.* at 1130.

181. 77 F.4th 337 (5th Cir. 2023).

182. *Id.* at 339.

183. *Id.*

184. *Id.* at 340 (quoting 18 U.S.C. § 922(g)(3)).

185. *Id.* at 339.

186. *Id.* at 340 (quoting *United States v. Daniels*, 610 F. Supp. 3d 892, 892 (S.D. Miss. 2022)).

187. *Id.*

188. *Id.* at 357. The Fifth Circuit did not rule on Daniels’ claim that § 922(g)(3) was unconstitutionally vague, in light of the court’s finding that the statute was unconstitutional as applied to Daniels. *Id.* at 341 n.1.

regulation that is inconsistent with those limits is inconsistent with the Second Amendment.

. . . Only by showing that the law does not tread on the historical scope of the right can the government “justify its regulation.”<sup>189</sup>

The court began by rejecting the district court’s claim that the Second Amendment didn’t even apply to Daniels.<sup>190</sup> It explained:

The right to bear arms is held by “the people.” That phrase “unambiguously refers to all members of the political community, not an unspecified subset.” Indeed, the Bill of Rights uses the phrase “the people” five times. In each place, it refers to all members of our political community, not a special group of upright citizens. . . .

. . . .  
 . . . More than just “model citizen[s]” enjoy the right to bear arms. . . .

. . . .  
 Once we conclude that Daniels has presumptive Second Amendment rights, the focus shifts to step two of the *Bruen* analysis: whether history and tradition support § 922(g)(3).<sup>191</sup>

The court then concluded that the closest historical analogue to marijuana use was alcohol use.<sup>192</sup> Noting that only a few laws touched on that, all of which were aimed at preventing the use of firearms while actually intoxicated, and none of which denied anyone, even habitual drunkards, the right to arms, the court concluded that as applied to Daniels, § 922(g)(3) was unconstitutional.<sup>193</sup> “Despite the prevalence of alcohol and alcohol abuse, neither the government nor *amici* identify any restrictions at the Founding that approximate § 922(g)(3). Although a few states after the Civil War prohibited carrying weapons while under the influence, none barred gun possession by regular drinkers.”<sup>194</sup>

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189. *Id.* at 341 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022)).

190. *Id.* at 342 (“We begin with the threshold question: whether the Second Amendment even applies to Daniels.”).

191. *Id.* at 342–43 (fourth alteration in original) (citations omitted).

192. *Id.* at 344–45 (“Because there was little regulation of drugs (related to guns or otherwise) until the late-19th century, intoxication via alcohol is the next closest comparator.” (footnote omitted)).

193. *Id.* at 345–48 (describing the historical laws that dealt with intoxication and concluding that the history and tradition does not support the application of § 922(g)(3) to Daniels for a mere pattern of drug use).

194. *Id.* at 345.

A dissent from a denial of en banc review in the *Jackson* case, above, brought out some similar analysis from the Eighth Circuit.<sup>195</sup> Judges Stras, Erickson, Grasz, and Kobes dissented from that denial.<sup>196</sup> “By cutting off as-applied challenges to the federal felon-in-possession statute,” they said, the Eighth Circuit was giving “second-class treatment” to the Second Amendment.<sup>197</sup> *Jackson*, they said,

fails to get the basics right. The Supreme Court told us last year that the burden is on “the government [to] demonstrate that the regulation”—here, the ban on possessing a firearm as a felon—“is consistent with this Nation’s historical tradition of firearms regulation.” Yet *Jackson* does not put the government to its task of establishing an “historical analogue.”

Worse yet, *Jackson* actually flips the burden. It says that the *defendant*, not the government, must “show . . . that his prior felony conviction is insufficient to justify the” stripping of Second Amendment rights. How can that be? Apparently one of our pre-*Bruen* cases says so. It should go without saying that we have to follow what the Supreme Court says, even if we said something different before.<sup>198</sup>

The dissent continued:

Consider what flipping the burden does. When no one makes much of an effort to present historical evidence about a law’s constitutionality, the government will always win. . . .

. . . Reversing the burden also lets *Jackson* avoid the sort of probing historical analysis *Bruen* requires. In particular, it makes no effort to draw the necessary connections between colonial-era laws and the felon-in-possession statute. Why were these particular groups targeted? What, if anything, does their disarmament have to do with felons? What lessons can we draw from the history? It is not as simple as saying some groups lost their arms, so felons should lose them too. After all, it goes without saying that we would not allow Congress to indiscriminately strip Catholics and Native Americans, two groups targeted by colonial-era disarmament laws, of their guns today.

There is, unsurprisingly, more to the story.<sup>199</sup>

Those early disarmament laws were about “lessening the danger posed by armed rebellion or insurrection,” a threat not posed by Mr. Jackson.<sup>200</sup> Black enslaved people and freedmen, Native Americans, Catholics, and the like were all seen as a

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195. United States v. Jackson, 85 F.4th 468, 468–79 (8th Cir. 2023) (Stras, J., dissenting from the denial of rehearing en banc).

196. *Id.* at 468.

197. *Id.* at 468–69.

198. *Id.* at 469 (second and third alteration original) (citations omitted).

199. *Id.* at 470 (citations omitted).

200. *Id.*

military threat and were disarmed to limit their potential for rebellion.<sup>201</sup> “Practices shortly after the Founding are consistent with the dangerousness rationale. . . . People considered dangerous lost their arms. But being a criminal had little to do with it. *Jackson*’s cursory historical analysis does not establish otherwise.”<sup>202</sup>

The dissent’s historical analysis concluded that “the people” are all people, not just those deemed “virtuous” by a legislature, and asks, “[i]f felon disarmament is so obviously constitutional, then why were there ‘no [Founding-era] laws . . . denying the right [to keep and bear arms] to people convicted of crimes?’”<sup>203</sup> *Jackson*’s answer was that felonies in the Founding era were punished by death, making arms bearing in convicted felons beside the point.<sup>204</sup> But in fact, says the dissent, “[n]ot all felonies were punishable by death, particularly the non-dangerous ones.”<sup>205</sup>

*Jackson*, the dissenters conclude, got it wrong and a rehearing should be granted.<sup>206</sup> They also note that the “floodgates” fears that seem to have animated the panel opinion are unfounded:

Perhaps the driving force behind *Jackson* is prudence and practicality, not text or history. The court is worried about what “felony-by-felony” litigation will look like, and whether the new post-*Bruen* world will be judicially manageable. But the biggest questions all have simple answers. What is the standard? Dangerousness. When will it happen? When a defendant raises an as-applied challenge. What will it look like? The parties will present evidence and make arguments about whether the defendant is dangerous. The truth is that it will look almost the same as other determinations we ask district courts to make every day.

It is not as if assessing dangerousness is foreign. District courts considering whether to release a defendant before trial must consider whether it would “endanger the safety of any other person or the community.” And then at sentencing, dangerousness comes up at least twice.<sup>207</sup>

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201. *See id.* at 470–72 (analyzing various disarmament laws).

202. *Id.* at 472 (citation omitted).

203. *Id.* at 473 (second, third, and fourth alteration original).

204. *See id.* (“*Jackson* tries to explain why: the standard penalty for felonies was death, and dead men don’t need guns.”).

205. *Id.*

206. *Id.* at 479.

207. *Id.* at 478 (citations omitted).

In a footnote, citing *Brown v. Board of Education II*, the dissenters add: “Besides, difficulty of administration is no excuse for failing to follow Supreme Court precedent.”<sup>208</sup>

So, what are some takeaways from this lower-court caselaw? There are several. The first is that lower courts are acting as designed, providing a place for new law to percolate through the circuits, with new issues being raised, and new ways of resolving them explored, before the questions return to the Supreme Court. The second is that, for the most part, at least, the lower courts are taking *Bruen* seriously in a way that lower courts generally failed to do with *Heller* and *McDonald*. While there is a certain amount of lower court resistance out there, generally speaking, the lower courts are now treating the Second Amendment as ordinary constitutional law.<sup>209</sup> This does not mean that they’re always faithful to precedent, or doctrine, much less that they always get it right—any more than they (or the Supreme Court) do in other areas—but they are at least trying. And with *Rahimi*, they’ve presented the Supreme Court with an opportunity, if it is willing to take it, to clarify a lot of things. Whether the Court will take advantage of that opportunity is another question.

### III. CODA: THE RAHIMI ORAL ARGUMENT

After much of this Essay was written, the Supreme Court heard oral argument in *Rahimi*.<sup>210</sup> The Court seemed to recognize the difficulty the case presented and at times the Justices seemed uncertain how to extract the Court from the somewhat awkward position in which it found itself after *Bruen*. Solicitor General Elizabeth Prelogar’s position on behalf of the United States was that the Fifth Circuit had “profoundly erred” in its decision and that, taken together, the Court’s cases stand for the proposition that “Congress may disarm those who are not law-abiding, responsible citizens.”<sup>211</sup> This proposition, she further argued, “is firmly grounded in the Second Amendment’s history

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208. *Id.* at 478 n.3.

209. See Glenn Harlan Reynolds, Foreword, *The Second Amendment as Ordinary Constitutional Law*, 81 TENN. L. REV. 407, 413–14 (2014) (explaining that the Second Amendment is now considered ordinary constitutional law).

210. Transcript of Oral Argument, *United States v. Rahimi* (2023) (No. 22-195).

211. *Id.* at 4.

and tradition,” noting that legislatures had historically “disarmed those who have committed serious criminal conduct or whose access to guns poses a danger,” citing “loyalists, rebels, minors, individuals with mental illness, felons, and drug addicts” as examples.<sup>212</sup>

In response to some probing questions by the Court, Prelogar clarified that “law-abiding” meant one not convicted of a felony-level crime and that “responsible” meant “not dangerous.”<sup>213</sup> In so doing, she shrewdly attempted to retrofit portions of the *Heller* safe harbor into *Bruen*’s history and tradition test, analogizing restrictions on dangerous persons to the presumptively lawful regulations of sensitive places or dangerous and unusual weapons.<sup>214</sup> She also urged the Court to allow analogies to be made at a relatively high level of abstraction.<sup>215</sup>

By the Government’s reading of *Bruen*, the action is really at identifying some overarching principle you might fit a regulation into, e.g., history and tradition supports the disarmament of dangerous persons. “[O]nce you have the principle,” she explained, “then I don’t think it’s necessary to effectively repeat that same historical analogical analysis for purposes of determining whether a modern-day legislature’s disarmament provision fits within that category.”<sup>216</sup> Rather, “I think you would look at . . . the consensus view, whether legislatures routinely think of this circumstance as being dangerous, the breadth of the law, and other factors along those lines.”<sup>217</sup>

She urged the Court to correct the “destabilizing” reading of *Bruen* that many lower courts have adopted, which required a precise historical analogue.<sup>218</sup> Once that misreading is corrected, she continued, “the constitutional principle is clear. You can disarm dangerous persons.”<sup>219</sup> Once you begin there, she further argued that this case is an easy one for three reasons.<sup>220</sup> “First, it requires an individualized finding of dangerousness,” after

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212. *Id.*

213. *Id.* at 7–13 (exchanges with Chief Justice Roberts and Justice Kavanaugh).

214. *Id.* at 9–10.

215. *Id.* at 56–57.

216. *Id.* at 55–56.

217. *Id.* at 56.

218. *Id.* at 100–01.

219. *Id.* at 102.

220. *Id.*

notice and a hearing and, she continued, the presumption of regularity precludes assumptions that “these state court procedural orders . . . are fundamentally flawed or inherently unreliable.”<sup>221</sup> Second, she said legislative consensus—forty-eight states and territories, in addition to Congress, have such laws—makes this an easy case.<sup>222</sup> Finally, the law guards “against a profound harm. A woman who lives in a house with a domestic abuser is five times more likely to be murdered if he has access to a gun.”<sup>223</sup> She noted, too, that domestic violence calls pose a grave threat to law enforcement personnel as well.<sup>224</sup>

Rahimi’s case was argued by Matthew Wright, a federal public defender, arguing before the Court for the first time. Wright was forced on the one hand to argue that a precise analogue was required, while on the other hand making concessions that seemed to undercut his case.

Towards the end of his argument, Justice Kagan then asked bluntly whether it was constitutional for Congress to disarm the mentally ill.<sup>225</sup> Wright gave a qualified yes, to which Kagan responded:

I’ll tell you the honest truth, Mr. Wright. I feel like you’re running away from your argument . . . because the implications of your argument are just so untenable that you have to say no, that’s not really my argument.

. . . [I]t just seems to me that your argument applies to a wide variety of disarming actions, bans, what have you . . . that we take for granted now because . . . it’s so obvious that people who have guns pose a great danger to others and you don’t give guns to people who have the kind of history of domestic violence that your client has or to the mentally ill or what have you.

So . . . I’m asking you to clarify your argument because you seem to be running away from it because you can’t stand what the consequences of it are.<sup>226</sup>

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221. *Id.* at 102–03.

222. *Id.* at 104.

223. *Id.*

224. *Id.* (“I was struck by the data showing that . . . domestic violence calls are the most dangerous type of call for a police officer to respond to in this country.”).

225. *Id.* at 88 (“Do you think that the Congress can disarm people who are mentally ill, who have been committed to mental institutions?”).

226. *Id.* at 88–89.

Wright claimed only to be running away from interest balancing and arguing that the historical record required by *Bruen* was not present in this case.<sup>227</sup>

Wright's argument concluded with Justice Jackson trying to pin Wright down on his claim that "the government cites no laws punishing members of the American political community for possessing firearms in their own homes based on dangerousness, irresponsibility, crime prevention, violent history, or any other character trait."<sup>228</sup> He agreed that was his understanding of the historical record.<sup>229</sup> So, she ventured, "if the government were to convince us that there was a ban related to, say, dangerousness, do you lose?"<sup>230</sup> Wright claimed he did not, because there is nothing in the historical record that supports "bans against rights-holders."<sup>231</sup>

### CONCLUSION

Handicapping Supreme Court decisions based on oral arguments is inevitably an iffy proposition. But we'll go out on a limb and say, first, that the Court will reverse the Fifth Circuit; that reversal might well be unanimous. We think we can confidently predict a welter of concurring opinions that go off in multiple directions. It appears that a majority of Justices might be content to accept the Government's interpretation of the Court's reference to "responsible" gun owners to exclude those who are "dangerous," either to themselves or others, and to support disarmament as long as there is some historical basis for laws disarming similar groups. We wouldn't be surprised as well to see at least some Justices disclaim the virtue theory of the Second Amendment and hold that "the people" means the same in the Second Amendment as it does elsewhere in the Constitution. The big question is whether the Court buys the Government's attempt to shoehorn the *Heller* safe harbor into *Bruen*'s history and tradition test by claiming—as Justice Thomas tried to—that there was no inconsistency between the two approaches. It might be that the Court simply holds that "dangerous" persons, like those subject to orders of protection, can be disarmed and once again

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227. *Id.* at 89–90.

228. *Id.* at 99.

229. *Id.*

230. *Id.*

231. *Id.* at 100.

leaves the more difficult questions for another case and, perhaps, for a more sympathetic client.