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PROTECTING PUBLIC SAFETY
AFTER NEW YORK STATE RIFLE &
PISTOL ASSOCIATION V. BRUEN

HEARING
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PROTECTING PUBLIC SAFETY
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WEDNESDAY, MARCH 15, 2023

UNITED STATES Senate,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room 216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.


OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order. It’s my understanding that Senator Graham is on the way and has asked us to start. We’ll of course recognize him when he arrives for any opening statement he may have.

Last week, I went to the Senate floor and paid tribute to a fallen Chicago police officer, Andres Vasquez Lasso, 32 years old. He was an immigrant to this country, became a U.S. citizen, volunteered for the Chicago Police Department, served there for 5 years. He was killed protecting the same Southwest Side neighborhood he lived in.

On March 1st, Officer Vasquez Lasso responded to a 911 call about a domestic violence incident. When he arrived on the scene, the suspect fled, and a chase ensued. The suspect had a gun, and when he ran onto an elementary school playground with children present, he turned and fired it five times. Kids were taking cover under slides and equipment they could find on the playground. Officer Vasquez Lasso was killed.

For his funeral last week at St. Rita’s Chapel, his wife, Milena, wrote, and I quote, “I wish I would’ve hugged you stronger that Wednesday morning, given you more goodbye kisses. If only I had known it was the last time I would see you alive.”

Every day, millions of Americans like Officer Vasquez Lasso dedicate themselves to protecting public safety and keeping our communities and our kids safe. Law enforcement officers, emergency responders, social service workers, community leaders, and teachers—these are increasingly dangerous jobs, in part because
there are more guns than people in this country, and hundreds of Americans are shot every day.

We owe it to these Americans to enact laws that will help protect them from being shot and killed. I believe that well-regulated firearm ownership, to keep Americans safe, is consistent with the Second Amendment. But we’re up against a gun lobby that wants to strike down the gun laws on the books and stop new ones from passing, and that brings us to the Bruen case. Here’s a brief video.

[Video is shown.]

Chair DURBIN. For the record, the Bruen decision came down the day before the Dobbs decision, which of course drew a lot of public attention. The gun lobby got what it wanted in the 2008 Heller case, a Supreme Court decision, making clear that the Second Amendment is an individual right, but the gun lobby wasn’t happy with more than 1,500 cases that implemented Heller in the lower courts. Why? Because those cases largely upheld the gun laws on the books from constitutional challenge.

The Court said those laws passed muster under Heller’s then-two-step test that looked both at history and considered modern-day ends and means. That was just too much for the gun lobby to take, so they went to work. They advocated aggressively to put Justices on the Supreme Court who supported a history-based approach to Second Amendment challenges, so-called “originalism,” “literalism.” I discussed this approach with both Justice Kavanaugh and Justice Barrett at their confirmation hearings, because I was concerned about what a conservative majority on the Supreme Court would do to our gun laws.

And then, as I feared, the gun lobby worked to get a case before the Supreme Court, the Bruen case. Last year, the Court’s majority went further than necessary to decide the case and established a new, purely historical, test for considering the constitutionality of gun laws. The gun lobby was thrilled.

Wayne LaPierre of the National Rifle Association put out a press release. He called the Bruen decision a landmark win for the NRA that, quote, “unequivocally validates the position of the NRA.” That’s the same Wayne LaPierre who sat in this room 10 years ago and testified before this Committee that we, quote, “need to enforce the thousands of gun laws that are currently on the books.” But his Bruen press release didn’t say that. It said, quote, “Many unconstitutional gun control laws remain in America. The NRA will continue to fight these laws.”

Now, after the Bruen decision, longstanding gun laws on the books are being challenged across the country. More than 100 cases so far. And under the new Bruen historical test, judges decide not whether a law reasonably protects public safety, but whether the law resembles laws that were in place in 1791 or in 1868. In the beginning, in 1791, of course, we were talking about muzzle-loading muskets. I think about drawing that standard, legality, and constitutionality, based on 1791, and I think about last Fourth of July in Highland Park, Illinois, when a deranged individual went on the roof of a downtown business and discharged 83 rounds in 60 seconds, killing 7 innocent people and injuring dozens of others, including paralyzing an 8-year-old little boy, Cooper Roberts.
So it’s no surprise to see decisions like the Fifth Circuit’s recent Rahimi case. A panel of judges struck down a Federal law barring those with domestic violence restraining orders from possessing guns. I can’t square that decision with the actual danger that women and police officers face from armed domestic abusers, and I don’t believe the Founders of this Nation would’ve wanted courts to simply ignore this danger when applying the Constitution they wrote.

The chaos that the Bruen decision has caused was predictable. For 15 years, courts have been steadily applying the Heller decision to make reasoned judgments about gun laws on the books. Now, the Supreme Court has imposed a radical new framework under Judge Thomas’ decision, with barely any guidance to apply it and plenty of opportunity for judges to cherry-pick from history, to engage in judicial activism in the name of originalism.

The gun lobby saw Bruen as a landmark win, but it’s a significant challenge for police, law enforcement, and the population of America when it comes to public safety. That’s what we'll discuss today. We have a distinguished panel of witnesses that will examine where we go as we navigate Bruen’s unprecedented upheaval of efforts to combat gun violence. I look forward to this discussion.

I now turn to Ranking Member, Senator Graham.

OPENING STATEMENT OF HON. LINDSEY O. GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator Graham. Thank you, Mr. Chairman. Well, number one, I think this is an important hearing to have. The role of the Second Amendment in average everyday life. Senator Cornyn worked in a bipartisan fashion to make some changes to background checks, putting money into the system to deal with the folks that are a danger to themselves or others, to enhance public safety. So there is a bipartisan approach to some of these issues. But this, sort of, is the difference between the parties here, I would think. That America’s Second Amendment was passed for a purpose.

If you live in a kingdom and the king rules, the first thing they want to do is make sure nobody can object and that you’re pretty well defenseless. You have to ask yourself, why did we have a Second Amendment to begin with? Well, if you understand the history of the country, people fleeing England, where you couldn’t say bad things about the king, you really couldn’t express yourself—so the First Amendment allows you to speak openly and to worship the way you would choose. Not the way the king would choose, and on and on and on, the right to assemble.

The Second Amendment is to be able to bear arms. There are millions—1.7 million times per year, people use firearms to defend themselves. I have a very long list of people who have been able to protect their family, their property, by having a firearm to ward off intruders and people who are acting aggressively toward them, particularly women. And, Mr. Chairman, I’d like unanimous consent to put that in the record.

Chair Durbin. Without objection.

[The information appears as a submission for the record.]

Senator Graham. And what we’re trying to do here, I think, is our Democratic friends are trying to make the argument that the
Bruen, Heller cases—if they could, they would overturn those decisions, and I think people on our side are going to be unanimous in the idea that responsible gun ownership is part of American society. Guns are used every day to defend Americans, and people abuse their right to own a weapon. And I would hope we could find common ground to go after those who abuse the right to own a weapon, who act irresponsibly, and enforce the laws on the books.

So what we will be doing in response to this hearing is that I've introduced legislation, Federal law, that would basically codify the Heller decision. That the Second Amendment right to own a weapon is an individual right, and the Bruen decision, having a different legal analysis about efforts to regulate guns, more back to the historical perspective of why we have the Second Amendment. As you want to overturn these decisions, we will want to reinforce these decisions.

We've found bipartisan support for the idea of background checks and trying to get guns out of the hands of people that are dangerous, Mr. Chairman, but we haven't had much success in finding common ground on increasing punishments for those who are involved in crime. We're talking a lot about fentanyl, but we haven't done much to deter it. All of us see the laws regarding sexual exploitation of children in need of upgrading. So what I hope we'll find is some bipartisan support to go after the criminal and reinforce America's safety.

This is a very dangerous time in America, Mr. Chairman. The policies being pursued in the major cities in this country are not working—on the drug front, on the public safety front. And here's the sad news. There's probably never been a more important time to be able to own a weapon than now. The threats to the average American are going up, not down. And at the end of the day, the Second Amendment is part of our Constitution, is part of the fabric of this Nation. There is bipartisan support to make sure reasonable gun ownership reigns, but there will be, on our side of the aisle, Mr. Chairman, a robust response to the idea of undoing the legal framework that has come out of the Supreme Court, because we believe now is the time to reinforce responsible gun ownership, not to undermine it. Thank you.

Chair DURBIN. Thank you, Senator Graham. Today we welcome five witnesses. Let me introduce them. Our first witness is Ruth Glenn, president of public affairs, National Coalition Against Domestic Violence. It's a project of the National Domestic Violence Hotline. Prior to joining this organization, Ms. Glenn had served with the Colorado Department of Human Services for 28 years, 9 of which she spent as a director of the Domestic Violence Program. She is indeed a survivor of gun violence, herself.

Amy Swearer has appeared before the Committee before. She is a senior legal fellow in the Heritage Foundation, Edwin Meese Center, where her areas of scholarship include the Second Amendment, overcriminalization, school safety, and the intersection of mental health and gun violence.

Eric Ruben, assistant professor of law at the SMU Dedman School of Law. His scholarship focuses on exploring the regulation of violence and weapons and how that regulation intersects with self-defense and Second Amendment.
Rafael Mangual—did I pronounce it right? Good. Rafael Mangual is the Nick Ohnell Fellow and head of research for the Policing and Public Safety Initiative of the Manhattan Institute for Policy Research, where he writes on topics relating to police, crime, and incarceration, among others.

And Stephen Lindley, who is the program manager for Combating Crime Guns Initiative at Brady. Before joining Brady, Mr. Lindley served in the National City Police Department in San Diego County and at the California Department of Justice. He has 27 years of law enforcement experience.

I thank all of the witnesses for being here today. Each Senator will have 5 minutes, after you have 5 minutes for an opening statement. Could each of the witnesses please stand at this moment to be sworn in?

[Witnesses are sworn in.]

Chair Durbin. Let the record reflect that the witnesses have answered in the affirmative, and we will recognize you in the seating arrangement that you’ve chosen. Ms. Glenn, you’re first.

**STATEMENT OF RUTH M. GLENN, PRESIDENT, PUBLIC AFFAIRS, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AND NATIONAL DOMESTIC VIOLENCE HOTLINE, DENVER, COLORADO**

Ms. Glenn. Good morning, Chair Durbin, Ranking Member Graham, and distinguished Members of the Senate Judiciary Committee. I thank you for the opportunity to testify before you today on a critical issue, the impact of the Supreme Court’s decision in New York State Rifle & Pistol Association v. Bruen on victims and survivors of domestic violence.

As was stated, my name is Ruth Glenn. I am currently the public affairs president for the National Coalition Against Domestic Violence and the National Domestic Violence Hotline. I’m going to take my time to share with you why I do what I do, why it is important to speak to this issue, and how I hope to enable further understanding of the particular concerns for victims, survivors, advocates, and those that care for them when there is access to firearms by abusive intimate partners.

There was always a gun present during my 13 years of marriage. It was used as a tool to frighten me and control me. In one instance, when my son was 14 years old and he was struggling at school, my then-husband aimed the gun at me, looked at our son, and said, “If you bring one more F in this house, I will kill your mother.” I was so traumatized and terrified, I could hardly think. My experience was and is far from unusual. About 14 percent of women and almost 6 percent of men in the U.S. experience firearm threats from an abusive intimate partner; 43 percent of those women who have been injured by a firearm include being shot, pistol whipped, or sexually assaulted.

I wish I could share with you that that was the extent of my experience, but it was not. I am fortunate to be among that 43 percent—fortunate because I was almost another statistic, one of the people murdered every 7 hours by an intimate partner, mostly with firearms. An abusive male partner’s access to firearm increases the risk of intimate partner femicide fivefold.
A gunshot is the most awful sound. The smell is even worse, especially up close. I remember those two blasts, each one distinctly. The first went under my scalp. The other skipped off my forehead. When a bullet hits you, you feel a stinging sensation, distinctly metallic, like being burned or getting an electric shock. I thought, “This can’t be happening,” and then he shot me again in the arm. He drove away and left me for dead.

This was pre-1994, when Congress passed the law prohibiting respondents to final protective orders from possessing firearms. I did not have the benefit of legal protections that are now afforded to survivors with protection orders almost everywhere in the United States. I say, “almost everywhere,” because those protections are being eroded by courts confused by the Supreme Court’s ruling in Bruen.

Bruen threw out the post-Heller, two-part test that courts were using to assess the constitutionality of firearms laws and now requires courts to rule solely based on the historical tradition. To be blunt, the historical tradition, when it comes to women, in particular, includes burning women at the stake as witches, permitting and even encouraging physical chastisement of wives—in other words, domestic violence—and turning a blind eye to rape and other forms of gender-based violence.

Post-Bruen courts across the country have looked at the Federal laws disarming adjudicated abusive partners and have come to dramatically different conclusions. While most courts that have considered the protective order prohibitor have upheld it, a three-judge panel of the Fifth Circuit Court of Appeals found it unconstitutional in United States v. Rahimi. The legal implications of this ruling are limited, as it applies only to Texas, Louisiana, and Mississippi, and it does not apply to State laws, and it does not apply to the relief written directly into protective orders. But it is important to realize the confusion and concern that has resulted from the ruling.

It is also important to note that the National Domestic Violence Hotline contacts mentioning firearms in Texas, Louisiana, and Mississippi between February 2nd, when Rahimi was released, and March 9th increased by 56.6 percent compared to the same time period last year. Given the general confusion, many respondents to final protective orders erroneously believe they are allowed to have firearms, and survivors may believe they can no longer rely on the courts for protection from abusive partners with firearms. The lack of historical laws restricting firearms access by domestic abusers is not evidence that such laws are unconstitutional. Rather, it is a reflection of the legally subordinate status and general disregard for the rights and needs of women in early America.

Ultimately, we expect Federal and State laws restricting firearm possession by adjudicated abusive intimate partners to be upheld. However, in the interim, some abusive intimate partners will legally access firearms they were previously forbidden from possessing, and some will use those firearms to terrorize or even kill their victims and others. The uncertainty created by Bruen has placed victims and their children in fear of their lives and created yet another barrier to safety. Thank you again for the opportunity to testify today, and I look forward to answering your questions.
Chairman Durbin, Ranking Member Graham, and distinguished Senators, last June, in *Bruen*, the Supreme Court affirmed that ordinary law-abiding Americans have a right to bear guns in public for self-defense. It struck down New York’s restrictive public carry framework, which required applicants to prove they had a, quote, “proper cause” to exercise their constitutional rights outside the home, a burden that was usually insurmountable.

Additionally, *Bruen* rejected lower courts’ use of a heightened scrutiny approach, an approach that they, not *Heller*, created. And that, in practice, allowed many courts to never meet a gun law that they couldn’t find perfectly constitutional. Instead, under *Bruen*, judges must assess whether the challenged restriction is consistent with the Nation’s historical tradition of firearms regulation.

After *Bruen*, some pundits and politicians immediately responded with hysterical fearmongering about its potentially devastating public safety consequences. Even today, the title of this hearing presupposes, albeit with fewer theatrics, that *Bruen* is a thing from which the public must be protected. This is simply not true. *Bruen*’s immediate impact on public safety is positive. For too long, States like New York told millions of citizens that their right to armed self-defense ended the moment they left their homes. Lawful gun owners are not the driving force behind criminal gun violence, and this is particularly true of concealed-carry permitholders. At the same time, as I outline in much greater detail in my written submission, they play a significant but underappreciated role in crime prevention and crime interruption.

Yes, good-faith applications of *Bruen* will likely result in some favored gun control laws being struck down. To the extent that *Bruen* threatens certain laws, however, these are generally laws that weren’t very good at protecting the public in the first place. And, at the same time, it’s undeniable that *Bruen* does not threaten many of the laws that are most effective at protecting the public. But in recent months, as some post-*Bruen* challenges have succeeded in lower courts, the opinions and reasonings therein have been grossly mischaracterized in the same way we saw after *Bruen*.

I cover this handful of successful and still largely ongoing challenges in more depth in my written submission, but the recent Fifth Circuit decision in *U.S. v. Rahimi* is worth highlighting. As others have noted, the panel struck down a Federal statute prohibiting gun possession for individuals subjected to certain domestic violence civil restraining orders, and the opinion has been widely—and wrongly—denounced as in some respects giving domestic violence abusers a license to kill and essentially preventing the Government from doing anything at all about it.

But let’s review the facts underlying that case. The defendant there, Mr. Rahimi, is a despicable cretin that no sane, sober, moral,
or prudent person truly believes should own guns. He violently assaulted his girlfriend, threatened to kill her, and shot at a bystander who witnessed the assault. The Government quite properly charged him with several crimes, but then it released him, apparently believing that a civil restraining order instead of pretrial detention was the best way of dealing with this violent individual.

Predictably, Mr. Rahimi soon thought, “To hell with your restraining order,” and committed aggravated assault with a deadly weapon against a different woman, using a gun that he wasn't legally allowed to own but obtained anyway. The Government appears to have protected the public by releasing him again. And, once again, Mr. Rahimi ignored the restraining order and its prohibition, on his way to ignoring a lot of other gun laws about not shooting people. In a 2-month span, he shot at a guy he sold drugs to. He shot at a constable. He shot at the driver of a car crash he caused, fled the scene, returned in a different car and shot at him again. And then, for good measure, fired a couple of rounds into the ceiling of a Whataburger restaurant.

Let’s assume, for the sake of argument, that the Fifth Circuit’s interpretation of Bruen is correct, and the Government can’t charge Mr. Rahimi for violating his domestic violence restraining order because this is historically an inappropriate method by which to disarm people. Anyone who insists that this result somehow dramatically endangers the public either didn't read the case in good faith, does not understand the criminal justice system, or is very comfortable lying to your face.

As the judges noted at length in that opinion, the Government could have, completely consistent with Bruen, held Rahimi for pretrial detention after either time that he violently assaulted someone. It could have disarmed him as a condition of his pretrial release, a condition which he likely would have ignored as flippantly as he did his restraining order, but at least it would’ve been constitutional under Bruen. It can prosecute and convict him for at least a dozen serious crimes and incarcerate him for a very long time. If and when Mr. Rahimi is ever released from prison, every post-Bruen court agrees—and Bruen itself indicates—that the Government can continue prohibiting him from owning guns in perpetuity as a violent felon.

Senators, do you see the problem here? It’s not Bruen that will—as some critics have stated—get women killed. Both before and after Bruen, it’s terrible criminal justice policies that get women killed. To any extent that Bruen limits the Government’s public safety options, it does so in a way that forces the Government to use the far more effective tools already at its disposal to protect us from violent offenders.

We are told all the time to respect the rights and needs of victims, as we should. We should respect them by detaining, arresting, and criminally prosecuting the men who harm them—and believe in them enough to allow them to defend themselves from these violent offenders when the Government won’t. I look forward to your questions.

[The prepared statement of Ms. Swearer appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Swearer. Professor Ruben?
STATEMENT OF ERIC RUBEN, ASSISTANT PROFESSOR OF LAW,
SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF
LAW, DALLAS, TEXAS

Professor Ruben. Chairman Durbin, Ranking Member Graham,
and Members of the Committee, thank you for inviting me to tes-
tify. My name is Eric Ruben. I’m a professor of law at SMU
Dedman School of Law. Today I’m testifying in my personal capac-
ity.

This Committee is considering how to protect public safety after
the Supreme Court’s decision in Bruen, so it is important to under-
stand what that decision did and the challenges that it presents for
the lower courts. You just heard one view on Bruen and its after-
math. I’ve read the opinions, and I’m going to provide a different
view. I will make four points.

First, Bruen abandoned a mode of reasoning used for almost
every other right and inserted a new test for evaluating the con-
stitutionality of modern laws addressing modern guns and modern
problems. In particular, Bruen held that in cases where the Second
Amendment’s text applies, courts must assess whether or not a
modern restriction is consistent with this country’s history and tra-
dition. And to do that, the Bruen majority said that the Govern-
ment has to point to analogous regulations from the late 1700s or
perhaps the 1800s. Litigants in courts, the Court said, are to com-
pare how and why modern and historical gun laws burden armed
self-defense. This is a novel approach. It’s different than the one
that courts were using before the Bruen decision came down, and,
in fact, it’s different from how the Court itself usually evaluates
constitutional rights questions.

The second point that I’d like to make is that Bruen has intro-
duced a substantial amount of uncertainty for Second Amendment
document with this new test. The lower courts have struggled to
apply Bruen to modern laws such as those regulating 3D-printed
guns, large-capacity magazines, or gun possession by domestic
abusers. Bruen purported to constrain judicial decisionmaking
through a test of historical analogy, but the post-Bruen caselaw
highlights the risk that, in fact, Bruen has enabled judicial subjec-
tivity and unpredictability. In different cases dealing with the same
laws—or even within the same case dealing with a law—courts
have pointed in opposite directions about what the Second Amend-
ment means.

Third, as the issue of keeping guns out of the hands of domestic
abusers show, courts are struggling with how to compare modern
laws to historical ones in light of the immense changes between the
past and the present. What meaningful historical comparator can
there be for the modern prohibition on guns in airplane cabins? Or
on automatic weapons? Perhaps more fundamentally, what about
modern laws that reflect broader social change, like prohibitions on
gun possession by domestic abusers?

The domestic-violence-focused gun laws highlight the challenge
of basing today’s constitutional decisionmaking on the legislative
priorities of the distant past. The Fifth Circuit, in the recent Rahimi
case, applied Bruen to strike down the prohibition on gun
possession by people subject to domestic violence restraining or-
ders. The Court said that the record did not contain comparable gun laws from the framing era.

But, of course, there were not robust protections for the victims of domestic violence back in the framing era. Policymakers back then did not view women as the political or legal equals to men, and they did not prioritize protecting the victims of domestic violence through legislation. In fact, rather than focusing on protecting domestic violence victims, historically the law protected the husband’s legal prerogative to inflict marital chastisement. But it would be absurd to think that the Constitution today condemns us to that same view.

Fourth, and finally, despite the initial disruption that it’s caused, Bruen does not mean the end of reasonable gun policy. We have a long tradition of gun regulation in this country, and the Justices in the Bruen majority said that, properly interpreted, the Second Amendment still allows for a variety of gun regulation. The major challenge after Bruen is how to compare historical gun laws to modern ones in light of changed circumstances. The Rahimi court, for example, recognized that historical laws disarmed various groups of people viewed to be dangerous, but it then construed those historical laws narrowly and concluded that they could not serve as analogues for the modern laws regulating gun possession by those subject to domestic violence restraining orders.

But other courts have taken a different message from those same historical gun laws. In a case called Kanter v. Barr, then-Judge Amy Coney Barrett looked at the same laws that were considered by the Rahimi court, but she reached a different conclusion about their meaning. She wrote, quote, “History is consistent with common sense. It demonstrates that legislatures have the power to prohibit dangerous people from possessing guns,” end quote. The central challenge for the Second Amendment today is ensuring that history and common sense do not part ways. Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Professor Ruben appears as a submission for the record.]

Chair DURBIN. Thank you, Professor. Mr. Mangual?

STATEMENT OF RAFAEL MANGUAL, NICK OHNELL FELLOW, AND HEAD OF RESEARCH, POLICING AND PUBLIC SAFETY INITIATIVE, MANHATTAN INSTITUTE, NEW YORK, NEW YORK

Mr. MANGUAL. Good morning, Chairman Durbin, Ranking Member Graham, and Members of the Committee. I’d like to begin by thanking you all for extending to me another invitation to testify before this body on what is perhaps the single most important policy issue of our time, public safety, especially gun violence.

My overarching point this morning is straightforward. When it comes to the important issue of public safety, our most pressing problem is not the possibility that more law-abiding citizens will now be able to carry firearms for self-defense in the small handful of States that didn’t already allow them to do so prior to Bruen. It’s that, in so many parts of the country, legislative and administrative policy choices have exacerbated the risks associated with failing to arrest, prosecute, and meaningfully incapacitate high-risk, high-rate criminal offenders.
As such, the focus of policymakers hoping to stem the tide of resurgent violent crime should be on identifying and plugging the holes created or made larger by recent depolicing and decarceration efforts. Failing to do so will inevitably lead to tragedy, as it has in so many cases already—one of those cases the shooting death of Keaira Hudson Bennefield in upstate New York last year.

The 40-year-old mother was taking her kids to school when police and prosecutors allege she was fatally shot in the head by her husband. Her husband was released on his own recognizance the day before the shooting. That release came after being charged with savagely beating Keaira Hudson, an assault that was captured by a home security camera and shared with the authorities. And the release occurred despite the defendant having been paroled in 2015 after serving time for the armed kidnapping of an ex-girlfriend and escaping from a correctional facility.

New York's bail laws required release and prohibited the judge from considering the danger that this man posed to his wife or the community. Perhaps the most tragic part of this story is that Keaira was so certain about the risk that she faced that she was reportedly wearing a bulletproof vest at the time she was killed. Instead of the safety that she needed, all the court would offer Hudson Bennefield was a piece of paper containing an order of protection.

Unfortunately, data from multiple sources suggest that when it comes to domestic violence, shootings, homicides, stories like the one I just told, are all too common. A report published by the Indiana Criminal Justice Institute reported that the 3,036 individuals convicted of domestic violence in 2017 had a combined total of 15,396 prior arrests. A study done by the University of Chicago Crime Lab found that, on average, those arrested for a shooting or homicide in that city in 2015 and 2016 had 12 prior arrests. Nearly 1 in 5 had more than 20. This measure is in line with recent remarks from Washington, DC, Metro Police Chief Robert Contee, who told members of the media earlier this month that, quote, “The average homicide suspect has been arrested 11 times prior to them committing a homicide.”

What all of this tells us is that the laws that we have on the books regarding firearms restrictions—or any other criminal law, for that matter—are no good to us unless we have the wherewithal to see to it that those who violate the rules are held to account in a way that actually protects public safety. And this is where the focus of policymakers should lie. We must be seeking to find and, where necessary, create opportunities to maximize the incapacitation benefits that attend the incarceration of bad actors.

Actively supporting efforts to cut down on those incapacitation benefits is simply incongruous with calls for more gun rights restrictions as a means to pursue public safety gains, and yet cutting down on incapacitation is precisely what recent criminal justice reforms have achieved over the last decade plus. And these reforms individually and collectively have reduced the likelihood of arrest, prosecution, and/or incarceration for many criminal offenders, as evidenced by the 24-percent decline in the Nation’s prison population and 15-percent decline in the Nation’s jail population be-
between 2010 and 2021, as well as a 25-percent decline in arrests between 2009 and 2019.

None of that makes us safer, especially not those stuck living in the small slices of the country where crime concentrates. The downside risk associated with the push for decarceration and depolicing will be borne disproportionately by the very same people living in the pockets of concentrated gun violence. And this was made crystal clear by a study published last year and reported on by The Wall Street Journal, showing that the 2021 firearm homicide victimization rate approached 60 per 100,000 for Black men, reaching its early 1990s peak, which is almost double what it was just 10 years ago. The white male rate stood in the single digits.

America's gun violence problem has gotten significantly worse in recent years, and that should concern us all. The reversal of the progress made over the 1990s and early aughts has hit a very small slice of America in a very big way. Now, I'm encouraged by this Committee's desire to engage with this problem, but I urge its Members to consider that the policies most urgently in need of change are those that have lowered the transaction costs of committing crime or raised the transaction costs of enforcing the law. At the end of the day, rules without the means or will to enforce them are little more than empty threats. And for those stuck living in America's most dangerous neighborhoods, they're broken promises, to boot. Thank you, and I look forward to your questions.

[The prepared statement of Mr. Mangual appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Mangual. Mr. Lindley?

STATEMENT OF STEPHEN LINDLEY, PROGRAM MANAGER, COMBATING CRIME GUNS INITIATIVE, BRADY, LOS ANGELES, CALIFORNIA

Mr. LINDLEY. Chairman Durbin, Ranking Member Graham, and distinguished Members of the Committee, thank you for the opportunity to testify before you today. My name is Steve Lindley. I've spent my career in the service of public safety. For nearly three decades, it's been my honor to serve in law enforcement, starting as a cadet, working my way up to a detective, sergeant, and then a special agent. I made it to the upper ranks of the California Department of Justice. I spent nearly a decade as the chief of the Bureau of Firearms.

Today, I work at the Combating Crime Guns Initiative at Brady, one of the Nation's oldest gun violence prevention organizations, I serve as a senior technical advisor on firearm issues, California gun laws, and the source of diversion of trafficked firearms.

California was a very different place when I joined the police force in 1990. At the National City Police Department, we responded to shootings every night. Everyone on the streets had a gun, and by 1993, California had a firearm homicide rate that was 46 percent higher than the national average. Our streets were awash with guns and victims, and every day, my colleagues and I put our badges and our vests on and hoped for the best.

Almost every cop has a moment when gun violence really hits home. For me, it was in 1992 when I held a 16-year-old boy and watched the life drain from his eyes. He'd gotten into a fight over
a girl, a fight that happens every day in our country, sometimes hundreds of times, except during this fight, one of the kids had a gun. What should have ended with a bruised ego and maybe a black eye ended with that boy coughing up blood all over me. He asked if he was going to die, and I wish I could’ve told him he was going to be okay.

I wish my story was unique, but it represents a bigger problem that requires more than thoughts and prayers. Between 1989 and 1991, California took its initial steps to address gun violence, passing an early assault weapons ban, comprehensive background checks, and prohibitions for violent offenders. Nationally, there was also a reckoning on gun violence, with Congress passing the Brady background check bill and assault weapons ban. California built on these laws, establishing a reasonable framework of gun laws, and it worked.

In the last three decades, our firearm homicide rate was cut in half. Today, California remains the biggest State, with many of the country’s largest cities, but our gun death rate is 36 percent lower than the national average and the 7th lowest in the country. It could’ve been much lower, but the most recent statistics from ATF shows that tens of thousands of guns traced to crime in California come from other States.

Needless to say, we also share the national burden of mass shootings, most recently Monterey Park and Half Moon Bay. However, our laws, especially around assault weapons, make it much more harder for mass shooters to access the most deadly firearms. Californians are 25 percent less likely to die from a mass shooting than people in other States.

We have some of the strongest gun laws in the country, and they’re working. But rest assured the Second Amendment is alive and well in California. We have more civilian-owned firearms than most other States, more than a quarter of Californians live in a gun-owning home, and Californians purchased almost a million firearms last year.

This past summer, the Supreme Court upended California’s long-standing framework with the opinion in Bruen, and today California’s assault weapons ban, high-capacity magazine ban, age restrictions, and ammunition background checks are all at risk. Federal laws are also at risk, including those passed by this body last year. In courts across the country, we’re seeing confusion and activism in applying the new Bruen standards. States are being forced to reconsider every law as if it was written in 1791, when muzzle-loaded muskets and pistols were the only firearms available to the public.

Evidence shows that laws protect public safety while representing Second Amendment rights. I’m neither a lawyer or a historian, but what I can tell you after nearly 30 years in law enforcement is that if gun safety laws continue to be struck down, it will be harder for law enforcement to protect public safety, and it will make their jobs far more dangerous.

After nearly three decades in law enforcement, I can also say that we cannot incarcerate our way out of this problem. We tried that, and it didn’t work. While we all agree we need to enforce the law, we do not devote enough attention to the upstream source of
guns being trafficked into our communities. Guns do not grow on trees, and they do not magically appear on our streets.

In addition to my work at Brady, I’m also a high school teacher. My students worry about a million different things these days. Near the top of that list: Are they going to be shot on the way to school or while at their desks? As I watch over my students, I am constantly reminded of that 16-year-old kid who died in my arms, a kid who, today, could be in my class. He lost everything he was and everything he could’ve been. I look at my students, and I wonder if I will lose one of them.

Will one of them lose their future to senseless gun violence? Will my daughter? That’s a question that terrifies me every day, a question millions of parents ask themselves every day. Thoughts and prayers are not enough. Action is needed. Thank you for the time today, and I look forward to your questions.

[The prepared statement of Mr. Lindley appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. Lindley. We’ll start the questioning. I want to thank you, personally—27 years in law enforcement—and I want to thank all the men and women in law enforcement. We know that they are under close scrutiny and living lives which subject them to dangerous situations on a daily basis, to protect us, our neighborhoods, and our homes.

But let me ask you this, point blank. We’re in mourning in Chicago because 2 weeks ago today an officer responded to a domestic violence incident, came across a man with a gun, chased that man, who turned on him and killed him in a playground of a school in Chicago while the children around were cringing in fear. How often do domestic violence incidents—have you run into domestic violence incidents in your practice of law enforcement?

Mr. LINDLEY. Thank you for the question. Law enforcement is one of the most difficult jobs I think we have in this Nation. We ask a lot of our officers, day in and day out. And one of the most unpredictable situations that they’re called to deal with is domestic violence. They’re going into a charged, emotionally charged situation, not knowing what the basis of it is, into a situation that may have taken years to come about. Also, you look at the different type of weapons inside the house. You have firearms, you have bats, you have knives, you have frying pans. It is a very difficult situation, and lots of injuries to law enforcement and injuries to the public come about from domestic violence situations.

Chair DURBIN. So one of the witnesses here says, “Well, it’s okay. Rahimi—if you accept it, that that person would have a gun, they’ll probably break some other law that they can be prosecuted.” Does the gun—presence of a firearm in a domestic violence dispute make it more dangerous for the police?

Mr. LINDLEY. Absolutely. Firearms in the house when law enforcement is there in an emotionally charged situation—you know, unless the situation is completely controlled, which is difficult for law enforcement to do these days—makes it very dangerous for them.

Chair DURBIN. Professor Ruben, let’s follow what the Court has decided and see if you can help me understand it a little better. They’ve decided that they can’t find—in Rahimi, they’ve decided
they couldn't find an analogy to removing a firearm from a person who was under a domestic violence protective order. And so, as a consequence, they struck down the applicable law in that situation.

And yet, when it comes to the firearms themselves, they don't go back to 1791 and ask the obvious question, “What did the Founding Fathers have in mind when they used the word ‘arms’”? They seem to have expanded it to almost anything. I used the example before—at Highland Park, at a Fourth of July parade, with a man on the roof of a building firing off 83 rounds in 60 seconds, killing 7 people, injuring dozens of others. There wasn’t even a weapon imaginable in 1791 that could do that. How do they make that leap when it comes to arms, to include that type of an assault weapon?

Professor RUBEN. Thank you, Senator. So this is one of the challenges and the questions that comes up after Bruen, is how can we make sense of our historical gun laws in light of the vast changes, including gun technology and also in terms of our moral sensibilities? We had blinkered moral sensibilities when it came to gendered violence back in 1791. And one of the points that I flesh out a bit in my written testimony is that, if we’re going to be approaching what counts as an arm at a high level of generality and allow that to evolve with the times, then we certainly need to find ways to likewise allow our regulatory frameworks to evolve, as well, to deal with modern problems today.

Chair DURBIN. Ms. Glenn, you have a personal experience with this, which is chilling to think what you went through, as a victim of domestic violence. What do you think about the argument that someone with a gun in a domestic violence episode is likely to break some other law that they can be prosecuted for, and that’s good enough?

Ms. GLEN. Thank you so much for the question. It certainly is not good enough. Without understanding the dynamics of domestic violence and when there is a domestic violence situation in which an abuser has a firearm and the escalation that occurs—and if you don’t understand the dynamics of domestic violence—sometimes that’s all that’s present, is the domestic violence situation. Waiting for prosecution or charging in that particular instance is unreasonable. Protective orders are built to help the victim provide themselves with protection. Removing the firearm is also that part of ensuring that safety and that they can be safe.

Chair DURBIN. Thank you. Senator Graham.

Senator GRAHAM. Thank you. Ms. Swearer, let’s revisit—is it the Rahimi case? Is that the right name?

Ms. SWEARER. Yes, sir, I believe so.

Senator GRAHAM. Okay. Let’s see what is the most compelling thing to learn from that case. How many times was this gentleman involved with shooting at people?

Ms. SWEARER. I’m not sure, in total, but it seems like at least six or seven.

Senator GRAHAM. Okay. And he was released based on what charge? He was facing a charge and released?

Ms. SWEARER. The first time, he was facing at least one felony domestic violence charge and two others. I’m not sure whether they were misdemeanors or felonies under Texas law.
Senator GRAHAM. Okay. Is it pretty fair to say that this guy should not have been out on the streets?

Ms. SWEARER. Absolutely not. He was very clearly a danger to both specific individuals and the public at large.

Senator GRAHAM. Mr. Mangual, is this a common problem, where our criminal justice system has a revolving door when it comes to people who are exhibiting violent behavior?

Mr. MANGUAL. It most certainly is a common problem and one that is a longstanding problem, as well. I mean, one of the statistics I didn't get a chance to get to was that between 1990 and 2002, the Bureau of Justice Statistics reported that over a third of individuals convicted of violent felonies were either out on probation, parole, or pretrial release at the time of those offenses. As our criminal justice system has gotten softer, that problem's only gotten bigger.

Senator GRAHAM. So when you look at what America's facing, would you agree with me the best thing we could do as a nation is to make sure that our parole laws and our attitude toward violent criminals is changed so that they are not out hurting people? They stay in jail?

Mr. MANGUAL. I think that's exactly right. I mean, one of the biggest challenges that we currently face, as evidenced by the data on the role that repeat offenders play in serious gun violence, is that we are systematically failing to draw and enforce a line as to how much repeated criminal conduct we are willing to accept and tolerate.

Senator GRAHAM. Well, if your proposition is true, America would be responding in a certain way. Do you realize, Ms. Swearer, that from 1991 to 2019, the number of guns in America owned—number of weapons owned by Americans has doubled?

Ms. SWEARER. I am aware of that. Yes, Senator.

Senator GRAHAM. Are you aware of the fact that the number of concealed-carry permits have increased by sevenfold?

Ms. SWEARER. I know it has increased exponentially. I will take you at your word that it's roughly sevenfold.

Senator GRAHAM. Are you aware that, between 2019 and 2020, 58-percent increase in gun purchases by African Americans, 43-percent increase by Asians, 46 increase in purchases by Latino Americans, 40 percent of those purchases were made by first-time gun buyers? Are you aware that, from 2005 to 2020, a 77-percent increase in gun ownership by women and that from 2019 to 2020, a majority of people buying guns were women? Are you aware of all that?

Ms. SWEARER. Yes, Senator, I am.

Senator GRAHAM. Why do you think that's going on?

Ms. SWEARER. It's because there are a lot of Americans, specifically, as you mentioned, women and ethnic minorities, who, a lot of them, for the first time in their lives, beginning in the last couple of years, looked around at the state of reality in this country, with sort of widespread issues with policing, with——

Senator GRAHAM. Well, let's just stop there for a moment. Mr. Lindley, you've been a police officer. Thank you for your service. How's morale among police in America, generally speaking?
Mr. LINDLEY. Thank you for the question, Senator. I think overall, morale is decreasing.

Senator GRAHAM. Yes. And there are probably a lot of reasons for that, but it’s harder to get people into law enforcement now, and I’d like to work with people to try to change that. Mr. Ruben, do you agree with the Heller decision that interpreted the Second Amendment to be an individual right? Was that a good legal decision?

Professor RUBEN. Yes, sir.

Senator GRAHAM. You do?

Professor RUBEN. Yes.

Senator GRAHAM. Thank you. Ms. Glenn, your experience was terrible. Your husband, former husband, had been charged with armed robbery. Had he been convicted of armed robbery, or—I don’t know my—make sure I got——

Ms. GLENN. Yes, many years before the incident. Yes.

Senator GRAHAM [continuing]. Okay. And he had actually been charged with kidnapping you, too——

Ms. GLENN. Yes.

Senator GRAHAM [continuing]. Before the shooting?

Ms. GLENN. Months before the incident.

Senator GRAHAM. Yes. So, I guess, here’s my point. Senator Cornyn has shown the way to work on responsible gun ownership limitations. I don’t think there’s anything in this case that says common sense doesn’t prevail. But this Bruen case and Heller case are important, in my view. Mr. Chairman, it reinforces the idea that the Second Amendment is there for individuals and that individuals have a right to defend themselves in a responsible way even outside their home.

So what I would hope this Committee could do is end, to the extent possible, the revolving-door policies that allow people, time and time again, to come back out on the streets, hurt their fellow citizens. In this situation, I would just add, in conclusion, the reason so many people are buying guns is because they’ve lost faith in their government to protect them.

Chair DURBIN. Thank you, Senator Graham. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Thank you to the witnesses for being here. Professor Ruben, the history and tradition of factfinding in the American judicial system is that it’s done at the trial court level, and where the rare successful challenge to the very tough, “clearly erroneous” standard is made on appeal, then an ordinary way to resolve that is to send the case back to the district court for factfinding, where factfinding belongs.

I’ve had a hearing in my Courts Subcommittee on this Supreme Court’s recent penchant for appellate factfinding. Some of the prominent cases have been Shelby County, where they made the finding that nobody had anything to worry about from the freed legislatures, that conditions had changed, and then, of course, immediately you saw a case come up in which Federal judges said, “This is targeted with surgical precision at minority voters,” completely discrediting the spontaneous factfinding by the Court.

Citizens United was another one. They said, “Don’t worry about it. All the unlimited spending we’re going to unleash is going to be
independent of candidates, and it's going to be transparent." And a couple of billion dollars of dark money, nontransparent funding later, we know perfectly well that that factfinding was false. So this seems to be an increasing trend, and I noticed in the Bruen case there was a lot of factfinding done in the context of defining what the true history and tradition were.

A lot of historians took a look at that and said, "That is junk history. That is not real." It had not come up through any kind of an adversarial process. It was not tested in the different layers of review. It was just made up by the Supreme Court Justices. Could you talk a little bit about the dangers of appellate factfinding in terms of how it permits ambitious and activist courts to run a bit wild if they're not constrained any longer to facts as found through the traditional history and tradition of judicial factfinding in lower courts and through adversarial process?

Professor RUBEN. Thank you, Senator. So Bruen has transformed the way that litigation looks, transformed from before Bruen was decided, when a more conventional approach applied. Now, one of the things that we're seeing is that historians are getting retained by the parties. In fact, courts themselves are asking litigants whether or not they should retain their own independent historian, to help them parse the historical facts.

And one of the challenges that comes up, as you mention, is what happens on appeal, especially if a court on appeal is doing historical factfinding that subsequently is determined to be erroneous. Are lower courts then bound by that erroneous historical determination, when ordinarily there would be a route to appeal and challenge it? So this is transforming the way that litigation is looking.

Senator WHITEHOUSE. I think it needs to transform a good deal, because if you have an appellate decision that stands on what events have proven to be utterly false facts, and the appellate court hasn't gone back and cleaned up its clear error, then it becomes incumbent on the lower courts to take a look at that and see if it really makes sense, because Marbury v. Madison says that it's the job of the Supreme Court to decide what the law is. It has no particular expertise with respect to the facts. In fact, it's probably the worst part of Government to make decisions about the facts, given the constraints on briefing and so forth. So thank you for that observation.

The other thing that was notable about Bruen was that 12 NRA-funded amici showed up, and the funding disclosures at the Supreme Court have been a continuing source of frustration. The Judicial Conference is now looking at that, and I hope they'll be putting out a report fairly soon. But what is the danger if other parties and the public and the judges don't have a true and accurate description of who is really behind an amicus group that shows up in court, particular as regards to coordination of multiple amici?

Professor RUBEN. Senator, I think it's important to understand who is filing different briefs, just in terms of assessing whether or not there are any particular biases with the briefs that are getting filed.

Senator WHITEHOUSE. Motive matters, right? Thanks, Chairman.

Chair DURBIN. Thank you, Senator. Senator Grassley.
Senator GRASSLEY. Thank you, Mr. Chairman, and thanks to all the witnesses for being here to discuss this very important issue. I'm going to start with Mr. Mangual. Last year, I held a field hearing in Iowa for the Drug Caucus that I co-chair with Chairman Whitehouse. At that hearing, the Iowa Department of Public Safety commissioner said that 42 percent of the murders that occurred in Des Moines in the last 2 years had a tie to drug trafficking, so I'm interested in your view. On a national basis, how does drug trafficking factor into the increase that we've seen in violent crime?

Mr. MANGUAL. Well, I think drug enforcement certainly can play an important role in the provision of public safety, and one of the main reasons for that is that there's a substantial overlap between people involved in the drug trade and people who are driving the serious kinds of gun violence that we're here to talk about today. One of the statistics that always comes to mind on this point is a statistic out of the City of Baltimore, which in 2018 reported that, of the about 118 homicide suspects identified from the year 2017, 7 in 10 had at least one prior drug arrest in their criminal history.

If you look at the recidivism data at the national level, the Bureau of Justice Statistics often reports on longitudinal analyses, looking at the rate of recidivism for people who are incarcerated primarily for drug offenses: 75 percent of them will be rearrested for at least one nondrug offense, and more than a third will be re-arrested for a serious violent offense, specifically.

And so, if you talk to law enforcement agencies, I think what they'll tell you is that they view drug enforcement as a way to pretextually attack violent crime. Taking that tool off the table and minimizing it, as has been done through criminal justice policy-making over the years, I think can be significantly detrimental to our overall strategy to reducing gun violence.

Senator GRASSLEY. Yes. Last fall, the FBI released its 2021 crime statistics. Those statistics showed that the number of murders increased, from 2020 to 2021, by 4\%\textsuperscript{10} percent. That’s on top of the
29-percent increase, 2019 to 2020. So, do you, Mr. Mangual—that’s a steep increase in violent crime, but isn’t it true that the rates of violent crime have affected some communities more than others, and as an example, the African-American community?

Mr. MANGUAL. That’s exactly right. I mean, the homicide victimization rate for African-American males is about 10 times the rate for their white male counterparts. And, you know, in my home City of New York, the New York City Police Department has been keeping data on gun violence and gun violence victimization since at least 2008, in a systematic way, and every single year for which we have data, a minimum of 95 percent of all shooting victims in that city are either Black or Latino, and I can assure you that Blacks and Latinos do not constitute anywhere close to 95 percent of New York City’s population.

You know, just to really hit the point home on the geographic concentration point, which I think is really important to understand, in any given city in America, somewhere around 5 percent of street segments will see about 50 percent of all the violence. In my home City of New York, about 3½ percent of street segments see 50 percent of all violent crime. About 40 percent of street segments don’t see any violent crime whatsoever.

I mean, just to really bring the point home, with an example out of the City of Chicago, the 10 most dangerous neighborhoods in that city in 2019 had a collective homicide rate of 61 per 100,000. Collectively, the population of those neighborhoods was, on average, 95 percent Black and Hispanic. If you take the 28 safest communities in that city that same year, the homicide rate was less than 2 per 100,000.

So this is a problem that disproportionately affects some communities more than others, and we should keep that in mind. And it should also be a source of comfort to know that we don’t have to take a dragnet approach to enforcement to do the job well. We can target our approach because data tell us very clearly that a small number of individuals drive this problem.

Senator GRASSLEY. Mr. Chairman, could I ask a very short question of Ms. Swearer?

Chair DURBIN. Of course.

Senator GRASSLEY. Yes. Can you tell us what the fastest-growing group of gun owners in America is?

Ms. SWEARER. My understanding, Senator, is that is specifically Black women.

Senator GRASSLEY. Okay. Thank you, Mr. Chairman.

Chair DURBIN. Let me add, since we’re displaying our expertise on Chicago, that I know a little bit about that, and I would say poverty is an important overlay in this question, and it applies to Hispanic neighborhoods as well as Black neighborhoods. And I also think that if you’re looking at the general population in the City of Chicago, you’ll find that violent gun crime is now reaching beyond those areas into other neighborhoods because of social media and many other aspects. So there’s a lot more to the story than what you just said. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. In 2020, Hawaii had the lowest gun death rates and the third-lowest rate of gun ownership in the entire country. Prior to Bruen, Hawaii police depart-
ments had only issued four licenses to carry in the past two decades. Following the Court’s decision, however, police departments across all counties in Hawaii have begun issuing licenses. As of December 2022, Hawaii County has issued 89 concealed gun licenses, and Maui County has issued 18. Between 50,000 to 60,000 people are expected to apply for a concealed-carry permit in upcoming years.

State and local officials have expressed concerns that lax gun laws may lead to a rise in violent crime. Consequently, county police departments have implemented stronger requirements for applicants seeking licenses to carry. State and local legislators have also introduced gun safety measures, including an enacted law in Hawaii County designating sensitive places, such as churches, where firearms are prohibited. However, gun owners have stated their intent to challenge these gun legislations in court.

In September 2022, the National Association for Gun Rights, NAGR, filed a lawsuit against the State of Hawaii, seeking to overturn the State’s ban on assault pistols and large-capacity magazines. The NAGR is seeking to challenge the constitutionality of these laws under the Court’s new framework in *Bruen*. The organization had filed six other lawsuits against States and cities with assault-rifle or large-capacity magazine bans.

So a question for Mr. Lindley. Do you think that the concern over the thousands and thousands of applicants who will now apply for licenses in Hawaii—and that this could lead to a rise in violent crime? And is that a misplaced concern? Do you agree with the concern of law enforcements in Hawaii?

Mr. LINDLEY. I do agree with those concerns, Senator. If you just looked at more guns equals safety, there’s over 400 million firearms in the United States. If that was the case, we should be the safest country in the world. So more guns is not the answer to safety.

Senator HIRONO. I agree with you. And the statistics I pointed to in Hawaii, where we have some of the strictest gun safety laws—and there is a cause and effect as to the use of guns in Hawaii in violent situations.

Ms. Glenn, you have spent almost 30 years as an advocate for domestic violence victims and have testified today on the impact of *Bruen* on intimate partner violence. Just last month, the Fifth Circuit, in the first major case to apply *Bruen*, found that portion of the Violence Against Women Act that prohibited the possession of firearms by those subject to certain domestic violence restraining orders violated the Second Amendment. This kind of restriction was a commonsense kind of restriction on violent abusers. How will interpretations of *Bruen* like this one in the Fifth Circuit make it harder to protect victims and survivors of domestic violence?

Ms. GLENN. Thank you so much for the question. I think we go back to my written testimony, which is, there has to be some type of protection that is allowed before the violence escalates. So having a protection order that says that I can have a firearm removed from the situation so that I am safer is very, very critical.

Senator HIRONO. Well, I’d say under *Bruen* maybe there’s no historical basis for removal of a firearm in those kinds of circumstances. Professor Ruben, I really found it instructive that you said that this decision is transforming the way litigation is looking,
and historians are being retained in cases. Justice Barrett, in *Bruen*, observed that the flaw of a historical approach to the Second Amendment and in the interpretation of the Constitution is that originalism is far from scientific. I would agree with that. And sadly, though, she went ahead and agreed with the majority opinion in that case.

So I wanted to ask you, Professor Ruben. In the wake of *Bruen*, you examine New York’s proposed legislation to require gun owners to have express permission from property owners to carry guns onto their private property, including homes, restaurants, offices, and entertainment venues. Do you think a law like that would withstand a *Bruen* challenge?

Professor Ruben. So, Senator, that law is currently the subject of litigation, some adverse decisions currently on appeal. There’s a fundamental right to keep and bear arms, but it’s important to recognize that there’s also a fundamental right to private property, and there’s nothing in the Constitution that says that the right to keep and bear arms has to trump the private property rights of other people.

And so, one of the things that that law in New York does is it switches the default. Private property owners always have the ability to exclude people who are carrying a gun if they don’t want that person on there. All it does is it switches the default about who has to ask who about the private property owner’s preferences.

Senator Hirono. I applaud New York for their approach. And, by the way, you know, before *Heller*, which is a 2008 decision, there was no explicit, in my view, right for individuals to own guns and also to own whatever the guns they wanted. *Heller* is a 2008 decision. How did we get along with the Second Amendment before then, I say? Thank you, Mr. Chairman.

Chairman Durbin. Thank you, Senator Hirono. Senator Cornyn.

Senator Cornyn. Thank you, Mr. Chairman. And I appreciate a legal seminar as much as anybody, but what I’d like to see—whether we can get some agreement on some basic principles. First of all, Ms. Swearer, do you believe a law-abiding citizen is a threat to public safety because they exercise their Second Amendment rights to keep and bear arms?

Ms. Swearer. Statistically, no, Senator. Law-abiding citizens are not a threat to public safety. They are overwhelmingly not responsible as a driving force behind criminal gun violence.

Senator Cornyn. Well, one area that we’re in this very—what can be a controversial topic, where I think we’ve been able to find some consensus is on the importance of background checks to make sure that people who are prohibited under existing law from purchasing or possessing firearms—mainly, people with criminal convictions, people with mental health commitments, and the like—this has been one area where we have been able to find some consensus. A couple of years ago, we passed a bill called Fix NICS, which was after the Sutherland Springs shooting where the Air Force had failed to upload criminal convictions of the shooter into the NICS background check system.

Several of us went recently to Clarksburg, West Virginia, to see how the FBI is conducting the background check system, and it is pretty impressive. More recently, as the Chairman mentioned or
others mentioned, we were able to find some common ground on the Bipartisan Safer Communities Act, again, in an area where it's hard to find much common ground.

But I just want to update my colleagues on exactly what has happened so far with this. For example, the enhanced background check for gun purchasers between the age of 18 and 21—unfortunately, it's a cohort of individuals who are disproportionately impacted by this profile or disproportionately part of a profile that characterizes shooters from Adam Lanza at Sandy Hook through the shooter in Uvalde, more recently. Using the enhanced background check authority that Congress passed in the Bipartisan Safer Communities Act, so far the background check system has identified 101 potential transactions where juvenile records, which are now subject to the background check system, have disclosed individuals that are either convicted felons, drug users, or those with mental health adjudications who otherwise, had they been an adult previous to that statute, would’ve already been prohibited from purchasing a firearm.

At the same time, 98.5 percent—98.5 percent—of the National Instant Criminal Background Check transactions are unaffected by the Bipartisan Safer Communities Act. So it was focused on that cohort, that age cohort that was disproportionately represented in some of the mass shootings that we’ve seen around the country, and it seems to be working. Likewise, some of the additional penalties that we included for straw purchasing of firearms and trafficking in firearms has led to 30 indictments, so far, just in the brief few months it's been in effect—indictments of gang members, cartel members, and other violent criminals.

Mr. Mangual, let me ask you—I thought you made a really important point about how—what parts of the communities are affected by gun violence and others that are not as dramatically and how communities of color and where there’s lower income levels are disproportionately affected. You're familiar, I'm sure, with Project Safe Neighborhoods, are you not?

Mr. MANGUAL. No, I don’t think I am.

Senator CORNYN. Okay. Well, Project Safe Neighborhoods is a targeted effort, which you seemed to allude to there, where you go after targeted enforcement of convicted felons and people who cannot legally possess firearms, and you prosecute those cases using the mandatory minimum standards under Federal law, to keep those individuals off the street. Is that a sort of targeted effort that you think might address what you identified, in terms of where this is a big problem and where it's not as big or as urgent a problem?

Mr. MANGUAL. I do. The kind of prohibited possessor laws that you’re talking about that carry those significant sentences I think could be a really important tool in a targeted approach to addressing the gun violence problem.

Chair DURBIN. Thank you, Senator Cornyn. Senator Welch.

Senator WELCH. Thank you, Mr. Chairman. I thank the witnesses. You know, this question of gun violence is really being affected by changes in analytic approach by the Supreme Court. The changes in the analytic approach by the Supreme Court, in my view, has resulted in a significant threat to the legislative preroga-
tives in an imbalance in the checks and balances that are so essential to the well-being of our democracy.

The historical approach that the Supreme Court is taking, to many—Senator Whitehouse, of course, is the leader of the Subcommittee, has been a leader on this—in my mind is creating the significant not potential but the significant reality of the Court essentially bootstrapping opinions to get to the result that it wants and interfering in the legislative prerogatives and responsibilities that a legislature has to protect the well-being of its citizens. This historical approach I want to ask you about, Professor Ruben—you've been talking about it, but—is leading to some of these anomalies where things that the lower courts are deciding in response to this seem to me to make no sense whatsoever.

I'll just give a specific example. In *United States v. Price*, a district court held that a Federal law prohibiting possession of a firearm with an altered or obliterated or removed serial number—something essential in law enforcement investigation—was unconstitutional. And the reason was, we didn't have serial numbers that were in common use in 1791. And the way I react to that is, the court is the ultimate legislative body, when it has the capacity to essentially waive away the rights of the people of this country through their elected representatives to address challenges that it faces as a society. Could you comment on that?

Professor RUBEN. Sure. Thank you. So you talked about legislative prerogatives, and indeed, during this hearing, I've heard a lot of comments about policies that, in some people's opinions, work or don't work. And traditionally, conventionally, that was what legislative bodies focused on. And one of the problems and concerns with the *Bruen* opinion is that the *Bruen* opinion said that, in fact, it's not modern legislative priorities that are most important for assessing the constitutionality of modern laws addressing modern problems. It's the legislative priorities of legislative bodies over 200 years ago.

Now, this still shouldn't cause all gun laws to be struck down. The Court set forth some standards, but they're simply not specified enough to provide a lot of guidance, and so one of the things that we're seeing in the lower courts, including the *Price* case and others, is that courts are emphasizing or de-emphasizing different historical facts, they're construing the history differently, and then they're reaching different results in the same case.

So with respect to altered serial numbers, for instance, one of the things that the Supreme Court said is that modern courts have to compare modern and historical laws in light of how and why modern laws impact armed self-defense. Well, it's unclear how a law that simply restricts somebody from removing a serial number has any impact on that person's ability to engage in armed self-defense. So there are differences of opinions there, and the opinions are coming out and pointing in different ways, different directions, about what the Second Amendment means.

Senator WELCH. Let me just ask Mr. Lindley. You work in law enforcement. How does it affect you? There's discussion about law-abiding people aren't the problem. We all agree with that. It makes sense. But you deal with a lot of other people who aren't so law abiding. And also, law-abiding people who have a temper and have
a gun and have a domestic partner sometimes, in that moment, are not so law abiding. Can you comment?

Mr. LINDLEY. So we’ve talked a lot about individuals and all the arrests that they’ve had. One of the things that we have here in the United States is, you are innocent until proven guilty. You can have a lot of arrests. But individuals with mental health problems, convicted felons, people with a history of other types of violence, whether it’s a misdemeanor—that those individuals with firearms is a— it’s a poisonous cocktail, not only to the community but to law enforcement, and they’re very difficult and dangerous to deal with.

Senator WELCH. My time is up. Thank you. I yield back, Mr. Chairman.

Chair DURBIN. Thank you, Senator Welch. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. I do think it’s important in this conversation to remember that we’re not talking about legislative priorities from 200 years ago. We’re talking about a provision of the Constitution. It is different than a legislative priority. When we adopt something into the Constitution, we’re making a law that’s meant to stand the test of time. Unless or until that amendment is removed or altered, it stands, and it’s the job of the Court to interpret what that means. And that’s exactly what happened here.

I do think it is important, and I agree with Senator Welch that it’s very important that we always focus on the rights of the law abiding and keep those in mind whenever we consider legislation or legislative strategies here. And one of the worst things you can do, particularly where a constitutional right is involved, but really in any case where you’re dealing with something that involves public safety is, what are we doing that might make it more difficult for the law abiding to defend and protect themselves? What is this legislation going to do to make us safer or less safe?

It’s important to remember a few dynamics that are well known, with respect to the study of criminal offenses, and with respect to advice that we’ve received from seasoned law enforcement officers. Just last week, DC Police Chief Robert Contee remarked that, quote, “If we really want to see homicides go down, keep bad guys with guns in jail.” Then he went on to say, “Right now, the average homicide suspect has been arrested 11 times prior to them committing a homicide.” That’s a problem. Mr. Manguel, do you want to respond to that? This—do you share this view, that if we want to keep homicides down, we have to arrest, convict, and detain those who are violent?

Mr. MANGUAL. I do share that view, especially with respect to the last part of that, you know, sort of plan, the detainment part. I mean, the failure to incapacitate repeat offenders is at the core of America’s gun violence problem and has been for a long time. If you look at the statistics on people who are charged with homicides or shootings, you will inevitably see long criminal histories that involve multiple arrests, multiple convictions, and often active criminal justice statuses.

Until that changes, we are going to continue to deal with this problem, especially given the fact that over the last 10 years we have exacerbated it by enacting all kinds of reform efforts that have, again, lowered the transaction costs of criminal offending in
important ways, whether we’re talking about bail reforms, discovery reforms, sentencing reforms, decriminalization efforts, the electoral success of the progressive prosecutor movement. All of these things have come together to make it less likely that when individuals come before a court of law after being charged with a gun crime or some other kind of serious offense, it becomes less likely that they will be prosecuted and incarcerated and, if prosecuted and incarcerated, less likely that they’ll be there for a significant period of time.

Senator LEE. And as a case in point, just recently the District of Columbia Council voted to reduce criminal penalties for a lot of these same offenses, for the same bad guys committing violent crimes with guns. And so, it defies reason and logic to say that that is not a problem, when we know that is the source of the problem. It’s also important for us to remember how the Bruen decision reached its conclusion and the constitutional reasoning on which it was based.

I find especially helpful the penultimate paragraph in the majority opinion, which reads as follows, quote, “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’ We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or,” the free exercise clause or protections with regard to “the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant’s right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.”

Ms. Swearer, do you agree with that assessment, both as a matter of constitutional reasoning and as a matter of logic, when dealing with crime?

Ms. SWEARER. Senator, I absolutely do. The Second Amendment, especially in what we saw with New York’s framework, was fundamentally treated and held to a different standard. You essentially had millions of residents who were told, regardless of what the text says, you might have a right to keep, but you don’t have a right to bear arms the second you leave your home—which renders toothless that unalienable natural right to self-defense on which the Second Amendment is based. And so, certainly for those residents in New York and the seven other States with those types of public carry frameworks, their rights were being treated and held to a second-class standard.

Senator LEE. I see my time has expired. As I wrap this up, I just want to emphasize, again, that the Second Amendment isn’t something new. Yes, it is old. It’s been in place since 1791. That’s a long time ago. That doesn’t make it irrelevant to our time. In fact, as we’ve seen crime increase, I don’t think it’s ever been more relevant, particularly when you look at those who are victimized, those who are at a competitive disadvantage with regard to size, strength, speed, wealth, assets, where they live in proximity to a police station, and the availability of police officers who could come, either sooner or later, to their home.
This is, moreover, something that had its roots centuries before the American Revolution. These were well understood terms. This is not an exaggeration. This is not a modern-day rewriting of a piece of the Constitution. This is a correct application and one that is right. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Lee. Next up is Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and thank you—I had other hearings and things going on, but I caught up on your testimony, and I just want to thank you all for being here in this important hearing and thank the Chair for calling it. One of my focuses on guns has been on domestic violence. For too long, domestic abuse was considered a family affair, and they would say what happened in a house didn’t have to come into the courthouse.

We all know times have changed with the passage of the domestic violence bill, the reauthorization of it many times. But we also know that when a gun is present in the home, women in abusive situations are five times more likely to be killed, which is why, as part of the gun safety bill, on a bipartisan basis, we put in a version of the bill that I have been working on with Senator Hirono and others for years to make sure that people that are convicted of domestic abuse can’t go out and buy a gun the next day.

As a survivor yourself, Ms. Glenn, can you first say more about the dangerous connection between domestic violence and gun violence? And then I just—you could add onto that just your concern about the Bruen decision and what that will mean. Go ahead.

Ms. GLENN. Thank you so much for the question. The concern, of course, is that—what I stated earlier, which is that victims will feel less safe because there is the idea that, at minimum, when and if I felt like I could do something about it, now I can’t. I cannot get the gun removed. Second, I would say that we are also talking about abusive persons feeling a bit more freedom to take that few seconds to pull the trigger on a gun when there’s domestic violence present by them.

What we’re seeing is widespread confusion, widespread concern about this particular ruling and what it will mean to the future.

Senator KLOBUCHAR. Mm-mm.

Ms. GLENN. As we all know, domestic violence victims very seldom, if at all, call law enforcement, simply because of the already present danger, particularly when there is a firearm in the home.

Senator KLOBUCHAR. Mm-mm.

Ms. GLENN. The concern is really quite marked right now, what this will mean outside of that Fifth—

Senator KLOBUCHAR. Thank you.

Ms. GLENN [continuing]. Circuit.

Senator KLOBUCHAR. Okay. And I know, Mr. Lindley, you mentioned this in your testimony. Do you want to add anything?

Mr. LINDLEY. Thank you for the question. With domestic violence and firearms, it’s a lethal cocktail. We already stated the statistics that, you know, women are five times more likely to be killed when there’s a firearm in the home with domestic violence. With that, there’s also a danger toward law enforcement and just the greater community. So we need to really look at protecting those domestic
violence restraining orders, in order to ensure that women or other victims are protected and we remove those firearms from an already volatile situation.

Senator KLOBUCHAR. Okay. And I know you also are expert on this. So my State has passed a number of commonsense gun safety laws to prevent convicted felons, fugitives from justice, and convicted stalkers and domestic abusers from getting a gun. And we also have this very strong tradition of hunting. It is a big part of our life, with legal gun owners and people who are law abiding, but yet we’ve been able to differentiate those that shouldn’t have a gun, who have broken the law, and those that have not. And so, could you talk about how the Bruen decision complicates efforts by State and local governments to protect public safety?

Mr. LINDLEY. Thank you. So California has a program called the Armed and Prohibited Persons System, which identifies individuals who at one time legally purchased a firearm but, subsequent to that purchase, became prohibited due to a mental health issue, due to the restraining order, or some type of act of violence. That has been a very successful program, identifying people who no longer have the ability to possess firearms because of an act that they’ve done or mental health issue. It doesn’t deal with individuals who are still law abiding.

So with those things combined, if you look at Bruen—and, again, I’m not an attorney, I’m looking at this from a law enforcement perspective—that could muddy the waters with who might be having their restraining orders removed because of some Act going back to 1791. Things were far different in 1791 than they are today.

Senator KLOBUCHAR. Okay. My very last question. Professor Ruben, in your dissent in the Bruen case—in his dissent, you didn’t have a dissent. You probably were thinking one. In the dissent in the Bruen case, which was—Justice Breyer was joined by Justices Kagan and Sotomayor. He asked this question. He asked, “Will the Court’s approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?” Based on the cases that have recently applied Bruen, how would you answer Justice Breyer’s question?

Professor RUBEN. History does not speak with one voice when it comes to the tradition of firearms regulation. And one of the big risks of Bruen that we are seeing right now, in the way that lower courts are addressing constitutional questions after that opinion came down last June, is that courts are picking and choosing different historical laws to emphasize, they’re construing them differently, they’re reading history at different levels of generality, and they’re pointing in opposite directions about what the Constitution means. So without more clarification about what—how exactly to do the Bruen test, there is a real risk that opinions will, cloaked in history, will actually be subjective.

Senator KLOBUCHAR. All right. Well, I will ask the rest of my follow-up questions, many on the “boyfriend loophole” bills and laws, implications of these cases on that, but I will do that on the record, because I know my colleagues are here ready to ask. So, thank you.

Chair DURBIN. Thanks, Senator Klobuchar. Senator Blackburn.
Senator Blackburn. Thank you, Mr. Chairman. We appreciate so much that you all are here. It's an important conversation to have and we are grateful for your testimony. You know, the Chairman said he just couldn't square why some people would purchase guns or have guns. What I can't square is why we have prosecutors and judges who are letting criminals back out on the streets and not holding people who have committed crimes. And that's letting people that shouldn't have a gun get a gun. So let me ask—Mr. Lindley, let me start with you. Do you know who Jack Wilson is?

Mr. Lindley. Actually, I do not.

Senator Blackburn. Okay, you don't? Elisjsha Dicken?

Mr. Lindley. I'm not really a name person, so, no.

Senator Blackburn. Okay. Well, let me tell you, these are both good Samaritans that exercised their right to carry a firearm and, as a result, were able to intervene during a mass shooting, one in Texas, one in Indiana, and they saved untold lives. These are the law-abiding citizens that we want to be carrying guns and whose right to do so is protected by the Second Amendment. What about Tyree Reynolds? Do you know that name? Christian Wingfield. Do you know that name?

Mr. Lindley. They're familiar to me, but not in detail.

Senator Blackburn. Not in detail. Well, they should be. These are criminals who committed violent crimes using firearms, and then they were released back to their communities as a result of the radical left’s soft-on-crime policies and the Soros-backed bail reform. So they got out. They went on to participate in shootings. One—one of these individuals left a child dead.

So this is the disparity. It is outrageous, absolutely outrageous, instead of prosecuting violent criminals who are committing these crimes, that many on the left are focused on criminalizing gun ownership for law-abiding citizens. Violent crime is raging across this country. We hear about it in communities. Every year I visit with each of our 95 counties in the State of Tennessee. I visit with law enforcement in those counties. And what we hear is, with gangs proliferating, with drugs flooding this country, because of the cartels, because of that open border, crime is on the rise.

And there seems to be a penchant, though, from my colleagues across the aisle, to restrict self-defense options. Senator Graham talked about this at the outset. This is a right. The Second Amendment is a right. Senator Lee just mentioned it's the only right that you've got to go talk to a local official and get a license in order to exercise that right.

But we have plenty of people that are alive today because Jack Wilson and Elisjsha Dicken chose to exercise that right and, in exercising that right, they saved a lot of lives during a time with a mass shooting event. And we ought not to have people that try to restrict self-defense options for good Samaritans. They should be spending their time trying to get violent criminals off the street.

Ms. Swearer, I'd like to come to you for a moment. I led an amicus brief last month to support the lawsuit challenging ATF’s pistol brace rule. This imposes potential criminal liability on millions of Americans for exercising their Second Amendment rights. The ATF claims that this rule is necessary because arm braces transform a pistol into a short-barreled rifle.
Now, when I’m back at home in Tennessee and I’m talking with a lot of our veterans and our disabled combat veterans, they talk to me about why they rely on these pistol braces to be able to operate a firearm, to operate that gun. So can you explain how our disabled combat veterans use pistol braces and the devastating impact that the ATF rule would have on their ability to exercise their Second Amendment rights?

Ms. SWEARER. Senator, thank you for that question. Pistol braces work in such a way—so if you understand a handgun, which, generally speaking, you can hold with one hand, a lot of these disabled veterans cannot use that second hand, for example, as an additional stabilizer. They have trouble using that with one hand. The way that the pistol brace works is that it extends, a lot of them, down the arm and either allow the person with that brace to brace it against their inner arm or to even strap it into their forearm to give them additional stability when defending themselves.

Senator BLACKBURN. So it’s a safety mechanism?

Ms. SWEARER. Correct. Yes.

Senator BLACKBURN. It stabilizes the handgun?

Ms. SWEARER. Correct. And, to the extent that someone is not disabled, they would have a plethora of other options. Again, whether this is a criminal, for example, they don’t need to rely on a stable brace. They can just use a handgun or, for example, use a rifle. This exclusively is something that is beneficial to law-abiding but disabled citizens. Yes, it might be used by people who are not disabled, but that is primarily a benefit to them, while, at the same time, again, would-be criminals have a plethora of alternatives to accomplish their criminal goals.

Senator BLACKBURN. Thank you. Thank you, Mr. Chairman.

Senator PADILLA [presiding]. Thank you, Senator Blackburn.

I want to thank Chair Durbin and Ranking Member Graham for holding this hearing. There’s no denying that we have a gun violence epidemic in the United States of America. When gun violence becomes the leading cause of death in America or yet another small town becomes a household name across the country because of another tragedy, we have a moral obligation to act.

Just yesterday, I joined President Biden in Monterey Park, California, to meet with a community that’s still grieving from a mass shooting that took the lives of 11 people at a dance studio on the eve of Lunar New Year. I was pleased to see President Biden announce his Executive actions that will make our communities safer and will save lives, but I think we all acknowledge, including the President, that these Executive actions to address gun violence do not absolve us of our duty as legislators.

Now, last Congress, this Committee held 11 hearings on commonsense steps to reduce gun violence, and we know that the overwhelming public support these measures have. But as we gather here today, just after America surpassed 100 mass shootings in this calendar year—that’s 100 tragedies by the first week of March—and Americans are watching from home, asking, “When will Congress step up and do something?” So I’m committed to finding a path forward. I look forward to working with whoever is willing, on the other side of the aisle, to end the epidemic of gun violence in our country.
Now, my first question is for Mr. Lindley. As a program manager for Brady’s Combating Crime Guns Initiative and as a former law enforcement officer, you’ve spent a good part of your career combating gun violence. The Brady Handgun Violence Prevention Act created a system requiring background checks for gun purchases from licensed dealers. And yesterday President Biden announced a new Executive order directing the Attorney General to ensure that gun dealers are following existing laws concerning background checks, highlighting the role gun dealers have in limiting the proliferation of guns in our communities. Are you concerned that the *Bruen* decision will lead to looser gun laws, and in particular surrounding the registration of firearms, and then undermine our efforts to improve safety?

Mr. Lindley. Thank you for the question, Senator. Absolutely. Again, I’m not an attorney, so I can’t see the future when it comes to legal issues.

Senator Padilla. That’s okay. I’m not one, either.

Mr. Lindley. But if you look at some of the things that have been put into place, especially with the Brady background check process, it didn’t go far enough, back in the 1990s, so you have to look at universal background checks, something that California has put into place and has been very successful with. You also look at limiting, if not, you know, outlawing, new purchases of assault weapons and high-capacity magazines—again, something that California has put in and has been successful for years.

Senator Padilla. Thank you. And I don’t mean to make light of the fact that you’re not an attorney, nor am I. Trust me, we hear from a lot of attorneys in this Committee. There’s a lot of attorneys on the Committee. But I do want to uplift your perspective, with your law enforcement experience, to this conversation.

Now, as a former law enforcement officer, you’ve experienced the epidemic of gun violence firsthand, and I think you’d agree that the Monterey Park shooting was simply a high-profile example of the epidemic that we have in this country. I mean, in a span of 8 days surrounding that one incident, California experienced at least two more. In your opinion, what role does the availability of large-capacity ammunition magazines and semiautomatic assault weapons play in the gun violence plaguing our Nation?

Mr. Lindley. Again, after almost, you know, 30 years in law enforcement, seeing far too many victims, far too many mass shootings—and when you look at the lethality of semiautomatic weapons, especially assault weapons, coupled with the high-capacity magazines, it makes it very difficult for the victimology, if you look at how many people can be shot in that timeframe, with a 30-round magazine as compared to a 10-round magazine. And we’ve seen instances here in California that an individual who went in, did a mass shooting, but had a lower-capacity magazine had far fewer victims, but individuals usually have to wait until the person reloads until they engage in trying to disarm the individual. A lot of different victims can take place between 10 rounds and 30 rounds or, let’s say in Las Vegas, 50 or 100 rounds.

Senator Padilla. Thank you very much. I’d love to have follow-up questions here, but at this point I’ll turn it over to Senator Blumenthal for his questions.
Senator BLUMENTHAL. Thank you, thanks very much, Senator Padilla. Thank you all for being here. Thank you to the advocates who have joined us today. And I want to thank Senator Padilla and other Members of the Committee for their steadfast support of measures that will stop that epidemic of gun violence, these measures made vastly more difficult by the Supreme Court’s decision in Bruen in ways that we have no way of knowing at this point, because Bruen remains an inchoate and deeply frightening potential obstacle to commonsense measures.

I could talk about a great many of them, but I want to focus on safe storage laws, known in Connecticut as Ethan’s Law. Our law is named after a young man who was killed when he was accidentally shot by an unsecured firearm. Ethan Song was a teenager at the time, and the firearm had been stored in a Tupperware box in a closet alongside the ammunition and keys to the gun lock. Ethan’s Law passed in Connecticut, but we know across the country 4.6 million minors live in households with at least one loaded and unlocked gun. An estimated 54 percent of gun owners don’t lock all of their guns securely.

Ethan’s Law simply requires that guns be safely stored. Doesn’t take away a single gun, doesn’t look at who owns the gun, doesn’t provide any ban on any type of gun. It simply says if you have a gun, you should safely store that gun. So I would like to ask Professor Ruben, based on the Bruen decision, whether that kind of law would be constitutional under the Court’s apparent reasoning that there has to be some historical analogue on which any kind of law is based under the Second Amendment.

Professor RUBEN. Thank you, Senator. So as you mentioned, there’s a lot of uncertainty right now about what Bruen means and how it will apply to specific gun laws, including that one. Before Bruen, safe storage laws fared very well in the courts. And after Bruen, the question will be, first, whether or not laws about storage fall within the plain text of the Second Amendment. That’s an open question.

And then, the second question that will be asked is whether or not they have historical analogues, and it’s a challenging one. It’s a good example of the challenges that courts have now, because back in the framing era, the guns were largely muzzle-loaded black-powder guns that were not kept loaded or carried loaded because of the risk of misfire. There were laws about storage, back then. For instance, there were laws in the City of Boston and other places about storing gunpowder separate from the firearms, but those were because there was a risk of fires.

It was a different time, with different problems, and the policymakers back then addressed the problems that existed. Today, the problems, as you mentioned, are different than the problems back then, and a lot will depend on how flexibly courts look to historical laws like the Boston safe storage law and how they relate them to today. And it’s very much an open question, but one thing is for sure, that the Court did say that a lot of regulation is still permissible under the Bruen standard.

Senator BLUMENTHAL. I think your point is very important, that an analogue means exactly that. That it doesn’t have to be exactly the same, and the laws, for example, that you’ve cited in Boston,
requiring safe storage of some of the materials used in firearms or firing weapons, perhaps provide that kind of analogue. And today the risks may be different.

In fact, gun deaths have recently surpassed any other kinds of deaths affecting children. Gun violence is the most common cause of child death in the United States today. Every day, an estimated eight children, teens are killed, unintentionally injured or killed due to an unsafely stored firearm. So the risk may be different, but the analogue is the same insofar as it says risk can be taken into account in requiring safe storage.

Professor Ruben. And that's absolutely correct, in terms of how courts are going to have to apply Bruen in light of changed circumstances. And one of the problems that I've seen in opinions that have come out after the Bruen decision is that courts, in effect, are looking for dead ringers. A lot of courts are sidestepping the analogical exercise altogether and just looking for dead ringers. Well, that's not how analogical reasoning works, and, in fact, historical laws are going to have to be viewed at a relative high level of generality, flexibly, in order to accommodate the reality of change over time.

Senator Blumenthal. Well, thank you very much. Thanks, Mr. Chairman, for having this hearing. I'm going to continue to advocate Ethan's Law at the Federal level and other measures that I've introduced here, trying to encourage the courts to interpret Bruen expansively, because it really is a matter of life and death. And I commend President Biden for taking the action he did yesterday. Thanks.

Chair Durbin [presiding]. Thanks, Senator Blumenthal. I want to apologize, personally and for the Committee. Our coming and going has a lot to do with things beyond our control. One of them is a roll call vote on the floor, so Members have to make the roll call and try to make this Committee hearing and others at the same time. It is not a display of disrespect. It's the reality of our frantic lives here when we're in session. But your testimony has been very important and very valuable.

Professor Ruben, I was just trying to think, if we use the same standard in Bruen of historical analogue—we have a hearing coming up on social media and the internet. I am trying to imagine how we would do such a thing, in light of the First Amendment's speech and press, and what we would be guided by. What—what really was the state of social media in 1791 or in 1868? I think it's ridiculous on its face. And you wonder why the Court, particularly Justice Thomas, who has his own peculiar view of the Constitution—wonder why the Court is buying it, in this instance. Do you know what the end goal was, the real reason—not the good reason, historical analogue, but the real reason?

Professor Ruben. I don't know about the intentions of Justices, obviously. One thing that happened before Bruen was that the courts were applying doctrine pulled from First Amendment cases. Heller cited First Amendment jurisprudence repeatedly, and in the First Amendment context, we do not solely decide cases on the basis of history alone. Rather, history is one input, but so are contemporary costs and benefits.
So, to your point about social media or other First Amendment issues, courts—the Supreme Court has said, for instance, that child pornography is not protected expression under the First Amendment. And in arriving at that decision, they were not looking for analogues in the Founding generation. This is a unique test that has been put forward for the Second Amendment.

Chair DURBIN. Senator Lee talked about the constitutional language standing the test of time. We might engage in an exchange as to whether or not the original language of the Constitution stood the test of time on the issue of women voting, on the issue of slavery, on the issue of property land-owning males being primarily the voting populace at the time. There are a number of things in the Constitution which were flawed, some corrected by constitutional amendment and some by court ruling. Is that not the case?

Professor RUBEN. That’s true, and the Supreme Court in *Bruen* said that the Second Amendment is to withstand the test of time and change over time. And the question right now is how to do the *Bruen* analogical exercise in a way that will respect the reality of the fact that things were very different back in the 1790s than they are today. A lot of the problems that we have with respect to firearms and weapons today would’ve been unimaginable at the Founding, so of course they weren’t legislating on those issues. And, yes, the task of courts and litigants today is to draw analogies between that time and now.

Chair DURBIN. And I wonder how our Founding Fathers would’ve reflected on a chilling milestone as we surpassed 100 mass shootings a little over a week ago. That’s more than one a day. We ended last year with 647 mass shootings, which means four people were shot or killed in an incident. Six hundred, forty-seven last year, almost 2 a day, and more than 44,000 people, overall, killed by gunfire. It appears the proliferation of weapons in America has not brought peace to our streets but just the opposite. And that’s what I’ve witnessed many times over.

So I thank you all for being here today, and I thank you for your testimony. The hearing record will remain open for a week for statements and questions. I thank you for participating, and the hearing stands adjourned.

[Whereupon, at 12:04 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]
APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List
Hearing before the
Senate Committee on the Judiciary

“Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen”

Wednesday, March 15, 2023
Hart Senate Office Building, Room 216
10:00 a.m.

Ruth M. Glenn, MPA
President of Public Affairs
National Coalition Against Domestic Violence (NCADV)/National Domestic Violence Hotline (NDVH)
Denver, CO

Eric Ruben
Assistant Professor of Law
SMU Dedman School of Law
Dallas, TX

Stephen Lindey
Program Manager, Combating Crime Guns Initiative
Brady
Los Angeles, CA

Amy Swearer
Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies
Heritage Foundation
Washington, D.C.

Rafael Mangual
Nick O’Haller Fellow and Head of Research for the Policing and Public Safety Initiative
Manhattan Institute
New York, NY
Statement on Behalf of Ruth M. Glenn and the National Coalition Against Domestic Violence/The National Domestic Violence Hotline

Submitted for the hearing on

Protecting Public Safety After New York State Rifle and Pistol Association v. Bruen

Senate Judiciary Committee

March 15, 2023

My name is Ruth M. Glenn, and I am the President of Public Affairs at the National Coalition Against Domestic Violence (NCADV), which is a project of the National Domestic Violence Hotline (The Hotline). Prior to NCADV’s merger with The Hotline, I served as the President & CEO of NCADV for more than eight years. I am also a survivor. In my testimony, I am speaking on behalf of NCADV, of The Hotline, and on my own behalf. I am also speaking on behalf of the millions of people¹ who experience intimate partner violence every year in the United States. Other witnesses will discuss the legal merits of Bruen. I am here to tell you about its impact on real people.

The National Coalition Against Domestic Violence and the National Domestic Violence Hotline

The National Coalition Against Domestic Violence is America’s oldest national grassroots domestic violence organization, amplifying the voices of victims, survivors, and advocates in our nation’s capital. Our mission is to lead, mobilize, and raise our voices to support efforts that demand a change of conditions that lead to domestic violence such as patriarchy, privilege, racism, sexism, and classism. We are dedicated to supporting survivors and holding offenders accountable and supporting advocates. NCADV envisions a national culture in which we are all safe, empowered, and free from domestic violence.

In October of 2022, NCADV merged with the National Domestic Violence Hotline to create Project Opal. The National Domestic Violence Hotline was created as part of the original
Violence Against Women Act. The Hotline answers the call to support and shift power back to those affected by relationship abuse. 24 hours a day, seven days a week, 365 days a year, the National Domestic Violence Hotline provides essential tools and support to help survivors of domestic violence so they can live their lives free of abuse. The Hotline envisions a world where all relationships are positive, healthy, and free from violence.

The intersection between intimate partner violence and firearms
At NCADV, we define ‘intimate partner violence’ (used interchangeably with ‘domestic violence’) as the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, psychological violence, and emotional abuse. The frequency and severity of domestic violence can vary dramatically; however, the one constant component of domestic violence is one partner’s consistent efforts to maintain power and control over the other. According to the Centers for Disease Control, approximately 40% of women and 25% of men in the United States experience physical violence, contact sexual violence, or stalking in their lifetimes with intimate partner violence-related impacts.² Intimate partner violence-related impacts include being injured, requiring medical care, needing law enforcement help, requiring legal services or other victim services, experiencing PTSD, missing work, feeling fearful, and being worried about their safety.³

Abusive partners often use firearms as a tool with which to exert power and coercive control. They threaten to kill their victims, their victims’ children, family members, friends, pets, co-workers, strangers, and themselves. An estimated 13.6% of women and 5.9% of men in America today have been threatened by an intimate partner with a firearm.⁴ Of women threatened by a firearm, 43% have been shot, pistol whipped, sexually assaulted, or otherwise physically injured with a firearm.⁵ A 2014 survey of contacts to the Hotline found that, of respondents whose abusive partners had access to firearms, 10% said the abusive partner had fired a gun during an argument, and 67% said they believed the abusive partner was capable of killing them.⁶ In 2022, 21,225 contacts to The Hotline reported firearms were used in abuse, a 22.2% increase over 2021.

Far too often, abusive partners make good on their threats to murder their intimate partners. When an abusive intimate partner has access to a firearm, the risk of intimate partner homicide increases at least five-fold⁷; one study puts the increased risk at 1,000%.⁸ When an abusive partner has used a firearm in the past, the risk of homicide increases more than forty-one-fold.⁹

Most women who are murdered are killed by someone they know, usually by intimate partners, and most intimate partner homicides are committed using firearms.¹⁰ According to calculations based on the FBI’s Uniform Crime Report, a person is shot and killed by an intimate partner on average at least approximately every 7 hours,¹¹ although due to data limitations,¹² this is likely based on an undercount of annual intimate partner homicides, and they occur even more frequently. While intimate partner homicides decreased substantially beginning the mid-1990s with the passage of the Violence Against Women Act, and intimate partner homicides
committed using means other than firearms continue to decrease, the rate of intimate partner homicide is now increasing, driven entirely by an increase in firearm homicides.\textsuperscript{13}

While the perpetrator’s intimate partner is typically the direct target, 20% of casualties of intimate partner homicide are individuals other than the intimate partner, including children, law enforcement, and others.\textsuperscript{14} At NCADV, we have a project called Remember My Name, which memorializes victims of intimate partner homicide. Every year, we release a poster with the names of victims who have been submitted by their loved ones. The poster is alphabetized by last name and includes the age of the victim and the state in which the homicide occurred. Far too often, the poster includes an adult’s (usually a woman’s) name surrounded by the names of children with the same last name in the same state, children aged zero, two, ten, twelve. Intimate partner homicides committed with firearms are more likely than those committed by other means to have ‘collateral’ victims,\textsuperscript{15} so we can infer that two generations of a family have been murdered by an intimate partner with a gun.

\textbf{Federal and state laws}

18 USC 922(g)(8)

Recognizing the deadly intersection between domestic violence and firearms, Congress included a provision in the 1994 Violent Crime Control and Law Enforcement Act restricting certain respondents to final domestic violence protective orders from possessing, receiving, shipping, or transporting firearms or ammunition for the duration of the order (“DVPO prohibitor” or “protective order prohibitor”).\textsuperscript{16} When the protective order expires, the individual’s firearm access is no longer restricted. To be clear, the protective order prohibitor temporarily delays a respondent’s firearm access, but most protective orders only last between six months and a year.

Civil court orders, in this case domestic violence protective orders, are the only survivor-led legal remedy to which survivors have access. Unlike other legal proceedings such as prosecutions, in which prosecutors choose whether to charge the abusive partner and with what to charge them, survivors make the choice whether to apply for a protective order, what relief to request, and when to seek an order. Domestic violence protective orders can provide an array of relief to meet the survivor’s needs holistically, including requiring the respondent to stay away from the survivor and their children and pets, requiring the respondent to seek counseling, requiring the respondent to refrain from using drugs or alcohol, addressing child custody and visitation (including restricting access or requiring supervised visitation if the respondent poses a danger to the safety of children), and addressing financial and property issues.

For a DVPO to trigger the protective order prohibitor, it must meet several requirements. First, as noted previously, it must be a final order. This means that it must be issued after a hearing of which the respondent has notice and at which the respondent has an opportunity to appear and make their case.

Also, the respondent and the petitioner or protected must have a certain relationship. For the purposes of the protective order prohibitor, the respondent and the petitioner must be 1)
or former spouses; 2) current or former cohabitants; 3) share a child in common; or 4) the protected party must be the child of either the petitioner or the respondent.

Finally, the order must restrain the respondent from harassing, stalking, or threatening the intimate partner or child or engaging in conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or child. The order must also either include a finding that the respondent represents a credible threat to the physical safety of the intimate partner or the child or explicitly prohibit the use, attempted use, or threatened use of physical force against the intimate partner or the child that would reasonably be expected to cause bodily injury.

18 USC(g)(3)
In 1996, Congress further restricted certain individuals convicted of a misdemeanor crime of domestic violence from possessing, receiving, shipping, or transporting firearms or ammunition ("MCDV prohibitor" or "misdemeanor domestic violence prohibitor"). Due to the relationship between the victim and the perpetrator, prosecutions for domestic violence crimes frequently result in plea agreements, reduced charges, or diversion programs that end up treating felony-level violence as a misdemeanor offense.

As with the protective order prohibitor, the MCDV prohibitor requires the perpetrator to have one of the following relationships with the victim: current or former spouse; current or former cohabitant; share a child in common; parent; guardian; similarly situated to a spouse, parent, or guardian; or current or recent dating relationship.

The defendant must have been convicted of or pled guilty to a misdemeanor crime under federal, state, tribal, or local law involving the use or attempted use of force or a threat with a deadly weapon. The defendant must also have been afforded appropriate due process protections. They must have either been represented by counsel or knowingly and intelligently waived their right to counsel, and if they are entitled to a jury trial under the laws of the jurisdiction, they must either have had a jury trial or knowingly and intelligently waived their right to a jury trial. And if the conviction has been expunged, set aside, the individual has been pardoned, or the individual has had their rights restored (unless the restoration of rights stipulates they cannot possess firearms), the MCDV prohibitor no longer applies. For first-time offenders who are convicted of a qualifying domestic violence crime against someone with whom they are or were recently in a dating relationship, the MCDV prohibitor also only applies for five years after the completion of their sentence.

To be clear, both the DVPO and MCDV prohibitors require a court adjudication and provide robust due process protections to the respondent or defendant.

These prohibitors have been updated over the years to better protect victims and survivors from armed abusers. In 2006, Congress clarified that convictions for a misdemeanor crime of domestic violence under Tribal law triggers the MCDV prohibitor. In 2021 (took effect in 2022), Congress further clarified that convictions for a misdemeanor crime of domestic violence under local law triggers the MCDV prohibitor. Most recently, in 2022, Congress expanded the MCDV
prohibitor to include individuals convicted of a misdemeanor crime of domestic violence against a person with whom they have or have recently had a dating relationship.23

Most states also have laws addressing firearm possession by domestic violence misdemeanants and/or respondents to domestic violence protective orders.24 Some states’ laws provide more expansive protections, some states’ laws provide less expansive protections, and some state laws mirror or reference federal laws. All states have some mechanism by which a judge issuing a final protective order can address the respondent’s access to firearms.25

The Supreme Court of the United States ("SCOTUS" or "the Supreme Court") has considered and upheld the federal MCDV prohibitor in three cases: United States v. Hayes,26 United States v. Castleman,27 and Vosine v. United States.28 In United States v. Hayes, the Court held that the state statute under which the defendant had been charged did not need to explicitly be called ‘domestic violence’; as long as the elements of the statute were satisfied, the prohibitor applied. In United States v. Castleman, the Court ruled that the MCDV prohibitor was triggered by a crime involving the degree of force necessary for a common law battery conviction, which could include offensive touching. Most recently, in Vosine v. United States, the Court found that a conviction for reckless domestic assault constitutes a misdemeanor crime of domestic violence for the purpose of the MCDV prohibitor. The Supreme Court has not heard challenges to the DVPO prohibitor.

New York State Rifle and Pistol Association, Inc. v. Bruen
In September, 2021, NACDV led an amicus brief29 by the domestic field in the case of New York State Rifle and Pistol Association, Inc. v. Bruen ("Bruen"). In our brief, we urged the Supreme Court to rule narrowly on the provision of New York concealed carry permitting law that was being challenged and warned of the consequences of a broad ruling. We feared a broad ruling would undermine critical protections for survivors that keep firearms out of the hands of individuals found by the courts to have committed domestic violence or to pose an ongoing threat to the safety of their victims.

Our brief was dismayingly prescient. The SCOTUS ruling was so broad as to upend centuries of jurisprudence pertaining to firearms regulation. For the first time, SCOTUS declared an individual right to carry a firearm outside of the home. Furthermore, it rejected the two-part test courts had been using after SCOTUS’s ruling in District of Columbia v. Heller,30 in which SCOTUS declared an individual right to have a firearm in the home. Under a new test endorsed by four of the six justices ruling in favor of the plaintiffs, courts could no longer consider whether there was a compelling public interest undergirding laws addressing firearms; the government must now prove that any firearms regulations are part of a "historical tradition."31

Unsurprisingly, the Bruen decision caused considerable consternation in the domestic violence field. American society has advanced in many ways over the past several centuries, and tethering laws exclusively to those existing hundreds of years ago, with no other considerations, has the potential to undo many of the advances we have made, particularly in areas such as gender equality.
The lack of historical laws restricting firearms access by domestic abusers is not evidence that such laws are unconstitutional. Rather, it is a reflection of the legally subordinate status of and general disregard for the rights and needs of women in early America. Until the mid-to-late 1800s, married women were not permitted to own property independently of their husbands. Mississippi became the first state to allow this in 1839. 32 Women only gained suffrage in 1920. 33 In 1871, Alabama became the first state to rescind a husband’s right to beat his wife through a court ruling. 34 and in 1882, Maryland became the first state to criminalize wife-beating. 35 Interstate domestic violence did not become a federal crime until 1994. 36 Until 1976, marital rape was legal in all fifty states. 37 History, and the historical record, are not neutral arbiters - recorded history represents primarily the history of those with power, and thus has, with notable exceptions, excluded the concerns of women.

Moreover, Bruen’s framework for assessing the constitutionality of firearms laws is far from exact. Not only does it unreasonably expect courts to possess the specialized expertise of professional historians, it fails to provide guidance on a number of issues. For example, while it recognizes that changes in society may require analogical reasoning, it fails to establish parameters around how closely analogous laws must be to establish a ‘historical tradition.’ Moreover, it fails to establish what, specifically, constitutes a ‘tradition.’ It is so vague that two courts considering the same law can come to very different conclusions - and they have.

Post-Bruen
The post-Bruen landscape is littered with contradictory rulings. This includes conflicting rulings on the constitutionality of the federal DVPO prohibitor. Rulings against the domestic violence prohibitors were not inevitable, but they are unsurprising. To be clear, we fully expect both domestic violence prohibitors to ultimately be upheld. However, Bruen’s lack of clarity allows courts to read into it what they want.

For example, courts have issued contradictory rulings about the constitutionality of the DVPO prohibitor. A judge in Western Texas asks whether Bruen requires courts to take a scalpel or a chainsaw to 2nd Amendment jurisprudence - and the judge in this case chose a chainsaw. 38 In contrast, a court in Western Oklahoma upheld the DVPO prohibitor with very little fuss and no extended metaphors. 39

In early February, a three-judge panel of the 5th Circuit Court of Appeals released their ruling in United States v. Rahimi (“Rahimi”), 40 declaring the federal protective order prohibitor to be unconstitutional (a fact sheet about this case can be found in the appendix). This ruling, which was reissued with revisions in early March, has caused substantial harm to survivors of domestic violence. Not only did the Rahimi ruling inappropriately limit the federal government’s ability to protect Americans from armed, adjudicated abusers, it has caused substantial confusion - even chaos - across the nation.

In Rahimi, whether intentionally or not, the 5th Circuit sent a very powerful message to victims and survivors of domestic violence: their right to live free from fear and violence - and to live at
all - is less important than their abusive partner’s access to a firearm. Abusive intimate partners isolate their victims, telling them that no one will help them and no one else cares about them. With this ruling, the 9th Circuit affirmed that narrative, siding with abusers over victims.

The refiled ruling includes a concurrence that emphasizes this point. The concurrence’s underlying message is, ‘you shouldn’t believe survivors.’ The author repeats the long-debunked myth that courts ‘give out protective orders like candy’ and hints at widespread perjury by unscrupulous petitioners with ulterior motives. Any domestic violence advocate or survivor who has sought a protective order can tell you from bitter experience that protective orders are difficult to obtain. Moreover, it takes courage and resilience to recount some of the most painful and traumatic experiences of a person’s life to a stranger, knowing that the very act of seeking a protective order may cause the abusive partner to escalate, and if the order is denied, the survivor may be worse off than if they had not petitioned in the first place.

While the focus of this written testimony is not the ruling in Rahimi, I will nonetheless use this opportunity to address some of the most egregious falsehoods mentioned therein. Chief among these is the repeated assertion that DVPOs do not provide for due process. This simply is not true. As discussed earlier, contrary to what the judges in Rahimi seem to believe, a petitioner cannot simply make unsubstantiated allegations of abuse and obtain a DVPO without the respondent having the opportunity to defend themselves. As with any other court proceeding, there are basic standards and processes. The respondent must have notice and the opportunity to participate in the court proceeding, and the respondent can be represented by a lawyer. The petitioner must provide evidence, and the respondent or their lawyer has the opportunity to refute that evidence and provide contrary evidence.

The judges in this case emphasize that Rahimi waived his right to a hearing as evidence that he did not have sufficient due process. However, I draw the opposite conclusion. First, the fact that he waived his right to a hearing simply reinforces the fact that he had such a right. Second, respondents may choose to waive their hearing specifically to avoid any findings of fact or evidentiary hearing that could later be used against the respondent in a criminal trial. In other words, he benefited from waiving the hearing; he was not a hapless victim of a predatory system.

Moreover, under Texas law, had Rahimi chosen to have his hearing, the court would have had to find both that family violence had occurred and that family violence is likely to occur in the future in order to issue a DVPO. The claim that the protective order prohibitor unintentionally disarms individuals with no history of violence due to ‘boilerplate language’ in non-abuse-related domestic proceedings ‘that tracks’ the federal DVPO prohibitor is patently absurd and has no basis in reality of which NCADV or the Hotline is aware - and even if we were to entertain this as a hypothetical scenario, the obvious remedy would be to fix the form in question, not to overturn a basic protection upon which survivors rely.

While, again, this is not the forum to contest every claim made in the Rahimi decision, a multivariate analysis based on protective order hearings in a large Southwestern city illustrates
many other inaccuracies. For example, more than one third of petitions were denied, and of those petitions that were granted, less than 40% were for protective orders lasting more than six months.42 Judges do not simply issue protective orders on a whim. Also, contrary to claims in the concurrence about mutual orders of protection, federal law makes very clear that full faith and credit shall not be accorded to mutual orders of protection unless both parties petition for protection and there were findings in both cases (unlike the scenario envisioned in the concurrence)43 and state laws also intentionally limit the use of mutual orders of protection.44 To the extent that judges continue to issue mutual orders, the solution is to provide better training and support for judges, not strip away a critical tool survivors use to seek safety. Finally, research shows that judges routinely discount women’s claims of abuse in child custody cases, and are actually more likely to grant custody to abusive men when a woman alleges abuse.45 In fact, in direct contrast to the claims in the concurrence, judges in some jurisdictions are instructed during onboarding and judicial training to be skeptical of abuse claims.46 Given that courts ignore real abuse, people have no incentive to falsely allege abuse.

In general, the quotes and examples highlighted in Rahimi are ‘the exceptions that prove the rule’ - the few cases in which the process failed to work, rather than the vast majority of remarkable cases in which it did. In contrast, I will draw your attention to some of the many cases in which the judge failed to disarm an abuser who subsequently murdered the petitioner.47 These are true tragedies, yet this is the outcome Rahimi promotes.

At NCADV, we have heard anecdotally that both within and outside of the geographic jurisdiction of the 5th Circuit, law enforcement, prosecutors, and judges are confused about the continued enforcement not only of the federal DVPO prohibitor but also the federal MCDV prohibitor, state laws restricting adjudicated abusers’ firearm access, and protective orders prohibiting firearm access in the text of the order. Moreover, media coverage to date has mostly failed to clarify the limits of the ruling, and many people who are not legal experts mistakenly believe as a result that Bruen applies nationwide and to state as well as federal laws.

Given the general confusion, many respondents to final protective orders who are either outside the 5th Circuit or prohibited under state law or in the terms of a court order may erroneously believe they are allowed to have firearms, and survivors may believe they can no longer rely on the courts for protection from abusive partners with firearms. We appreciated the joint statement released by the US Attorney’s Office for the District of Maine, the Maine Attorney General’s Office, and the Maine District Attorneys, clarifying for Mainers that federal and state law still applies in Maine,48 as well as the efforts of some of the Members of this Committee to educate individuals in their own states.

In the aftermath of Rahimi, the National Domestic Violence Hotline, of which NCADV is now a part, we have seen a massive spike in contacts mentioning firearms in Texas, Louisiana, and Mississippi, the states covered by the 5th Circuit ruling. Contacts mentioning firearms between February 2 and March 9 increased 56.6% in these three states compared to the same time period last year. Broken down by state, contacts mentioning firearms have increased 121.4% in
Louisiana, 50.3% in Texas, and 23.5% in Mississippi. While we recognize correlation is not causation, these numbers are certainly suggestive.

Conclusion
Domestic violence is not a new problem; it existed at the time of the founding of the United States. The lack of protections for victims of domestic violence from gun violence in the late 18th and early 19th centuries is not an indication that the Founders would have found such restrictions unconstitutional had they considered domestic violence to be a pressing social concern; it is simply a reflection of the widespread societal acceptance of domestic violence at that time and throughout most of human history. We believe that even under the Bruey framework, laws restricting adjudicated abusers’ access to firearms will ultimately be upheld, by the Supreme Court if necessary, when historical analogies are appropriately considered. Given the change in attitudes toward domestic violence over the past two-and-a-half centuries, the DVPO prohibitor certainly falls into the category of “cases implicating unprecedented societal concerns . . . [that] may require a more nuanced approach” as mentioned in Bruey.

However, in the interim, some abusive intimate partners will legally access firearms they were previously forbidden from having, and some will use those firearms to terrorize or even kill their victims and others. Other individuals may inadvertently break the law, wrongfully believing they are permitted to possess firearms, and some courts and law enforcement agencies will fail to take the necessary action to protect survivors. In short, the uncertainty created by Bruey has placed victims and their children in fear for their lives and safety.
Appendix

U.S. v. Rahimi Summary and Impact

Background: 18 U.S.C. § 922(g)(8) prohibits respondents subject to qualifying domestic violence protection orders (issued after a hearing of which the respondent has notice and in which they have the opportunity to participate) from possessing, receiving, shipping, or transporting firearms while the order is in place. The provision, called the ‘protection order prohibitor,” was enacted as part of the 1994 Violent Crime Control and Law Enforcement Act. 18 U.S.C. § 922(g)(8) applies to situations in which the respondent has one of the following relationships to the protected person: is or was married to the protected person; cohabits or cohabited with the protected person; shares or shared a child in common with the protected person; is the parent of the protected person; or is the intimate partner of the parent of the protected person. Law enforcement and military personnel are exempt from this prohibition while carrying out official duties.

What happened: A three-judge panel of the 5th Circuit Court of Appeals found this law (18 U.S.C. § 922(g)(8)) unconstitutional and vacated the sentence of the defendant, Zackey Rahimi, resulting from his conviction under that provision. This decision applies in Texas, Mississippi, and Louisiana. This decision does not address the state (Texas, Louisiana) firearm prohibition for those restrained by a protection order, firearms restrictions ordered by a judge, or 18 U.S.C. § 922(g)(9) (the federal firearm prohibition addressing criminal convictions).

Why this happened: In June, the Supreme Court ruled in NYSRPA v. Bruen that courts should no longer use a two-part test to determine whether a law related to firearms is constitutional under the Second Amendment, which was the framework developed after the 2008 Heller ruling. The two-part test allowed courts to consider both historical precedent and whether there was a compelling government interest. Under Bruen, courts can only consider historical precedent. However, recognizing that the world has changed in the past 250 years, the Supreme Court ruling directed courts to consider analogous historical laws in addition to identical historical laws. The 5th Circuit decided that there is not a sufficiently analogous historical law to uphold the protection order prohibitor.

What this means: Those subject to domestic violence protection orders issued after notice and a hearing in Texas, Louisiana, and Mississippi, who have been found by a court to pose a
danger to an intimate partner or child, are no longer prohibited under federal law from possessing, receiving, shipping, or transporting firearms under 18 U.S.C § 922(g)(9), although they may be prohibited for other reasons. This does NOT impact the rest of the country.

This decision is incorrect: This ruling is not a surprising outcome of the Bruen decision, but it is not the inevitable or correct outcome. Nearly 30 years ago, Congress determined that a person who is subject to a court order that restrains them from threatening an intimate partner or child cannot lawfully possess a firearm. Whether analyzed through the lens of Supreme Court precedent, or of the text, history, and tradition of the Second Amendment, that statute is constitutional.

This ruling is extreme:

- Firearms in the hands of those who have been violent increases the risk of lethal outcomes and serious injuries not only for the person who is protected by a court order but also for the community generally.
- There is a broad consensus among policy makers across the political spectrum and throughout society at large that domestic abusers who have had their day in court should not have guns.
- The judges on the panel value an abuser’s access to firearms over the right of the victim, their family, and the broader community to be protected from firearms violence.
- This court’s view of the acceptability of interpersonal and firearm violence, historically and in our current climate, is unacceptable and dangerous.

This matters, because:

- People who use violence against intimate partners and family members use firearms as a tool with which to exert power and control.
  - They threaten to shoot their victims, their victims children, pets, other family members, co-workers, community members, and themselves.
  - An estimated 13.6% of American women have been threatened by an intimate partner with a firearm, and 43% of these have been physically injured with a firearm (shot, pistol whipped, sexually assaulted, etc.) 50
  - A survey of contacts to the National Domestic Violence Hotline found that, of respondents whose abusive intimate partners had firearms, 10% reported the intimate partner had fired a gun during an argument, and 67% believed their intimate partner was capable of killing them. 51
- Firearms are the tool of choice for intimate partner homicides and increase community violence risks.
  - Most intimate partner homicides are committed using firearms. 52
  - Access by an intimate partner who uses violence to a firearm increases the risk of intimate partner homicide at least five-fold. 53
  - Domestic violence incidents involving firearms are twelve times more likely than those involving other weapons or bodily force to result in death. 54
59.1% of mass shootings between 2014 and 2019 were related to domestic violence, and in 68% of mass shootings, the shooter had a history of domestic violence or killed a family member or intimate partner. In many cases, 18 U.S.C. § 922(g)(8) is the only way a survivor can get legal protection from an intimate partner with a firearm.

Why are many domestic violence cases handled in the civil rather than the criminal context?

- Prosecutors choose whether or not to bring a criminal case, not survivors.
- Civil court orders (in this case, domestic violence protection orders) are the only survivor-led legal remedy to which survivors have access. They specifically protect the named survivor and provide a host of other remedies.
- Survivors decide what, when, and how to petition for a protection order. Protection orders can be modified to respond to changing circumstances to enhance survivor safety.
- Domestic violence protection orders provide a holistic response to intimate partner violence. Relief can include ordering the respondent to stay away from the victim and the victim’s children and pets, requiring the respondent to seek counseling or participate in a batterer intervention program, providing a custody and visitation/parenting time schedule or supervised/restrictive access to a child who may be at risk of violence, addressing financial issues, assigning the use of a residence and car, etc.
- In order to exert power and control, many abusers undermine their victim’s employment, withhold household cash, register shared property in their names, and otherwise make the victim financially dependent on them. In these cases, if an abuser is incarcerated, the survivor may be left without financial support, including child support. A protection order can permit the respondent to continue working and supporting their children while also protecting the victim from further violence.

Next steps:

- The government attorneys will be deciding next steps procedurally which could include an appeal to the 5th Circuit or the US Supreme Court.
- 18 U.S.C. § 922(g)(8) should be found to be constitutional.

Myth-busting:

- The protection order prohibitor provides robust due process (notice and the opportunity to be heard) protections to the respondent.
- Protection orders require a court adjudication, based on evidence. In a final protection order, the respondent has the opportunity to refute the petitioner’s claims, to be represented by a lawyer, and to provide contrary evidence. Protection orders are not ‘handed out like candy.’
- Survivors in the geographic area covered by the 5th Circuit should not respond to this ruling by purchasing firearms with which to protect themselves.
  - Research shows that possessing a firearm is not a protective factor.
An abused woman’s purchase of a firearm increases the risk of intimate partner homicide by 50% and doubles the risk of firearm homicide by an abusive partner. All.

Even NYPD officers, who train constantly, hit their targets less than half of the time from seven yards away.

Survivors who use firearms in self-defense are often prosecuted, particularly survivors who are women of color.

**Additional Background on US v Rahimi:**

- Zackey Rahimi was subject to a civil protection order after being accused of assaulting his ex-girlfriend (with whom he shared a child in common). The order restrained him from harassing, stalking, or threatening his ex-girlfriend and their child and also expressly prohibited him from possessing a firearm. After the order was issued, Rahimi was involved in five shootings in and around Arlington, Texas. On December 1, 2020, the defendant, after selling narcotics to an individual, fired multiple shots into that individual’s residence. The following day he was involved in a car accident where he shot at the other driver. On December 22, 2020, he shot at a constable’s vehicle. Finally, on January 7, 2021, he fired multiple shots in the air after his friend’s credit card was declined at a restaurant. A federal grand jury indicted him for possessing a firearm while subject to a qualifying domestic violence restraining order in violation of 18 U.S.C. § 922(g)(8), and he pled guilty to that offense. The defendant appealed his conviction, and the appeals court issued the ruling at hand.

- Rahimi was not convicted of domestic violence; he agreed to a civil protection order that resulted in him being prohibited under the federal firearm prohibition under 18 U.S.C. § 922(g)(8).

- He was sentenced to violating that restriction subsequently when he admitted to having firearms he used in the commission of other crimes and had that sentence vacated in this decision.

- The panel was not persuaded by the historical parallels put forward by the U.S. Department of Justice, which was defending the conviction. The Justice Department argued that the domestic violence law was analogous to 17th-and 18th century regulations that disarmed “dangerous” persons.

- The court found that the prohibition on firearm possession by people subject to qualifying protection orders is unconstitutional for several reasons:
  - 18 U.S.C. § 922(g)(8) burdened Rahimi’s 2nd Amendment right to bear arms under _Brune_;
  - The federal prohibition is not supported historically and is an “outlier”;
  - The court did not find the arguments the government put forth to ground the prohibition in history supportable.

- The court noted that other prohibitions were not at issue here.

The full text of the ruling can be found at [https://www.ca5.uscourts.gov/opinions/pub/21/21-11001-CR1.pdf](https://www.ca5.uscourts.gov/opinions/pub/21/21-11001-CR1.pdf)
36 Pub. L. 103–322
38 United States v. Perez-Gallant, (W.D. Tex. 2022)
39 United States v. Kays (W.D. Okla. 2022)
40 United States v. Rahimi (5th Cir. 2023)
41 Tex. Fam. Code 85.001(a)
43 18 USC 2265
46 Ibid.

Written Testimony of
Stephen J. Lindley
Program Manager, Combating Crime Guns Initiative
Brady

Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen

Before the United States Senate
Committee on the Judiciary

Wednesday, March 15, 2023
Chairman Durbin, Ranking Member Graham, and Distinguished Members of the Senate Judiciary Committee,

Founded in 1974, Brady works across Congress, courts, and communities, uniting gun owners and non-gun owners alike, to take action, not sides, and end America’s gun violence epidemic. Our organization today carries the name of Jim Brady, who was shot and severely injured in the assassination attempt on President Ronald Reagan. Jim and his wife, Sarah, led the fight to pass federal legislation requiring background checks for gun sales. Brady continues to uphold Jim and Sarah’s legacy by uniting Americans from coast to coast, red and blue, young and old, liberal and conservative, to combat the epidemic of gun violence.

Thank you for allowing me to submit testimony before this Committee today. My name is Stephen J. Lindley and I have spent my career in the service of public safety. For nearly three decades it was my honor to serve in law enforcement, starting as a cadet, a patrol officer and working my way up to detective, sergeant, and later through to the upper ranks of the California Department of Justice, including nearly a decade as the Chief of the Bureau of Firearms. Today, I work for the Combating Crime Guns Initiative at Brady, one of the nation’s oldest gun violence prevention organizations, where I serve as a senior technical advisor on firearms, California firearms laws, and the sources and diversion of firearms away from the legal market.

California was a very different place when I joined the police force in 1990. At the National City Police Department, we responded to shootings nearly every night, sometimes several a night. Saturday Night Specials — small, cheap, and usually small-caliber handguns — were available for purchase by the dozen and by 1993, the year with the highest gun death rates on record, California had a firearm homicide rate that was 46% higher than the national level.1

Our streets were awash with guns and victims, and everyday my colleagues and I put on our badges and our vests, and hoped for the best.

The Federal Response: The Brady Bill and the Assault Weapons Ban

Gun violence across the country prompted a national reckoning. In the early 1990s, gun violence reached its then-highest recorded level nationally, and Congress finally took action to address the crisis. In 1994, the Brady Handgun Violence Prevention Act went into effect, establishing for the first time a system by which background checks would be conducted for all gun purchases from licensed firearm dealers.

By all accounts, the Brady Background Check System has been hugely successful. Since its passage, nearly 450 million checks have been conducted,\(^2\) preventing more than 4.4 million unlawful gun transactions.\(^1\) In 2018 alone, 630 prohibited gun transactions were prevented, on average, every single day.\(^4\) It is the foundation upon which all other gun laws function, establishing the system by which guns are kept out of the hands of individuals prohibited by law from purchasing or possessing them.\(^5\)

Less than a year later, Congress passed the Federal Assault Weapons Ban, prohibiting the manufacture and sale of certain new semi-automatic firearms and large-capacity ammunition magazines (LCMs). These weapons and accessories, designed to kill as many people as possible in the shortest amount of time, had been wreaking havoc on American streets, and this commonsense law effectively reduced the rates and lethality of violence for the next 10 years.\(^6\)

In 2004, Congress allowed the law to expire with dire consequences. The year the bill expired, just 100,000 assault-style rifles were manufactured in the country. In 2013, not even ten years later, nearly 2 million were manufactured,\(^7\) and by 2020, there were an estimated 20 million assault-style firearms in the United States.\(^8\) Of course, such weapons still represent a small minority of all civilian-owned firearms — it is estimated that there are over 400 million privately owned firearms in the United States\(^9\) — and according to a survey by the National Shooting Sports Foundation, individuals who own such firearms own, on average, more than one, further diminishing the likely share of gun owners who own assault-style firearms.\(^10\)

Today, these firearms have become the weapons of choice for mass murderers in shootings all across the country whether at movie theaters, offices, concerts, houses of worship, grocery stores,

\(^4\) id
\(^5\) 18 United States Code § 922
\(^6\) Paul, M. Assault weapon ban significantly reduces mass shooting [sicf]. Northwestern University. 25 March 2021. Available at https://news.northwestern.edu/stories/2021/03/assault-weapon-ban-significantly-reduces-mass-shooting/
night clubs and bars, or even elementary schools.\textsuperscript{11} Between 2010 and 2020, of the ten deadliest mass shootings in the United States, all but one involved the use of LCMs, and eight of the ten involved assault weapons.\textsuperscript{12} During the decade that the federal assault weapons ban was in effect, 89 people died in 12 gun massacres (defined here as six or more people shot and killed). In the decade after, more than 300 people were shot and killed in 34 gun massacres, representing a $193\%$ increase in such massacres and a $239\%$ increase in fatalities.\textsuperscript{15}

Due to Congress’s failure to renew the ban, some states have since enacted their own versions of the law. These laws, banning assault weapons and LCMs, have reduced fatalities in lieu of significant federal regulation.\textsuperscript{14} One analysis of state laws spanning more than four decades found that LCM bans were associated with 38\% fewer fatalities and 77\% fewer nonfatal injuries.\textsuperscript{15}

**California: A Case Study on Gun Violence Prevention**

California was among the states that took steps to address the gun violence epidemic, even before the federal government. Gun violence was raging in California in the 1980s and 1990s, and beginning with an assault weapons ban in 1989, the state took strong steps to address gun violence, establishing a multifaceted system of common-sense measures that has worked to significantly reduce gun violence. In addition to an assault weapons and LCM ban, California has enacted universal background checks and background checks on ammunition, a 10-day waiting period on gun purchases, mandatory gun safety training, expanded purchase and possession prohibitors for those convicted of certain crimes indicative of increased risk, age restrictions, one gun a month limitation on purchases, safe firearm storage laws, data collection regarding gun sales, strong regulation on “ghost guns,” and an extreme risk law, called a Gun Violence Restraining Order or “GVRO.”\textsuperscript{16}

This system of laws has unquestionably saved thousands of lives. In the last three decades the gun death rate and firearm homicide rate in California were cut in half. In 1993, the gun death rate in


\textsuperscript{12} The following involved the use of both an assault weapon and an LCM: Las Vegas, NV (2017); Orlando, FL (2016); Newtown, CT (2012); Sutherland Springs, TX (2017); El Paso, TX (2019); Parkland, FL (2018); San Bernardino, CA (2015); and Aurora, CO (2012). The 2018 shooting in Thousand Oaks, CA involved an LCM and not an assault weapon, and the 2013 shooting in Washington, DC did not involve either.


\textsuperscript{16} Christopher, B. How California got tough on guns. CalMatters. 1 September 2022. Available at https://calmatters.org/explainers/california-gun-laws-policy-explained/
California was 17.6 per 100,000 persons, by 2020, it was 8.8 per 100,000 persons. Today, California remains the most populous state with many of the country’s largest cities, but the gun death rate is 36% lower than the national average and the 7th-lowest of any state in the Union. The firearm homicide rate is 25% lower than the national firearm homicide rate, and firearm suicide rate is 44% lower than the national firearm suicide rate. These decreases did not happen by accident; rather, they are the result of a reasonable and evidence-based system of laws regulating firearms in the state.

Conversely, rates of gun violence are much higher in states with weak gun laws. In Texas, the firearm mortality rate is 12.73 per 100,000 persons. The rate is 22.22 in Louisiana, 21.03 in Missouri, 19.79 in Arkansas, and 18.80 per 100,000 persons in Tennessee. These are not just numbers: these are mothers, husbands, friends, brothers, nieces, and neighbors. These are lives that could have been spared with the enactment of evidence-based laws. Instead, in many of these states, we have seen state legislatures roll back life-saving policies. For example, the number of mass shootings in Texas rose more than 62% in the year that followed the passage of a Texas law making it legal for anyone over the age of 18 to carry a gun in public without a permit or license.

Those who are working to undo gun safety laws in other states suggest that such laws infringe upon the 2nd Amendment. However, no rights are unlimited and reasonable regulation is not infringement, and while California has some of the strongest gun violence prevention laws in the country, millions of law-abiding citizens in our state exercise their 2nd Amendment rights. In fact, California has one of the highest totals of civilian owned firearms of any state and more than a quarter of Californians live in gun-owning homes. In 2020, an estimated 1.2 million firearms were purchased in California, and in 2021, nearly a million more were sold.

Of course, there is still gun violence in California:

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25 FBI. NICs Firearm Checks: Month/Year by State/Type. Accessed March 2023 at https://www.fbi.gov/file-repository/ncis_firearm_checks__-_month_year_by_state_type.pdf/view
The largest share of firearm deaths in California – more than 50% – are suicides, and more than a third of suicide deaths in the state are by firearm. However, firearm suicides in California occur at a far lower rate than firearm suicides nationally, which account for more than 53% of all suicide deaths.

More than a third of women and nearly a third of men in California experience intimate partner violence in their lifetimes, and one survey found that guns had been used by partners to threaten or abuse nearly half of women in domestic violence shelters.

Each year, 35 people in California are unintentionally shot and killed, including children.

Community violence also devastates our state, particularly ravaging communities of color, which are disproportionately impacted by trafficked firearms. In California, Black Americans make up 6.5% of the state’s population, yet they represent over 30% of the gun homicide victims. Black men between the ages of 15 and 34 are more than 16 times as likely as white men of the same age to be murdered with a gun. Black children and teens (aged 0-17) are 18 times as likely as white children to die by a gun. The harmful effects from this violence stretch far beyond the victims themselves and perpetuate racial inequities by sustaining generational cycles of violence, poverty, and trauma.

Finally, we also bear the burden of mass shootings; there were 49 in 2022 alone. However, according to a recent study, Californians are 25% less likely to die from a mass shooting than other Americans.

California’s system of laws has also proven effective at preventing dangerous individuals who may be a danger to themselves or others from sourcing guns from within the state. The majority of crime guns recovered in California come from outside its borders, and as California’s laws have gotten stronger, the share of guns recovered in crime that have come from out of state has also decreased.

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20 CDC. https://wonder.cdc.gov/controller/saved/D76/D329F722
increased. In 2021, more than seven out of every 10 guns recovered in crime were traced to a different state, a 24% increase from 2014.35

Unfortunately, without a strong system of federal regulations, California will continue to suffer the consequences of trafficked firearms originating in states with weak gun laws. This mirrors the circumstances of other states with strong gun laws like New York and New Jersey, where firearms are making their way via Interstate-95 (dubbed the “Iron Pipeline”) from states with weak gun laws like Georgia and Florida.36 In New York and New Jersey, the contrast is even more stark than in California, and nearly 9 out of every 10 guns traced to crime in both states are sourced from beyond their borders.37

There is a lot that can be done on a state level to prevent gun violence, and California is the case study. In the span of three decades the firearm death rate went from 46% higher than the national average to a rate that is 36% below the national average. Statistics confirm that states with strong gun laws have lower rates of gun violence, and in California I had the opportunity to enforce, facilitate, and implement many of these laws as the Chief of the Bureau of Firearms and I believe in their effectiveness.

The Impact of Bruen on Public Safety and Law Enforcement

California gun laws are well established and until recently had been upheld consistently. In June 2022, the Supreme Court upended decades of precedent with its opinion in New York State Rifle & Pistol Association vs. Bruen.38 Today, California’s assault weapons ban, LCM ban, age restriction laws, and ammunition background check system are all now at risk.39 While I am neither a lawyer nor a historian, as a former cop, special agent, and law enforcement executive, it is clear to me that it will be significantly harder for law enforcement to protect the public and it will make their jobs much more dangerous.

The risk posed to law enforcement by unfettered access to firearms is well established, but in the past several years, that risk has increased. Intentional killings of police officers reached a 20-year high in 2021, with the number of police officers shot and killed rising by 35% from the previous

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36 Id.
37 Id.
38 143 S. Ct. 2111 (2022)
year. More than nine in ten officers killed in the line of duty are killed by guns. Claims that other weapons — such as hammers — pose an equal or greater risk to law enforcement are not born out by evidence.

The expansion of permitless carry across many states has further complicated law enforcement duties, as it makes it difficult for officers to identify whether an individual is or is not a threat. Law enforcement officers have to make split-second life or death decisions when potential threats are perceived. Across 10 states that relaxed restrictions on civilians carrying concealed firearms in public between 2014 and 2020, officer-involved shootings increased by an average of 13%.

Law enforcement is shouldered with the nearly impossible task of protecting public safety. If you truly want to support law enforcement, prevent crime, and increase stability and harmony between police and the communities they serve, it is necessary to establish and uphold reasonable standards for the sale, purchase, possession, use, and carrying of firearms.

In courts across the country, we are already seeing confusion and activism in applying the new Bruen standards to the law. States are being forced to reconsider every gun law they have as if it were written in 1791, when muzzle-loaded muskets and pistols were the only firearms available to the public. If Bruen sets our laws back 30 years, or 300 years, it will put law enforcement lives at risk and imperil public safety.

Thank you, and I look forward to your questions.

Statement to the U.S. Senate Committee on the Judiciary

Hearing on: Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen

Wednesday, March 15th, 2023

Washington, DC

The limited importance of recent developments in gun rights jurisprudence in an era of criminal justice reform

Submitted by:

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About the Author

Rafael A. Mangual is the Nick Ohnell fellow and head of research for the Policing and Public Safety Initiative at the Manhattan Institute for Policy Research** and a contributing editor of City Journal. He is also the author of Criminal (In)Justice: What the push for decarceration and depolicing gets wrong and who it hurts most.

Through the Manhattan Institute, and in other outlets, Mr. Mangual has authored and coauthored numerous policy papers, as well as more than one hundred essays and columns on topics related to policing, crime, and incarceration, among others. His work has been featured in a wide array of publications, including the Wall Street Journal, The New York Times, and The Washington Post.

Rafael holds a B.A. from the City University of New York’s Baruch College and a J.D. from DePaul University in Chicago. In 2022, he was elected a member of the Council on Criminal Justice, and also serves on the New York State Advisory Committee to the U.S. Commission on Civil Rights.

**The Manhattan Institute for Policy Research does not take institutional positions on federal, state, or local legislation, rules, or regulations. Although my comments draw upon my research and writing about criminal justice issues as an Institute fellow, my statement to the Subcommittee is solely my own, and should not be construed as my employer’s.
Statement

Chairman Durbin, Ranking Member Graham, and members of the Committee:

I’d like to begin by thanking you all for extending to me another invitation to testify before this body on what is perhaps the single most important policy issue of our time: Public safety—especially gun violence. What I’d like to explore in this statement is the possibility that recent and future policing and criminal justice policy choices have been, and will continue to be, far more consequential for public safety outcomes than the Supreme Court’s recent decision in New York State Rifle & Pistol Association Inc. v. Bruen.

To put a finer note on it: When it comes to the important issue of public safety—our most pressing problem isn’t the possibility that more law-abiding citizens will now be able to carry firearms for self-defense in the small handful of states that didn’t already allow them to prior to Bruen; it’s that in so many parts of the country, legislative and administrative policy choices have exacerbated the risks associated with failing to arrest, prosecute, and meaningfully incapacitate high-rate, high-risk criminal offenders. As such, the focus of policymakers hoping to stem the tide of resurgent violent crime should be on identifying and plugging the holes created by recent depolicing and decarceration efforts.

The problem of gun violence is a familiar foe, over which America has, in recent history, emerged victorious. Between 1991-2014, America’s homicide rate was cut by more than 50%, going from 9.8 per 100,000 in 1991 to 4.5 per 100,000 in 2014.¹ During that period, America also saw a sharp decline in non-fatal firearm-related violence.²

But after nearly a quarter century of progress, America has begun to see an erosion of public safety in recent years—one characterized by marked increases in shootings that drove a nearly 12% increase in murders in 2015,³ a more-than 8% increase in 2016,⁴ and a 30% spike in murders in 2020; the single largest one-year spike this country has seen in at least 100 years.⁵

It’s worth noting that in the lead up to the Great Crime Decline of the 1990s, our nation’s criminal justice systems were hardened in a number of ways. States across the country enacted truth-in-sentencing regimes, three-strikes laws, and habitual offender statutes aimed at maximizing the incapacitation benefits associated with the incarceration of serious offenders. The federal government undertook similar efforts, and invested in local police departments that adopted more proactive postures and made use of data analysis to inform how they deployed and managed their officers. It’s also worth noting that the recent softening of those

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same systems began not long before the gun violence resurgence that is still plaguing too many American neighborhoods. Those efforts continue, and their impact is visible in criminal justice enforcement measures, as well as in the legislative and electoral success of the movement to pursue depolicing and decarceration.

Over the last decade-plus, jurisdictions around the country have seen a number of policy developments in the areas of policing and criminal justice—those developments reveal a great deal of momentum for the reform movement that has accelerated in recent years. What has that looked like?

- Between 2010-2016, police departments across the country saw a sharp increase in oversight actions undertaken by the U.S. Department of Justice’s Civil Rights Division, which has initiated pattern and practice investigations and entered into agreements with police departments at a far higher clip than in years past. The current administration seems to be continuing this approach, despite evidence that the launching of prior investigations led to sharp increases in serious crime.
- Over the last 10-20 years, the country has seen federal and state sentencing reforms, state and local bail reforms, state-level discovery reforms, various decriminalization efforts aimed at drug and theft offenses, successful litigation efforts targeting police practices or incarceration levels, and a slew of (often hasty) state and local police reforms aimed at restricting police powers and discretion.
- Since 2016, the so-called “progressive” prosecutor movement has enjoyed an enormous amount of electoral success, winning seats across the country, such that somewhere in

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11 [https://www.courts.ca.gov/prop47.htm](https://www.courts.ca.gov/prop47.htm).
the range of 30-40 million Americans live in jurisdictions with “progressive” prosecutors, who have:
- adopted broad policies of non-prosecution as to certain disfavored offenses, limited the discretion of line prosecutors with respect to pretrial detention, parole opposition, and the pursuit of sentencing enhancements, among other things.16

These shifts, individually, and collectively, seem to have reduced the likelihood of arrest, prosecution, and/or incarceration for many criminal offenders. Evidence that these shifts have had just such an impact includes (though is certainly not limited to):

- A 24% decline in the nation’s prison population between 2010-2021,17
- A 15% decline in the national jail population between 2010-2021,18
- A 25% decline in arrests, nationwide, between 2009-2019;19 and
- A long-standing police recruitment and retention crisis characterized by declines in hiring, increases in resignations and retirements, and reports of recent declines in morale.20

To the extent these changes have contributed to the crime spike of the last several years, it’s important to remember that the effects of these shifts won’t be evenly distributed. Indeed, troubling as they may have sounded, the national statistics I mentioned earlier mask an important reality that is key to a more-than-superficial understanding of our gun violence problem: Crime, especially violent crimes like homicides and shootings, are hyper-concentrated both geographically21 and demographically.22

A county-level analysis from 2014 showed that somewhere in the range of 2% of U.S. counties saw approximately half of the country’s murders in a given year, while a majority of counties didn’t see any.23 But that still doesn’t fully capture the degree to which crime concentrates at

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19 See Manguel, Criminal (In)Justice at page 21.
microgeographic levels. Analyses done in both urban24 and suburban25 environments across the country consistently have shown that somewhere in the range of 3-5% of street segments (defined as the space between one side of two city blocks—i.e., corner to corner, both sidewalks) will see 50% of a given jurisdiction’s violent crime, while somewhere in the range of 1% of street segments will see 25% of the violence.

The uneven geographic distribution of crime is accompanied by equally stark demographic disparities. For example, the homicide victimization rate for blacks in the United States between 1980-2008 was six times the rate for whites.26 That disparity has since grown. In 2020, the black homicide victimization rate grew from 19.5 per 100,000 to 25.3 per 100,000—almost ten times the 2020 white homicide victimization rate of 2.6 per 100,000.27 The bulk of that disparity is driven by the shockingly larger disparity in the firearm homicide victimization rate between black and white men. In 2021, that rate approached 60 per 100,000 for black men—reaching that measure’s early 1990s peak—while the white male rate stood in the single digits.28

To illustrate the point, consider data out of the city of Chicago, whose ten most dangerous neighborhoods in terms of homicide risk in 2019 (where 95.7% of residents were either black or Latino) posted a homicide rate of 61.7 per 100,000. Those neighborhoods saw 250 more murders that year than 28 of the city’s safer neighborhoods, combined—this despite housing 264,000 fewer residents. In my home city of New York, a minimum of 95% of shooting victims have been either black or Hispanic since at least 2008, despite those groups not constituting anywhere close to 95% of the city’s population.29

The concentrated nature of serious violent crime, and gun violence, in particular, undermines the suggestion that the announcement of broadly applicable rules regarding the Second Amendment’s interpretation will cause the public safety sky to fall. One reason for this is that the available data suggest that the perpetrators of shootings and homicides in particular were already prohibited from legally possessing firearms at the time of their offenses because of their ages, lack of permits, or criminal justice status. Indeed data out of cities like Chicago suggest that a key driver of America’s gun violence problem is the systemic failure to meaningfully incapacitate repeat offenders before they kill.

A study done by the University of Chicago Crime Lab found that, on average, those arrested for a shooting or homicide in the city of Chicago in 2015 and 2016 had 12 prior arrests; nearly one

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26 https://bjs.ojp.gov/content/pub/pdf/tusu008.pdf.
27 Rafael A. Manguel, Criminal (In)Justice: What the push for decarceration and depolicing gets wrong and who it hurts most, Figure 2 at page 30.
in five had more than **20 prior arrests.**\(^{30}\) This measure is in line with recent remarks from Washington D.C. Metro Police Chief Robert Contee, who told members of the media earlier this month that “the average homicide suspect has been arrested **11 times** prior to them committing a homicide, (emphasis added).”\(^{31}\) In 2018, the Baltimore Police Department reported that the 2017 homicide suspects identified by the Department had **9 prior arrests** on average, and that more **than a third** of them were on parole or probation.\(^{32}\) Repeat offenders have long played central roles in America’s violent crime story. The Bureau of Justice Statistics reported that between 1990-2002, **more than a third** of those convicted of violent felonies in America’s 75 largest urban counties were on probation, parole, or pretrial release at the time of their offense; **75%** of them had a prior arrest history.\(^{33}\)

What these statistics tell us is that while the police seem to be doing a decent job of concentrating enforcement resources on the right people and in the right places, the criminal justice system more broadly is failing to serve as a meaningful backstop to those efforts by ensuring that dangerous offenders are taken off the street. Those failures too often prove deadly.

Consider the tragic case of Kearia Bennefield in upstate New York. Bennefield—a 40-year-old mother of two—was, police and prosecutors allege, shot in the head while taking her young children to school by her husband who was released on his own recognizance the night before her murder. His release came after being charged with savagely beating her. You see, due to New York’s bail laws, the judge could not consider the danger Bennefield’s husband posed to her or the community when deciding whether and under what conditions to release him pretrial. This, despite the fact that Bennefield had posted a recording of the beating that led to her husband’s arrest. Perhaps the most tragic part of this story is that Kearia Bennefield was so certain about the risk she faced—the one New York’s law requires judges to turn a blind eye to—that she was reportedly wearing a bullet proof vest when she was killed.\(^{34}\) Instead of the protection she needed, all the court could offer Bennefield, and victims like her, was a piece of paper containing an order of protection.

What cases like this tell us is that the laws we have on the books regarding firearms restrictions, or any other criminal law, are no good to us unless we have the wherewithal to see to it that those who violate the rules are held to account in a way that actually protects the public’s safety. This is where the focus of policymakers should lie. We must be seeking to find, and, where necessary, create, opportunities to maximize the incapacitation benefits that attend the

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\(^{30}\) [https://urbanlabs.uchicago.edu/attachments/c5b06b6b6b6a9309ed88ad85f5bb05b0892d4e771store/93793d3e7c7cc65a29abc0dfe8bfe892b3a350c3253d1d24b3b3d15e7b8/UCHicagoCrimeLab+Gun+Violence-in+Chicago+2016.pdf](https://urbanlabs.uchicago.edu/attachments/c5b06b6b6b6a9309ed88ad85f5bb05b0892d4e771store/93793d3e7c7cc65a29abc0dfe8bfe892b3a350c3253d1d24b3b3d15e7b8/UCHicagoCrimeLab+Gun+Violence-in+Chicago+2016.pdf).


\(^{33}\) [https://bjs.ojp.gov/content/pub/pdf/vfluc.pdf](https://bjs.ojp.gov/content/pub/pdf/vfluc.pdf).

incarceration of bad actors. Actively supporting efforts to cut down on those incapacitation benefits is simply incongruous with the arguments made in favor of gun rights restrictions as a means to pursue public safety gains.

Nevertheless, I understand that some may feel uneasy about even a marginal expansion in gun carriage rights during a time of rising crime. However, skepticism of the claim that recent developments in Second Amendment jurisprudence will bring about a significant crime inceast is warranted.

In short, there seems to be little in the way of rigorous causal evidence suggesting that an expansion of gun carriage rights will have a significant impact on public safety, in either direction.25 In a recent analysis and literature review, my Manhattan Institute colleague, Robert VerBruggen, explains why this is so.26 Among the things VerBruggen illustrates is that the results of the most prominent study linking Right-To-Carry (RTC) Laws with violent crime increases are dependent on modeling choices that other scholars have questioned.27

One of the mechanisms through which some suspect RTC expansions may increase crime is that establishing or broadening a right to carry may undermine the efforts of police to discover and seize illegally possessed firearms. But, as my colleague, Mr. VerBruggen concludes in another paper analyzing data from New York City, “stops that uncover guns... tend to have other bases, in addition [to suspicion of carrying a firearm]—suggesting that changes in the legal landscape need not dismantle efforts to stop illegal gun carriers via street stops.”28 Perhaps more important on this front are recent efforts seeking to minimize the involvement of police in traffic enforcement. Why? Because there is good evidence to suggest that traffic enforcement is a common means through which police discover contraband—including illegally possessed firearms. For example, a paper published by the Manhattan Institute and authored by Deputy Inspector John Hall of the NYPD’s Office of Crime Control Strategies reported that, in 2020, 42.3% of gun arrests made by the department began as traffic stops.29

Good policymaking in the realm of public safety requires an honest assessment of the available data. Those data suggest that, if enhancing public safety is our goal, our collective attention would be better directed at efforts to minimize the role of repeat offenders in America’s violent crime problem.29

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27 Id.
28 Id.
30 https://media4.manhattan-institute.org/sites/default/files/hall-police-enforce-traffic-laws.pdf. See also, https://nicic.ojp.gov/topics/articles/gun-recovery-strategies (finding that traffic and pedestrian stops “account for the majority of gun seizures”), and https://ojjdp.ojp.gov/sites/p/files/kyd179/files/pubs/gun_violence/profile-20.html (finding that “Traffic stops were most effective in locating illegal guns, with 1 gun found per 28 stops,” made during the experiment in which “intensive police patrols were directed to an 80-block hotspot area where the homicide rate was 20 times the national average.”).
crime problem than at recent jurisprudential developments with respect to the Second Amendment. The policies most urgently in need of change are those that lower the transaction costs of committing crime and/or raise the transaction costs of enforcing the law. Rules without the means or will to enforce them are little more than empty threats. In light of recent spikes in serious violent crime, we would all do well to closely and carefully consider the degree to which criminal justice policy has exacerbated the risks of victimization faced by those in the areas already struggling with elevated crime. Such consideration, I hope, will lead to a long past-due reorientation of our nation’s criminal justice systems around their proper mission: maintaining safety for those who need it most.

Thank you.

/s/ Rafael A. Mangual
Written Testimony of

Eric Ruben

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Hearing: “Protecting Public Safety
After New York State Rifle & Pistol Association v. Bruen”

Before the United States Senate
Committee on the Judiciary

Wednesday, March 15, 2023
Chairman Durbin, Ranking Member Graham, and members of the Committee, thank you for inviting me to testify regarding the state of Second Amendment case law after the Supreme Court’s landmark decision in *New York State Rifle & Pistol Association v. Bruen*,¹ and the implications for future gun safety legislation. My name is Eric Ruben, I am a professor at SMU Dedman School of Law, and I am testifying in my personal capacity.²

In *Bruen*, the Supreme Court held that the constitutionality of modern gun laws must be evaluated by direct analogy to history. The Court’s novel historical-analogical approach was a drastic departure from the pre-*Bruen* doctrine applied by the lower federal courts, which had coalesced around a methodology that combined historical analysis with consideration of contemporary costs and benefits. As a result, *Bruen*, in one fell swoop, cast doubt on over a decade’s worth of case law regarding the constitutionality of dozens of regulatory issues, in effect giving litigants a do-over under the new *Bruen* test.

More than 100 opinions have issued since *Bruen*,³ which demonstrate how lower courts have struggled to apply *Bruen* to various modern laws such as those regulating 3D-printed guns, large-capacity magazines, obliterated serial numbers, and gun possession by domestic abusers. Though *Bruen* purported to constrain judicial decisionmaking through historical analogy, the post-*Bruen* case law highlights the risk that, in fact, the opinion has enabled judicial subjectivity, obfuscation, and unpredictability.

I appreciate this committee’s attention to this issue, and I submit this statement to aid your efforts. In Section I, I describe *Bruen*’s methodological approach. In Section II, I describe three broad challenges underlying the lower court struggles in post-*Bruen* cases: first, identifying principles of relevant similarity to compare past and present laws; second, conducting *Bruen*’s historical-analogical inquiry in a way that accommodates the drastic differences between past and present guns and gun violence; and, third, proceeding in a way that does not exacerbate the judiciary’s institutional limitations.

I. *Bruen* Disrupted The Consensus Methodology For Second Amendment Cases In The Lower Courts And Replaced It With A Novel Historical-Analogical Inquiry

*New York State Rifle and Pistol Association v. Bruen* adopted a novel approach to constitutional historicism—one that does not simply identify the original public meaning of constitutional text and then apply standard doctrinal rules (as *Heller*’s progeny did), but purports to reason directly by analogy to the historical record.

In *Bruen*, the Court struck down a century-old New York law requiring that an individual demonstrate a heightened risk of being attacked in order to obtain a permit to carry a concealed handgun.⁴ That outcome had an immediate and significant impact on the roughly 80 million people

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¹ 142 S. Ct. 2111 (2022).
³ See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke J. 101 (forthcoming) (analyzing results from more than 100 lower federal court decisions in Second Amendment cases after *Bruen*).
⁴ *Bruen*, 142 S. Ct. at 2122.
living in states with laws like New York’s, as it required them to remove heightened self-defense need as a requisite for a concealed carry permit.

But the broader and more lasting impact of Boren will be the novel approach the Court adopted for evaluating Second Amendment challenges. Before Boren, “the Courts of Appeals [had] codified around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.” In fact, that framework was adopted by every federal court of appeals to consider the question. Under this consensus approach, courts would “ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they would] ... apply the appropriate level of scrutiny.” The majority in Boren rejected that approach. Instead, Boren held that modern gun laws, including those addressing problems unknown to the founding generation, must be evaluated solely based on whether they are analogous to historical laws “when the Amendment’s plain text covers an individual’s conduct”:

In keeping with Heller, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

This new test of historical tradition represented a sea change in doctrine, calling into question more than a thousand post-Heller cases that had been decided on grounds that were not exclusively historical.

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6 See Boren, 142 S. Ct. at 2138 n.9 (noting that “nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regime”); id. at 2162 (Kavanaugh, J., concurring) (understating that “shall-issue licensing regimes are constitutionally permissible”).
8 Boren, 142 S. Ct. at 2125.
9 Id. at 2174 (Breyer, J., dissenting) (“Every Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment.”).
10 United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017), cert. denied, 139 S. Ct. 846 (2019).
11 Boren, 142 S. Ct. at 2126 (internal citation omitted), see id. at 2129-30 (reiterating this test nearly verbatim). Though Boren dismissed the consensus two-part approach applied in the lower courts as having “one step too many,” id. at 2117, it introduced a two-part test of its own—one that prescribes the historical-analogical inquiry only in a subset of Second Amendment disputes “when the Second Amendment’s plain text covers an individual’s conduct,” id. at 2130. Assuming that the word “when” is being used as a conditional—as seems to be the case—the reach of Boren’s historical-analogical test might be limited only to those cases already covered by the “plain text” of the Amendment. That said, because doctrinal challenges in the lower courts are largely arising in connection with the second step of the Boren test—the historical-analogical inquiry—that is the focus of my testimony.
and analogical.\textsuperscript{12} And as the majority acknowledged, simply looking to tradition will not sufficiently decide cases since, as courts before 

\textit{Bowers} had widely noted, history is often unclear.\textsuperscript{13} To fill the gap, \textit{Bowers} emphasized repeatedly that its methodology requires litigants and judges to make analogies to historical regulations.\textsuperscript{14}

The turn to analogy raises deep questions. The \textit{Bowers} majority recognized that “because [e]verything is similar in infinite ways to everything else, one needs ‘some metric enabling the analogizer to assess which similarities are important and which are not.’”\textsuperscript{15} What “metric,” then, should guide the historical-analogical process? The majority pointed to “at least two”:

\begin{quote}
While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that \textit{Heller} and McDonald do point toward at least two metrics: \textit{how} and \textit{why} the regulations burden a law-abiding citizen’s right to armed self-defense.\textsuperscript{16}
\end{quote}

Citing \textit{Heller} and McDonald \textit{v. Chicago} for the proposition that individual self-defense is the central component of the right to keep and bear arms, the Court further elaborated that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.”\textsuperscript{17} But just how “comparable” the modern and historical gun laws must be remains unclear in the opinion, except that “analogical reasoning requires only that the government identify a well-established and representative historical \textit{analogue}, not a historical \textit{taste}.”\textsuperscript{18} \textit{Bowers} further signaled that courts can consider other factors beyond the “how” and “why,” observing that the opinion “do[es] not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment.”\textsuperscript{19}

Though the how-and-why metrics have generally been treated as \textit{Bowers}' central holding,\textsuperscript{20} the Court elsewhere describes them as a “more nuanced” approach that applies only where a “modern

\begin{footnotesize}
\begin{enumerate}
\item One measure of this disruption was the fact that, within days of \textit{Bowers}, nearly every Second Amendment case on Westlaw was marked with a red flag. Unfortunately, WestLaw does not—or would not, in response to queries—account for how many red flags were added or why, so this is simply an observation.
\item See, e.g., \textit{Kachalsky v. City of Westchester}, 701 F.3d 81, 91 (2d Cir. 2012) (“History and tradition do not speak with one voice.”).
\item The opinion contained more than thirty references to versions of the word “analogy.”
\item \textit{Bowers}, 142 S. Ct. at 2132 (internal citations omitted).
\item Id. at 2132-33 (emphasis added).
\item Id. citing McDonald \textit{v. City of Chicago}, 564 U.S. 742, 767 (2011) (quoting \textit{Heller}, 554 U.S. at 599) (quotation marks and emphasis omitted).
\item Id. at 2132 (emphasis in original); id. (‘So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.’) (internal citations, quotation, and emphasis omitted).
\item Id. at 2132 (emphasis added). The Court also said that \textit{Heller} and McDonald point to “at least two metrics”—those being the “how” and “why”—suggesting that other metrics are permitted. Id. at 2133 (emphasis added).
\item See, e.g., \textit{Ammon v. Hildreth}, ___ F.3d ___ 2022 WL 5253485, at *6 (N.D.N.Y. Oct. 6, 2022) (“To ‘enable[] [courts] to assess which similarities are important and which are not’ during this analogical inquiry, they must use at least ‘two metrics,’ which are ‘central’ considerations to that inquiry: ‘how and why the regulations burden a law-abiding citizen’s right to armed self-defense.’”) (quoting \textit{Bowers}, 142 S. Ct. at 2132-33) (alterations in original).
\end{enumerate}
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regulation [was] unimaginable at the founding,” in which case one must look for “relevantly similar” analogies to the “distinctly modern firearm regulation.”

An apparently more stringent—and thus presumably less “nuanced”—version of the historical-analogical test applies to modern laws addressing a “general societal problem” that has existed since the founding era. 21 If the societal problem has persisted: (1) “the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment”; 22 (2) “if earlier generations addressed the societal problem, but did not through materially different means, that also could be evidence that a modern regulation is unconstitutional”; 23 and (3) “if some jurisdictions attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.” 24

This category of similar-problems-but “materially different”-solutions places a great deal of weight on historical silence, problematically treating it as evidence for expansive gun rights. Failure to regulate—or, more accurately, absence of evidence of regulation—might have nothing to do with a belief that doing so would have been unconstitutional and reflect nothing about original public meaning. Maybe the founding generation did not think of a particular solution. Maybe the regulatory means did not exist. Maybe policymakers prioritized other pressing issues, like setting up a new government and addressing external and internal threats to its existence. It is simply unwarranted to assume that policymakers always regulated to the outer bounds of their constitutional authority. Moreover, which lens—modern or historical—should be used to determine if a phenomenon even is a “societal problem”? The framers did not seem to regard armed domestic violence as a problem worthy of legislation 25—a fact judges have cited in the course of striking down the modern law prohibiting gun possession by those subject to a domestic violence restraining order. 26 But that silence reflects their blinkered moral sensibility with regard to gendered violence, 27 not a determination about the right to keep and bear arms.

As fundamentally, the test introduces room for judicial discretion in deciding whether a historical problem has persisted and characterizing the means adopted for addressing it. In other words, what is a “general societal problem”? 28 What does it mean for a historical regulation to be “distinctly similar”? 29 What are “materially different means”? 30 If, for example, one defines the “general societal problem” as “gun violence”—a broad level of generality—then it will be harder to justify modern regulations

21 Brown, 142 S. Ct. at 2132.
22 Id. at 2162-63 (Flaum, J., concurring) (noting that the majority opinion does not resolve whether history after the framing era, including during Reconstruction, is relevant to the historical-analogical test the majority endorses).
23 Id. at 2131 (majority opinion).
24 Id.
25 Id.
28 See Siegel, supra note 26, at 2127 (describing historical protection of the “husband’s legal prerogative to inflict marital chastisement”).
29 Brown, 142 S. Ct. at 2131.
30 Id.
that are not “distinctly similar” to predecessors. But one might also define the modern “general societal problem” as “mass shootings” or “school shootings”—a lower level of generality—and thereby avoid the need for a “distinctly similar” historical forebear to prove constitutionality. Both descriptions of the societal problem are accurate, just at different levels of generality, yet they lead to very different conclusions.

Brown itself demonstrates how slippery and manipulable the persistent-societal-problem principle can be. The majority seems to equate the modern “societal concern” of handgun violence with a purportedly identical founding-era “societal concern.” Of Heller, the Court wrote:

One of the District’s regulations challenged in Heller ‘totally ban[ned] handgun possession in the home.’ The District in Heller addressed a perceived societal problem—firearm violence in densely populated communities—and it employed a regulation—a flat ban on the possession of handguns in the home—that the Founders themselves could have adopted to confront that problem.

The implication was that the historical omission was strong evidence of the modern law’s unconstitutionality. The Court characterized Brown similarly: “New York’s proper-cause requirement concerns the same alleged societal problem addressed in Heller ‘handgun violence,’ primarily in ‘urban area[s].’” Both cases, according to the majority, called for “straightforward historical inquiry,” but this conclusion is anything but—in fact, it reflects the risk of anachronism invited by a historical-analogical approach. Certainly, gun violence existed in the founding era. But why would “the Founders themselves” have “adopted” a handgun ban when less than 10 percent of the firearm stock consisted of handguns, and without evidence of widespread handgun use in crime? There were, in some sense, “urban areas” and “densely populated communities,” but nothing even remotely comparable to today; New York City alone now contains more than twice the entire country’s 1790 population. How can that comparison be “straightforward”?

A final wrinkle on understanding Brown is that despite the seeming stringency of its historical-analogical test, Brown repeatedly emphasizes—as Heller did—that it permits various forms of gun regulation. The majority notably does not fully reproduce (as the earlier decision in McDonald v. City of Chicago had done) the language from Heller regarding “presumptively lawful” gun restrictions, which had been central to post-Heller Second Amendment litigation:

[The majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing 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

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33 See infra notes 116-118 and accompanying text (discussing the recentness of mass shootings and school shootings).
34 Brown, 142 S. Ct. at 2131.
35 Id.
36 Id.
38 See infra notes 105-109 and accompanying text (discussing lack of urbanization at the founding).
sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.99 Nonetheless, the _Brenn_ majority does discuss some of those restrictions with approval.100 Moreover, concurring opinions signed by three of the Justices who joined the six-Justice majority emphasized that _Heller_'s endorsement of various forms of regulation remains good law. Justice Alito wrote, “Nor have we disturbed anything that we said in _Heller_ or _McDonald_ v. _Chicago_ about restrictions that may be imposed on the possession or carrying of guns.”101 Justice Brett Kavanaugh, in a concurring opinion joined by Chief Justice John Roberts, underscored that, “as _Heller_ and _McDonald_ established and the Court today again explains, the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.”102 Kavanaugh then went on to reproduce the “presumptively lawful” paragraphs from _Heller_ and _McDonald_.103 Separately, Kavanaugh highlighted, as the majority opinion also had, that the decision does not call into question “shall-issue” permitting, without acknowledging the lack of any obvious founding-era analogue for such policies.104

These reassurances signal that the Supreme Court may be willing to uphold gun regulations outside the parameters of the Court’s historical-analogical test—including those recognized as “presumptively lawful” in _Heller_. Though evidence exists that courts will continue to invoke _Heller_’s exceptions as carve-outs from Second Amendment coverage,105 there is also evidence of gross departures from pre- _Brenn_ case law that call into question how much continuity will be maintained between pre- and post- _Brenn_ case outcomes. I discuss these in the next section.

II. The Lower Courts Have Struggled To Apply _Brenn_ In A Consistent And Coherent Way

In the wake of _Brenn_, courts are faced not only with the concrete difficulty of resolving Second Amendment challenges, but also with making sense of a novel constitutional methodology. As with the post-_Heller_ decade, lower courts will be the primary authors of doctrine to implement _Brenn_’s

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99 See _Heller_, 554 U.S. at 626–27 (citations omitted). In a footnote, _Heller_ referred to these as “examples” of “presumptively lawful regulatory measures,” further noting that the “list does not purport to be exhaustive.” _Id._, at 627 n.26. The opinion then also blessed restrictions on “dangerous and unusual weapons” such as “M-16 rifles and the like.” _Id._, at 627; see also Eric Ruben & Joseph Blocher, _From Treaty to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After_ _Heller_, 67 DUKELJ. 1433, 1488 (2018) (noting, based on review of more than 1,000 Second Amendment challenges between 2008 and 2016, that “a majority of the challenges in our study (69 percent) explicitly cited those paragraphs, though the ratio trended downward over time, perhaps reflecting the fact that _Heller_ itself has now been baked into circuit precedent.”).

100 _Brenn_, 142 S. Ct. at 2133–34 (discussing “sensitive places” restrictions).

101 _Id._, at 2157 (Alito, J., concurring) (internal citations omitted).

102 _Id._, at 2162 (Kavanaugh, J., concurring) (internal citations and quotation marks omitted).

103 _Id._ (quoting _Heller_, 554 U.S. at 626–27 and n. 26, and _McDonald_, 561 U.S. at 786 (plurality opinion)).

104 _Id._, at 2162 (stating that “shall-issue licensing regimes are constitutionally permissible”); _Id._, at 2138 (majority opinion); see also Adam M. Samaha, _In _Brenn_:_ Constitutionalizing_ On the Methodology that Saved Most Gun Licensing_, 98 N.Y.U. L. Rev. (forthcoming 2023) (analyzing inconsistencies between _Brenn_’s stated methodology and the preservation of shall-issue licensing regimes).

directives. But unlike after *Heller*, when courts borrowed rules and standards from other areas of constitutional law (and especially from First Amendment doctrine), *Breyer’s* unique approach forecloses such borrowing.

Lower courts have struggled to reach coherent and consistent results after *Brenn*, diverging in terms of both outcomes and methodology. For example, just nine months after *Brenn*, courts have pointed in different directions regarding the enforceability of:

- the federal law banning people under felony indictment from acquiring new guns,
- laws banning possession of firearms with obliterated serial numbers,
- large-capacity magazine restrictions,
- disarmament of people subject to domestic violence restraining orders,
- restrictions on self-manufactured "ghost guns,"
- disarmament of unlawful users of controlled substances, and
- restrictions on bringing guns into “sensitive places” such as places of worship, summer camps, urban mass transit, and Times Square.

Other cases have halted enforcement of laws on Second Amendment grounds, and it would not be surprising to see different results in future cases based on different application of *Breyer’s* test:

- restrictions on bringing guns into “sensitive places” such as bars, zoos, libraries, and airports,
- prohibition on gun carrying by 18–20-year-olds,

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41 See Ruben & Blocker, supra note 39, at 1455 (noting that after *Heller*, the Supreme Court “[l]eft doctrinal development primarily to the lower courts,” which crafted rules and standards in over 1,000 challenges).
42 See United States v. Marzzarella, 614 F.3d 85, 89 & n.4 (3d Cir. 2010).
43 For a helpful analysis of such divergences, see Charles, supra note 3, at *49–*50.
50 See infra notes 71-79 and accompanying text (discussing divergent outcomes within the *Antonynk* line of opinions).
restrictions on bringing guns into private homes and businesses, and various public curry application requirements.

Commentators have noted “turfmou” in the lower courts, which is a fair characterization, but for the purposes of my testimony, I will focus on three noteworthy challenges facing lower courts. First and most fundamentally, the central legal issue after Broun is not finding historical sources but drawing meaningful connections between them and present controversies. To do so, courts need to articulate principles of relevant similarity to make the historical-analogical exercise sensible. Yet lower courts are largely failing to do so. Second, courts must understand and accommodate the reality of change over time and thereby avoid anachronism. But lower court case law has exemplified such anachronism. Third, courts face challenges because of institutional limitations with regard to Broun’s historical-analogical approach. Modern empirics and legislative deference may help ameliorate this challenge, but lower courts have deemed such tools off limits after Broun—a conclusion not necessarily consistent with Broun’s guidance.

A. Lower Courts Have Largely Failed To Identify Principles Of Relevant Similarity To Guide The Historical-Analogical Inquiry

Under Broun, courts must at a minimum understand and articulate workable principles of relevant similarity. In the kind of historical-analogical test that Broun has created, such principles are the basis for judicial decision, so to say that courts must articulate them is simply to say that they must give reasons for their decisions. And yet many cases have failed to satisfy this basic requirement. Instead, many lower courts are essentially looking only for exact matches in the historical record; in Broun’s words, they are seeking a “historical twin.” In effect, it is the equivalent of ducking analogical reasoning entirely, and looking for discrete historical facts rather than principles of relevant similarity. I provide a few examples.

The first prominent post-Broun case was Antonov v. Nigrelli, a challenge to a New York regulation barring guns from various places including behavioral health centers, playgrounds, nurseries schools, and homeless shelters. In the span of ten weeks, the case resulted in a trilogy of opinions attempting Broun’s test. In the first, the court opined that all of New York’s sensitive places restrictions were unconstitutional because “the Supreme Court in NYSPRA effectively barred the expansion of sensitive locations beyond schools, government buildings, legislative assemblies, polling places and courthouses,” and the court could not find “historical analogs for restricting firearms at all of the locations enumerated in the New York law.” Five weeks later, in a second opinion, the court walked

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58 See, e.g., Antonov, 2022 WL 16744700.
59 Id.
61 Broun, 142 S. Ct. at 2133 (emphasis in original).
64 Antonov I, 2022 WL 3999791, at *34 (emphasis in original).
back both of these methodological interpretations of Brune. As for what counts as a sufficient analogue, however, the court stated simply that “generally, a historical statute cannot earn the title ‘analogue’ if it is clearly more distinguishable than it is similar to the thing to which it is compared.” Instead of explaining what makes a law “distinguishable,” the court shifted to headcounting, concluding that at least three historical laws are needed to comprise an analogous “tradition.” A month later, in its third opinion, the court acknowledged that sometimes it must “broaden its conception of what constitutes an ‘analogue’ and focus its attention on the justification for, and burden imposed by, it.” But the Court did not explain how to “broaden” its conception of what constitutes an “analogue.” Rather, the court added another layer atop the quantity of laws necessary for an analogue “tradition”: the laws must govern more than 15 percent of the population.

Predictably, the shifting methodologies created confusion. The Court opined that bans on guns in places of worship were unconstitutional in Antonevich I, constitutional in Antonevich II, and unconstitutional again in Antonevich III. Bans on guns in children’s summer camps were unconstitutional in Antonevich I and II, but constitutional in Antonevich III. The same went for guns in Times Square — unconstitutional in the first two go-arounds, and constitutional in the third. In Antonevich I and II, the court found the prohibition on guns in mass transit unconstitutional for lack of historical analogues. In Antonevich III, the court changed course, opining that a ban on guns on NYC buses would be constitutional “during the period before school.” Within the opinions, a litigant could only speculate about why some place-based restrictions were constitutional and others were not. In Antonevich III, for example, the court found it constitutional to restrict guns at playgrounds because of the presence of children, but unconstitutional to restrict them at zoos because, despite the presence of children, some adults are unaccompanied by them. The court explained the discrepancies between opinions as a result of “better briefing by the State Defendants and its further consideration of the

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65 Antonevich II, 2022 WL 5239895, at *14 (“Although the Supreme Court has not altogether barred the expansion of sensitive locations beyond schools, government buildings, legislative assemblies, polling places and courthouses, it has indicated skepticism of such an expansion based on the historical record.”). Id. (“Although this Court has found that most of the CCLVA’s list of ‘sensitive locations’ violate the Constitution, the Court does so not because the list (or a portion of the list) must rise or fall in its entirety.”).
66 Id. at *8.
67 Id. at *9. As the opinion put it, “two such historical analogues . . . can . . . appear as a mere trend,” not a “tradition,” and Brune requires “traditions,” not “trends.” Id.
68 Antonevich III, 2022 WL 16744700, at *41.
69 Id.
70 Id. at *67 (“The Court need not go back and reevaluate the numbers so that they both come from the same census: it is confident that, under reasoning . . . in NY3RP-4, the resulting percentage of less than 15 would not suffice to be representative of the Nation.”).
71 Antonevich I, 2022 WL 5999791, at *34.
72 Antonevich II, 2022 WL 5239895, at *16. The court required New York to make “an exception for those persons who have been tasked with the duty to keep the peace at the place of worship or religious observation.” Id.
73 Antonevich III, 2022 WL 16744700, at *60–63.
74 Antonevich I, 2022 WL 5999791, at *34; Antonevich II, 2022 WL 5239895, at *17.
75 Antonevich III, 2022 WL 16744700, at *22 n.35.
76 Antonevich I, 2022 WL 5999791, at *34; Antonevich II, 2022 WL 5239895, at *20.
77 Antonevich III, 2022 WL 16744700, at *37 and n.66.
78 Antonevich I, 2022 WL 5999791, at *34; Antonevich II, 2022 WL 5239895, at *17.
79 Antonevich III, 2022 WL 16744700, at *71 n.114.
80 Id. at *67.
historical laws obtained in light of the standard set forth in NYSPRA. But the meandering methodologies and correspondingly divergent constitutional outcomes are more clearly an indication of Brown’s failure to set forth a clear standard and the Antunez court’s failure to identify sensible, workable principles of relevant similarity.

The Antunez opinions are not isolated examples. In United States v. Perez-Gallan, a federal judge struck down a law prohibiting possession by people subject to a domestic violence restraining order. The law was passed in 1994 to address the relationship—well-documented now, but apparently unappreciated at the founding—between guns and domestic violence. The court concluded that, after Brown, “[n]o longer can lower courts account for public policy interests, historical analysis being the only tool.” And it found that “straightforward historical analysis reveals a historical tradition likely unthinkable today” because “until the mid-1970s, government intervention—much less removing an individual’s firearms—because of domestic violence practically did not exist.” The court agreed with then-Judge Amy Coney Barrett’s observation that “founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.” But the court refused to see that legal tradition as analogous to modern restrictions on domestic abusers, declining to take what it called a “leap of faith” in concluding that the “colonies considered domestic abusers a threat to public safety.” Thus, the historical failure to treat domestic violence specifically as a threat to public safety in the late 1700s made it unconstitutional today to disarm domestic abusers deemed a present threat to others’ safety.

In Firearms Policy Coalition v. McGraw, a district judge struck down a Texas law prohibiting 18–20-year-olds from carrying a handgun in public. The court emphasized that the earliest age restriction identified by the government dated to 1856, too late in the court’s view. Nowhere did the court consider whether restrictions on other categories of people could reflect a principle of relevant similarity that could be applied to age-based restrictions. The court also did not consider whether youth gun violence was a historical problem warranting a historical solution—in other words, whether the historical omission of age restrictions has a benign explanation unrelated to the scope or protection of the right to keep and bear arms.

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81 Id. at *41.
83 18 U.S.C. § 922(g)(8).
84 See Pub.L. 103-323, § 110401(c) (1994); SAFE HOMES FOR WOMEN ACT, H.R. 4092 § 1624 (finding that “domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44” and “firearms are used by the abuser in 27 percent of domestic violence incidents”); DMYI on DMYI et al., Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014, 65 MORRIS*Y MORTALITY WEEKLY REPORT 741, 741 (July 2017) (observing that most women who are murdered in the United States are killed by an intimate partner and more than half of those murders involve a firearm); Elizabeth Richardson Vidor & James A. Mercy, Due Process Rights in Firearms and Domestic Violence Offenders’ Privacy, Intimate Partner Homicide, 30 EVALUATION REV. 311, 313 (2006) (concluding that roughly 60 percent of intimate-partner homicides are committed with a firearm).
85 Perez-Gallan, 2022 WL 16858516, at *1.
86 Id. at *15.
87 Id. at *11 quoting Kanter v. Barr, 919 F.3d 437, 455 (7th Cir. 2019) (Barrett, J., dissenting).
88 Id. at *11.
89 Cf. United States v. Quinones, __ F.Supp.3d ___, 2022 WL 4342482, at *10 (W.D. Tex. Sept. 19, 2022) (refusing to extend the “historical tradition of excluding specific groups from the rights and powers reserved to ‘the people’” to those under felony indictment, observing that “little evidence” from the late 1700s “supports excluding those under indictment in any context”).
91 Id. at *11 (“The earliest law cited is from 1856.”).
Similarly, in Koons v. Reynolds, a challenge to New Jersey’s post-Browne law regulating public carry, a district judge struck down a ban on gun possession in bars, emphasizing the government’s failure to present exact historical replicas of the modern law. The government pointed to historical prohibitions on possessing guns while intoxicated, but the judge dismissed that precedent as having “no relevance here as the restriction at issue clearly does not address possession of firearms by intoxicated persons.” The court relegated the question of why the historical intoxication laws were passed to a footnote—“presumably because guns and alcohol do not mix”—opining that it is “unlikely” any such rationale would be sufficient.

Analysis of Browne’s injunction that modern gun laws must be “consistent with this Nation’s historical tradition” has generally focused on identifying the relevant “historical tradition.” But as a matter of law development it is even more important that courts elaborate what it means to be “consistent” with that tradition. That is the basic function of principles of relevant similarity in a historical-analogical mode, and it is precisely what is missing from many early post-Browne opinions.

B. Lower Courts Have Failed To Account For Drastic Differences Between Past And Present

Perhaps the most concrete and jarring complication of the historical-analogical approach is the degree to which it requires judges to compare modern and historical gun laws, given the extraordinary technological and social changes since the founding. What meaningful historical comparator could there be for the modern prohibition on guns in airplane cabins or restrictions on automatic weapons? Perhaps more fundamentally, what about modern laws that reflect broader social change, like the prohibition on gun possession by those who have committed misdemeanor crimes of domestic violence or are subject to a domestic violence restraining order?

Many post-Browne cases fall prey to anachronism. In Antosynek II, for example, the court found “an insufficient number of historical analogues exists requiring a list of social media accounts for the past three years” to receive a gun permit, noting that New York had “added no historical analogues requiring persons to disclose the pseudonyms they have used while publishing political pamphlets or newspaper articles.” The most prominent appellate decision after Brown is United States v. Rahimi, in which the Fifth Circuit Court of Appeals struck down a law prohibiting gun possession by people subject to a domestic violence restraining order. As noted above, the law was passed in 1994 to address the relationship—well-documented now, but unappreciated at the founding—between guns and domestic violence. The court concluded that the “ban on possession of firearms is an outlier]

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93 Id. at *14 (citing Kansas and Missouri laws).
94 Id. at *14.
95 Id. at *14 n.15.
96 Id. at 2126 (internal citation omitted); see also id. at 2129-30 (reiterating this text nearly verbatim).
97 See, e.g., 14 C.F.R. § 135.119 (“No person may, while on board an aircraft being operated by a certificate holder, carry on or about that person a deadly or dangerous weapon, either concealed or uncounseled.”)
98 See, e.g., 18 U.S.C. § 922(g)(1) (banning the possession or transfer of machineguns not possessed before May 19, 1986).
99 See, e.g., 18 U.S.C. § 922(g)(8) and (9).
100 Antosynek II, 2022 WL 5259985, at *12.
102 See supra note 84 and accompanying text.
that our ancestors would never have accepted.

But that is largely due to the fact that the framing era did not view women as political or legal equals to men, and did not view domestic violence as a problem worthy of addressing through legislation. Even if they had appreciated the problem of domestic violence, there still might not have been a need to regulate guns in the domestic violence context because research suggests that they were rarely used for domestic violence—a reflection of the unadvanced state of firearm technology at the time. As historian Randolph Roth has noted, "Family and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand," which were not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists." What's more, women did not have the ability to vote for leaders who would safeguard their interests until the Nineteenth Amendment was ratified in 1920.

The challenges of anachronism facing courts after Bensing fit into at least three categories. First, the historical record underlying the historical-analogical method is replete with silences (no historical evidence one way or the other); second, it contains violations (historical laws that would be unconstitutional by modern lights); and, third, it is full of variations (different approaches taken in different places).

First, historical practice will obviously not always speak directly to a contemporary problem, especially those involving technological and social change. No amount of painstaking archival work will turn up historical predecessors except at a higher level of generality. The narrowness of the analogical approach on display in many post-Bensing cases suggests that the historical-analogical method is especially prone to over-reading historical silences.

For example, urban areas simply did not exist in 1791 as we understand them today. In 1790, just before the Second Amendment was ratified, 33,000 people lived in New York City, the country's largest city and home of the First Congress. The population of the entire country was under 4 million. Today, more than twice that many people live in New York City alone. The densification of American cities during the late 1800s is well documented, as is the relationship between urbanization and crime.

Likewise, firearm technology has transformed. Americans in 1791 generally owned muzzle-loading flintlocks, "liable to mistake" and incapable of firing multiple shots. Fewer than ten percent of

103 Rabine, 2023 WL 2317796, at *12.
105 UNITED STATES CENSUS BUREAU, 1790 FAST FACTS, https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html (noting a 1790 population of 33,131 in New York City).
107 Id. (noting a 1790 estimated population of 3,929,214 people in the United States); UNITED STATES CENSUS BUREAU, QUICKFacts, https://www.census.gov/quickfacts/newyorknewyork (noting a July 2021 population of 8,467,513 in New York City).
110 Roth, supra note 104, at 275.
firearms were pistols. 111 Crime was committed using weapons far less lethal than modern firearms—according to some research, often without firearms at all. 112 Well into the 1800s, even after pistols became more common, some commentators still considered knives to be more dangerous. 113

Today, in contrast to at the founding, criminal gun violence is largely an urban problem and is perpetuated most often by handguns far more deadly than a colonial-era musket. According to one analysis, "half of America's gun homicides in 2015 were clustered in just 127 cities and towns, . . . even though they contain less than a quarter of the nation's population." 114 Another analysis found that "in Maryland from 2016–2020, someone living in Baltimore City was 30 times more likely to die by firearm than someone living 40 miles away in Montgomery County." 115

Other gun violence problems, meanwhile, like mass shootings where an attacker kills multiple people and school shootings, are also of recent vintage. In one recent case, a court relied on "evidence that there is no known occurrence of a mass shooting resulting in double-digit fatalities from the Nation's founding in 1776 until 1948, with the first known mass shooting resulting in ten or more deaths occurring in 1949." 116 At the founding, nothing similar occurred not could have occurred, and framing-era policymakers unsurprisingly had no reason to pass public-safety measures to address acts of random mass violence. Similarly, researchers have tracked a significant increase in school shootings in recent years, 117 from 11 a decade ago to 93 during the last full school year. 118 At the founding, there was no similar problem of gun violence at schools, and, accordingly, no efforts to address it.

In other cases, historical silence might reflect not an absence of law and practice, but the simple fact that historians have yet to uncover it, let alone on a briefing schedule. As one court recently noted in the context of a Second Amendment challenge to California's restrictions on homemade guns:

In order to even be able to assess whether or not [plaintiff] could demonstrate a "likelihood" of prevailing on the merits . . . there is no possibility this Court would

112 Cockran v. State, 24 Tex. 394, 402 (1859) ("The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least . . . The bowie-knife differs from these in its device and design, it is the instrument of almost certain death.").
expect Defendants to be able to present the type of historical analysis conducted in

_Brown_ on 31 days’ notice (or even 54 days’ notice). 119

Had the court required such an analysis and treated it as final, the result almost certainly would have been to build constitutional law on a fundamentally incomplete foundation.

Indeed, historians have emphasized the tension between litigation and their professional norms in this regard. Historian Zachary Schrag, an expert both on methods of historical research 120 and on mass transit in particular, 121 was retained by the District of Columbia to defend the constitutionality of its rule against firearms on mass transit like the DC Metro. 123 Even with that professional expertise—indeed, because of it—Schrag entered an expert declaration effectively declining the job: “The District has asked whether I or a team of historians could adequately research the ‘Nation’s historical tradition’ of firearm regulation on mass transit within 60 days. The answer is ‘no’. . . .” 125

_Brown_ minimizes this problem by invoking the rule of party presentation and saying that “[c]ourts are thus entitled to decide a case based on the historical record compiled by the parties.” 126 But that simply compounds the problem when the doctrinal test directs courts to a historical record that could not possibly be complete. The issue here is not a failure of the parties, but of a test that purports to respect history without accounting for the realities of historical research.

A second problem related to regulatory silences is that the known historical record from which lawyers and judges must analogize is full of practices and laws that would be impermissible today. The Alien and Sedition Acts, to take one obvious example, were passed within a decade of the First Amendment’s ratification, but originalists dismiss them as a guide for understanding the meaning of the freedom of speech. 127 Similarly, it would be impossible to even begin to canvass the ways in which law marginalized and oppressed the majority of people living in the United States, and by doing so limited the voices of those who might have shaped it. As a Justice of the Ohio Supreme Court recently noted in a post-_Brown_ gun case: “[T]he glaring flaw in any analysis of the United States’ historical tradition of firearm regulation in relation to Ohio’s gun laws is that no such analysis could account for what the United States’ historical tradition of firearm regulation would have been if women and nonwhite people had been able to vote for the representatives who determined these regulations.” 128 Nor is there an obvious way to correct this omission: “[E]ven if a court tries to take the views of women and

123 Id. ¶ 6.
124 See, e.g., _Brown_, 142 S. Ct. at 2130 n.6. This is itself a bit ironic, given that _Brown_ was decided on the pleadings and therefore did not have the benefit of the development of historical facts at trial notwithstanding disagreements and uncertainty regarding the historical record.
125 Cf. Amy Coney Barrett, _Originalism and stare decisis_, 92 NOTRE DAME L. REV. 1921, 1931 (2017) (“It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether _Marbury v. Madison_ was decided correctly.”) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 1380-39 (Amy Gutmann ed., 1997)).
nonwhite people into account, are there sufficient materials on their views available to enable reliable conclusions to be made?"\textsuperscript{127}

A third problem is that of variation. As Akhil Amar has noted, "our common Constitution looks slightly different from state to state and across the various regions of this great land."\textsuperscript{128} The same, of course, was true historically, especially with regard to gun regulations, which varied significantly both regionally\textsuperscript{129} and locally\textsuperscript{130} because of differing needs and values. What result if eight original states did not pass a given law, but five did? What if the count is nine and four? What if some of those states changed positions on the issue in the 19th Century? What if some state courts upheld the restriction but others struck it down? What if variations existed within a state? And what if state weapon traditions were shaped by divergent state constitutional protection for the right to keep and bear arms?\textsuperscript{131} A narrow focus might lead to doctrine being constructed on the basis of unrepresentative cases—using only antebellum cases from Southern states as comparators, for example.\textsuperscript{132}

The complications of historical silences, violations, and variations invite a fundamental question for judges implementing Bruen's approach: What should courts do about the acute risk of anachronism? After all, as Brown recognized, "the Founders created a Constitution—and a Second Amendment—intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."\textsuperscript{133}

The most obvious doctrinal solution is to adjust the level of generality at which a court conducts the inquiry. How broadly or narrowly a judge defines a principle of relevant similarity (or, for that matter, applies it) can increase or decrease the risk of anachronism, but at the same time can be outcome-determinative, meaning that it is not the historical record that will determine the result but the level of generality at which the judge decides to approach it.\textsuperscript{134} Understanding this dynamic will be crucial for principled application of Bruen's test.

Although it may be impossible to articulate a single, overarching principle governing levels of generality in legal reasoning,\textsuperscript{135} Bruen's particular approach to historical analogy raises the importance of operating at a high level of generality. If questions are pitched too narrowly, courts will run directly into the problems of anachronism discussed above, like searching for historical examples of regulations of guns in subways. So, too, will they fail to account for historical silences, variations, and violations, potentially building federal constitutional doctrine on a set of unrepresentative or even

\textsuperscript{127} Id.
\textsuperscript{130} Joseph Blocher, Firearm Localism, 123 YALE L.J. 82 (2013).
\textsuperscript{132} See Ruben & Cornell, supra note 129.
\textsuperscript{133} Brown, 142 S. Ct. at 2132 (quoting McCulloch v. Maryland, 4 Wheat. 316, 415 (1819)).
\textsuperscript{134} See generally Peter J. Smith, Originalism and Level of Generality, 81 GE. L. REV. 485 (2017) (providing examples of originalist attempts at constitutional interpretation and demonstrating how selecting a level of generality plays a pervasive, undertheorized role).
\textsuperscript{135} Scholars have investigated the issue of levels of generality for decades. See, e.g., Michael C. Dorf & Laurence H. Tribe, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057 (1990).
reprehensible traditions. Operating at a high level of generality—looking for broad principles of similarity, rather than near-identical historical laws—might help minimize these problems.

C. Courts Have Institutional Limitations In Conducting The Historical-Analogical Inquiry, And Legislative Deference And Empirics Remain Solutions

A final challenge facing courts after Brown is accounting for institutional limitations. An approach focused on historical analogy transforms the way litigation looks, stretching resources more than conventional constitutional argumentation. Judges have acknowledged that “[w]e will inevitably miss some” historical precedents because “[t]he briefs filed are able to address only so many before running up against word limits.”156 If historical analogy is the sole determinant of constitutionality, running out of space to document historical precedents can be the difference between winning or losing a case. This is especially true when courts rely on party presentation of historical analogues,157 and consider the quantity of analogues to be probative.158 In Antonyuk, New York requested an additional 70 pages to respond to a motion for a preliminary injunction.159 Even still, the court found historical laws not included in the briefing.160 New York State might have the resources to conduct such extensive—but still incomplete—motion practice; most municipalities defending local gun laws certainly will not. At the same time, the burden on judges tasked with parsing a voluminous historical record and rendering it relatable to modern times will be significant and difficult—judges have even considered hiring historians to assist in the exercise.161

Courts faced with tasks they are ill-suited to do often consider whether it is appropriate to defer to co-equal branches of government. Yet Brown critiqued lower court caselaw as being too deferential to legislatures and too responsive to modern day realities.162 As a result, some courts have read Brown as prohibiting consideration of empirics or deference to the legislature.163 But both empirics and deference remain relevant after Brown, and they could mitigate the institutional challenges presented by the historical-analogical approach.

156 Penata v. Cnty. of San Diego, 742 F.3d 1144, 1156 n.6 (9th Cir. 2014), en roh'y ex huo, 824 F.3d 919 (9th Cir. 2016).
157 See, e.g., Brown, 142 S. Ct. at 2130 n.6 (“Courts are thus entitled to decide a case based on the historical record compiled by the parties.”).
158 See, e.g., Firearms Policy Coalition v. McCraw, __ F.Supp.3d __, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022) (”The historical record before the Court establishes [at most] that between 1856 and 1892, approximately twenty jurisdictions (of the then 45 states) enacted laws that restricted the ability of those under 21 to ‘purchase or use firearms.’”), Antonyuk II, 2022 WL 5239895, at *9 (“[T]he Court generally has looked to instances where there have been three or more such historical analogues.”).
159 Consent Letter Motion, Antonyuk v. Hochul, No. 1:22-CV-986 (N.D.N.Y.) (GTS/CFH) (Oct. 12, 2022); Text Order, Antonyuk v. Hochul, No. 1:22-CV-986 (N.D.N.Y.) (GTS/CFH) (Oct. 12, 2022) (granting motion for additional pages). In Miller v. Bonta, a case concerning California’s ban on assault weapons, the district judge asked the parties to compile a spreadsheet of relevant weapons policies from the time of the Second Amendment’s enactment until 20 years after the Fourteenth Amendment’s enactment. California’s list was 36 pages long and contained 191 laws, statutes, or regulations. See Defendants’ Survey of Relevant Statutes (Pre-Founding – 1888, Miller v. Bonta, No. 3:19-cv-01537-BEN-JLB (Jan. 11, 2023).
160 See Antonyuk III, 2022 WL 16744700, at *41 & n.72 (describing the court’s research process).
162 Brown, 142 S. Ct. at 2131.
163 See, e.g., Perez-Gallan, 2022 WL 16858516, at *1 (concluding that after Brown, “[i]t is no longer can lower courts account for public policy interests, historical analysis being the only tool”).
Despite *Brnovich’s* suggestion that its approach is purely historical, the plain text of its test requires contemporary evidence to play a doctrinal role. Quite simply, there is no way to compare the “why” and “how” of modern and historical gun laws without evidence. History alone cannot show the “burden” that modern gun laws place on “armed self-defense,” nor why such laws are “justified.” Doing so requires modern empirics to demonstrate, for example, how often particular weapons are used for self-defense or in crimes or what harms a particular law prevents.

The continuing relevance of empirics invites a question about how much deference judges should give to legislative determinations. To the extent historical legislatures had broad autonomy to regulate on a given public safety issue, modern legislatures arguably should, too. For example, in her dissenting opinion in *Kantor v. Barr*, then-Judge Barrett concluded that “[j]n 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when *they judged* that doing so was necessary to protect the public safety.” In this telling, it was the legislature that was “judging” the threat to public safety presented by a category of people.

Under *Brnovich*, deference afforded to historical legislatures arguably should carry forward to today. If the principle of relevant similarity at issue in categorical prohibition cases, for example, is that the legislature can bar those “they judge[]” to be dangerous from gun possession, and their historical determinations were overinclusive, modern-day legislatures arguably should be granted similar leeway, subject, of course, to other constitutional limitations (like, for example, the Equal Protection Clause).

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The Supreme Court’s embrace of a novel historical-analogical test in *Brnovich* has opened the door to tremendous challenges, reflected in divergent methodologies and outcomes in the lower courts. The ones identified in this testimony—how to articulate principles of relevant similarity to compare historical and modern laws, how to account for the immense differences between past and present, and how to remain within the courts’ institutional competence—are not exhaustive. Ultimately, how courts address these challenges will determine whether the Court’s new approach to Second Amendment cases succeeds or fails at providing a stable, coherent, and predictable jurisprudence.

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114 Kantor v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (emphasis added); see also id. at 458 (“In sum, founding-era legislatures categorically disarmed groups whom *they judged* to be a threat to the public safety.”) (emphasis added).

115 Id. at 458.
Legislative Testimony

Bruen Promotes Public Safety Far More Than The Unconstitutional Gun Laws It Threatens

Protecting Public Safety After New York State Rifle & Pistol Ass’n v. Bruen
Hearing before the U.S. Senate Committee on the Judiciary
March 15, 2023

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Chairman Durbin, Ranking Member Graham, and distinguished Senators,

My name is Amy Swearer, and I am a Senior Legal Fellow in the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies.¹ My areas of scholarship and study include, among other things, the Second Amendment, school safety, and the intersection of gun violence and mental health. I was a primary author of Heritage’s recent e-booklet, The Essential Second Amendment, and run the organization’s Defensive Gun Use Database. I have testified numerous on firearms policy at both the state and federal level, including on several occasions before this Committee. Most recently, these testimonies have covered an array of proposed gun control measures, recent nationwide spikes in violent crime, keeping the nation’s children safe from gun violence, and the economic toll of gun violence.²

Today, I have been asked—along with my fellow panelists—to discuss how Congress can protect public safety after the Supreme Court’s opinion this past summer in New York State Rifle and Pistol Association v. Bruen. The very title of the hearing implies that, as a result of the Bruen opinion and subsequent Second Amendment litigation, the public safety is endangered.

What an absurd premise.

To be clear, this mild insinuation that Bruen endangers public safety is quite tame compared to the hysterical theatrics employed by some media outlets and public figures. At various points after the opinion’s release, pundits and policymakers have alleged, among other things, that Bruen:

- is a radical gun ruling that will lead to more violence;³
- will have significant and dangerous consequences for New Yorkers, including law enforcement officers;⁴
- is reckless, reprehensible, and shows an extreme vision for life in the United States;⁵

¹ The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. The Heritage Foundation’s books are audited annually by the national accounting firm of RSM US, LLP.
• asserts that nearly any attempts at gun regulation are invalid;⁶
• will literally get women killed.⁷

The good news is that Bruen does none of these things.

In fact, in its most immediate impact, Bruen is likely to increase public safety by striking down laws that for far too long effectively prohibited ordinary, peaceable citizens from carrying firearms in public to defend themselves against violent victimizations. Defensive gun uses have a significant protective impact against violent crime—a protective impact which will now finally be fully extended to millions of residents in the seven states whose public carry frameworks formerly rendered most of them defenseless victims.

Yes, it is likely that when the dust of the post-Bruen legal fallout settles, several modern gun control laws will be struck down as unconstitutional (most of which should have been struck down under a fair application of Heller and McDonald). But these laws overwhelmingly failed to offer significant public safety benefits in the first place, and precisely for the reasons they will likely be struck down—in practice, they most commonly target peaceable Americans while doing very little to ensure that violent criminals are effectively deterred or prevented from committing violent acts.

At the same time, Bruen leaves ample room for the enforcement of a variety of public safety measures that are far more effective than the “just do something” laws it threatens. This is abundantly clear in those cases where courts have thus far struck down gun control statutes post-Bruen. In each those cases, the court points out constitutionally permissible measures (like pre-trial detention) that could have been but were not, in fact, used against the defendant, who then went on to simply ignore the stricken law.

1. Understanding Bruen: How Did We Get There and What Does It Actually Say?

Bruen was, in many ways, a much-needed correction to lower courts’ widespread refusal to treat District of Columbia v. Heller⁸ and McDonald v. City of Chicago⁹ with any semblance of respect. In those landmark cases, the Supreme Court struck down bans on the possession of operable handguns inside the home. Taken together, Heller and McDonald affirmed that the right to keep and bear arms is, indeed, individual in nature and centered on the natural right of self-defense.¹⁰

The Second Amendment does not protect a second-class right, but one that is fundamental to our scheme of ordered liberty and applicable against the states through the Fourteenth Amendment.¹¹

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⁹ 561 U.S. 742 (2010).
¹¹ McDonald, 561 U.S., at 778.
At the very least, law-abiding, peaceable adult citizens have a right to own arms that are of a type commonly possessed by such citizens for lawful purposes.\textsuperscript{12}

Notably, the Court declined in both cases to explicitly adopt or apply a “tiers of scrutiny” framework, but deemed means-end interest balancing tests to be inappropriate and focused its analysis on the Amendment’s text, history, and tradition.\textsuperscript{13} It emphasized that nothing in either opinion should be understood as “casting doubt” on “certain longstanding” and “presumptively lawful” restrictions.\textsuperscript{14} These included prohibitions on firearm possession by felons or the mentally ill, laws restricting the carrying of firearms in “sensitive places” like schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms.\textsuperscript{15}

And then, for the next decade, the Court declined every opportunity to put flesh onto this bare bones Second Amendment framework. In the interim, lower courts developed a two-step approach that, in effect, led courts at the second step to use intermediate scrutiny to engage in the very type of means-end interest balancing the Supreme Court deemed inappropriate. Under this test, \textit{Heller} and \textit{McDonald} were effectively rendered toothless, and many lower courts never found a gun control law they could not uphold under the second step.\textsuperscript{16}

\textit{New York State Rifle & Pistol Association v. Bruen}\textsuperscript{17} was the Supreme Court’s first major attempt to clarify (and vindicate) \textit{Heller} and \textit{McDonald}, and address at least some of the questions those cases left unanswered—namely, what is the scope of the right to bear arms outside of the home and what, exactly, is the framework courts should use when analyzing Second Amendment challenges. New York generally prohibited civilians from possessing a firearm outside of their homes without an unrestricted concealed carry permit, which allows a person to “have and carry” a concealed handgun in public. Applicants for this license needed to prove to the state that they had “proper cause” for being armed in public, meaning they had a “special need for self-protection distinguishable from that of the general community.” In practice, this proper-cause requirement worked to ensure that ordinary, law-abiding New Yorkers did not have a right to armed self-defense outside the home. Lower courts had upheld the constitutionality of the proper-cause standard both in New York and six other states with similar frameworks, uniformly justifying the requirement under some form of heightened scrutiny.

In \textit{Bruen}, the Supreme Court struck down New York’s “proper cause” requirement, holding that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun outside the home for self-defense.\textsuperscript{18} Just as importantly, the Court outright rejected the two-step test developed by lower courts in the wake of \textit{Heller} and \textit{McDonald}, finding in particular that the

\textsuperscript{13} \textit{Heller}, 554 U.S. at 595, 654–55; \textit{McDonald}, 561 U.S. at 767, 791.
\textsuperscript{14} \textit{Heller}, 554 U.S. at 626–27; \textit{McDonald}, 561 U.S. at 786.
\textsuperscript{15} \textit{Heller}, 554 U.S. at 626–27; \textit{McDonald}, 561 U.S. at 786.
\textsuperscript{16} As just one example, in the years immediately preceding \textit{Bruen}, two Ninth Circuit opinions together effectively held that, despite \textit{Heller}’s emphasis on text, history, and tradition, the Second Amendment did not protect a right of ordinary, law-abiding citizens to bear arms outside of their homes, either openly or in a concealed manner.
\textsuperscript{17} 142 S.Ct. 2111 (2022).
\textsuperscript{18} \textit{Id.} at 2122.
second step is “inconsistent with Heller’s historical approach and its rejection of means-end scrutiny.”\(^{19}\) Instead, it adopted the following standard for Second Amendment cases:

> When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”\(^ {20}\)

The Court explained that while courts are required to reason through historical analogy, this is “neither a regulatory straightjacket nor a regulatory blank check.”\(^ {21}\) Courts should neither uphold every modern law that remotely resembles a historical analogue nor require the government to produce a historical twin or “dead ringer” for a modern law. According to the Court, *Heller* and *McDonald* pointed toward at least two central metrics for a historical analogical inquiry: “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”\(^ {22}\)

In short, New York’s proper cause requirement did not fit within the confines of those “reasonable, well-defined restrictions” that historically delineated the outer limits of the right of peaceable, law-abiding adult citizens to bear commonly used arms in public for self-defense. While there is a longstanding tradition of limiting the intent for which one could carry arms in public, the manner by which one could carry arms in public, or the exceptional circumstances or sensitive places in which one could not carry arms, there was simply no historical analogue limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.\(^ {23}\)

Importantly, the Court explicitly stated that nothing in its holding “should be interpreted to suggest the unconstitutionality” of the shall-issue frameworks already employed by a majority of states and which do not require an applicant to prove an atypical need for self-defense.\(^ {24}\) At the same time, it did not “rule out constitutional challenges to shall-issue frameworks” whose bureaucratic burdens may nonetheless work to deny ordinary citizens their right to public carry.\(^ {25}\)

### II. *Bruen’s Most Direct Impact—Striking Down “Proper Cause” Carry Statutes—Promotes Both Public Safety and a Fairer, More Equitable Criminal Justice System*

The most immediate and direct impact of *Bruen* is that it struck down ”proper-cause” requirements in seven states, effectively forcing those states to become “shall issue” for purposes of concealed carry permits. While some have decried the prospect of a more concealed carry permit holders carrying guns in public places, insinuating that this will exacerbate violent crime problems, this is

\(^{19}\) Id. at 2129–30.
\(^{20}\) Id. at 2126, 2190–30.
\(^{21}\) Id. at 2133.
\(^{22}\) Id.
\(^{23}\) Id. at 2138–56.
\(^{24}\) Id. at note 9.
\(^{25}\) Id.
inconsistent with the evidence. Rather, because of *Brnen*, millions more peaceable Americans will have the option of lawfully defending themselves and others with a firearm in public, something that promotes the public safety. Moreover, because states may no longer arbitrarily prohibit public carry for ordinary Americans, fewer peaceable citizens are likely to find themselves branded “violent weapons offenders” for having the audacity to defend themselves in public without a government license they could never hope to obtain.

A. Peaceable Citizens Benefit from the Right to Armed Self-Defense, Both at Home and in Public Spaces

In general, lawful gun owners are not the driving force behind criminal gun violence. It is universally true that most gun crimes are committed by a very small subset of serial offenders who are already prohibited from legally possessing firearms. While some lawful gun owners will inevitably use their firearms in furtherance of criminal activity in any given year, the overwhelming majority will not. This is particularly true of concealed carry permit holders, who are as a group one of the most law-abiding populations in the nation. Analyses of available state-level data routinely shows that they are, in fact, significantly less likely to be convicted of firearms-related violations than are police officers, who under federal law are exempt from most state-level gun laws (including those regulating public carry), including while they are off-duty. This is not to suggest that law enforcement officers are prone to committing weapons offense—quite the opposite, it highlights just how little the public has to fear from an increase in concealed carry permit holders.

Given this reality, it is little wonder that the most methodologically sound studies on the issue routinely find that more permissive public carry schemes do not lead to more violent crime.

29 Id.
the extent that any studies do show a relationship between public carry frameworks and violent crime, there still exists no logical causal mechanism to explain how more permissive public carry laws would conceivably cause that violent crime. The only crimes that could logically be the result of permissive public carry laws are those (1) carried out with firearms (2) in public places (3) by a person lawfully carrying that firearm under the permissive framework (4) who would not otherwise have been highly motivated to commit the same crime regardless of whether state laws prohibited him or her from carrying in public. Most crimes (in fact, the vast majority of crimes) do not fit within those parameters. And, again, concealed carry permit holders are overwhelmingly law-abiding and rarely commit any crimes, much less gun crimes in public spaces that were facilitated by their carry permits in the sense that permit holder committed a crime of opportunity during the normal course of his or her otherwise lawful public carry. Moreover, to the extent that permit holders sometimes do commit these types of crimes, it is equally true that they are sometimes stopped by other armed citizens whose ability to defend themselves and others is owed directly to the more permissive public carry framework.31

Indeed, gun violence rates plummeted between the early 1990s and late 2010s, even as the national momentum shifted dramatically toward more permissive public carry schemes.32 Not a single state that voluntarily moved to a more permissive framework has chosen to return to its more restrictive laws. Since most individuals who own guns or carry them in public do so out of concern for their own safety, it is far more likely (and the available evidence certainly suggests) that any causal mechanism works the opposite way—increases in violent crime tend to cause states to move toward less restrictive frameworks so that law-abiding citizens may better defend themselves in public, and not the other way around.

Just as advocates of stricter public carry laws often overstate concealed carry permit holders’ contribution to violent crime, they often seriously downplay (or completely ignore) the protective impact of lawful gun ownership. According to a 2013 report by the Centers for Disease Control and Prevention, almost every major study on defensive gun uses has concluded that Americans use their firearms defensively somewhere between 500,000 and several million times every year.33 In 2021, the most comprehensive survey of gun owners and gun use ever conducted reinforced these earlier studies, estimating an average of just over 1.6 million annual defensive gun uses.34 Importantly, this latest analysis reveals that, unlike criminal gun uses, defensive gun uses are quite common amongst lawful gun owners, with approximately one-third of all gun owners reporting having used a firearm to defend themselves or their property.35 Moreover, while many of these

34 CRBS. FOR DISEASE CONTROL AND PREVENTION, PRIORITY FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 13 (2013), https://www.nap.edu/read/18319/chapter/3#15.
35 Id. at 35.
defensive gun uses occur in or around the gun owner’s home, 14 percent (or approximately 224,000) occurred either in public or in a third-party residence.35 The number of defensive gun uses outside of the home has likely been kept artificially low by overly restrictive public carry schemes like the one struck down in 

Bruen, precisely because these laws all but ensured that tens of millions of ordinary, law-abiding adults would never have the option of lawful armed self-defense in public spaces.

Not only are armed civilians better able to resist criminal activity when it occurs, but according to criminals themselves, knowing that potential victims might be armed effectively deters many crimes from happening in the first place. According to one survey of imprisoned felons, roughly one-third reported being “scared off, shot at, wounded or captured by an armed victim,” while 40 percent admitted that they had refrained from attempting to commit a crime out of fear that the victim was armed.36 Well over half of the surveyed felons acknowledged that they would not attack a victim they knew was armed, and almost three-quarters agreed that “one reason burglars avoid houses where people are at home is that they fear being shot.”37 Importantly, the study also found that felons from states with the greatest relative number of privately owned firearms registered the highest levels of concern about confronting an armed victim.38

This is consistent with the conclusions of a study that analyzed the effect of a Memphis newspaper listing all Tennessee residents with a handgun carry permit in a publicly accessible database, locating them within their five-digit zip code. The database received more than a million views in 2009.39 The study’s authors concluded that, in the months following a newspaper article that dramatically increased online traffic to the database, zip codes with higher densities of carry permit holders experienced a 20 percent relative decrease in burglaries compared to zip codes with lower densities of carry permit holders.40

International data, too, seems to indicate that criminals generally consider the likelihood of armed resistance and adapt their behavior accordingly. According to one study, only about 13 percent of burglaries in the United States take place when the occupants are home, a rate far lower than in many other developed countries like Canada, Great Britain, and the Netherlands.41 Because these “hot burglaries” are far more likely to result in an assault against a victim than are burglaries of unoccupied homes, it is relatively easy to predict—as several researchers have—that the lower percentage of hot burglaries in the United States results in over half a million fewer assaults every year than would otherwise occur if the percentage of hot burglaries was on par with these other countries, saving the nation billions of dollars in avoided crime costs and an untold number of lives.42 While these studies looked specifically at burglaries, which by definition do not occur in public, it should be presumed that the same protective effects of gun ownership extend (at least to some extent) to the public sphere based on the same logic—most criminals seek to avoid armed

34 Id. at 14.
36 Id. at 27.
37 Id.
38 Id.
40 Id.
42 Id. Importantly, these dollar amounts likely increase significantly when accounting for inflation.
resistance and in many cases will be deterred from attacking victims in a public place if those victims are likely to be armed.

Additionally, armed civilians play a significant but underacknowledged role in stopping active shooters, including those bent on committing acts of mass public violence. Between 2014 and 2021, armed citizens successfully stopped 51 percent of active shooters who carried out attacks in public places that allowed civilians to lawfully carry their own firearms for self-defense. In none of those incidents did the armed citizen injure innocent bystanders.

Finally, armed self-defense—including armed self-defense in public—is often a vital but overlooked part of ensuring the safety of victims of intimate partner domestic violence. As explained below, too often, perpetrators of intimate partner domestic violence are simply told by a court not to contact or harm their victims, but are otherwise not detained. Far too often, they are not even prosecuted for their crimes until after they violate restraining orders. According to my analysis of the Heritage Foundation’s Defensive Gun Use Database, between January 1, 2021 and March 10, 2022, we recorded 208 media-verified instances in which victims of intimate partner were protected from an abuser solely because they or a third-party was lawfully armed with a gun. In total, these armed citizens protected an estimated 395 potential victims, including 65 minor children and three unborn children. In 24 cases, the victim had a restraining order against the abuser, which was ignored. In 15 additional cases, it was clear that the assailant had a significant history of domestic violence, and in three cases, the victim was in the process of obtaining or renewing a protective order.

Our database is limited, and almost certainly undercounts by several orders of magnitude the actual number of times armed civilians successfully defend domestic violence victims from further abuse. First, our database relies solely on publicly accessible, online media reports that provide enough information to conclude that a particular DGU occurred during an incident of domestic violence involving partners. Often, media reports on DGUs fail to provide enough information for us to make reasonable determinations about the specific context in which the DGU occurred, or about whether the defensive gun user acted in an entirely lawful manner.

There is also good reason to believe that most defensive gun uses (in any context) are either not reported to police or are not considered “newsworthy” enough by local reports to garner a newspaper article. Notably, our list almost exclusively involves situations where a gun was not just fired defensively, but where the assailant was injured or killed. It is impossible to know how many women are protected each year during defensive gun uses that are less likely to be reported.

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49 Id.

46 Almost every study on defensive gun use has concluded that Americans use their guns defensively between 500,000 and 3 million times a year, far more than the numbers found in media sources, which range from several hundred to several thousand a year, INSTITUTE OF MEDICINE & NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner, Bruce M. Altevogt, Arlene F. Lee, Margaret A. McCoy, and Patrick W. Kelley, eds. 2013), https://www.nap.edu/read/18319/chapter/3.
in a public media source—like, for example, scenarios where the assailant is warded off by a warning shot or by the victim’s mere presentation of a firearm.

At the very least, these verified defensive gun uses underscore the importance of the Second Amendment in protecting victims of domestic violence from their abusers. Far too often, civilian gun possession is framed as contrary to the interests of domestic violence victims. While it is certainly true that armed domestic abusers present a serious threat to their victims, it is also true that armed civilians routinely present a serious threat to would-be abusers.

Additionally, despite common suggestions by some prominent gun control advocates that armed domestic violence victims routinely have their firearms taken and used against them by their abusers, this is not supported by the available evidence. Such tragedies have, of course, occurred. But they are exceedingly rare, especially when compared to the number of successful defensive gun uses. Between our records of cases excluded from the Heritage database for being unsuccessful and the records available from the Gun Violence Archive—which flags instances of domestic violence involving guns stolen from their owners—we have been able to find only five cases since January 1, 2021, that even remotely fall into this category. In only one of these cases did an abuser overpower his armed victim, take her gun, and immediately use it against her to cause death or serious bodily injury. In a second case, the abuser confronted the victim while she was not armed, demanded that she hand over the gun he knew she possessed for protection against him, and then used the gun to fatally shoot her nearly two weeks later. In three other cases, a victim’s gun was taken but the abuser either did not attempt to use the gun against the victim or did not successfully use the gun against the victim.

B. Overly Restrictive Public Carry Laws Have Devastating Criminal Justice Consequences

Not only does *Brune* better enable peaceable citizens to defend themselves and others in public, it strikes down some of the worst aspects of discretionary, restrictive public carry frameworks that

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48 Megan Guza & Megan Tomašic, *Police: Woman Had Protection Order Against Ex Accused of Killing Her With Her Own Gun, Taken Live* (Jan. 21, 2022), https://www.bibleive.com/local/police-say-woman-killed-with-her-own-gun-in-bellevue/. Of note, the victim was shot shortly after leaving her place of work and while walking to a bus stop to take public transportation home. Id. While the victim had a concealed carry permit, it is possible that her company’s weapons policy forbade her from carrying while at work. If this is the case, she likely would not have been able to carry to or from work, either, as she would not have a place to safely store her firearm during work hours. This type of scenario—where concealed carry permit holders are forced, for logistically reasons, to disarm themselves for much longer than any particular law or policy would require in a vacuum—is far from uncommon.

too often resulted in the government perversely creating “violent weapons offenders” out of otherwise law-abiding, upstanding citizens. As a coalition Black defense attorneys highlighted in an amicus brief in support of the petitioners in **Brune**, New York’s licensing requirements effectively criminalized the exercise of fundamental rights, in particular for poor and non-white Americans. 50 It was almost impossible for them to obtain a license to carry because licensing officials almost always determined that they lacked proper cause or sufficiently good moral character. And yet, because many still nonetheless truly felt a need to protect themselves with firearms in public despite government assessments to the contrary, or because they simply could not afford the often-prohibitive fees the government requires, thousands of New Yorkers were prosecuted every year as felons for possessing guns without licenses. 51 Nearly all of them were ethnic minorities. 52 In many cases, this is the only crime they were ever alleged to have committed. Now, at the very least, there is some method for ordinary peaceable New Yorkers to exercise their fundamental rights in a non-criminal manner.

Unfortunately, even shall-issue states sometimes make it too difficult for ordinary, law-abiding citizens to obtain and carry firearms in public, resulting in the same criminal justice problems. A recent study from Loyola University on arrests for illegal gun possession in Cook County helps to demonstrate the punitive effect of Illinois’ burdensome process for obtaining a concealed carry permit. 53 A significant percentage of individuals arrested for illegal firearm possession are not otherwise prohibited from possessing guns and are not accused of using their gun in a violent manner or in furtherance of a crime. Their sole offense was a failure to obtain a concealed carry permit, something that under Illinois law—they—as non-prohibited persons—could in theory obtain. The question is why individuals who want to carry in public and would actually qualify for the permit to do so nonetheless fail to obtain one. The answer seems to be, in large part, that obtaining a carry permit in Illinois will cost hundreds of dollars, require a working knowledge of the legal process, and impose serious time and logistical burdens.

### III. The Post-Brune Legal Fallout Is Widely Mischaracterized and Its Potential Public Safety Consequences Grossly Exaggerated

With respect to the post-Brune legal fallout, this hearing is probably at least six months premature. The most significant post-Brune challenges are still working their way through the lower courts, and will likely take several more months (if not years) to fully resolve. That said, it is almost certain that Brune will ultimately threaten certain types of modern gun control laws. The current extent of the post-Brune legal fallout can be generally categorized into two groups: (1) cases dealing with public carry frameworks (most of which are in formerly “proper cause” states), and (2) cases in which more modern 20th century laws have been challenged. In each of these cases,

51 Id.
52 Id.
the holdings and practical effects have been widely mischaracterized by gun control advocates and liberal academics, and the potential public safety consequences grossly exaggerated.

A. Successful Challenges to Post-Brueen Public Carry Frameworks in Formerly “Proper Cause” States

After Brueen, some formerly proper-cause states responded by merely suspending that requirement and leaving in place other time, place, and manner restrictions, which generally brought their public carry permit frameworks in line with the more restrictive and burdensome shall-issue jurisdictions. Others, however, seemingly went out of their way to take out their frustrations over the Brueen decision on law-abiding concealed carry applicants. New York and New Jersey are two prime examples. They immediately implemented extensive changes to their public carry laws that were obvious attempts to circumvent and undermine key aspects of Brueen.

Since these states could not use its discretion to determine whether an applicant had a “proper cause” to exercise his or her Second Amendment rights in public, they pivoted to insisting that applicants must still prove they are of sufficiently good “moral character.” Licensing officers still reserve all the discretion in the world to determine whether an applicant meets that standard (a standard that, of course, is not based on objective measures of character such as criminal history or evidence of dangerousness). Applicants in New York, specifically, have to provide lists of all current and past social media accounts, the names and contact information of family members and cohabitants, at least four character references, and basically any other information a licensing officer decided might be relevant.

While the Court in Brueen said that New York could not deem the entirety of the public arena a “sensitive place,” both it and New Jersey did their darndest to deem off limits as many public places as possible. Among other things, these states created a default presumption that a permit holder may not carry a firearm on to any third-party private property (including businesses open to the public) without explicit permission from the third-party—a presumption that all but ensures permit holders will not be allowed to bear arms in almost any area outside of their homes.

To the extent that some courts have enjoined parts of these post-Brueen public carry frameworks, it is because they largely fall far outside of the norms of the shall-issue frameworks identified in Brueen as presumptively constitutional. And, notably, most of New York’s post-Brueen restrictions are still in place after the Second Circuit issued stays with respect to almost all aspects of the temporary restraining orders.54 Oral argument is scheduled for March 20. It is likely that these more extreme aspects of New York’s new framework will ultimately be struck down as inconsistent with Brueen, though likely by virtue of a “grant, vacate, and remand” order from the Supreme Court and not the Second Circuit, which, like the Ninth Circuit, is notorious for having

never found a gun control measure that it could not find perfectly compatible with the Second Amendment.55

This will not, however, create serious public safety concerns. Again, concealed carry permit holders are overwhelmingly law-abiding and are not the driving force behind gun crimes. These were not restrictions on public carry that New York, New Jersey, or others deemed necessary for maintaining public safety until after Brown. That is because these brand-new restrictions are not about public safety in the first place. They are nothing more than cynical efforts to ensure that the concealed carry process is so convoluted, burdensome, and restrictive that many residents will simply decline to waste time and money obtaining a permit that does not actually seem to allow them carry anywhere outside of their homes. They are the very types of Kafkaesque bureaucratic burdens with abusive ends that the Brown majority maintained would open a shall-issue regime to constitutional challenge.56 If and when these provisions are finally struck down, and New York and others are made to fall in line with other shall-issue states, the only effect on public safety will be an increased opportunity for peaceable citizens to defend themselves in public.

There has been, to my knowledge, only one successful post-Brown challenge to public carry laws that pre-dated Brown. In August of 2022, in Firearms Policy Coalition v. McCraw, the U.S. District Court for the Northern District of Texas enjoined a Texas statute prohibiting law-abiding 18- to 20-year-old from obtaining a license to carry a handgun outside of the home for self-defense.57 The court determined that law-abiding 18- to 20-year-olds are part of “the people” mentioned in the Second Amendment, and that the wholesale prohibition on their bearing handguns in public was not consistent with the Nation’s historical tradition of firearm regulation, as required by Brown.58 The court started its analysis by noting that the Second Amendment does not mention any sort of age restriction, and that “when the Framers meant to impose age restrictions, they did so expressly.”59 Heller made clear that “the people” is a term of art referring “all members of the political community, not an unspecified subset,” and in Brown it was undisputed that “ordinary, law-abiding, adult citizens” are part of the “people” whom the Second Amendment protects.60 Moreover, while the Second Amendment protects an individual right regardless of whether he or she is actively engaged in militia service, “logic demands . . . that the Second Amendment’s protections extend at least to those who constitute the militia . . . [I]t must protect at least the pool of individuals from whom the militia would be drawn.”61 This was generally understood at the Founding to include able-bodied 18- to 20-year-olds.62

55 This includes having been the Circuit responsible for upholding New York’s “proper cause” public carry framework, in the first place, as well as even more restrictive components that had (prior to a 2021 law change by New York to evade Supreme Court review) effectively prohibited lawful gun owners in New York City from transporting their guns outside of their homes for any reason, except to travel to one of seven gun ranges inside of city limits.


58 Id.

59 Id. at 6.

60 Id.

61 Id.

62 Id. at 9.

63 Id. at 9–11.
Texas’ scheme did not, like historical analogues, distinguish between methods of carrying a firearm in public (such as openly versus concealed), prohibit carrying only in certain “sensitive places,” involve the carrying of “dangerous and unusual” arms, or deal with gun ownership by felons or the mentally ill. While laws restricting certain rights of individuals under the age of 21 were enacted in some jurisdictions during the latter half of the 19th century, the court recalled that Brnen “should not be understood to endorse freewheeling reliance on historical practice” from that period “to establish the original meaning of the Bill of Rights.” Rather than appeal, Texas settled the case and changed its concealed carry permitting scheme to allow applications from law-abiding residents aged 18 or older.64

Notably, at least one federal circuit has already disagreed with McCraw’s reasoning, though in a case dealing with the slightly different (but very much related) issue of laws prohibiting gun sales to young adults.66 However, should the reasoning in McCraw ultimately win the day (an outcome that is perfectly reasonable under a fair application of Brnen), the sky will still not fall. As with restrictive public carry laws implemented by formerly “proper cause” states after Brnen, there are few negative public safety implications for allowing law-abiding 18-to-20-year-olds to obtain permits to carry firearms in public for self-defense on the same basis as other law-abiding adults.

B. Successful Challenges to Non-Public Carry Gun Laws Based on Brnen Framework

There have also been a handful of successful post-Brnen challenges to gun laws unrelated to public carry. While these cases are still working their way through litigation and additional appeals, they do provide meaningful insight into how Brnen may operate to strike down certain types of gun control laws. Importantly, they also provide valuable insight into the types of laws that lower courts generally agree Brnen leaves untouched.

United States v. Quiroz67

One month after McCraw, in September of 2022, the U.S. District Court for the Western District of Texas dismissed an indictment under 18 U.S.C. § 922(n), which prohibits those under felony indictment from “receiving” (but not possessing) firearms or ammunition. The court reasoned that the federal statute does not “align with the Nation’s historical tradition,” as required by Brnen.68 In this case, the defendant was under felony indictment in Texas state court for both burglary and for jumping bail with respect to that burglary charge. While under indictment, he attempted to buy a firearm from a licensed firearms dealer, during which transaction he denied being under felony indictment when filling out his required ATF Form 4473. Because of a delayed background check, the defendant was able to acquire the firearm before the denial came back to the dealer. Shortly thereafter, the Bureau of Alcohol, Tobacco, Firearms, and Explosives was informed of the illegal

64 Id. at 19 (quoting Brnen, 142 S.Ct. at 2163 (Barrett, J., concurring)).
68 Id. at 15.
firearm acquisition. The defendant’s firearm was seized, and he was charged and ultimately convicted of violating § 922(n), as well as 18 U.S.C. § 922(a)(6), which prohibits a person from making false statements during the purchase a firearm.

In holding § 922(n) unconstitutional, the court reasoned that the Second Amendment’s plain text presumptively protects the “receipt” of a firearm just as much as the “keeping” and “bearing” of a firearm, as the right to possess an object necessarily encompasses the right to “receive” it into one’s possession. Far from being “relatively similar” to historical regulations, § 922(n)’s history does not begin until the Federal Firearms Act of 1938 and did not apply to state-level indictments for non-violent crimes until 1968. Moreover, the court noted that the statute warranted additional skepticism because of historical misappropriation of similar laws to “pretextually and unlawfully disarm unfavored groups” without the benefit of due process or legal tribunals.

United States v. Price

In October of 2022, the U.S. District Court for the Southern District of West Virginia granted a defendant’s motion to dismiss an indictment for possessing a firearm with an obliterated serial number in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B), effectively finding that those statutes were unconstitutional under the Bruen test. Here, law enforcement officers arrested the defendant during a traffic stop in which they searched his vehicle and found a pistol with an obliterated serial number. The defendant had previously been convicted in another state of involuntary manslaughter and aggravated robbery, both felonies, and was indicted by a grand jury for both being a felon in possession of firearm and for possessing the unlawfully altered gun.

The court upheld the indictment for being a felon in possession of a firearm, noting that the Supreme Court repeatedly issued assurances in Heller, McDonald, and Bruen that its opinions “did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons.’” The Bruen majority in particular was careful to state that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms for self-defense.” Even if Bruen did intend for lower courts to re-examine felon-in-possession laws, such laws “fit comfortably within the nation’s longstanding tradition of disarming unvirtuous or dangerous citizens.”

At the same time, the court could not find such historical evidence for criminalizing the mere possession of a firearm with an obliterated serial number. 18 U.S.C. §§ 922(k) and 924(a)(1)(B) are not commercial regulations on the sale of arms, but rather criminal prohibition on any person’s

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69 Id. at 3.
70 Id. at 4–5.
71 Id. at 11–12.
73 Id.
74 Id. at 1.
75 Id. at 7.
76 Id.
77 Id. at note 4.
78 Id. at 6.
possession of an unserialized firearm, regardless of that firearm’s condition at the time of the commercial sale. 79 Moreover, it was not until 1934 that Congress first required serial numbers on firearms, and even then, it was only for a small subset of firearms covered under the National Firearms Act. It was not until 1968 that the federal government first broadly required serial numbers on all firearms manufactured or imported in the United States. 80 By 1938, Congress had prohibited the sale, transfer, or receipt of guns with obliterated serial numbers, but did not criminalize possession of such a firearm until 1990. 81 The court therefore dismissed the defendant’s indictment for possessing a firearm with an obliterated serial number, finding that the relevant statutes were unconstitutional under 

Bruen.

At least one other federal district court has reached an opposite conclusion. 82

United States v. Harrison 83

In early February of 2023, the U.S. District Court for the Western District of Oklahoma dismissed an indictment under 18 U.S.C. § 922(g)(3), which prohibits unlawful users of controlled substances from possessing firearms, because the government failed to prove that this prohibition was consistent with “the historical traditions that define the outer limits of the right to keep and bear arms.” 84 The defendant in this case was arrested during a traffic stop in which officers discovered a loaded handgun in his vehicle, as well as various marijuana and THC-infused substances. 85 At the time of his arrest, the defendant was on bond awaiting trial in Texas for aggravated assault, stemming from an altercation in which he and another man were alleged to have shot into a crowd at a college party, seriously wounding one victim. 86 Importantly, it was not clear to the court from pre-trial records that the defendant had been prohibited from possessing firearms as a condition of his pre-trial release. 87

In the court’s view, the historical statutes cited by the government only restricted the public carry of firearms by individuals who were actively intoxicated. 88 They did not, however, impose a broad prohibition on all gun possession in all circumstances for those who use intoxicating substances but are currently sober. 89 In short, the nation’s historical tradition of firearms regulations “was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed.” 90 Where felon-in-possession laws deprive a person of the right to keep and bear arms after a criminal conviction requiring an individualized, adversarial proceeding that complies with the requirements of due

79 Id. at 3.
80 Id. at 5.
81 Id.
84 Id.
85 Id. at 1–2.
86 Id. at note 1.
87 Id.
88 Id. at 6–8.
89 Id.
90 Id. at 15.
process, § 922(g)(3)’s deprivations occur without any pre-deprivation due process, at all. The court was clear to note, however, that Bruen does not prohibit the government from playing a role in protecting the public from dangerous people who possess firearms. If the state of Texas thought that the defendant was a danger to the public based on his alleged involvement in a previous shooting, it could have demonstrated to a judge during an individualized proceeding that he should be kept in pre-trial detention, which “would be a highly effective means of protecting the public from a gun-toting [defendant].”

A Tenth Circuit panel has already heard oral argument for this case, but it has not yet issued a decision.

United States v. Rahim

Most recently, gun control advocates have decried a Fifth Circuit panel decision where the court vacated a conviction under 18 U.S.C. § 922(g)(8), which prohibits gun possession for individuals under certain types of domestic violence restraining orders, finding that the statute “fails to pass constitutional muster” under Bruen. In this case, the defendant had various criminal charges pending against him in Texas state court for, among other things, using a firearm while physically assaulting his girlfriend in December 2019, and committing aggravated assault against a different woman in November 2020. He was not, apparently, held on pre-trial detention. However, as a result of the December 2019 allegation, he was subject to a civil protection order prohibiting him from “committing family violence,” coming within 200 yards of his ex-girlfriend, or possessing a firearm. Nevertheless, he was accused of participating in five additional shootings within the two-month span between December 2020 and January 2021. During his arrest, officers found him in possession of two firearms, so on top of all of his other various state criminal charges, he was charged in federal court with violating § 922(g)(8).

The Fifth Circuit, in holding § 922(g)(8) unconstitutional, noted that while the defendant was subject to a civil restraining order and accused of committing a number of serious criminal offenses, he was not a convicted felon, mentally ill, or otherwise within a category historically understood as excluding someone from “the people” for purposes of the Second Amendment. The only historical laws remotely resembling modern arms prohibitions based on civil protection orders were surety laws, which did not completely deprive a person of the right to keep and bear arms, but only prohibited him from publicly carrying arms if he failed to “post surety.” Through Bruen’s lens, then, § 922(g)(8)’s ban is an “ outlier that our ancestors would never have accepted.”

Importantly, as with the district court in Harrison, the Fifth Circuit panel was quick to point out that while the government could not disarm the defendant through a civil restraining order, it was not left without options. Judge Ho’s concurrence in particular made clear that:

51 Id. at 9–10.
52 Id. at 24.
54 Id.
55 Id.
56 Id. at 12.
Those who commit violence, including domestic violence, shouldn’t just be disarmed—they should be detained, prosecuted, convicted, and incarcerated. And that’s exactly why we have a criminal justice system—to punish criminals and disable them from engaging in further crimes.\textsuperscript{97}

Whereas civil protection orders can be “misused as a tactical device in divorce proceedings” and arise in situations where judges may feel pressured (or even incentivized) to grant them, criminal proceedings require much more robust standards of due process.\textsuperscript{98} During criminal proceedings, the government can detain and disarm defendants before trial and as part of the sentence. The court cast no doubt on the government’s ability to continuing prohibiting gun possession for convicted felons. It can also pursue charges against (and therefore detain and disarm) those who threaten criminal violence.\textsuperscript{99}

\textit{Themes From These Cases:}

Gun control advocates have painted these cases as devastating for public safety, a refrain that continues gaining traction due in no small part to the involvement of unsympathetic defendants and the general public’s limited and unannounced understanding of criminal law. One media outlet went so far as to assert that the \textit{Rohani} opinion literally gives “violent domestic abusers” a “license to kill,” as though the judges had unilaterally declared murder to be legal before handing the defendant a machine gun and saying, “Have at it.”\textsuperscript{100} The reality is that in every single case outlined above, the government was left with a variety of options for detaining and disarming the allegedly dangerous person. Assuming none of these cases is overturned during further appeal, in none of them is the defendant likely to be lawfully able to possess arms at any time in the near future or ever. And in none of them is the ultimate result that society must throw up its hands, decriminalize murder, and give guns to violent offenders. Any suggestion to the contrary is preposterous.

In \textit{Quiroz}, the government can seek to have the defendant detained while pursuing the original criminal charges for burglary—pre-trial detention may be particularly warranted given that he is also accused of bail jumping. It can seek to have a court impose a prohibition on possessing firearms as a condition of his pre-trial release. If the defendant is convicted of either of his two felony charges, the government can prohibit him from possessing firearms as a condition of his sentence or in perpetuity as a convicted felon.

In \textit{Price}, the government may still prohibit the former violent felon from possessing firearms and can pursue additional criminal charges for violating that prohibition. In the meantime, the government can seek to have him held in pre-trial detention or incarcerated as part of his sentence.

In \textit{Harrison}, the government may continue pursuing criminal charges against the defendant for allegedly shooting innocent partygoers. The government can seek to have him held on pre-trial

\textsuperscript{97} Id. at 14 (Ho, J., concurring).
\textsuperscript{98} Id. at 15 (Ho, J., concurring).
\textsuperscript{99} Id.
\textsuperscript{100} Billy Sinclair, \textit{Violent Domestic Abusers Now Have A License To Kill}, \textit{The Crime Report} (Feb. 8, 2023), https://thecrimereport.org/2021/02/08/violent-domestic-abusers-now-have-a-license-to-kill/.
detention or prohibited from possessing firearms as a condition of his pre-trial release. If he is convicted, the government may protect the general public by incarcerating him, prohibiting him from possessing weapons as a condition of his probation or parole, and prohibiting him as a violent felon from possessing firearms after his sentence is completed. If he is acquitted, the government can prohibit him (and anyone else) from possessing firearms in public while actively intoxicated, and can arrest and criminally charge him for doing so.

In Rahimi, the defendant is likely going to spend many years in state prison for shooting at multiple innocent victims and committing multiple serious domestic violence offenses.\footnote{Rahimi’s original charges included making a terrorist threat against a family or household member, discharging a firearm in specified municipality, and family violence causing bodily injury. See United States v. Rahimi, No. 21-11001 (5th Cir. Jun. 8, 2022).} Should he be released, the government can prohibit him from possessing firearms, either as a condition of his parole or because of his conviction for a violent felony.

In short, anyone who insists that these cases greatly affect the government’s ability to detain and disarm violent offenders either has not read them, does not understand how these laws work, or is a liar with a flair for the dramatic.

IV. Properly Understood, Brnen Leaves Ample Room for Legitimate and Effective Public Safety Solutions

As the actual holdings from the above cases indicate, to the extent that Brnen threatens certain gun control laws, they are generally laws that have never been effective at protecting the public. At the same time, Brnen clearly leaves ample room for many constitutionally legitimate options when it comes to public safety. The even better news is that these public safety solutions are actually far more effective than any of the gun control laws likely threatened by Brnen.

A. The Gun Control Laws Realistically Threatened by Brnen are Generally Ineffective at Protecting Innocent Victims

The cases outlined above largely speak for themselves about the ineffectiveness of the laws they struck down. Many of the overly restrictive post-Brunen public carry frameworks were not deemed “necessary” for the public safety until after Brnen. They apply to a segment of society (concealed carry permit holders) that are overwhelmingly not responsible for gun crimes. As a practical matter, they do nothing to deter criminals who were already motivated to carry without a permit and use firearms to harm innocent parties, and who routinely did so while violating more restrictive public carry laws. Civil protection orders, as well, are rarely effective against the most motivated (and therefore the most dangerous) offenders, who routinely violate those conditions with impunity. At the same time, they can be weaponized against innocent parties, including as a way for domestic violence offenders to further their abuse.

Meanwhile, laws that strip law-abiding young adults of their fundamental rights do not distinguish between the vast majority of adults who are peaceable and law-abiding, and those who by their actions have proven themselves to be individualized risks of criminal violence. As with other laws
outlined above, motivated criminal offenders are likely to simply ignore the prohibition, as they already routinely do. Meanwhile, while it is true that adults between the ages of 18 and 20 are responsible for a disproportionate amount of violent crime, it is equally true that they are disproportionately likely to be victimized by violent crime—and therefore disproportionately likely to need to rely on their right to armed self-defense.

While an exhaustive review of all potentially threatened laws in unnecessary, two other major prohibitions are worth analyzing—bans on so-called “assault weapons,” and bans on so-called “large-capacity magazines.”

**Bans on So-Called “Assault Weapons”**

In *Heller*, the Court reasoned that the Second Amendment’s protections are not limited only to those arms in existence at the time of ratification, but “extends, prima facie, to all instruments that constitute bearable arms.”102 While “dangerous and unusual” arms may fall outside of the Amendment’s scope, it certainly covers small arms (in that instance, handguns) that are “typically possessed by law-abiding citizens for lawful purposes,” like self-defense.103

There is no standard definition of “assault weapon,” but the phrase generally refers to a semi-automatic rifle with a detachable magazine and one or more of a handful of common cosmetic features, such as a pistol grip, forward grip, barrel shroud, collapsing or folding stock, or threaded barrel.104 Despite purposeful attempts by gun control advocates to conflate these guns in the public mind with machine guns and select-fire assault rifles, semi-automatic rifles with pistol grips and barrel shrouds are functionally identical to all other semi-automatic rifles.

Semi-automatic rifles—with or without the cosmetic features decried by gun control advocates as being “military-style”—are the exact type of bearable small arms whose civilian possession is protected by the Second Amendment.105 Even as early as 1994, well before *Heller*, *McDonald*, and *Brnen*, the Supreme Court referred to these rifles as weapons that “traditionally have been widely accepted as lawful possessions.”106 This is even more true today, when tens of millions of these rifles are currently in the hand of peaceable, law-abiding citizens who will never use them to harm themselves or others.107

If bans on so-called “assault weapons” are struck down under in post-*Brnen* litigation (as they should be), public safety will not be meaningfully impacted. To begin with, these bans have never been clearly associated with measurable increases in public safety. There exists no plausible causal mechanism explaining how such a ban could lead to fewer gun crimes given how rarely rifles of

103 Id. at 625–30.
104 For an extensive analysis of these features, see generally Stephen P. Halbrook, America’s Rifle: The Case for the AR-15 (2022).
105 Id.
107 See English, supra note 34, at 33–34. Importantly, owners of these rifles widely report owning them for perfectly lawful purposes, including home defense, participation in competitive shooting sports, hunting, and recreational target shooting. Id.
any kind are actually used to commit crimes and how easily “non-assault weapon” versions of the same firearm could be used just as effectively by criminals in the vast majority of cases.109 During the past decade, rifles of any kind were known to be used in only 3 percent to 4 percent of homicides, without any clarity on how many of those rifles were “assault weapons” compared to other types of “non-assault” rifles.109 The average American is, in fact, several times more likely to be stabbed to death than he or she is to be shot to death with a rifle of any kind.110

Similarly, handguns are by far the weapon of choice in non-fatal firearm crimes.111 Even if enforcement were immediate and total, such that no criminal could ever again access a pistol-gripped semi-automatic rifle, most crimes (in fact, virtually all crimes) could just as easily and effectively be carried out with a ban-compliant firearm of the same caliber. It is little wonder, then, the official government report on the 1994 federal assault weapons ban—which expired in 2004—determined that “[i]f the ban were repealed, the ban’s effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. [Assault weapons] were rarely used in gun crimes even before the ban.”112

Indeed, the primary concern raised by advocates of assault weapons bans is related to the least common type of firearm violence—mass public shootings, which account for a fraction of a percent of all gun homicides every year, although they certainly garner a lot of attention for understandable reasons.113 Gun control advocates, politicians, and the media routinely characterize semi-automatic rifles, specifically the AR-15, as the “weapon of choice” for mass public shooters. This is far from an accurate depiction of the facts. Of 82 mass public shootings that occurred between 2012 and 2022, 38 involved shooters who used handguns alone while only 17 involved shooters who used rifles alone.114 Even if this analysis includes the 19 mass public shootings in

108 See generally Kleck, infra note 112.
110 FBI Crime Data Explorer; supra note 109.
114 Fellman, supra note 113. Additionally, as of the time of this testimony was written, all three of the mass public shootings that have taken place in 2023 involved the use of handguns alone. Id.
which the perpetrator possessed a combination of firearms including a rifle, most mass public shootings still would not involve the use of a rifle. 116

To the extent that semi-automatic rifles are utilized by mass shooters, it is because they are popular among all Americans, the vast majority of whom will never use them for any unlawful purpose, much less a mass shooting. Moreover, some of the deadliest mass public shootings in United States history have been carried out with nothing more than handguns. This includes the worst school shooting in U.S. history at Virginia Tech in 2006, where the shooter was able to fire 174 rounds in roughly 11 minutes, killing 30 people and wounding 17 others with nothing more than common, relatively low-caliber handguns. 117 Similarly, in 1991, a shooter at a Luby’s Cafeteria in Killeen, Texas, fatally shot 23 people and wounded another 19 with two handguns. 118

The reality is that, even if all would-be mass public shooters were successfully diverted to the use of “non-assault weapons,” it would likely have no meaningful impact on their ability to kill large numbers of unarmed civilians. 119 With only a few arguable exceptions, such as the 2018 Las Vegas shooting, the type of firearm was not a major factor in the ability of mass shooters to cause significant casualties, particularly compared to other important factors such as the time the shooter remained unconfined by a meaningful response. 120 This is because both “assault weapons” and “non-assault weapons” are functionally the exact same firearms and expel the exact same caliber of bullets with the exact same muzzle velocity, impacting the victim’s body in the exact same manner.

116 The remaining mass public shootings involved either shotguns alone, or a combination of handguns and shotguns.
119 Although many gun control advocates seem to believe—or at least appear to convey to their respective audiences—that banning “assault weapons” would mean banning the use of all semi-automatic rifles or firearms chambered in common rifle calibers, such that would-be mass shooters would be limited to the use of handguns or handgun calibers, this is simply a fiction.
120 The Las Vegas shooting is an outlier amongst modern mass public shootings for several reasons, most notably in that the shooter operated from a fixed “sniper’s nest” position. The factor that most obviously impacted the casualty count in this shooting was not the shooter’s use of a pistol-gripped rifle, but his use of a bump stock device, which significantly increased his rate of fire. There is at least a facially plausible argument that the shooter’s use of foregrips and pistol grips enabled him to better hit his targets from a distance of almost 500 yards than if his firearms did not have such features. However, there are several problems with this argument. First, the shooter does not appear to have been pinpointing specific victims, but rather attempting to fire at as many rounds as possible at the general mass of concertgoers. Given that his target was comprised of thousands of potential victims packed tightly together in a large, open space, any potential slight decrease in accuracy rendered by the use of a “featureless” rifle would likely have resulted not in fewer casualties, but merely a different set of casualties. Second, while it is still unclear which of the shooter’s dozens of firearms were actually used that night, many of them were attached with bipods—common devices for hunting and marksmanship that allow the shooter to rest the front end of the firearm in a stable and elevated position. The use of these devices—which are not features of “assault weapons”—would have provided far more stability from the shooter’s “sniper’s nest” vantage point than would a foregrip or pistol grip. Moreover, from such a position, there are a variety of methods the shooter could have used with a featureless rifle to stabilize the firearm even without a bipod or foregrip, such as resting the forestock on a bag or chairback.
At the same time, the millions of Americans who own these firearms do so for the same reasons that police departments across the country now routinely issue them to their peace officers, who are, by definition, not authorized to wage offensive warfare or “kill as many people as possible in the shortest amount of time.” In short, they are incredibly useful tools against criminal threats that commonly arise in a civilian context. Civilians can and do use them to great effect in defense of themselves and others.

Magazine Capacity Limitations

Again, even before Brown the Court had made clear that the Second Amendment’s protections are not limited to the technology that existed in 1792. Multi-shot firearms were well-known to the Founding generation, and the trend in firearm manufacturing toward increased ammunition capacity was already well underway by the time the Second Amendment was ratified. Rifles with magazines capable of holding more than 10 rounds of ammunition first achieved mass-market success in the late 1860s, while handguns with such magazines first became popular in the 1930s. By the 1960s and 1970s, advancements in magazine technology had made magazines capable of holding more than 10 rounds the factory standard for many of the most popular firearms on the civilian market, with millions of such firearms being sold. As one might guess from the longstanding popularity of 10+ round magazines by civilians, attempts to limit magazine capacity for civilians are a modern phenomenon. Far from being rooted in some historical tradition of regulation, the first laws even remotely resembling modern bans on large-capacity magazines did not arise until the 1930s—and two of the three were repealed within decades. Even today, magazine capacity limits exist in only a minority of states, most of which did not impose those limitations until the 21st century. It is therefore incredibly difficult to see how any court could uphold such modern bans while remaining faithful to Heller and Brown.

120 English, 2021 National Firearms Survey, supra note 34, at 33–34.
121 Data from the 2021 National Firearms Survey suggests that rifles are used in roughly 13 percent of defensive gun uses, though it is unclear how many of these rifles are semi-automatic “assault weapons” compared to other types of rifles. Id. at 10–16. Media-verified defensive gun uses often do not include specific information on the type of weapon used, much less clearly distinguish between various types of rifles. However, it is abundantly clear that civilians, just like law enforcement officers, can and do rely on these weapons for self-defense. See, e.g., Joseph Erickson, 3 Charged by SLED in Williamsburg County Shooting, ABC 4 NEWS (Dec. 9, 2022), https://abcn.ws/4/a9/c90-charged-by-sled-in-williamsburg-county-shooting-louistree-sc-south-carolina- state-law-enforcement-division/; Darren-apple-davis-tate-and-legion-green-terrel-graham-sccey, Fanina Collins, Florida Sheriff Says Man Will ‘Absolutely Not’ Face Charges For Defending Home With ‘AK-47-Style’ Gun, FOX NEWS (July 13, 2022), https://www.foxnews.com/us/florida-sheriff-says-man-absolutely-not-face-charges-defending-home-ak-47-style-gun; Thomas Mates, Man Arrested After Shootout in Melbourne Neighborhood, CLICK ORLANDO (Apr. 20, 2022), http://www.clickorlando.com/DELIGHT%202020%20%204%2032_Melbourne_FL.pdf; see Caetano v. Massachusetts, 577 U.S. 411 (2016).
123 Kopel, supra note 123 at 854–57.
124 Id. at 859–62.
125 Id. at 864–66.
126 In fact, of the 13 states that currently impose some form of magazine capacity restriction, 5 enacted those laws within the last 15 months. https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/
As with bans on semi-automatic firearms deemed “assault weapons,” the public safety implications are minimal should post-Brown litigation result in bans on “large-capacity magazines” being struck down as unconstitutional. Most gun crimes are not targeted shooting attempts, but rather robberies and aggravated assaults in which the perpetrator brandishes—but does not fire—the gun. Even with respect to the minority of gun crimes in which perpetrators fire their weapon, it is not at all clear that magazine capacity limits offer meaningful benefits. Only a small percentage of homicides involve two or more victims, which are the types of crimes most likely to require an offender to fire more than 10 rounds. Unsurprisingly, an official analysis of the 1994 federal law prohibiting their sale concluded that there was “no evidence of reductions in multiple-victim gun homicides or multiple-gunshot wound victimizations” as a result of the prohibition. This is hardly surprising, given that the “banned . . . magazines were used in only a modest fraction of gun crimes before the law.” Moreover, later analyses have determined that the proportion of all multiple-victim homicides actually increased slightly during the first half of the federal ban, before stabilizing around 2000 and remaining consistently around 4.5 percent until 2008, when the most recent report was apparently published.

It is little wonder, then, that proponents of magazine capacity limitations have increasingly turned away from arguments that these laws will lower crime rates, generally, and instead focus on their alleged impact on the least common type of gun violence—mass public shootings. One of the most popular arguments raised in favor of limiting magazine capacity for civilians is that mass public shooters may use standard capacity magazines to inflict higher numbers of casualties, namely by decreasing the number of times they need to reload. Again, even assuming widespread compliance and effective enforcement, limiting magazine capacity is unlikely to meaningfully lower casualty rates in mass public shootings. First, mass public shooters can (and routinely do) work around these limitations by bringing several firearms and extra loaded magazines, easily

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128 See Grace Kena & Jennifer L. Truman, Trends and Patterns in Firearm Violence, 1993–2018, Bureau of Justice Statistics Special Report NCI 251663 (Apr. 2022), https://bjs.ojp.gov/content/pub/pdf/rtpv9318.pdf. There are far more non-fatal firearm victimizations than firearm homicides every year. Between 2014 and 2018, only 9 percent of all non-fatal firearm victimizations involved an offender who actually fired a weapon, and only 2 percent resulted in a victim being shot. Id. at 10.

129 Alexa Cooper & Erica L. Smith, Homicide Trends in the United States, 1990–2008, Annual Rates for 2009 and 2010, Bureau of Justice Statistics NCI 236018 at 24 (Nov. 2011), https://bjs.ojp.gov/content/pub/pdf/hus9008.pdf. Of course, offenders may fire more than 10 rounds in a single-victim homicide, but it is far more likely in such cases that rounds 11 and above were “overall” and not necessary to offender’s ability to kill the victim.


131 Id.


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replacing expended magazines within seconds.\textsuperscript{134} Moreover, an analysis of data from mass public shootings shows that most perpetrators do not actually use magazines capable of holding more than 10 rounds, and that regardless, mass public shooters typically do not fire at a fast enough rate for casualty counts to be attributed to magazine capacity.\textsuperscript{135} This conclusion is supported by the findings of various panels analyzing the effect of magazine capacity for individual mass shootings, as well as by the reality that high casualty counts have occurred during shootings where only “limited-capacity” magazines were used.\textsuperscript{136}

It is not just that these laws have little practical effect on criminal actions—at the same time, they undermine the practical ability of peaceable citizens to defend themselves in those scenarios where the need for armed self-defense is most acute, such as when they are outnumbered, outgunned, or otherwise placed at a tactical disadvantage.\textsuperscript{137} These scenarios of tactical disadvantage are almost certainly more common for peaceable citizens than for criminals, who have the upper hand in planning and executing their crimes. Unlike law-abiding citizens, who must reactively defend themselves whenever and under whatever circumstances they are victimized, criminals can (and often do) wait for (or even create) the most advantageous circumstances. For example, a significant percentage of homicides, robberies, and other violent crimes involve multiple offenders.\textsuperscript{138} Multiple-offender homicides, in particular, are becoming increasingly common, with roughly one out of every five homicides in 2008 involving multiple offenders.\textsuperscript{139}

\textsuperscript{134} Roughly half of mass public shootings between 2012 and 2022 involved perpetrators who possessed more than one firearm while carrying out their crimes. See Follman, supra note 113. Even if magazine capacity laws are taken to the most extreme and entirely prohibit the use of detachable magazines, mass public shooters or other criminals could still quickly reload a fixed magazine by using pre-loaded stripper or en bloc clips. Or, as was the case in the 2022 mass public shooting at a supermarket in Buffalo, New York, “compliant” non-detachable low-capacity magazines can easily and quickly be illegally modified by would-be mass shooters with access to the internet and a screwdriver. Joshua Eaton, YouTube Videos That Taught Buffalo Suspect to Modify His Gun Are Still Online, NBC News (Updated May 20, 2022), https://www.nbcnews.com/tech/internet/buffalo-shooting-shooter-puuyin-gondron-video-youtube-guns-2879299.


\textsuperscript{136} VA. TECH. REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL 36–A (Nov. 2009), https://scholar.lib.vt.edu/preval/docs/April16ReportRev20091204.pdf. The worst school shooting in U.S. history—at Virginia Tech in 2009—was carried out by an individual using two handguns and 19 extra magazines with capacities of 10 and 15 rounds. Id. In 1967, a gunman perched in a clock tower killed 17 at the University of Texas while primarily shooting a bolt-action hunting rifle that had, at maximum, a 5-round magazine. In 2018, a gunman at Santa Fe High School in Texas killed 10 with only a shotgun and revolver—and would almost certainly have killed far more but for the quick interventions of armed school resource officers.

\textsuperscript{137} See Amy Swearer, If You Can’t Beat ‘Em, Lie About ‘Em, Heritage Foundation Legal Memorandum (forthcoming Spring 2023) (detailing cases from the Heritage Foundation Defensive Gun Use Database involving more than 10 rounds being fired in self-defense).


Indeed, gun control advocates arguably concede this point on the potential importance of being able to fire more than 10 rounds without reloading when they support magazine capacity laws that universally exempt law enforcement officers, including in their off-duty capacities and with their personal firearms. Law enforcement officers in the United States are peace officers acting in a civilian context, and generally speaking respond to the same criminal threats first faced by the peaceable citizens who called them for assistance in the first place. The circumstances under which they may use deadly force largely parallel the laws of self-defense for civilians. While off-duty, their powers of arrest and investigation are, in many cases, based solely on the rights of citizens’ arrest possessed by all other members of society. And while most civilian defensive gun uses do not involve any rounds being fired, much less more than ten rounds being fired, the same is true of police-involved shootings. To whatever extent, then, that standard capacity magazines are useful for law enforcement officers, they are equally useful for civilians who face those same threats.

B. *Brnen* Does Not Realistically Threaten a Variety of Far More Effective Public Safety Measures

Just because *Brnen* is likely to threaten several laws that were ineffective at protecting the public in the first place does not mean that the opinion leaves the government without other valid and effective tools. *Brnen*, and the post-*Brnen* cases outlined above, were abundantly clear about the plethora of constitutionally legitimate measures at the government’s disposal.

With respect to public carry, the *Brnen* majority made clear that certain regulations have ample historical limitations on the extent to which a person can carry firearms in public, on the manner by which one carries firearms in public, and on the “exceptional circumstances” under which a person may not carry firearms in public. Moreover, while the government may not declare wide swaths of the public sphere off limits under the guise that it all constitutes a “sensitive place,” the Court looked favorably on a “sensitive places” doctrine properly limited to areas like legislative assemblies, polling places, courthouses, and their modern analogues. Neither the Supreme Court nor any post-*Brnen* lower court has questioned the constitutional validity of shall-issue frameworks that require applicants to receive training before carrying public.

Under *Brnen*, it is almost unquestionable that the government may prohibit gun possession for those convicted of violent criminal offenses, who threaten to commit violent acts against other, or

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this is likely an understatement because the number of offenders was assumed to be only one for the 30.8 percent of homicides involving an unknown number of offenders. *Id.* at 55.


142 New York State Rifle & Pistol Ass’n v. Bruen, 142 S Ct 2111, 2156 (2022).

143 *Id.* at 2133.

144 *Id.* at note 9.
who are mentally ill and dangerous to themselves or others. The government can also protect the public by holding those charged with criminal offenses in pre-trial detention or imposing gun prohibitions as a condition of pre-trial release. It can choose to pursue incarceration for violent offenders instead of probation or parole. Or, in the alternative, it can impose gun prohibitions as a condition of diversionary programs, deferred sentencing agreements, or probation or parole.

The catch, however, is that this means state and local prosecutors have to actually pursue criminal charges against violent offenders or file petitions for civil commitment proceedings. It means that they have to seek pre-trial detention against people who they believe are dangerous. It means that federal prosecutors have to step in and pursue federal charges and federal detention when local rogue prosecutors are willing to let violent criminals terrorize communities.

This last point in particular raises an important question to which this Committee should seek answers—what, exactly, is this Justice Department actually doing to pursue charges in § 922(g) felon-in-possession cases? The last time I testified before this body, Phoenix Police Chief Jeri Williams sat next to me and told you:

An overall lack of accountability for violent offenders is contributing to the rise in gun violence. In some of our major cities, district attorneys are not prosecuting serial firearm offenders, [and] judges continue to release violent offenders on low or no bond. To address these challenges Congress must provide resources to the U.S. Attorney’s offices to support additional federal prosecution, as appropriate. 144

The Justice Department has done a lot since then. For example, via agency fiat, it turned tens of thousands of peaceable AR-pistol owners into felons if they did not register their guns and pay the government $200. It has certainly made a big stink about shutting down every gun store it can the first time they see a clerical error. And sure, the Justice Department says on a nice little memo that it is really extra super serious about prosecuting gun crimes—but are they targeting the small subset of repeat offenders who are overwhelmingly responsible for terrorizing innocent people? Is there any actual evidence that they are ramping up efforts to step in and prosecute violent offenders for felon-in-possession, particularly in the cities most plagued by local rogue prosecutors refusing to add gun enhancements? Because thus far, I can find none. 145

The reality is that these available methods under Breen are far more effective at protecting the public than the laws Breen threatens. This point is perhaps nowhere as obvious as in United States v. Rahimi, the case so many gun control advocates have decried as literally “going to get women killed.” Any sane, sober, and prudent observer would have looked at the underlying facts of that defendant’s initial domestic violence charges and realized that he presented a serious risk of


violence and should not have been released from pre-trial detention. Instead of ensuring that any of his victims were protected from further injury, the government chose to rely on a civil protection order—a piece of paper saying “please refrain from owning guns.” And, predictably, this violent individual simply ignored that piece of paper on his way to ignoring a number of other laws about not shooting at people, endangering the lives of nearly a dozen more innocent victims.

True, Bruen does not allow Rahimi to be charged for having a gun while under a protection order, because it does not allow the government to disarm via such actions in the first place. But Bruen certainly would have authorized the government to seek to have Rahimi detained while facing charges for violently assaulting two women. It would also have authorized the government to seek to have a court disarm Rahimi as a condition of his pre-trial release (a condition he likely would have ignored just as flippantly as he did the restraining order). Regardless of Bruen, Rahimi is likely going to spend a good number of his remaining years in state prison for committing violent crimes. And, under Bruen, if and when Rahimi is released from prison, the government can prohibit him from possessing firearms as a convicted violent felon.

Bruen is not “going to get women killed.”

It will force the government to actually utilize the more effective tools it already has at its disposal to protect women, and all other members of the public, from violent individuals.

And just as importantly, it will allow more innocent victims to better protect themselves from any violent offenders the government refuses to pursue or prosecute.
## Appendix A

Media-Verified Cases of Successful Defensive Gun Use Against Intimate Partner Violence, January 1, 2021, to March 10, 2023\(^{1,2}\)

<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
<th>Secondary Context</th>
<th>Protective Order?</th>
<th>Min. Est. Victims(^{1,2})</th>
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\(^{1}\) Taken from the Heritage Foundation’s Defensive Gun Use Database, available at https://datavisualizations.heritage.org/Firearms/defensive-gun-uses-in-the-us/.

\(^{2}\) The minimum number of estimated victims is based on the number of individuals, excluding the assailant, who were (based on the media source’s characterization) in the immediate vicinity of the defensive gun use, such that it be reasonably inferred that the assailant posed a risk to them.
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<td>Northglenn, CO</td>
<td>Assault [Hands &amp; Foot]</td>
<td>None Specified</td>
<td>At least 2 Jamiese Arron, Prosecutor Seeks Justice for 14-Year-Old Allegedly Killed by Stepfather, CBS Denver (Jan. 26, 2023); <a href="https://www.cbsdenver.com/news/local/Prosecutor-seeks-justice-for-14-year-old-allegedly-killed-by-stepfather/">url</a></td>
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<td>1/7/2023</td>
<td>Port Orange, FL</td>
<td>Assault [Firearm]</td>
<td>None Specified</td>
<td>2 Sunai Cheadrowjohn, Police: Grand Jailed, I Jailed in Port Orange Shooting, WFTV (Jan. 8, 2023); <a href="https://www.wftv.com/article/port-orange/shooting-grand-jailed-i-jailed/13287534">url</a></td>
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<td>1/7/2023</td>
<td>Palmetto, AL</td>
<td>Assault [Firearm]</td>
<td>None Specified</td>
<td>At least 2 KCSO: Man Shoots Wife in Front Before Another Family Member Shoots Him, Fostco (Jan. 10, 2023); <a href="https://www.fostco.com/2023/01/08/two-people-killed-two-people-injured-in-palmetto-al/">url</a></td>
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<td>1/3/2023</td>
<td>Toledo, OH</td>
<td>Home Invasion</td>
<td>None Specified</td>
<td>At least 1 TBI: Man Shot in North Toledo Early Thursday, Says He Was Climbing Through Ex-Girlfriend’s Window, WOIO (Jan. 5, 2023); <a href="https://www.fox19.com/article/news/crime/toledo-man-shoots-woman-through-ex-girlfriends-window/1191618321">url</a></td>
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</table>
| 5/18/2022 | Carancro, LA | Assault [Hands & Feet] | None Specified; At least 2

  | 121 | |
| 5/11/2022 | Chicago, IL | Assault [Firearm]    | None Specified; 1

| 5/4/2022  | Mobile, AL  | Home Invasion; Assault [Hands & Feet] | None Specified; 1

| 5/4/2022  | Elmore, AL  | Home Invasion       | None Specified; 1

| 5/3/2022  | Murphysboro, TN | Assault [Firearm] | None Specified; 6 [1 minor child]

| 5/1/2022  | Waukegan, IL | Assault [Hands & Feet] | None Specified; 1

| 4/22/2022 | Houston, TX  | Assault [unspecified] | None Specified; 2

  | Investigation into Fatal Shooting at 6901 Selden Road, City of Houston News (Apr. 25, 2022), https://hustonnews.com/investigation-into-fatal-shooting-at-6901-selden-road |
| 4/22/2022 | Philadelphia, PA | Assault [unspecified] | Yes; 1

| 4/21/2022 | Humblewood, TN | Assault [Hands & Feet] | Yes; 3

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<th>Victim(s)</th>
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<td>4/2/2022</td>
<td>Homosassa, FL</td>
<td>Home Invasion</td>
<td>Assault [Hands &amp; Feet]</td>
<td>None Specified</td>
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<td><a href="https://www.thedailypress.com/news/local/2022/04/03/home-invasion-assault-hands-feet-homosassa-florida/">Link</a></td>
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<td>3/5/2022</td>
<td>Jacksonville, NC</td>
<td>Home Invasion; Assault (Hands &amp; Feet)</td>
<td>None Specified</td>
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<td>3/5/2022</td>
<td>Bowling Green, KY</td>
<td>Assault (Hands &amp; Feet)</td>
<td>None Specified</td>
<td>1 Allie Howard, Update: Woman Released in Warren County Shooting, WIKYO (Mar. 5, 2022), <a href="https://www.wikyo.com/2022/03/05/sheriff-fire-shoots-after-murder-county-domestic-dispute/">https://www.wikyo.com/2022/03/05/sheriff-fire-shoots-after-murder-county-domestic-dispute/</a></td>
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<td>1/11/2022</td>
<td>Houston, TX</td>
<td>Home Invasion</td>
<td>None Specified</td>
<td>Arrest 1 Daughter Says Her Heard Loud Rumbling, Crashing Noise to Man’s Shooting Death Outside W. Houston Home, ABC 13 Eyewitness News (Feb. 6, 2022), <a href="https://abc13.com/crimeshooting-death-into-west-houston-home/115179/">https://abc13.com/crimeshooting-death-into-west-houston-home/115179/</a></td>
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<td>11/27/21</td>
<td>Charlotte, NC</td>
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<td>Assault 1</td>
<td>Telman Associates, after a Deadly Domestic Violence Shooting (Built to Last), WSOC-TV (Dec. 31, 2021), <a href="https://www.wsoc.com/news/local/investigating-homicide-in-charlotte/2fa9359b37f095af5e6191e737c14c2f">https://www.wsoc.com/news/local/investigating-homicide-in-charlotte/2fa9359b37f095af5e6191e737c14c2f</a></td>
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<td>11/26/21</td>
<td>Forest, VA</td>
<td>Home Invasion; Assault [Male]</td>
<td>None Specified</td>
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<td>11/23/21</td>
<td>Tulsa, OK</td>
<td>Assault [Male]</td>
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<td>11/15/21</td>
<td>Pecosville, OH</td>
<td>Home Invasion</td>
<td>None Specified</td>
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<td>11/6/21</td>
<td>Delaware, FL</td>
<td>Assault [Hands &amp; Feet]</td>
<td>None Specified</td>
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<td>11/5/21</td>
<td>El Paso, TX</td>
<td>Assault [Male]</td>
<td>None Specified</td>
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<td>11/2/21</td>
<td>Milwaukee, WI</td>
<td>Assault [Hands &amp; Feet]</td>
<td>Yes, Assault 1</td>
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<td>10/30/21</td>
<td>Evans City, PA</td>
<td>Home Invasion</td>
<td>Assault 1</td>
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<td>10/25/21</td>
<td>Philadelphia, PA</td>
<td>Home Invasion</td>
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<td>10/20/21</td>
<td>Columbus, OH</td>
<td>Assault [Firearm]</td>
<td>Unclear [criminal DV history]</td>
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<td>10/18/21</td>
<td>Casselton, ND</td>
<td>Home Invasion</td>
<td>North Dakota Police, Man Arrested after a Deadly Break from Homes, North Dakota Police, North Dakota Police (Oct. 19, 2021), <a href="https://www.facebook.com/2021/10/19/sheriffman-killed-casselton-shootings-breaks-into-women-s-home-acted-justifiable/">https://www.facebook.com/2021/10/19/sheriffman-killed-casselton-shootings-breaks-into-women-s-home-acted-justifiable/</a></td>
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<td>10/16/21</td>
<td>Colorado Springs, CO</td>
<td>Assault [Firearm]</td>
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<td>7/22/2021</td>
<td>Trussville, AL</td>
<td>Home Invasion</td>
<td>Yes</td>
<td>None Specified</td>
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<td><a href="https://www.alcom.com/news/trussville/shooter-wanted-in-slaying-of-home-invasion-victim/article_5c1f9db6-3b0e-578c-b0c4-479f73a6a7c3.html">https://www.alcom.com/news/trussville/shooter-wanted-in-slaying-of-home-invasion-victim/article_5c1f9db6-3b0e-578c-b0c4-479f73a6a7c3.html</a></td>
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<td>7/7/2021</td>
<td>Charleston, CA</td>
<td>Sexual Assault</td>
<td>None Specified</td>
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<td><a href="https://www.journalnow.com/article/sexual-assault-dead-in-charlotte-cats-identified/">https://www.journalnow.com/article/sexual-assault-dead-in-charlotte-cats-identified/</a></td>
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<td>6/19/2021</td>
<td>Weston, WV</td>
<td>Assault</td>
<td>Hands and Feet</td>
<td>None Specified</td>
<td>1</td>
<td><a href="https://www.wsbtv.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html">https://www.wsbtv.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html</a></td>
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<td>6/8/2021</td>
<td>Houston, TX</td>
<td>Assault</td>
<td>Hands and Feet</td>
<td>None Specified</td>
<td>12 minor children, unborn child</td>
<td><a href="https://www.wsbtv.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html">https://www.wsbtv.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html</a></td>
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<td>6/8/2021</td>
<td>Mount Olive, PA</td>
<td>Assault</td>
<td>Hands and Feet</td>
<td>None Specified</td>
<td>At least 2</td>
<td><a href="https://www.huffingtonpost.com/entry/little-rock-home-invasion-victim/article_58f26dd97f7e5a902b6d7f8f">https://www.huffingtonpost.com/entry/little-rock-home-invasion-victim/article_58f26dd97f7e5a902b6d7f8f</a></td>
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<td>6/8/2021</td>
<td>Kilm, MS</td>
<td>Assault</td>
<td>[Harb object]</td>
<td>Home Invasion</td>
<td>None Specified</td>
<td>12 minor children</td>
<td><a href="https://www.walb.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html">https://www.walb.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html</a></td>
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<td>6/1/2021</td>
<td>Exemption, GA</td>
<td>Assault</td>
<td>Firearm</td>
<td>None Specified</td>
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<td><a href="https://www.ali.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html">https://www.ali.com/news/lawrenceville-dead-in-little-rock-home-invasion-victim/article_17a5c3ad-7a3a-5e1c-b03d-13b7e085a9db.html</a></td>
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<td>5/14/2021</td>
<td>Chino, CA</td>
<td>Home Invasion, Assault</td>
<td>None Specified</td>
<td>Assault [Blunt &amp; Foot]</td>
<td>At least 2</td>
<td><a href="https://www.cnn.com/2020/05/14/us/chino-home-invasion/index.html">Link</a></td>
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<td>4/3/2021</td>
<td>Indianapolis, IN</td>
<td>Home Invasion; Assault</td>
<td>Unclarified [Post Restraining Order and DV Convictions]</td>
<td>1 (including 3 minor children)</td>
<td><a href="http://www.vindy.com/news/local-news/crime/woman-rays-nephew-should-have-been-in-jail-for-shooting-on-the-night-she-died.html">Link</a></td>
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<td>3/17/2021</td>
<td>Clevelan, OH</td>
<td>Assault [Hands &amp; Feet]</td>
<td>Yes</td>
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<td>[Link](<a href="https://www.216news.com/story/news/local/crime/2021-03-17/man">https://www.216news.com/story/news/local/crime/2021-03-17/man</a> found dead in cleveland police say it is likely to be a murder-suicide)</td>
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<td>3/12/2021</td>
<td>Houston, TX</td>
<td>Assault [Hands &amp; Feet]</td>
<td>None Specified</td>
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<td>[Link](<a href="https://www.nbc10.com/news/local/crime/2021-03-12/man">https://www.nbc10.com/news/local/crime/2021-03-12/man</a> found dead in center city home)</td>
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<td>murder-suspect-death-related-hostility.</td>
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| 2-24-2021  | Houston, TX   | Assault [Hands & | None Specified      | 2                                                                            | https://houstonchronicle.com/2021/02/25/josh-carson-investigation-into-shooting-at-4061-
|            |              | [Firearm]         | Police Intervention for DV |                                                                               |                                                                                             |
| 6-21-2021  | Cleveland, OH | Homicide          | Unclear [Criminal  | 2                                                                            | https://www.cleveland.com/mariah-news/cleveland-mariah-news/cleveland-mariah-news/home-
|            |              |                   | DV Charges Pending]            |                                                                               | death-during-shooting.                                                                       |
| 2-8-2021   | Shreveport, LA| Assault [Firearm] | None Specified       | 2                                                                            | https://www.shreveporttimes.com/story/news/crime/2021/02/08/kansas-city-homicide-
| 2-7-2021   | Macon, TN     | Assault [Firearm] | None Specified       | 1                                                                            | https://www.nbcnews.com/news/localnews/2021-02-07-macon-police-arrests-home-investiga-
|            |              |                   |                    |                                                                               | tion-identified-killer-shoots-suspect-into-death-shoot.                                   |
| 2-4-2021   | Richmon Park, IL| Assault [unspec| Unclear [History of | 1                                                                            | https://www.shreveporttimes.com/story/news/crime/2021/02/04/dallas-police-takes-
| 2-2-2021   | Tulsa, OK     | Assault [unspec| Unclear [History of | 1                                                                            | https://www.wusa9.com/story/2021/02/01/tulsa-police-arrests-home-investigation-
Questions for Ruth M. Glenn

1. Can you elaborate on the impact you are seeing from the Rahimi decision in which a panel of 5th Circuit judges deemed the domestic violence restraining order prohibitor unconstitutional? Please discuss the impact both in states covered by the 5th Circuit’s ruling as well as nationwide.

2. Ms. Swearer emphasized the role of criminal convictions in addressing domestic violence. However, my understanding is that law enforcement agencies frequently direct members of the public who are experiencing abuse or may be at risk for future violence to obtain domestic violence protective orders. Why are the same acts of domestic violence that could be handled as felonies or misdemeanors often handled instead by civil courts?
Questions for the Record from Senator Lindsey O. Graham for Rafael A. Mangual, Nick Ohnelli Fellow and Head of Research, Policing & Public Safety Initiative, Manhattan Institute for Policy Research

“Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen”
March 15, 2023

1. What do you say to those who are concerned that these lower court cases after Bruen are taking away prosecutors’ tools to deal with criminals—such as in the Fifth Circuit Rahimi case?

2. Considering all of the severe challenges to public safety, including police recruitment and retention problems, progressive prosecutors, bail reform laws, and so forth, does the Bruen decision and its effects thus far present an impediment to public safety comparable to these severe challenges? Please explain.

3. What would be a more effective and efficient way to stop violent gun crime, to go after the small group of repeat offenders in various localities who commit a disproportionately high percentage of gun crimes, or to restrict possession of firearms by law abiding citizens through measures like New York’s old “may issue” licensing scheme? Please explain.

4. Do self-defense capabilities by law abiding citizens become more important as crime rates increase and law enforcement capabilities diminish on a relative basis? Please explain.
Questions for Eric Ruben

1. Before *Bruen*, lower courts applied the *Heller* standard in evaluating firearm restrictions. There were different levels of scrutiny depending on whether or not the law implicated a “core” Second Amendment right, but there was always a “means-end” test. In other words, the court would look to whatever 21st century problem the government was trying to solve, and ask how closely the challenged law fit that purpose.

But now, as I understand the *Bruen* standard, the question is only whether or not a historical analogy exists to demonstrate that this type of law had been instituted in similar ways and for similar reasons in years past. *Isn’t that a radical departure from how almost any other constitutional challenge to a statute is evaluated?*

2. As you have noted in your testimony, the *Bruen* standard doesn’t require a so-called “historical twin” to a modern gun law; it requires what the opinion calls a “historical analogue.” In other words, the modern and historical laws don’t have to be identical, there simply has to be “a comparable burden on the right of armed self-defense” and that burden has to be “comparably justified.”

Your testimony indicates that some lower courts have been leaning too far toward demanding “historical twins” — in other words, they are asking the government to provide them with an exact match between the modern law and some law on the books in the 1700s or just after the Civil War. *Isn’t that an incorrect reading of *Bruen*, and shouldn’t lower courts be taking a broader approach to analogizing modern and historical laws?*
Senate Judiciary Committee
Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen Hearing
March 15, 2023
Questions for the Record
Senator Amy Klobuchar

For Professor Eric Ruben:

While there is more work to do, Congress made significant progress to protect people from gun violence with the Bipartisan Safer Communities Act, which included provisions I have long fought for to prevent dating partners convicted of domestic violence from buying or owning a gun.

- If the Supreme Court were to uphold the Fifth Circuit’s decision in Rahimi, how might that impact other laws protecting victims of domestic violence?

- How do you believe courts should apply Bruen when evaluating state and federal laws that prevent convicted abusers from purchasing a firearm?
Questions for the Record from Senator Lindsey O. Graham for Amy E. Swearer, Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation

“Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen”
March 15, 2023

1. What is the significance of Bruen for individuals, especially women, who want to defend themselves?

2. Are there cases where individuals, particularly women, have been harmed because they weren’t able to get a firearm to protect themselves under one of these oppressive licensing schemes? If so, please describe a few such cases.

3. If the United States rolled back Bruen and permitted extreme restrictions on the right to possess firearms in public such as New York’s old “may issue” licensing scheme, what effect would that have on public safety?

4. Approximately how many innocent lives have been saved or protected because a victim or a bystander had a firearm to protect him or herself or others in the face of an attacker?

5. Please tell the Committee about the Heritage Foundation’s database on Defensive Gun Uses in the United States.
   a. How is this data collected?
   b. What is this data useful for?
   c. What lessons should we draw from the data collected thus far?
   d. Is the data comprehensive? How many cases of defensive gun use might we not be aware of?
Questions for Ruth M. Glenn

1. Can you elaborate on the impact you are seeing from the Rahimi decision in which a panel of 5th Circuit judges deemed the domestic violence restraining order prohibitor unconstitutional? Please discuss the impact both in states covered by the 5th Circuit’s ruling as well as nationwide.

At the National Coalition Against Domestic Violence (NCADV), we have heard anecdotally that both within and outside of the geographic jurisdiction of the 5th Circuit, law enforcement, prosecutors, and judges are confused about the continued enforcement not only of the federal domestic violence protective order prohibitor but also the federal domestic violence misdemeanor prohibitor; state laws restricting adjudicated abusers’ firearm access, and protective orders prohibiting firearm access in the text of the order. Moreover, media coverage to date has mostly failed to clarify the limits of the ruling, and many people who are not legal experts mistakenly believe as a result that Bruen applies nationwide and to state as well as federal laws.

As we discussed, the ruling in Rahimi applies only to the 5th Circuit (Texas, Louisiana, and Mississippi) and applies only to federal law, not to state law or to relief written into the text of a protective order. Given the general confusion, many respondents to final protective orders who are either outside the 5th Circuit or are prohibited under state law or in the terms of a court order may erroneously believe they are allowed to have firearms, and survivors may believe they can no longer rely on the courts for protection from abusive partners with firearms.

In the aftermath of Rahimi, we at the National Domestic Violence Hotline, of which NCADV is now a part, have seen a massive spike in contacts mentioning firearms in Texas, Louisiana, and Mississippi, the states covered by the 5th Circuit ruling. Contacts mentioning firearms between February 2 and March 9 increased 56.6% in these three states compared to the same time period last year. Broken down by state, contacts mentioning firearms have increased 121.4% in Louisiana, 50.3% in Texas, and 23.5% in Mississippi.

2. Ms. Swearer emphasized the role of criminal convictions in addressing domestic violence. However, my understanding is that law enforcement agencies frequently direct members of the public who are experiencing abuse or may be at risk for future violence to obtain domestic violence protective orders. Why are the same acts of domestic violence that could be handled as felonies or misdemeanors often handled instead by civil courts?

Domestic violence protective orders (DVPOs) and criminal prosecutions play different but complementary roles. They both address dangerous, life-threatening behaviors, but they approach these behaviors from different angles. Courts have many different interests, and they have different tools to promote those interests. DVPOs are designed to protect and meet the
needs of survivors by regulating the relationship between the victim and the abusive intimate partner, while criminal prosecutions are designed to protect and meet the needs of society. Survivors do not decide whether to investigate or prosecute criminal violations, although their wishes may be consulted – those decisions are made by law enforcement and prosecutors. In contrast, DVPOs were designed to give survivors control over whether to initiate a case, how to initiate a case, and what relief to pursue. To be clear, prosecutors often care deeply about the needs of the survivor and make charging decisions with the survivor in mind, but unlike civil courts, the criminal system simply does not have the power to regulate relationships to protect survivors.

DVPOs and criminal prosecutions are not mutually exclusive. The civil and criminal legal systems often work in tandem in domestic violence cases. Violating a protective order can lead to criminal charges, because civil court proceedings are serious undertakings with real consequences. Many states allow law enforcement officers to seek a civil emergency domestic violence protective order on behalf of the survivor if an incident occurs when courts are closed, which provides space for a survivor to seek a DVPO during regular court hours. As noted in the question, law enforcement officers responding to domestic violence incidents often suggest the survivor file for a protective order. Alternatively, a survivor may seek a DVPO as a first step, and the safety afforded by the order may enable them to report intimate partner violence to law enforcement, speak with prosecutors, or serve as a witness if charges are brought, without as much fear of retaliation. A survivor may seek a DVPO while prosecutors are developing their case, or they may seek a DVPO after a conviction if they are concerned about ongoing or future contact, harassment, or abuse by an intimate partner or if they need additional protective remedies such as child custody orders or economic relief. Courts may issue a criminal protective order once charges are brought against an abusive intimate partner, although those orders are often more limited than DVPOs, and are sought by the prosecutor rather than the survivor, who has no standing in criminal cases.

Moreover, survivors facing imminent danger may not have the luxury of time. Civil DVPOs provide immediate protection, with an ex parte order taking effect upon service (ex parte orders issued without notice or an opportunity to be heard do not trigger the federal DVPO prohibitor) and a final order taking effect after the full hearing, which, depending on the state, can be anywhere between a few days to a few weeks later. Criminal prosecutions, on the other hand, are lengthier processes. The survivor faces a substantially increased risk of homicide during this period. If a survivor does choose to engage with the criminal system, the time period after a survivor has reported abuse to law enforcement is often also a time period in which the violence escalates; the survivor has taken a step toward leaving, and the abusive intimate partner recognizes that they may ultimately lose control over the survivor. In this case, a DVPO may be necessary to ensure the victim survives long enough for the criminal process to play out.

While DVPOs provide a measure of accountability for the respondent, their primary purpose is not to punish the respondent but to protect the victim. They are forward looking, seeking to prevent future violence. Past violence and threats of violence are considered by courts in order to establish the existence of danger to the petitioner, their children, and others, but any accountability stems from measures to decrease risk of further violence rather than from intentional punishment. In contrast, criminal prosecutions are, at their heart, punishment for a
crime against the social order, and the needs and safety of the victim are secondary to the needs of society; victims are not parties in criminal cases. Firearms restrictions for DVPO respondents are critical to the basic function of a protective order, because armed abusive intimate partners pose a clear risk of injury or death to their victims. Although the length of final protective orders differs by state, they typically last for a few months to a few years. Firearms restrictions expire when the protective order expires.

Civil protective orders provide a variety of forms of relief, touching on many aspects of the everyday life of the survivor. Not only do they restrict the respondent from abusing, stalking, harassing, or otherwise harming the survivor and other protected parties (typically children), they can require the respondent to stay away from the survivor and other protected parties; require the respondent to seek counseling or batterer intervention programs; require the respondent to obtain treatment for drug or alcohol misuse; assign child custody and visitation in most states (including safe child exchanges and supervised visitation when necessary); assign custody of pets; require the respondent to move out of a shared residence; assign the use of a shared residence or car; provide temporary financial support to the survivor and children in common; and provide other relief to protect the petitioner and their children and to enable them to reestablish their lives after abuse. Moreover, DVPOs are afforded full faith and credit across state lines, providing flexibility for a survivor who may need to relocate. Again, temporarily delaying a respondent’s access to firearms is a core form of relief necessary for protective orders to fulfill their basic function. Most of these forms of relief are not provided to the survivor in a criminal prosecution. The primary purpose of a prosecution is to protect society from the defendant and hold the defendant accountable by punishing them; separating the victim and the perpetrator is a side benefit of convicting the perpetrator. In contrast, punishment accrues in the case of a DVPO only when the respondent violates the order.

While intimate partner violence is, at its core, violence by one person against another, the intermingled lives of the two parties can create complications that do not exist when the parties are strangers or mere acquaintances, which may necessitate a different type of approach for the sake of the victim. Consider the following example: a woman is injured by her husband and needs back surgery as a result. She is on her husband’s insurance plan, and insurance will cover the cost of the surgery. She can seek a DVPO, which will provide her with a variety of forms of relief, including requiring the respondent to stay away from her and to relinquish any firearms, and which can also require the respondent to keep her on his insurance. While a criminal conviction might ultimately also lead to the husband staying away from her and relinquishing firearms, with the husband incarcerated and thus no longer employed, she will no longer have access to the insurance necessary to address her injuries. In this case, accountability to the victim and accountability to society diverge. Had the victim and the perpetrator been strangers or acquaintances, prosecuting the perpetrator is a logical outcome and does not harm the victim. However, in the scenario described above, prosecuting the husband would actively harm the victim. A DVPO, in contrast, would provide the victim with both safety and the opportunity to get the necessary care to heal from the injury.
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Questions for the Record from Senator Lindsey O. Graham for Rafael A. Manguel, Nick Ohnell Fellow and Head of Research, Policing & Public Safety Initiative, Manhattan Institute for Policy Research

“Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen”
March 15, 2023

1. What do you say to those who are concerned that these lower court cases after Bruen are taking away prosecutors’ tools to deal with criminals—such in the Fifth Circuit Rahimi case?

   I would say that the concerns can, as Judge Ho noted in his concurrence in Rahimi, be addressed via the arrest and (importantly) incarceration (both pretrial and post-conviction) of criminal defendants who (like Mr. Rahimi, who, as Amy Swearer noted in her testimony, had two cases pending prior to the shootings that led to the warrant that led to the 922(g) charge) pose a significant risk to the public’s safety. As I noted in my testimony, those worried about gun violence would do well to redirect their concern from the recognition of 2nd Amendment rights by courts to the ineptitude of so many of our nation’s criminal justice systems when it comes to incapacitating violent criminals.

2. Considering all of the severe challenges to public safety, including police recruitment and retention problems, progressive prosecutors, bail reform laws, and so forth, does the Bruen decision and its effects thus far present an impediment to public safety comparable to these severe challenges? Please explain.

   Bruen is unlikely to deteriorate public safety to a measurable degree through its command that the right to bear arms be respected by state and local governments. This is based on a review of the available empirical evidence developed by efforts to assess the impact of prior expansions of gun carriage rights on crime. (see, e.g., Robert Verbruggen, More Guns, Same Amount of Crime? Analyzing the Effect of Right-to-Carry Laws on Homicide and Violent Crime, Manhattan Institute (Oct. 2022)). Any impact of the Bruen decision on crime is going to be even smaller in comparison to the potential effects of systematic efforts to lower the transaction costs of crime and raise the transaction costs of enforcing the law. Such efforts are illustrated by the following sampling of examples from New York State/City:

   - Criminalized Restrictions on Police Grappling Techniques (see,
Restrictions on Consent Searches by Police (see, [https://www.city-journal.org/article/wrong-footing-the-nypd](https://www.city-journal.org/article/wrong-footing-the-nypd))


The Elections of “Progressive” Prosecutors in Brooklyn and Manhattan (see, [https://www.city-journal.org/article/justice-for-whom](https://www.city-journal.org/article/justice-for-whom) and [https://www.city-journal.org/article/nothing-to-brag-about](https://www.city-journal.org/article/nothing-to-brag-about))


Such efforts will have the effect of putting/leaving more repeat offenders (a subset whom pose a risk of committing gun violence) on the street.

3. What would be a more effective and efficient way to stop violent gun crime, to go after the small group of repeat offenders in various localities who commit a disproportionately high percentage of gun crimes, or to restrict possession of firearms by law abiding citizens through measures like New York’s old “may issue” licensing scheme? Please explain.

The most effective and efficient crime suppression plan will prioritize law enforcement-centric approaches aimed at both maintaining public order, as well as identifying and incapacitating the relatively small number of high-risk, high-rate offenders driving gun violence in our nation’s cities. As noted in the response to Question 1, the existing literature does not support the contention that we can expect the adoption of “may issue” concealed carry licensing schemes in the jurisdictions that didn’t already have that rule will cause crime to spike. But there is quite a bit of research supporting the proposition that proactive policing and incarceration have historically reduced crime—gun violence, in particular. (see, e.g., [https://nap.nationalacademies.org/catalog/24928/proactive-policing-effects-on-crime-and-communities](https://nap.nationalacademies.org/catalog/24928/proactive-policing-effects-on-crime-and-communities) and [https://pricetheory.uchicago.edu/levitt/Papers/LvttUnderstandingWhyCrime2004.pdf](https://pricetheory.uchicago.edu/levitt/Papers/LvttUnderstandingWhyCrime2004.pdf)).

4. Do self-defense capabilities by law abiding citizens become more important as crime rates increase and law enforcement capabilities diminish on a relative basis? Please explain.

As jurisdictions across the country become less safe (and recent crime spikes indicate that many have in important ways) and the public perceives traditional institutions of law enforcement to be less effective (whether due to policy shifts or resource shortages or other reasons), many will naturally consider taking measures to make themselves less vulnerable to criminal acts of aggression. One example of this phenomenon may be the massive spike in civilian gun purchases in 2020—a year in which homicides across the U.S. rose approximately 30%. (see,
(showing that 70% of survey respondents say they purchased a weapon in 2020 to protect themselves from crime).
Dear Senators Durbin and Klobuchar,

Thank you for the opportunity to testify before the Senate Judiciary Committee. I write in response to your questions for the record. Please do not hesitate to let me know if you have any further questions.\(^1\)

**Questions from Senator Dick Durbin**

1. **Before *Bruen***, lower courts applied the *Heller* standard in evaluating firearm restrictions. There were different levels of scrutiny depending on whether or not the law implicated a “core” Second Amendment right, but there was always a “means-end” test. In other words, the court would look to whatever 21st century problem the government was trying to solve, and ask how closely the challenged law fit that purpose.

   But now, as I understand the *Bruen* standard, the question is only whether or not a historical analogy exists to demonstrate that this type of law had been instituted in similar ways and for similar reasons in years past. Isn’t that a radical departure from how almost any other constitutional challenge to a statute is evaluated?\(^2\)

   I am aware of no other area of constitutional rights adjudication that employs the sort of historical-analogical inquiry set forth in *Bruen* as the sole means of determining constitutionality.\(^3\) For example, despite the Supreme Court’s allusion in *Bruen* to the First Amendment,\(^4\) lower courts accurately observed before *Bruen* that the Supreme Court’s freedom-of-speech doctrine has long deployed

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\(^1\) My responses are drawn in part from my forthcoming article, Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 YALE L.J. (forthcoming), draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4400228.\(^2\) The closest doctrinal comparator may be the approach taken for Seventh Amendment cases. See Darrell A. H. Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 YALE L.J. 852 (2013) (discussing Seventh Amendment doctrine in the context of the turn to historicism in Second Amendment case law). However, Seventh Amendment doctrine is distinct from *Bruen’s* approach in various ways. One distinction is that the “reliance on analogical reasoning from text, common law, history, or tradition” is “not exclusive.” Id. at 856. Rather, Seventh Amendment doctrine applies a historical-analogical inquiry flexibly, and “[w]here history is not dispositive or an analogy not apparent,” id. at 896, expands the inquiry, including to policy or “functional” considerations, id. at 896, 891 (quoting City of Monterey v. Del Moni Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999)).\(^3\) New York State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2132 (2022).
means-end scrutiny. Indeed, the First Amendment precedent cited by the majority itself in *Braden* makes clear this aspect of freedom-of-speech doctrine.

2. As you have noted in your testimony, the *Braden* standard doesn’t require a so-called “historical twin” to a modern gun law; it requires what the opinion calls a “historical analogue.” In other words, the modern and historical laws don’t have to be identical; there simply has to be “a comparable burden on the right of armed self-defense” and that burden has to be “comparably justified.”

Your testimony indicates that some lower courts have been leaning too far toward demanding “historical twins” — in other words, they are asking the government to provide them with an exact match between the modern law and some law on the books in the 1700s or just after the Civil War. Isn’t that an incorrect reading of *Braden*, and shouldn’t lower courts be taking a broader approach to analogizing modern and historical laws?

Looking only for exact matches in the historical record fails to comply with *Braden’s* admonition that analogical reasoning does not require a “historical twin.” Under *Braden*, courts must, at a minimum, derive workable principles from the historical laws that can mediate the analogical inquiry. In the kind of historical-analogical test that *Braden* has created, such principles are the basis for judicial decision, so to say that courts must articulate them is simply to say that they must give reasons for their decisions.

The principles articulated must be broader than the precise sanction of the historical law, but courts will exercise discretion when deciding how broadly to define them. As I flesh out in greater detail in my forthcoming article, there are good reasons to operate at a high level of generality when considering the historical scope of the right and related regulatory tradition. In particular, doing so minimizes the risk of anachronism that exists when comparing modern weapons to historical ones, and modern laws to those passed centuries ago.

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6 See, e.g., Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 108, 194, 198 (5th Cir. 2012) (“First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation.”).

7 See United States v. Playboy Entm’l Grp., Inc., 520 U.S. 813, 813 (2000) (“Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.”); *Braden*, 142 S.Ct. at 2133 (citing Playboy Entm’l Grp., Inc.).

8 See Blocher & Ruben, supra note 1.
Questions from Senator Amy Klobuchar

While there is more work to do, Congress made significant progress to protect people from gun violence with the Bipartisan Safer Communities Act, which included provisions I have long fought for to prevent dating partners convicted of domestic violence from buying or owning a gun.

- If the Supreme Court were to uphold the Fifth Circuit's decision in Rahimi, how might that impact other laws protecting victims of domestic violence?

If the Fifth Circuit's decision is affirmed by the Supreme Court, that would have implications for the federal domestic violence restraining order ("DVRO") prohibitors\(^8\) as well as similar state DVRO prohibitors, which could likewise be struck down.

Such an outcome could also have implications for other laws protecting victims of domestic violence, including the federal law disqualifying domestic violence misdemeanants from gun possession.\(^9\) Federal law makes it a felony for an individual "convicted in any court of a misdemeanor crime of domestic violence" to transport, possess, or receive a firearm.\(^10\) As you note in your question, the Bipartisan Safer Communities Act expanded the definition of "misdemeanor crime of domestic violence" to include domestic violence crimes committed against specified individuals with whom the perpetrator has a "continuing serious relationship of a romantic or intimate nature."\(^11\)

In Rahimi, the Fifth Circuit cited articles calling into question the historical support for prohibiting gun possession by domestic violence misdemeanants.\(^12\) Yet, at the same time, in reaching its decision, the Rahimi panel emphasized that the DVRO prohibitor—which entails a "stiff process"—operates in the absence of the protections afforded by the Constitution to criminal defendants.\(^13\) Ultimately, the implications of a Supreme Court ruling like Rahimi for other laws protecting domestic violence victims will turn on how broadly or narrowly the Supreme Court writes its opinion.

- How do you believe courts should apply Bruesew when evaluating state and federal laws that prevent convicted abusers from purchasing a firearm?

After Bruesew, there are two primary questions courts must address in Second Amendment cases involving state and federal laws that prevent convicted abusers from possessing or purchasing a firearm: first, whether convicted abusers are part of the "people" who have Second Amendment rights,\(^14\) and second, if so, whether their disqualification is consistent with our historical tradition of

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8 See 18 U.S.C. § 922(g)(8).
9 See 18 U.S.C. § 922(g)(9).
10 Id.
11 Id. at 921(a)(3).
12 See United States v. Rahimi, 61 F.4th 443, 463 n.11 (5th Cir. 2023) (citing several articles questioning if there is a tradition supporting disarming domestic violence misdemeanants). But see infra notes 21-23 and accompanying text (discussing precedent finding a regulatory tradition supporting modern laws disarming domestic abusers).
13 Id. at 455 n.7 ("The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. In crafting the Bill of Rights, the Founders were plainly attuned to preservation of these protections. It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process.").
14 Bruesew, 142 S. Ct. at 2126; United States v. Sahadeo, ___ F.4th ___, 2023 WL 2765915, at *4 (8th Cir. Apr. 4, 2023) (evaluating "whether the conduct regulated by § 922(g)(9)(A) was protected by the plain text of the Second Amendment" and concluding "that it was not, as unlawfully present aliens are not within the class of persons to which the phrase "the people" refers").
frightened for law regulation. Answering the second question is where Bowers’ historical-analogical test comes into play. In applying that test, in order to avoid the risk of anachronism, it will be important for courts to understand the immense differences between modern and historical values, guns, and gun violence. The domestic violence context provides a great example of such a risk.

As I described in my oral testimony, at the founding, policymakers did not view women as political or legal equals to men, and did not view domestic violence as a problem worthy of addressing through legislation. Indeed, the law protected the “husband’s legal prerogative to inflict marital chastisement.” Thus, it is not surprising that there were not robust protections for domestic violence victims at that time.

Moreover, even if policymakers at the founding had appreciated the problem of domestic violence, there still might not have been corresponding gun regulations because, unlike today, research suggests that they were rarely used for domestic violence, which reflects the unadvanced state of firearm technology at the founding. As historian Randolph Roth has noted, “Family and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand,” which were not loaded guns but rather “whips, sticks, hoes, shovels, axes, knives, feet, or fists.”

Further, women did not have a federal constitutional right to vote for leaders who would safeguard their interests until the Nineteenth Amendment was ratified in 1920. As a Justice of the Ohio Supreme Court recently noted in a post-Bowers case: “[T]he glaring flaw in any analysis of the United States’ historical tradition of firearm regulation in relation to [modern] gun laws is that no such analysis could account for what the United States’ historical tradition of firearm regulation would have been if women and nonwhite people had been able to vote for the representatives who determined these regulations.” If, historically, women favored stricter firearm policies than White men—consistent with today’s overall demographic preferences—then the absence of women voters may have resulted in a corresponding absence of gun laws.

Turning to your specific question, courts will thus need to look to other historical contexts besides domestic violence to derive principles that might be applied to domestic violence prohibitions today. For example, in her dissenting opinion in Kanter v. Barr, then-Judge Amy Coney Barrett surveyed non-domestic-violence-related laws at the founding and concluded that “founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.” Before Bowers, courts used such a historically-derived principle to assess (and uphold) modern laws protecting

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15 Bowers, 142 S. Ct. at 2129-30.
16 Id. at 2132-33 (stating that “central considerations when engaging in [the] analogical inquiry” are “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified”).
21 Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting).
domestic violence victims through disarmament. That same principle can play, and has played, a role in post-Brown analogical reasoning.

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22 See, e.g., United States v. Boyd, 999 F.3d 171, 186 (3d Cir. 2021), cert. denied, 142 S. Ct. 511 (2021) (finding "longstanding historical support" for the principle that "legislatures have the power to prohibit dangerous people from possessing guns" and concluding that "those who are subject to domestic violence protective orders covered by § 922(g)(8) fall within the historical bar of presumptively dangerous persons") (citations omitted); United States v. Benk, 664 F.3d 1180, 1183-84 (8th Cir. 2011) (finding "historical support" for disarming "citizens who are not law-abiding and responsible" and concluding that section 922(g)(8) is consistent with the "tradition" of limiting the right to keep and bear arms to "responsible" citizens).

23 See, e.g., United States v. Guthery, No. 2:22-CR-00173-KJM, 2023 WL 690824, at *8 (E.D. Cal. Mar. 29, 2023) (rejecting a Second Amendment challenge to 18 U.S.C. § 922(g)(8) under Brown after finding, among other things, that "historical regulations cited by the government are analogous to § 922(g)(8) because they allowed the government to disarm individuals based on concerns regarding their threat to the community’s safety").
Questions for the Record from Senator Lindsey O. Graham for Amy E. Swearer, Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation
“Protecting Public Safety After New York State Rifle & Pistol Association v. Bruen”
March 15, 2023

1. **What is the significance of *Bruen* for individuals, especially women, who want to defend themselves?**

   For decades, states like New York have used the types of discretionary permitting systems struck down by *Bruen* to effectively strip millions of Americans of their Second Amendment rights outside the home. This “right of the people” was instead turned into a “privilege of the special few.” While New York and its small cohort of anti-Second Amendment states have seemingly gone out of their way to undermine both the spirit and the letter of *Bruen* over the last year, and have—out of sheer spite—imposed a myriad of expensive and time-consuming barriers for concealed carry permit applicants, at the very least, because of *Bruen*, millions more Americans now at least have some plausible method by which they may legally exercise their rights. It is imperative, however, that the courts be watchful against attempts by New York and other states to render their carry permits practically useless, such as by dramatically expanding the number of prohibited places.

2. **Are there cases where individuals, particularly women, have been harmed because they weren’t able to get a firearm to protect themselves under one of these oppressive licensing schemes? If so, please describe a few such cases.**

   It is impossible to know how many victims of violent crime were left defenseless due to gun control laws that either outright denied them the exercise of their constitutional rights, or that imposed such confusing, time-consuming, and expensive burdens that they were deterred from ever trying to exercise their rights in the first place. It is nonetheless statistically certain that restrictive gun control laws prevent many peaceable citizens who would otherwise choose to exercise their right to armed self-defense from doing so.¹ There are, however, striking examples of this type of preventable tragedy. One of the most well-known is that of Carole Browne, a New Jersey woman who, in 2015, was stabbed to death by her ex-boyfriend while still awaiting approval for a handgun permit that she had submitted months earlier.²

We also know that even gun control policies far less restrictive than New York’s can have devastating consequences for victims, often requiring them to choose between their unalienable right to self-defense and the risk of losing their jobs or being convicted of criminal offenses. For example, after a gunman fatally shot 12 of his colleagues in a

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¹ Compare, for example, the percentage of the adult population with concealed carry permits in “shall issue” states with the percentage in states like New York, New Jersey, and California, whose laws were implicated by *Bruen*. John Lott, *Concealed Carry Permit Holders Across the United States*, 2022, CRIME PREVENTION RESEARCH CENTER (Nov. 17, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4379117

municipal building in Virginia Beach, family members of one victim—Kate Nixon—disclosed that Nixon had seriously considered bringing her pistol to work the morning of the shooting. She ultimately decided not to do so because it was against city policy for employees to bring guns to work, even if they have valid state-issued concealed carry permits. Of course, no one knows for certain how differently that day might have turned out for Nixon, her colleagues, or their loved ones had she not been scared into surrendering her right to armed self-defense. It is certainly possible that she would not have been able to successfully defend herself or others. But, given the many cases in which armed civilians have successfully intervened to stop active shooters, it is safe to say that, at the very least, Nixon would have had (literally) a fighting chance.

3. If the United States rolled back *Brune* and permitted extreme restrictions on the right to possess firearms in public such as New York’s old “may issue” licensing scheme, what effect would that have on public safety?

Fortunately, in recent decades, the trend at the state level has been to roll back excessive burdens on the right to armed self-defense in public, and if *Brune* were overturned, Americans in a majority of states would—at least in the immediate future—continue enjoying the exercise of their rights with relatively few burdens. It would, however, once again effectively allow states like New York to shut the door on the right for millions of other Americans, and return to a pre-*Brune* status quo in which armed self-defense is the privilege of a special few.

4. Approximately how many innocent lives have been saved or protected because a victim or a bystander had a firearm to protect him or herself or others in the face of an attacker?

As with many statistics related to defensive gun use, it is difficult to know with any certainty just how many innocent lives are saved or protected because a victim or bystander was lawfully armed. Even if we just limit the scope to media-verified cases, it would still involve the particularly difficult feat of calculating harm that did not actually occur for an often-uncertain number of potential victims. Consider just cases where mass public shootings are thwarted by armed civilians—the precise number of casualties that the gunman might otherwise have caused could have been anywhere from “none” to the total number of people within the target zone, depending on hundreds of factors that never played themselves out in reality. Moreover, there is no way to count the number of victims protected by the majority of defensive gun uses that do not garner enough media attention to wind up in our database.

It is safe to assume, however, that the number is significant. As I noted in my written

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4 Id.

testimony, between January 1, 2021 and March 10, 2023, our database included 208 media-verified defensive gun uses in which victims of intimate-partner domestic violence either protected themselves with a firearm or were protected by another lawfully armed civilian. In just this limited subset of cases, representing only a fraction of the total of media-verified defensive gun uses compiled during these months, we estimated that defensive gun uses protected at least 395 potential victims, including 65 minor children and three unborn children. Moreover, because all of the defensive gun users were deemed to have acted in lawful self-defense, and because by definition, lawful self-defense only occurs where there is a reasonable belief of imminent death or serious bodily injury, it is reasonable to conclude that this is precisely the danger from which these victims were protected. If that ratio of protected-victims-per-defensive-gun-use is representative (and there is good reason to believe it is), then our database alone would suggest that, at a bare minimum, lawfully owned guns are used to directly protect thousands of innocent victims from death or serious bodily injury every year.

Equally difficult to calculate is the number of innocent lives protected from death or serious injury every year due to crimes that never occurred in the first place because the would-be perpetrators were deterred by the mere possibility of being met with armed resistance. There are, nevertheless, several indications that widespread civilian gun ownership offers broad and substantial protective benefits through crime deterrence—benefits that are greatly undermined when laws significantly restrict the ability of ordinary people to defend themselves with guns.

Criminals generally consider the likelihood of armed resistance and adapt accordingly. One survey of imprisoned felons in the United States found that roughly one-third acknowledged being “scared off, shot at, wounded or captured by an armed victim,” while 40 percent admitted that they had refrained from attempting to commit a crime out of fear that the victim was armed. Well over half of the surveyed felons acknowledged that they would not attack a victim that they knew was armed, and almost three-quarters agreed that “one reason burglars avoid houses where people are at home is that they fear being shot.” Importantly, the study also found that felons from states with the greatest relative number of privately owned firearms reported the highest levels of concern about the possibility of confronting an armed victim.

This finding is consistent with international comparisons of criminal behavior. For example, in the United States—where rates of civilian gun ownership are remarkably high compared to the international norm—only about 13 percent of burglaries take place when a home is occupied. This is far lower than the typical “hot burglary” rate of countries like Canada, Great Britain, and the Netherlands, where significantly more restrictive and burdensome gun laws make civilian gun ownership far less common, and therefore reduce

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8 Id.
9 Id.
the likelihood that a criminal will be met with armed resistance. “Hot burglaries” are far more likely to result in victims being assaulted, injured, or even murdered than are burglaries in which no one is home. By some estimates, this lower percentage of “hot burglaries” results in over half a million fewer assaults in the United States every year than would otherwise occur without the deterrent effect of having a widely armed civilian population. This deterrent effect offers protective benefits even to those individuals who do not personally own firearms, because criminals generally cannot be certain of which potential victims are armed.

5. Please tell the Committee about the Heritage Foundation’s database on Defensive Gun Uses in the United States.

a. How is this data collected?

The defensive gun uses featured in the Heritage Foundation’s Defensive Gun Use Database are all derived from news stories or police incident summaries that are readily available via online searches of publicly available sources.

b. What is this data useful for?

While the database is far from comprehensive, it does likely capture many of the most high-profile instances of defensive gun use and gives a snapshot into the various types of circumstances in which those defensive gun uses occur. Taken together, the thousands of cases provide incredibly useful insights into what actually occurs during defensive gun uses and help fill in many of the gaps left by earlier attempts to understand the effectiveness of guns as a tool for self-defense. As just one example, many early surveys on defensive gun use asked about injuries incurred during such instances, but did not ask about the timeline of when those injuries occurred in relation to the victim’s use of the firearm or ascertain the context in which the victimization occurred. Because surveys sometimes showed that victims who resisted with firearms were more likely to be injured than victims who simply complied or just called the police, some gun control advocates concluded that defensive gun use actually caused more victims to sustain injuries, perhaps by angering the perpetrator. While Second Amendment advocates countered that, in all likelihood, the more logical conclusion was that victims who resorted to lethal defensive force did so precisely because they were already in far greater danger than victims who could simply call the police, they did not have any solid evidence.

The thousands of cases in the defensive gun use database demonstrate a consistent pattern—when defensive gun users are injured or killed, it is rarely because they “goaded” an assailant into violent actions that otherwise might not have occurred. Rather, it is most often the case that they incurred their injuries either (1) prior to the defensive gun use, and the defensive gun use is what prevented a bad situation from becoming worse, or (2) during the defensive gun use but after a point in which the perpetrator had already evidenced an intent to cause serious injury or death while believing the victim to be defenseless.

Finally, as will be explained below, the examples are useful for debunking common gun

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11 Id.
12 Id.
13 Id.
control narratives that downplay the importance of armed self-defense or make sweeping (but erroneous) assertions about ordinary gun owners.

c. What lessons should we draw from the data collected thus far?

(1) Victims—especially those who are at a physical disadvantage—are far more likely to adequately use their firearms in self-defense than they are to be overpowered and have their firearms taken from them by their assailant.

(2) On the whole, the cases show that ordinary gun owners are capable of defending themselves without endangering other innocent people, even in crowded public spaces.

(3) Contrary to popular assertions that “no law-abiding citizen ever needs to fire more than 10 rounds in self-defense” or that certain semi-automatic weapons are “never useful for self-defense,” the database provides evidence that standard capacity magazines and so-called “assault weapons” can, in fact, have incredible impacts on the ability of ordinary Americans to defend themselves. While most media reports fail to specify either how many rounds were fired defensively or what specific type of firearm was used, some do. It is indisputable that some cases involve victims who needed to fire more than 10 rounds in self-defense, or who used an “assault weapon” for legitimate, lawful defense of self or others.14

d. Is the data comprehensive? How many cases of defensive gun use might we not be aware of?

No. The Defensive Gun Use Database is far from comprehensive, and represents, at best, merely the “tip of the iceberg” of how often Americans use their firearms to defend themselves or others. There is good reason to believe that, for various reasons, most defensive gun uses are either never reported to police, omitted from police reports, or otherwise do not garner enough attention to be written about by a media outlet.

The best data on defensive gun use comes from surveys, which consistently find that Americans use their firearms in lawful self-defense far more often than is captured by media reports. As the CDC itself acknowledged in a 2013 report, almost every major survey on the issue has found that Americans use their firearms in self-defense between 500,000 and several million times a year.15 The 2021 National Firearms Survey—by far the most comprehensive survey of American gun owners ever conducted—further substantiated these earlier findings, concluding that roughly 1.6 million defensive gun uses occur in the United States every year, on average.16

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14 See Amy Swaren, If You Can’t Beat ‘Em, Lie About ‘Em: How Gun Control Advocates Twist Heritage’s Defensive Gun Use Database in the “Large-Capacity” Magazine Debate, HERITAGE FOUND. LEGAL. MEMORANDUM No. 331 (May 17, 2023).


March 15, 2023

The Honorable Richard Durbin  
Chairman  
Senate Committee on the Judiciary  
Dirksen Senate Office Building 226  
Washington, DC 20510

The Honorable Lindsey O. Graham  
Ranking Member  
Senate Committee on the Judiciary  
Dirksen Senate Office Building 226  
Washington, DC 20510

Dear Chair Durbin and Ranking Member Graham:

On June 23, 2022, the United States Senate passed the Bipartisan Safer Communities Act by a vote of 65 to 33—the first significant gun violence prevention legislation in almost three decades. It was a landmark moment in the modern era to stop gun violence that showed that the politics have caught up to public opinion. Not more than 12 hours earlier, the Supreme Court, by a vote of six to three, delivered its opinion in *New York State Rifle & Pistol Association v. Bruen*. On the same day that the Senate took a historic life-saving step forward to support the implementation of Extreme Risk (or “red flag”) laws, expand background checks by clarifying who is engaged in the business of selling guns, prevent domestic abusers from getting their hands on firearms, crack down on gun trafficking and straw purchasers, and invest in community violence intervention initiatives and mental health services, the Supreme Court took two consequential steps back.

The Court’s first step backwards was to strike down the century-old proper cause requirement in New York’s carry licensing regime, which required individuals seeking a permit to carry a concealed handgun in public to show a particular need to carry a gun for self-protection. At the time, five other states—California, Hawaii, Maryland, Massachusetts, and New Jersey—had similar requirements. Notably, these are all states with some of the lowest rates of gun violence in the nation.\(^1\) Now that proper cause requirements are unconstitutional, the concealed carry laws in these states will be weaker. The result of the Supreme Court’s decision will be more gun violence. Research shows that in states that weakened their firearm permitting laws, there has been an 11-percent rise in the rate of homicides with handguns and a 13- to 15-percent increase in violent crime rates more broadly.\(^2\)

The Court’s second step backwards in *Bruen* was to reject the consensus approach to Second Amendment cases, which lower courts developed following *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010). Under that consensus approach, courts examined both a law’s historical pedigree and the degree to which it advanced public safety.

Instead, *Bruen* instructs lower courts to focus on text and history.

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https://www.everytown.org/what-you-need-to-know-nysgpa-v-bruen/
The *Brune* framework is dangerous and misguided. The Supreme Court put text, history, and tradition before all else, including a legislature’s interest in protecting public safety—and the Court did so with vague and ambiguous direction. But the *Brune* framework is at its most dangerous in the hands of extremist judges who will use—and have already used—it to strike down long-standing and life-saving gun violence prevention laws. *Brune* is a boon to the gun lobby and its unpopular political agenda, and it comes at the expense of making our communities and the public less safe.

The gun lobby and its accomplices have taken *Brune* as a license to beat down courtroom doors across the country and reopen constitutional questions that have long been settled. Since *Brune*, gun extremists have filed dozens of challenges to gun violence prevention laws nationwide, including challenges to restrictions on large-capacity magazines and assault weapons, age restrictions, restrictions on firearms in sensitive places, regulations on ghost guns, licensing regimes, and background check requirements—among others. Weakening gun laws—through either legislation or judicial activism—has deadly results. Everytown’s assessment of all 50 states’ gun laws and rates of gun violence unequivocally shows that states with weaker gun violence prevention laws see more gun violence.³

Last month’s decision in *United States v. Rahimi* exemplifies the dangers that *Brune* poses in the wrong judicial hands in which the Fifth Circuit overturned the conviction of a domestic abuser. *Rahimi* involved a challenge to the federal statute that prohibits an individual subject to a domestic violence restraining order (DVRO) from purchasing or possessing firearms. The Fifth Circuit, applying the new *Brune* framework, held that the DVRO prohibitor was unconstitutional, and it did so despite the fact that the DVRO prohibitor—enacted as part of the Violence Against Women Act almost three decades ago—serves a clear and important objective. The DVRO prohibitor keeps firearms out of the hands of domestic abusers when they pose the greatest danger to their intimate partners.

The man whose conviction the Fifth Circuit panel overturned was, in the panel’s own words, “hardly a model citizen.” That is an understatement: among other violent acts, Rahimi had been involved in five shootings in a two-month period between December 2020 and January 2021 in and around Arlington, Texas.

On December 1, after selling narcotics to an individual, he fired multiple shots into that individual’s residence. The following day, Rahimi was involved in a car accident. He exited his vehicle, shot at the other driver, and fled the scene. He returned to the scene in a different vehicle and shot at the other driver’s car. On December 22, Rahimi shot at a constable’s vehicle. On January 7, Rahimi fired multiple shots in the air after his friend’s credit card was declined at a Whataburger restaurant.⁴

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⁴ *United States v. Rahimi*, No. 21-11001, 2023 WL 2317796, at *1 (5th Cir. Mar. 2, 2023)
When law enforcement identified Rahimi as a suspect and obtained a search warrant for his home, officers recovered a rifle and a pistol—notwithstanding the fact that Rahimi had been subject to a DVRO since February 2020 for allegedly assaulting his ex-girlfriend. Rahimi’s "lengthy criminal history" also included three pending state charges resulting from his "use of a firearm in the physical assault of his girlfriend in December 2019," and another state charge arising from "an aggravated assault with a deadly weapon of a different woman in November 2020."7

Neither Rahimi’s prior violent conduct nor the critical public safety objectives furthered by the DVRO prohibitor had any bearing on the Fifth Circuit’s ruling. In fact, the Fifth Circuit panel concluded its opinion—authored by Judge Cory Wilson, a former Republican representative in the Mississippi House of Representatives and a former member of the National Rifle Association (NRA) who sought the NRA’s endorsement in 2015 during his campaign for elected office—by describing the DVRO prohibitor as “embed[ding] salutary policy goals meant to protect vulnerable people in our society.” But those “goals”, the panel said, had no role under the Bruen framework.

The implications of Rahimi cannot be overstated. Domestic and intimate partner violence and gun violence are interconnected. Abusers with firearms are five times more likely to kill their female victims. Each month, an average of 70 women are shot and killed by an intimate partner. That is in addition to the almost one million women alive today who have been shot or shot at by intimate partners and the more than 4.5 million women who have been threatened with a firearm by an intimate partner. Abusers use guns to threaten and control their victims—threats, as the data show, that often escalate to actual, if not lethal, violence.8

Rahimi makes an existing problem in Texas, in Louisiana, and in Mississippi that much worse. For example, in 2021, there were 204 victims of intimate partner homicide in Texas alone—five of whom were killed with active protective orders in place. Of these 204 victims, 169 were women, and of these 169 murders, 127 involved firearms.9 In addition, in Texas, in 2021, 240 individuals seeking to purchase a firearm were denied due to a DVRO found during a National Instant Criminal Background Check. In Louisiana, that number was 216, and, in Mississippi, it was 47.10 So long as Rahimi stands, these same individuals, unless prohibited for other reasons, could—and can—purchase and possess firearms. In effect, the Fifth Circuit has allowed abusers to remain armed and dangerous, and given them more power and more control over their victims,

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7 United States v. Rahimi, No. 21-11001, 2022 WL 2703932, at *1 (5th Cir. June 8, 2022), opinion withdrawn, No. 21-11001, 2022 WL 2552046 (5th Cir. July 7, 2022). This earlier Fifth Circuit decision had rejected Rahimi’s Second Amendment challenge to the DVRO prohibitor prior toBruen, but the court withdrew the opinion and reconsidered the issue under Bruen’s new standard.


10 Roxanna Aguiar, Appeals Court Ruling Says Alleged Domestic Abusers Have a Constitutional Right to Keep Their Guns, The Texas Tribune (Feb 9, 2023), https://www.texastribune.org/2023/02/09/domestic-abuse-second-amendment/
while creating a chilling effect that has made it even more difficult for victims and survivors to seek help from service providers, law enforcement, and the courts.

To be clear, there was nothing inevitable about the Fifth Circuit’s decision—in fact, Rahimi was clearly wrong even under Breen’s framework. Though Breen put history at the heart of defending gun violence prevention laws against constitutional challenges, the Supreme Court was absolutely clear that the government does not need to identify identical historical laws to establish that modern laws are constitutional. Instead, the government need only show that there were analogous laws historically. The Court was also clear that because the Founders intended the Constitution “to endure for ages to come, and consequently, to be adapted to the various crises of human affairs,” the Second Amendment inquiry is “nuanced” in cases involving “unprecedented societal concerns.” Given the historical lack of concern shown for violence against women, particularly in domestic settings, that certainly is the case for the DVRO prohibitor. If the Fifth Circuit had correctly applied these principles—and recognized, for example, that the long history of legislatures prohibiting dangerous individuals from accessing firearms is clear analogical support for the DVRO prohibitor—it would have rejected Rahimi’s challenge.

Even though a rational reading of the law and common sense tell us that Rahimi was a dangerous error, make no mistake that the decision speaks volumes to Breen’s dangers and portends how other judges could handle Second Amendment challenges under its framework. The Breen framework, when wielded by extremist judges, puts at risk common-sense laws intended to address the modern public health crisis of gun violence and proven to reduce gun violence. That the gun lobby celebrated the Rahimi decision as “a great thing for America”10 says even more about the dystopian path that extremists judges are putting us on. It is hard to imagine who the gun lobby thinks should not have access to a firearm when it celebrates arming a violent domestic abuser.

Breen was wrongly decided in the first instance, but its framework now controls in Second Amendment challenges. Under the Breen framework—when applied correctly—gun violence prevention laws should still be upheld as part of a centuries-old tradition of gun and weapon regulation that Everytown and Everytown Law have extensively documented. For instance, just last week, the Eleventh Circuit correctly applied Breen to uphold a Florida law, passed following the horrific shooting at Marjory Stoneman Douglas High School in February 2018, that prohibits 18- to 20-year-olds from purchasing firearms. The Eleventh Circuit recognized that the long history of analogous age-based restrictions—laws that stretch back for more than 150 years, and that courts and scholars consistently found to be constitutional—required that result.11

If there is one common thread that ties Second Amendment precedent together, it is Justice Scalia’s proclamation, in his 2008 opinion for the Court in Heller, that “the right secured by the Second Amendment is not unlimited.” Two years after that, in McDonald v. City of Chicago,

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Justice Alito’s majority opinion recommitted the Supreme Court to that principle. Thirteen years later, in *Bruen*, Justice Thomas repeated it for the majority, and Justice Kavanaugh—joined by Chief Justice Roberts—wrote in his concurring opinion that, “properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.” The Supreme Court should move with alacrity to reverse the dangerous and misguided *Rahimi* decision.

*Bruen* may have made the Second Amendment landscape more complicated and allowed extremist judges to pursue a political agenda and strike down life-saving laws, but it does not preclude states—or Congress—from passing and enacting strong gun violence prevention laws that save lives and keep communities across the nation safe. Legislatures can, and must, continue to march forward to end gun violence and protect public safety.

Sincerely,

Robert B. Wilcox, Jr.
Senior Legal Director
Everytown for Gun Safety
Defensive Uses of Firearms: Examples

The National Firearms Survey conducted in 2021 sampled 16,708 firearm owners and determined that firearms are used in self-defense about 1.7 million times a year. A small sampling of cases involving defensive uses of firearms are as follows:

- On February 22, 2023, in North Charleston, South Carolina, a burglar tried to break into another man’s home, the homeowner shot and hit him; the burglar then ran away and was caught by police.

- On February 20, 2023, in Myrtle Beach, South Carolina, an attempted armed robbery failed when a store employee shot the robber, who was taken into custody by police.

- On February 15, 2023, in Kershaw County, South Carolina, a man made threats to a woman, went to her house with a two-foot-long piece of black metal and a red handle, and attacked her and her boyfriend, but the boyfriend was able to shoot and kill the attacker in self-defense to protect them.

- On January 23, 2023, in Forest Acres, South Carolina, a man was shot dead breaking into a woman’s home, where she lived with her child.

- On January 10, 2023, in Fort Mill, South Carolina, a man climbed through the window of an apartment and began to attack and threaten everyone inside—including a 6 year old girl—the man who lived there shot the intruder who was later arrested by police.

- On January 3, 2023, in Anderson County, South Carolina in a domestic violence incident, a man began to physically and verbally assault the woman who was driving—he reached for a weapon, but she was able to shoot him in self-defense. He was later arrested.

- On May 4, 2022, an Elmore, Alabama, woman shot her ex-boyfriend after he attacked her at her home. She held him at gunpoint until police arrived. Investigators determined that he had been stalking the woman for some time and had arrived at the property with a pry bar, handcuffs, binoculars, and an unspecified number of knives. He may also have been videotaping the woman without her consent for several days.

- On March 23, 2022, a Las Vegas woman called 911 to report her ex-boyfriend was breaking into her home. While she was on the phone with 911, the ex-boyfriend entered the home through a broken window, but quickly retreated after the woman confronted him with a handgun. Before officers arrived, the ex-boyfriend returned to the home with his own gun and put it to the head of the woman’s current boyfriend. The woman fatally shot the ex-boyfriend.
• On February 3, 2022, days after a judge granted a Tulsa, Oklahoma woman’s protective order against her ex-boyfriend and ordered him to surrender his firearms, he showed up to her apartment armed and kicked in her door. Fortunately, the woman’s current boyfriend was present and, armed with his own gun, fatally shot the intruder before he could harm anyone.

• On May 21, 2021, in White Settlement, Texas, a woman gathered her three children and sought shelter in her brother’s apartment after a conflict with her enraged husband, who arrived at the apartment armed with a shotgun and threatened to shoot down the door if his wife would not let him see his children. He fired a round through the door with his wife and children still inside. The woman’s brother fatally shot the husband with an AR-15 before he could harm the woman or her children.

• On October 22, 2022, in Las Vegas, Nevada, a 28-year-old man broke into a family’s home and threatened the family with a knife he took from their kitchen. The family locked themselves in a bedroom, but the suspect tried to knock the door down. While police were en route, they shot the suspect through the door before he was able to breach it.

• On October 14, 2022, in Chicago, Illinois, a young woman was entering an apartment building when she was attacked by a knife-wielding man. He stabbed her in the hand and thigh before a female passerby, with a gun, shot the attacker. Fortunately, the stabbing victim survived due to the intervention of a Good Samaritan with a firearm.

• On October 25, 2022, in Edinburg, Texas, a mother defended herself and her children after a man broke into her home and tried to enter the bedroom in which they were hiding. The intruder would not leave, and after calling the police and giving the burglar a warning, she shot him through the door. The suspect fled and was later arrested.

• On January 1, 2023, in New Orleans, Louisiana, a tow truck driver doing his job removing illegally parked vehicles in New Orleans was surrounded by a group threatening to shoot him. Fortunately, the driver was quicker than the criminals and shot the suspect while he was loading his weapon.
The 2nd Amendment Is Essential for Women's Safety

Independent Women's Forum, Independent Women's Voice, and Independent Women's Law Center strongly believe the Second Amendment secures a personal right to carry a firearm outside the home for purposes of self-defense. This right is especially important for individuals for whom a firearm is the great equalizer: women.

Theresa Kingsbury was driving north from Connecticut to New York in the early morning hours when two cars forced her to the shoulder of a deserted road. She was alone and had $5,000 in cash, transporting it from one ski shop to another. She appeared an easy mark. Two men approached her vehicle, one brandishing a hammer. Theresa raised her loaded handgun and the men fled.

Peggy Landry was out with friends for dinner in New Orleans one evening. When they returned to their vehicle a man shoved a revolver through the open window and pressed it against her friend's head demanding money and jewelry. As the women began to pull off their jewelry, Peggy reached for her Smith & Wesson and pointed it at the man. He left.

DaShana Street, a Black woman, bought her first gun in June 2020. She works in retail and began to fear for her safety when over 100 nearby businesses were damaged following the death of George Floyd. She was also worried by the circumstances of Breonna Taylor's death. "You can't even sit in the comfort of your own home," she said.

After purchasing her firearm—a pink Glock 43 handgun—DaShana took a firearms class and obtained a concealed carry permit. Now, she always has her firearm with her, either holstered to her belly band or on the nightstand. It has given her more job flexibility, allowing her to deliver orders at night in her side hustle. "It's like my child," she said. "It gives me a sense of safety and security. I was really nervous about the idea of carrying a gun. But now, it's like the new normal."

Camron Whitehead's protective order against her ex-husband proved useless. Despite the order, he poured sugar in her gas tank, punctured her tires, and cut her telephone lines. When he showed up at her door one evening (again in violation of the protective order), she raised a .357 Magnum, pointed it in his direction, and fired beyond him. He hasn't violated the order since.

These are just a few of the examples of women for whom the right to bear arms has been essential. For more information, please see IWLC's Amicus Brief in New York State Rifle & Pistol Association Inc v. Superintendent of New York State Police: