CASE NO. 22-50048

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN DUARTE,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of California
Hon. André Birotte, J., Presiding
District Court Case No.: 20-cr-00387-AB-1

MOTION OF CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT STEVEN DUARTE'S PANEL AND EN BANC REHEARING PETITION

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September 24, 2024

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

On May 9, 2024, a panel of this Court decided the above-captioned appeal. The panel held that the disarmament of non-violent offenders who have served their time in prison and reentered society violates the Second Amendment.

On July 17, 2024, this Court granted the United States's motion for rehearing en banc.

Movant Cato Institute now seeks leave under FRAP 29(b)(2) and Ninth Circuit Rule 29-2(a) for leave to file an amicus brief in support of Appellant's pending combined en banc and panel rehearing petition. Attached to this motion is a copy of the Cato Institute's proposed amicus brief.

IDENTITY OF THE PROPOSED *AMICUS*

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

INTEREST OF THE PROPOSED *AMICUS*

This case interests Cato because among other rights the Institute seeks to

protect is the right of armed self-defense, and in that regard the Institute has represented parties and appeared as amicus in several cases involving this fundamental right. *See*, *e.g.*, *Marszalek v. Kelley*, No. 20-CV-4270, 2022 WL 225882 (N.D. Ill. Jan. 26, 2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Korwin v. Cotton*, 323 P.3d 1200 (Ariz. 2014). Institute scholars have also published important research on the right to possess firearms. *See, e.g.*, TIMOTHY SANDEFUR, THE PERMISSION SOCIETY ch. 7 (2016).

REASONS TO ALLOW THE PROPOSED *AMICUS* BRIEF

This *amicus* brief argues that the United States's proposed result is incompatible with the example set by years of historical analysis in the First, Second, and Sixth Amendment contexts. Exceptions to individual rights do not move with the political winds. When it comes to individual rights, history, not legislatures, determines exceptions' existence and scope. That means that courts may not simply assume that the Second Amendment will expand or contract to fit any crime labeled a felony. Rather, courts must confront the reality of what modern felonies look like, and compare that reality to the government's proposed historical analogues.

This brief also addresses the constitutional concerns with allowing categorical disarmament of felons in light of overcriminalization. Tens of thousands of offenses—many of them *malum prohibitum* regulatory crimes—have been added to the books since § 922(g)(1)'s passage. Many of these offenses are neither

particularly serious nor indicative of danger with a firearm. And there is no mechanism for limiting the conduct felonies can cover; legislatures have virtually unlimited power to define crimes and punishments.

Courts may not simply assume that the Second Amendment will expand or contract to fit any crime labeled a felony. Rather, courts must confront the reality of what modern felonies look like, and compare that reality to the government's proposed historical analogues.

CONSENTS

Both parties have consented to the filing of this *amicus* brief.

CONCLUSION

Based on the foregoing points and authorities, the Court should allow the filing of the attached *amicus curiae* brief in support of Appellant's pending petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies under FRAP 32(g) that the foregoing motion meets the formatting and type-volume requirements set under FRAP 27(d) and FRAP 32(a). The motion is printed in 14-point, proportionately-spaced typeface utilizing Microsoft Word and contains 549 words, including headings, footnotes, and quotations, and excluding all items identified under FRAP 32(f).

/s/ Matthew P. Cavedon

September 24, 2024

CERTIFICATE OF SERVICE

The undersigned certifies that on September 24, 2024, he electronically filed the above motion with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel for all parties to this case. The undersigned also certifies that lead counsel for all parties are registered ECF Filers and that they will be served by the CM/ECF system.

/s/ Matthew P. Cavedon

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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation, and none issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus*'s participation.

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INTEREST OF *AMICUS CURIAE*[1]

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

INTRODUCTION

The Supreme Court's watershed opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), transformed Second Amendment jurisprudence. Going forward, Second Amendment exceptions would spring from "the Nation's historical tradition of firearm regulation," not the means-ends balancing that lower courts had employed. *Id*. at 24. But though *Bruen* marked a decisive break from the prevailing method of Second Amendment analysis, its history-based standard was far from unprecedented. By "requir[ing] courts to consult history to determine the scope of th[e] right," *Bruen* aligned the Second Amendment with "how we protect other constitutional rights," particularly those in the First and Sixth Amendments. *Id*.

Even so, courts "struggled with this use of history." *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring). The "level of generality" posed particular challenges: "Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?" *Id*. *Rahimi* brought clarity by charting a middle course. *See* Appellant's Supplemental En Banc Brief at 3–7, *United States v. Duarte*, No. 22-50048, Dkt. 90 (Sept. 17, 2024). The Court identified a "principle" instead of a direct analogue. *Rahimi*, 144 S. Ct. at

1898. But that principle was narrow, concrete, and historically grounded enough to provide real guidance. *Id*.

The government, however, appears to have taken the wrong lesson from *Rahimi*. In the latest briefing addressing 18 U.S.C. § 922(g)(1), the government claims a mandate to derive broad regulatory "principles" from narrow historical regulations. Supplemental Brief of Appellees at 5, *Range v. Att'y Gen.*, No. 21-2835, Dkt. No. 119 (Aug. 2, 2024). According to the government, § 922(g)(1) conforms to these principles because modern lawmakers enact felonies only to punish "serious" crimes committed by those thought to pose a "special danger of [firearms] misuse." *Id*. at 9 (quoting *Rahimi*, 144 S Ct. at 1901). And in fact, says the government, § 922(g)(1) conforms to these principles so closely that courts need not even entertain as-applied challenges. *Id*. at 25–29.

The government's premise, however, is belied by an aggressive, decades-long trend in American politics: overcriminalization. Over the last fifty years, a tidal wave of new criminal laws has swept the country, drawing bipartisan criticism and alarm. This glut of new crimes has not come just from legislatures, but also from the many agencies to which state and federal legislatures delegate lawmaking authority. As a result, tens of thousands of offenses—many of them *malum prohibitum* regulatory crimes—have been added to the books since § 922(g)(1)'s passage. Many of these offenses are neither particularly serious nor indicative of danger with a firearm. And

there is no mechanism for limiting the conduct felonies can cover; legislatures have virtually unlimited power to define crimes and punishments. Overcriminalization therefore bears out a commonly held fear about the government's bid for "extreme deference": that instead of tethering the Second Amendment to the dangers motivating our regulatory traditions, the government would "give[] legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Range v. Att'y Gen.*, 69 F.4th 96, 102–03 (3d Cir. 2023), *cert. granted, judgment vacated sub nom. Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024) (quoting *Folajtar v. Att'y Gen.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting)).

This result is incompatible with the example set by years of historical analysis in the First, Second, and Sixth Amendment contexts. Exceptions to individual rights do not move with the political winds. When it comes to individual rights, history, not legislatures, determines exceptions' existence and scope. That means that courts may not simply assume that the Second Amendment will expand or contract to fit any crime labeled a felony. Rather, courts must confront the reality of what modern felonies look like, and compare that reality to the government's proposed historical analogues. Applying history's lessons to today's sprawling criminal codes, the Court can only conclude that the government has not met its burden to square universal, lifetime felon disarmament with our regulatory traditions.

ARGUMENT

I. Like historically-based exceptions to other constitutional rights, the "principles" governing Second Amendment regulations must be narrowly drawn and closely tied to history—not legislative judgments.

In a recent filing, which likely anticipates the government's position in this case, the government submits that "[h]istorical tradition establishes at least two principles that support felon disarmament: (1) legislatures may disarm persons who have been convicted of serious crimes; and (2) legislatures may disarm 'categories of persons thought by a legislature to present a special danger of misuse.'" Supplemental Brief of Appellees at 5, *Range v. Att'y Gen.*, C.A.3 No. 21-2835, Dkt. No. 119 (Aug. 2, 2024) (quoting *Rahimi*, 144 S. Ct. at 1901). These principles share two, notable features. Both extrapolate extremely broad exceptions to the Second Amendment from much more specific regulations. And both rely on legislatures to fill in the details.

These are well-worn tactics in constitutional litigation. But when governments have tried to deploy them in seeking exceptions to the First and Sixth Amendment, they have been rebuffed. Viewing *Bruen*'s and *Rahimi*'s methodology in light of these settled approaches to historical analysis, the government's proposed principles must be rejected.

A. Across constitutional contexts, the Courts has neither deferred to legislatures nor extrapolated from the generalized policies underlying historical exceptions.

Bruen's history-based approach to Second Amendment exceptions shares important "similar[ities]" with other constitutional traditions. 597 U.S. at 25. "Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms." *Id*. at 24. To establish that "the expressive conduct falls outside of the category of protected speech . . . the government must generally point to historical evidence about the reach of the First Amendment's protection." *Id*. at 24–25. Or consider the Sixth Amendment's Confrontation Clause. "If a litigant asserts the right in court to 'be confronted with the witnesses against him," courts must "consult history to determine the scope of that right." *Id*. at 25.

In each of these contexts, the Supreme Court has reinforced crucial limits on deriving constitutional principles from history: Courts may neither extrapolate broad exceptions from narrow historical traditions, nor delegate to legislatures to define those exceptions' scope.

The First Amendment. Consider, first, the Court's cases on speech that is "categorically unprotected by the First Amendment." *United States v. Stevens*, 559 U.S. 460, 468 (2010). Ordinarily, legislatures may not enact content-based prohibitions on speech. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791 (2011).

But the Court has identified "well-defined and narrowly limited" exceptions to that rule, like fraud, obscenity, incitement, and fighting words. *Id*.

Before recognizing an exception, however, the Court demands a close alignment between the historical exemplars and the principles derived. In *United States v. Alvarez*, the Court considered a First Amendment challenge to the Stolen Valor Act, which criminalized falsely claiming receipt of military decorations or medals. 567 U.S. 709, 713–15 (2012). To defend the law, the government proposed a new class of categorically unprotected speech: "false statements." *Id.* at 718. The government identified "three examples of regulations on false speech that courts generally have found permissible": (1) historical laws criminalizing perjury, (2) historical regulations addressing false statements to government officials, and (3) historical prohibitions on making the false representation that one is speaking as a government official. *Id.* at 720. From these isolated examples, the government extrapolated a general principle "that *all* proscriptions of false statements are exempt from exacting First Amendment scrutiny." *Id.* (emphasis added).

The Court rejected the government's bid. *Id*. True, the government had identified three kinds of regulation targeting falsehood. *Id*. But that did "not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context." *Id.* The laws in those examples were constitutional because of features distinctive to the particular false statements

proscribed, i.e., that they "protect the integrity of Government processes, quite apart from merely restricting false speech." *Id.* That these three types of false statements may be enjoined does not mean that *all* "false speech should be in a general category that is presumptively unprotected." *Id.* at 722. Such a rule, the Court warned, "has no clear limiting principle" and would "give government a broad censorial power" inconsistent with the First Amendment. *Id.* at 723.

In addition to demanding strong historical support to recognize a new exception, the Court has refused to defer to legislatures' judgment about what falls within exempted categories. For example, the Court has repeatedly declined to expand the obscenity exception beyond its historical precursors, all of which involve depictions of sexual conduct. *Brown*, 564 U.S. at 793 (citing *Stevens*, 559 U.S. at 470, and *Winters v. New York*, 333 U.S. 507, 519 (1948)). *Winters*, involving a state prohibition on violent novels, marked an early attempt to "shoehorn speech about violence into obscenity." *Id*. (citing *Winters*, 333 U.S. at 514). The state court had upheld the law by defining "obscenity" to encompass books that, in the legislature's judgment, "are likely to bring about the corruption of public morals or other analogous injury to the public order." *Winters*, 333 U.S. at 514. The Court rejected that analogy, holding that it implicated "no indecency or obscenity in any sense heretofore known to the law." *Id*. The Court reached the same conclusion in *Stevens*,

involving depictions of animal cruelty, and *Brown*, concerning the sale of violent videogames to children. *Brown*, 564 U.S. at 793.

In each case, the Court reaffirmed that obscenity "does not cover whatever a legislature finds shocking." *Id*. (cleaned up). "[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated," the Court explained. *Id*. at 791. "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs." *Id*. at 792 (cleaned up). Any other conclusion would replace a history-based inquiry with an "expansive view of governmental power to abridge the freedom of speech based on interest balancing." *Id*.

The Sixth Amendment. The same lessons repeat themselves in the Sixth Amendment context. There, too, the Supreme Court has countenanced only "founding-era exception[s] to the confrontation right." *Giles v. California*, 554 U.S. 353, 358 (2008).

There, too, exceptions to the right must align closely with their historical counterparts. For instance, the Court has acknowledged a deeply rooted "public records" exception to the Confrontation Clause. *Melendez-Diaz v. Massachusetts*,

557 U.S. 305, 322 (2009). At common law, this exception allowed a court to admit a clerk's certificate authenticating a public record, without the clerk's live testimony. *Id*.

In *Melendez-Diaz*, the dissent characterized clerks as "unconventional witnesses," whose contributions to cases were "far removed from the crime and the defendant." *Id*. at 347 (Kennedy, J., dissenting). From there, the dissent reasoned that the exception should apply to *all* such witnesses, including forensic analysts. *Id*. But the majority rejected that analogy. Historically, "a clerk's authority . . . was narrowly circumscribed," the majority reasoned. *Id*. at 322 (majority opinion). "He was permitted to certify to the correctness of a copy of a record kept in his office, but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *Id*. (cleaned up). The dissent's broad analogy to forensic witnesses therefore did not hold.

Likewise, in *Giles*, the Court enforced the narrow bounds of the forfeiture-by-wrongdoing exception. Historically, "the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Giles*, 554 U.S. at 359. But the state proposed to extend that exception to *any* "intentional criminal act [that] made [a witness] unavailable to testify." *Id*. at 357. In the state's view, this more expansive understanding would chime with "the basic purposes and objectives

of forfeiture doctrine," which turned on the belief that "a defendant should not be permitted to benefit from his own wrong." *Id*. at 374 (cleaned up). But the Court declined to "create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood." *Id*. "It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Id*. at 375.

Finally, just as courts may not analogize beyond the bounds of traditional Sixth Amendment exceptions, governments may not legislate new exceptions into existence. For example, the state in *Smith v. Arizona* contended that experts convey others' out-of-court statements only to explain their opinions, not to establish the truth of the matter asserted. 144 S. Ct. 1785, 1797 (2024). In support, it cited state and federal evidence rules exempting such statements from the rule against hearsay. *Id*. The Court disagreed. It noted that "federal constitutional rights are not typically defined—expanded or contracted—by reference to [such] non-constitutional bodies of law." *Id*. at 1797. For Sixth Amendment purposes, then, non-constitutional sources "do not control the inquiry into whether a statement is admitted for its truth." *Id*.

Second Amendment. When *Bruen* clarified that only history and tradition could support Second Amendment exceptions, then, the Court did not write on a clean slate; it built on a decades-long foundation for "how we protect other constitutional rights." *Bruen*, 597 U.S. at 24. It is therefore no surprise that the Court's recent Second Amendment cases reflect the same careful hewing to tradition as its First and Sixth Amendment jurisprudence.

Bruen first established boundaries when assessing New York's bid for broad authority to regulate public carry. 597 U.S. at 33. In support, New York pointed to a wide variety of historical precursors, like affray laws, surety statutes, concealed carry laws, and "sensitive places" laws. *Id*. at 30–69. According to New York, these specific laws demonstrated that governments have generalized power to regulate public carry in areas frequented by the general public, including by demanding that licensees demonstrate "proper cause" for going armed. *Id*. at 33.

Bruen rejected that generalization maneuver. Instead, it evaluated each law to determine whether it was sufficiently similar to the "proper cause" requirement. *Id*. at 30–69. Affray laws were a poor fit, because they prohibited only "bearing arms in a way that spreads 'fear' or 'terror' among the people." *Id.* at 50. They therefore did not support a "sweeping" power to pass "onerous public-carry regulations." *Id.* at 40. Historical statutes proscribing *concealed* carry did not justify New York's "*general* prohibition" on *all* modes of public carry (both concealed and open). *Id*. at

54 (emphasis added). And historical "surety statutes," which applied "only [to] those reasonably accused" of intending to do injury or breach the peace, did not validate a proper-cause requirement applicable to *all* New Yorkers. *Id*. at 57.

Legislative judgments could not cure these mismatches, as the Court made clear in discussing "sensitive places" laws. The Court acknowledged that "[t]he historical record yields . . . 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.,* legislative assemblies, polling places, and courthouses." *Id*. at 30. And starting from this tradition, courts could certainly identify "*new* and analogous sensitive places" where the Second Amendment would not shield public carry against regulation. *Id*. (emphasis original).

But that did not mean that legislatures could designate such places at will. New York could not "effectively declare the island of Manhattan a 'sensitive place,'" because "there was no historical basis" to do so. *Id*. at 31. Nor could the government define "sensitive places" so expansively as to make legislative deference inevitable. "[E]xpanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement"—as New York would have done—"defines the category of 'sensitive places' far too broadly" relative to its historical precursors. *Id*. at 30–31.

Ultimately, because a survey Anglo-American history revealed only a small number of "well-defined" restrictions on public carry, New York could neither

extrapolate a general power to regulate public carry nor assert legislative power to define the Second Amendment's scope. *Id*. at 70.

Last Term, *Rahimi* held that historical tradition did permit governments to disarm certain people under domestic violence restraining orders. 144 S. Ct. at 1901. But the historical principle the Court derived to support that law was closely tied to historical regulations. While the government proffered numerous purported analogues for § 922(g)(8), *see* Appellant's Supplemental En Banc Brief at 4–6, *United States v. Duarte*, No. 22-50048, Dkt. 90 (Sept. 17, 2024) (describing government briefing in *Rahimi*), the Court grounded its narrow holding on "two distinct legal regimes" that "specifically addressed firearms violence": founding-era surety and going-armed laws. *Rahimi*, 144 S. Ct. at 1899–1900. These laws established a narrow, well-defined historical exception to the Second Amendment for "prohibition[s] on the possession of firearms by those found by a court to present a threat to others." *Id*. at 1901. To establish that § 922(g)(8) fell within that tradition, *Rahimi* drew specific parallels between historical laws' features and § 922(g)(8)'s attributes. Both sets of laws "temporar[ily]" "restrict[ed] gun use to mitigate demonstrated threats of physical violence," following "judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 1901–02.

This close alignment explained why those analogues justified § 922(g)(8), even though they did not support New York's proper-cause law. "The conclusion that focused regulations like the surety laws are not a historical analogue for a *broad* prohibitory regime like New York's does not mean that they cannot be an appropriate analogue for a *narrow* one." *Id*. at 1902 (emphases added).

In contrast, the Court unanimously rejected the government's much more expansive contention that the Second Amendment permitted disarming all who are not "law-abiding, responsible citizens," *Id*. at 1944 (Thomas, J., dissenting) (quoting Brief for United States 6, 11–12), and thus, "that Rahimi may be disarmed simply because he is not 'responsible.'" *Id*. at 1903 (majority opinion). "'Responsible' is a vague term," the Court noted. "It is unclear what such a rule would entail." *Id*.

For multiple justices, the term's vagueness tied in with concerns about excessive legislative deference. "Not a single Member of the Court adopts the Government's theory," Justice Thomas noted, not just because it "lacks any basis in our precedents," but also because it "would eviscerate the Second Amendment altogether." *Id*. at 1944 (Thomas, J., dissenting). On the government's view, "Congress could impose any firearm regulation so long as it targets 'unfit" persons. And, of course, Congress would also dictate what 'unfit' means and who qualifies. The historical understanding of the Second Amendment right would be irrelevant." *Id*. at 1945 (cleaned up). It follows that "whether a person could keep, bear, or even

possess firearms would be Congress's policy choice." *Id*. at 1946. Justice Thomas applauded the majority decision to reject that suggestion, and cautioned courts to "remain wary of any theory in the future that would exchange the Second Amendment's boundary line . . . for vague (and dubious) principles with contours defined by whoever happens to be in power." *Id*. at 1946.

Justice Gorsuch agreed. "[W]e [do not] purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not "responsible,"'" he warned, citing to Justice Thomas's observations about that theory's unanimous rejection. *Id*. at 1910 (Gorsuch, J., concurring). Instead, Justice Gorsuch explicitly analogized *Rahimi*'s Second Amendment analysis to the kind of inquiry guiding Sixth Amendment jurisprudence. In both contexts, courts may not create exceptions to the right by "glean[ing] from historic exceptions overarching 'policies,' 'purposes,' or 'values' to guide them in future cases." *Id*. at 1908 (quoting *Giles*, 554 U.S. at 374–375 (opinion of Scalia, J.)).

Finally, Justice Barrett registered her concern about excessively broad principles. She believed that in *Rahimi*, the Court had "settle[d] just the right level of generality." *Id*. at 1926. But she cautioned courts to continue striking that appropriate balance moving forward, "not to read a principle at such a high level of generality that it waters down the right." *Id*.

These precedents all point in the same direction. Neither broad pronouncements about historical precedents' underlying policies, nor modern legislatures' judgments, can create or expand a historically-based exception beyond its historical foundations.

B. The government's proposed "principles" transgress these limits.

The government's latest proposed "principles" do not honor historical tradition. Supplemental Brief of Appellees at 9, *Range v. Att'y Gen.*, No. 21-2835, Dkt. No. 119 (Aug. 2, 2024). This is apparent from the government's historical analysis and the nature of the principles it derives.

First, the government points to a single class of criminal convictions that historically resulted in disarmament: treason-like offenses involving disloyalty during the American revolution. *Id*. at 12–14. In addition, the government notes that some historical felonies were punishable by death and forfeiture. *Id*. at 10–12.[2] From these laws, the government concludes that "legislatures may disarm persons who have been convicted of serious crimes."[3] *Id*. at 9. In its view, an offense's

[2] Whether the government's claim that "early legislatures had little occasion to consider whether to disarm convicted criminals who were not executed" is correct or not, *id*. at 12—and the historical record indicates that it is not—the fact remains that no felon disarmament laws were enacted anywhere in the United States *until the 20th century*.

[3] The government also mentions a rejected proposal from a state constitutional convention, which would have added an ambiguous crime-based exception to the Second Amendment, as well as a never-adopted model criminal code, which

"seriousness" would turn entirely on the legislatively prescribed maximum punishment, presumably tracking the statutory maxima that trigger § 922(g)(1). *Id*. at 27.

Second, the government identifies founding-era and nineteenth-century firearm restrictions on Loyalists, children, people with mental illness, vagrants, and the intoxicated. *Id*. at 19–23. From those regulations (none of which permanently disarmed one, for life), the government infers that "legislatures may disarm 'categories of persons thought by a legislature to present a special danger of misuse.'" *Id*. (quoting *Rahimi*, 144 S. Ct. at 1901).

Each of these arguments repeats the same errors identified in the opinions above. As an initial matter, the government's analysis includes no discussion of why the offenses § 922(g)(1) targets are all comparable to the particular *types* of crimes or the specific *kinds* of danger that historically warranted disarmament. In this respect, the government's reasoning recalls previous attempts to create, for example, (1) a "false statements" exception to the First Amendment, without acknowledging that historical regulations targeted only the *kinds* of false statements that interfere with government processes, *see supra*, p. 7; (2) an "unconventional witnesses"

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suggested expelling from the militia persons convicted of certain dishonesty-related offenses. *Id*. at 14–16. These one-off, non-regulatory sources do not help to establish that § 922(g)(1) falls within "this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

exception to the Sixth Amendment, without accounting for the fact that clerks were the only *types* of witnesses exempt from confrontation, *see supra*, p. 10; or (3) a "public carry" exception to the Second Amendment, without appreciating that only well-defined *varieties* of behaviors or places triggered regulation, *see supra*, p. 12.

Instead, the government's principles look behind their comparators' actual operation to discern what it believes the animating policies behind them were—that historical legislatures must have taken guns from Loyalists because their offense was "serious" (and not because they threated the very existence of the Nation at a critical time in its history) or that they must have disarmed various categories of people because legislatures declared them to pose "a special danger of misuse" (and not because the risk of firearm misuse inhered in their condition). The government's move recalls prior attempts to extrapolate (1) from obscenity, to cover "whatever a legislature finds shocking," *supra*, p. 9, (2) from forfeiture-by-wrongdoing, to cover any circumstance where a defendant might "benefit from his own wrong," *supra*, p. 11, or (3) from the sensitive places, to encompass "all places of public congregation that are not isolated from law enforcement," *supra*, p. 13. Even if these proposals hit on the reason for the historical exception to the First, Sixth, and Second Amendment, courts are not free to "create the exceptions that [they] think[] consistent with the policies underlying the [constitutional] guarantee, regardless of how that guarantee was historically understood." *Giles*, 554 U.S. at 374.

Finally, the government's proposals—too "vague" on their own to constrain legislative action, *Rahimi*, 144 S. Ct. at 1903—would give legislatures exclusive power to identify disarmament-worthy conduct or groups. But just as "new categories of unprotected speech may not be added to the list" of First Amendment exemptions "by a legislature that concludes certain speech is too harmful to be tolerated," *Brown*, 564 U.S. at 793, so too Second Amendment exceptions must not turn on a legislative decree that a person is too harmful to exercise the arms right.

To apply the proper analysis, this Court may not simply assume that the "felony" label marks out "serious" crimes and "dangerous" people on par with the conduct and persons regulated historically. Instead, the Court must engage with the kind of conduct historical regulations actually targeted, and compare it to the kinds of offenses § 922(g)(1) actually covers. When these empirical realities are considered, the government's analogy to founding-era analogues immediately encounters a problem: the modern phenomenon of overcriminalization.

II. Overcriminalization—and particularly, the proliferation of regulatory crimes—means that many felonies are neither "serious" nor associated with a "special danger of [firearms] misuse."

In recent decades, actors across the political spectrum have converged on an unfortunate conclusion: Federal law exhibits a "deep[] pathology" of "overcriminalization and excessive punishment." *Yates v. United States*, 574 U.S. 528, 569–70 (2015) (Kagan, J., dissenting). Year after year, 'Congress . . . puts forth

an ever-increasing volume of laws in general, and of criminal laws in particular." *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting), *overruled by Johnson v. United States*, 576 U.S. 591 (2015).

It is not just judges who have sounded the alarm. In 2013, the U.S. House of Representatives convened a task force on overcriminalization. *United States v. Valdovinos*, 760 F.3d 322, 339 (4th Cir. 2014) (Davis, J., dissenting). "[G]roups who . . . testified in support of reform include[d] the American Bar Association, the Heritage Foundation, and . . . the Judicial Conference of the United States and the Sentencing Commission." *Id*. Since then, reports, studies, and op-eds targeting the problem have proliferated. *E.g.*, TIM LYNCH, CATO INST., CATO HANDBOOK FOR POLICYMAKERS 193–199 (8th ed. 2017); The Heritage Found., *Overcriminalization*, https://heritage.org/crime-and-justice/heritageexplains/overcriminalization; JAMES R. COPLAND & RAFAEL MANGUAL, MANHATTAN INST. FOR POL'Y RSCH., INC., OVERCRIMINALIZING AMERICA (2018), https://manhattan.institute/article/over criminalizing-americaan-overview-and-model-legislation-for-states; Charles G. Koch & Mark V. Holden, *The Overcriminalizaton of America*, Politico Magazine (Jan. 7, 2015), https://www.politico.com/magazine/story/2015/01/overcriminaliza tion-of-america-113991/.

Viewed through the lens of this well-recognized trend, the government's three major claims about modern felony offenses do not withstand scrutiny. First and

foremost, the government contends that the 1968 Congress had the power to make a judgment that all offenses punishable by more than a year's imprisonment are serious offenses indicative of danger. Supplemental Brief of Appellees at 25, *Range v. Att'y Gen.*, No. 21-2835, Dkt. No. 119 (Aug. 2, 2024). But the sheer number and variety of modern felonies belie the assertion that felonies are invariably grave or associated with danger.

Federal law perhaps best exemplifies this problem, because agency rulemaking amplifies it by orders of magnitude. Congress has defined by statute at least 4,450 separate federal crimes. *See* HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 202 (2009). A large proportion of these offenses post-date § 922(g)(1)'s enactment: "[O]f the federal criminal provisions passed into law during the 132-year period from the end of the Civil War to 1996, fully 40 percent were enacted in the 26 years from 1970 to 1996." BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010), https://tinyurl.com/3y9z9ac3 (citing CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW (1998)).

Those, however, are just the crimes spelled out in the federal code. Others lurk in regulations, which federal statutes incorporate by reference. "In contemporary America virtually every regulatory scheme, particularly in federal law, includes

felony criminal enforcement provisions to add 'teeth' to the costs of noncompliance, covering such diverse areas as environmental safety, securities markets, employment practices, consumer protection, public benefits, and international trade." Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 Am. Crim. L. Rev. 1, 32 (1995). Include regulatory crimes in the count, and the estimate of federal crimes balloons to 300,000 potential separate federal crimes. Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 729 (2013). These grounds for criminal liability continue to snowball year by year, as the agencies add between "three thousand to five thousand final rules" annually. *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2619 n. 2 (2022) (Gorsuch, J., concurring) (quoting Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683, 694 (2021)).

Parallel processes play out in the 50 states. A recent five-state survey reviewed criminal statutes enacted over six-year periods. COPLAND & MANGUAL, *supra*, at 7. The study found that, on average, those states enacted 42 new crimes each year. *Id*. at 7. All five states created a substantial number of new felonies during the study period. *Id*. In fact, in Oklahoma, Michigan, and North Carolina, between one-third and one-half of all new criminal laws carried a felony designation. *Id*.; *see also* Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. Rev. 1935, 1942 (2014)

(finding that North Carolina's General Assembly had enacted 101 new felonies and reclassified 8 misdemeanors as felonies between 2008 and 2013).

As in the federal system, "[m]any state crimes are codified not in penal codes but in other parts of the broader statutory code, in the vast array of agency-created regulation, and even in private licensing-board rules that have de facto criminal effect through 'catchall' statutory delegations of criminal lawmaking power." COPLAND & MANGUAL, *supra*, at 7. A majority of new crimes in all five surveyed states fell outside the criminal code, and in three states, the proportion of such crimes exceeded 80%. *Id*.

Unsurprisingly, the tens of thousands of felonies scattered across the state and federal systems do not invariably cover conduct posing dangers comparable to, e.g., aiding the British during the Revolution or carrying a gun while drunk. Instead, "felonies include a wide swath of crimes, some of which seem minor." *Range*, 69 F.4th at 102. The offenses encompassed in § 922(g)(1) "include[] everything from . . . mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses." *Kanter v. Barr*, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting), *overruled by Bruen*, 597 U.S. 1.

These observations doubly undermine the suggestion that courts defer to the congressional "judgment" embodied in § 922(g)(1). Supplemental Brief of

Appellees at 25, *Range v. Att'y Gen.*, No. 21-2835, Dkt. No. 119 (Aug. 2, 2024). The problem is not just that some felonies are, objectively, neither "serious" nor suggestive of future "danger." *Id*. It is also fanciful to think that the 1968 Congress made a genuine "judgment" to that effect. *Id*. Felony offenses are so numerous that legislators could not have surveyed them all. And even if they had, the following decades' explosion of criminal laws would make that survey obsolete.

Second, the government claims that there is a sound basis to link even minor felonies to lifetime disarmament, because anyone "who commits a felony offense 'has shown manifest disregard for the rights of others.'" *Id*. at 21 (quoting *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004)). But again, that assertion does not match modern realities. Today, one need not disregard others' rights in order to transgress the law.

Once more, this is in part a function of the sheer number of crimes on the books. "There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes." Larkin, *supra*, at 726. Add to this the complexity of many such laws, and it becomes easy to see how "even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 166 (3d ed. 2001).

Yet, ordinarily, "ignorance of the law is no excuse." *Elonis v. United States*, 575 U.S. 723, 734–35 (2015) (cleaned up). Indeed, the intent needed to become a convicted felon can be shockingly low. One bipartisan study undertaken by the Heritage Foundation and the National Association of Criminal Defense Lawyers evaluated a year's worth of federal legislation, which included "446 criminal offenses that did not involve violence, firearms, drugs and drug trafficking, pornography, or immigration violations." WALSH & JOSLYN, *supra*, at ix. The analysis revealed that "[o]f these 446 proposed non-violent criminal offenses, 57 percent lacked an adequate mens rea requirement." *Id*. In Senator Orrin Hatch's view, that was no anomaly: "In recent years, Congress and federal agencies have increasingly created crimes with vague or unclear criminal intent requirements or with no criminal intent requirement at all." Press Release, Sen. Mike Lee, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 7, 2017), https://www.lee.senate.gov/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strength-criminal-intent-protections.

The mens rea problem intersects with the growth of regulatory malum prohibitum offenses. Such offenses "shift[] [the] ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books." Harvey A. Silverglate & Monica R. Shah, *The Degradation of the*

"Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud," 2009-2010 Cato Sup. Ct. Rev. 201, 220 (2010) (cleaned up). "For example, it is unlikely that most people would know that criminal sanctions may attach to such activities as walking a dog in a government building, mixing two kinds of turpentine, or violating an instruction in the twenty-two pages of OHSA regulations pertaining to construction of ladders and scaffolding." Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes As Case Study*, 96 J. Crim. L. & Criminology 643, 657 (2006).

In short, in the age of overcriminalization, criminal liability is not reserved for scofflaws. To the contrary, it is entirely possible for "honest, hardworking Americans [to become] swept up in the criminal justice system for doing things they didn't know were against the law." Press Release, Sen. Mike Lee, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 7, 2017), https://www.lee.senate.gov/2017/10/senators-hatch-lee-cruz-perdue-and-paul-introduce-bill-to-strength-criminal-intent-protections (quoting Sen. Hatch).

Finally, the government claims that the maximum authorized penalty for any offense is a dispositive indicator of that crime's seriousness and the danger it poses. Again, this simply is not the reality on the ground.

As an initial matter, there is little basis for supposing that a crime's maximum penalty reflects the crime's seriousness in most cases. When the legislature provides for a range of possible punishments, it stands to reason that it believes the offense's gravity lies on a spectrum as well. Accordingly, "courts . . . [will] generally reserve sentences at or near the statutory maximum for the worst offenders." *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017). Most will receive sentences far below the cap. Indeed, one Bureau of Justice Statistics study found that 3 in 10 convicted felons were not sentenced to prison at all. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES (Dec. 2009), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf.

Variations across states and across time further call into doubt the relationship between statutory maxima and seriousness. Is marijuana possession serious enough to warrant lifetime disarmament? Possess an ounce of marijuana in Georgia, and you have committed a misdemeanor. Ga. Code Ann. §§ 16-13-30(j)(2), 16-13-2(b). Step over the border into Florida, and you are guilty of a felony. Fl. Stat. Ann. § 893.13(b)(a)-(b). Does a second-time DUI suggest a special danger of firearms misuse? That offense is a felony in only 8 of 51 jurisdictions, counting Washington, D.C. *Holloway v. Att'y Gen. United States*, 948 F.3d 164, 192 (3d Cir. 2020) (Fisher, J., dissenting). But § 922(g)(1) pegs seriousness not to the overwhelming judgment of legislatures, but to the idiosyncrasies of each individual jurisdiction. The same

uneven treatment occurs across time. Commit petty theft in California in 2013, and you are a felon. Commit the same offense in 2014, and you are a misdemeanant. *See Morales v. Sherman*, 949 F.3d 474, 475 (9th Cir. 2020) (describing California's Proposition 47). To accept the government's theory, the Court would have to conclude that legislatures' power to disarm varies dramatically depending on the place and the day.

None of this is to "question the . . . legislature's judgment that a[] [particular] offense . . . should be punishable by a lengthy prison term." *Holloway*, 948 F.3d at 183 (Fisher, J., dissenting). "But for the purposes of answering the question before [the Court] today—whether that offense is 'serious' enough to deprive [Mr. Duarte] of his Second Amendment right—[the Court] must look to how his offense compares with those of the historically barred class." *Id*. Given the scope and variety of criminal laws, the Court simply cannot draw that conclusion for all possible felonies.

CONCLUSION

The government's vague, broad, and overly deferential "principles" depart radically from how courts have long derived exceptions to constitutional rights. But the problem is more than theoretical. Especially when it comes to § 922(g)(1), the government's proposed dissociation from the historical record has real world consequences. Because the government sees no need to demonstrate that any individual person with a felony conviction actually poses a comparable "danger," or

has committed a comparably "serious" crime, when measured against its proposed historical analogues, it would leave the decision to disarm entirely to legislatures. But since § 922(g)(1)'s passage, those same legislatures have enacted an unprecedented explosion of criminal laws. Overcriminalization belies the government's claim that all felony offenses are comparably serious or comparably indicative of danger to warrant comparison to historical analogues. This Court must therefore reject the government proposed principles, and instead conduct a careful as-applied comparison between Mr. Duarte's prior offenses and the government's proffered historical comparators.

Respectfully submitted,

Dated: September 24, 2024

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1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(2) because it contains 6,741 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ Matthew P. Cavedon

September 24, 2024

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Matthew P. Cavedon

September 24, 2024