

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
 Petitioner,)
 v.) No. 22-915
ZACKEY RAHIMI,)
 Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 22-915, United
5 States versus Rahimi.

6 General Prelogar.

7 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
8 ON BEHALF OF THE PETITIONER

9 GENERAL PRELOGAR: Mr. Chief Justice,
10 and may it please the Court:

11 Guns and domestic abuse are a deadly
12 combination. As this Court has said, all too
13 often, the only difference between a battered
14 woman and a dead woman is the presence of a gun.
15 Armed abusers also pose grave danger to police
16 officers responding to domestic violence calls
17 and to the public at large, as Zackey Rahimi's
18 own conduct shows.

19 To address that acute threat, Congress
20 and 48 states and territories temporarily disarm
21 individuals subject to domestic violence
22 protective orders. Congress designed Section
23 922(g)(8) to target the most dangerous domestic
24 abusers. It applies only if, after notice and a
25 hearing, a court makes an express finding that

1 the person poses a credible threat to an
2 intimate partner's physical safety or imposes a
3 specific prohibition on the use of physical
4 force, and the disarmament lasts only as long as
5 the order remains in effect.

6 The Fifth Circuit profoundly erred in
7 reading this Court's decision in Bruen to
8 prohibit that widespread common-sense response
9 to the deadly threat of armed domestic violence.
10 Like Heller and McDonald, Bruen recognized that
11 Congress may disarm those who are not
12 law-abiding responsible citizens.

13 That principle is firmly grounded in
14 the Second Amendment's history and tradition.
15 Throughout our nation's history, legislatures
16 have disarmed those who have committed serious
17 criminal conduct or whose access to guns poses a
18 danger, for example, loyalists, rebels, minors,
19 individuals with mental illness, felons, and
20 drug addicts.

21 Rahimi offers no historical evidence
22 that those laws were thought to violate the
23 right to keep and bear arms or that the Second
24 Amendment was originally understood to prevent
25 legislatures from disarming dangerous

1 individuals.

2 Despite all that, the Fifth Circuit
3 held that Section 922(g)(8) is facially
4 unconstitutional because the founding generation
5 didn't disarm domestic abusers in particular.
6 But Bruen specifically approved that kind of
7 demand for a historical twin. The Fifth
8 Circuit's approach departs from the Second
9 Amendment's original meaning and would enact the
10 very sort of regulatory straitjacket that this
11 Court disclaimed in Bruen.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: General, would you
14 just briefly define what you mean by
15 "law-abiding and responsible"?

16 GENERAL PRELOGAR: Of course, Justice
17 Thomas. So I would break that into its two
18 constituent components. With respect to those
19 who are not law-abiding, history and tradition
20 shows that that's defined by those who have
21 committed serious crimes defined by the
22 felony-level punishment that can attach to those
23 crimes.

24 This case focuses on the "not
25 responsible citizens" principle, and in this

1 context, we think that history and tradition
2 show that it applies to those whose possession
3 of firearms would pose an unusual danger, beyond
4 the ordinary citizen, with respect to harm to
5 themselves or harm to others.

6 JUSTICE THOMAS: What if someone --
7 this is a civil action. I think we could agree
8 on the -- if this were -- these were criminal
9 proceedings. What if someone is categorized as
10 irresponsible for not storing firearms properly?

11 GENERAL PRELOGAR: So I think that
12 there would be a history and tradition to
13 support the idea that if someone has improperly
14 stored their firearms and thus demonstrated by
15 their conduct that they're not fit to keep and
16 bear arms, they would fit within this category
17 of those who are not responsible. And -- and
18 there were a number of historical laws that
19 operated that way, for example, those who had
20 improperly stored gunpowder and caused the risk
21 of explosions.

22 JUSTICE THOMAS: Below, you and your
23 -- you -- you had a list of classes of
24 individuals who were excluded in -- in your
25 opening argument. Now below you included in

1 that class or in those classes slaves and Native
2 Americans. Why did you drop those classes?

3 GENERAL PRELOGAR: We haven't invoked
4 those laws at this stage of the proceedings
5 because we think that they speak to a distinct
6 principle and the textual hook that at the
7 particular point in time those categories of
8 people were viewed as being not among the people
9 protected by the Second Amendment in the first
10 instance.

11 Obviously, that was an odious
12 classification, but those laws were generally
13 accompanied by stripping of other political
14 rights or ability to -- to participate in the
15 political community, and we think they were
16 justified at that time on that basis.

17 And so the reason we haven't invoked
18 them here is because we focused on the more
19 directly relevant laws that apply to those who
20 are indisputably among the people but
21 nevertheless fit within this enduring
22 constitutional principle that the legislature
23 has authority to draw lines and make predictive
24 judgments about those whose access to firearms
25 will create that untenable risk of danger.

1 CHIEF JUSTICE ROBERTS: Is someone who
2 drives 30 miles an hour in a 25-mile --
3 mile-an-hour zone -- does that person qualify as
4 law-abiding or -- or not?

5 GENERAL PRELOGAR: I think that that
6 wouldn't qualify to the extent that it's
7 classified as a misdemeanor or minor criminal
8 conduct under state law. And I do want to be
9 clear that we certainly think that wouldn't
10 apply under the not responsible category, but if
11 you're focusing on law-abiding in particular, we
12 think that history and tradition there support
13 the conclusion that you can disarm those who
14 have committed serious crimes.

15 So it's not just that any kind of --
16 of conduct that is an offense would qualify.

17 CHIEF JUSTICE ROBERTS: Is it -- are
18 you making a misdemeanor/felony distinction?

19 GENERAL PRELOGAR: That's the line
20 that history and tradition reflect, and so, yes,
21 I think that that is the relevant category with
22 respect to law-abiding citizens. But, again, I
23 would just emphasize here we're not directly
24 invoking the law-abiding aspect of the principle
25 because Mr. Rahimi didn't have the kind of -- of

1 criminal record that would justify disarmament
2 on that basis. Instead, our arguments here are
3 directed at the aspect of the standard focused
4 on those who are not responsible.

5 JUSTICE KAGAN: You say --

6 CHIEF JUSTICE ROBERTS: Responsibility
7 is a very broad concept. I mean, not taking
8 your recycling to the curb on Thursdays. I
9 mean, if you're -- if it's a serious problem,
10 you're -- it's irresponsible. Setting a bad
11 example, you know, by yelling at a basketball
12 game in a particular way.

13 It seems to me that the problem with
14 responsibility is that it's extremely broad, and
15 what -- what seems responsible to some --
16 irresponsible to some people might seem like,
17 well, that's not a big deal to others.

18 So what is the model? I mean, is --
19 is -- do you go back to what was irresponsible
20 at the common law or what's -- take a poll and
21 see if people think it's irresponsible, you
22 know, to get into a fistfight at a -- at a you
23 know, sports event where tempers were running
24 high or -- or what?

25 GENERAL PRELOGAR: So I want to be

1 really clear that we're not using the term "not
2 responsible" to describe colloquially anyone who
3 you might describe as -- as demonstrating
4 irresponsibility in many of those contexts that
5 you just described in your hypotheticals.
6 Instead, we read this Court's case law and, in
7 particular, its articulation of that principle,
8 we're tracking the Court's language here, the
9 principle of responsibility, as being
10 intrinsically tied to the danger you would
11 present if you have access to firearms.

12 And I would draw a parallel here to
13 the principles the Court has articulated with
14 respect to sensitive places or with dangerous
15 and unusual weapons. In each of those
16 categories --

17 CHIEF JUSTICE ROBERTS: Well, just to
18 be clear, you're -- you're using "responsible"
19 as a placeholder for dangerous with respect to
20 the use of firearms?

21 GENERAL PRELOGAR: Correct. So that's
22 how we understand history and tradition in this
23 context. And the reason that we've used the
24 term "not responsible" is it -- it's because
25 it's the own -- the standard that this Court

1 itself has articulated in Heller and repeated in
2 McDonald and then re-repeated again in Bruen.

3 I think probably the reason the Court
4 has used the term "not responsible" is it gets
5 at the idea that some of the categories of
6 people who can be disarmed might not intend to
7 be dangerous. They might not be culpable in
8 that sense, like the mentally ill or minors, and
9 so I think responsibility gets at the idea that
10 they might not actually intend to be a danger
11 but, in fact, would present a danger if they had
12 firearms.

13 JUSTICE KAVANAUGH: So there's no --
14 no daylight at all then between not responsible
15 and dangerous?

16 GENERAL PRELOGAR: Yes. With respect
17 to responsibility in particular, our
18 understanding of what history and tradition
19 reflect and how this Court has used the term is
20 that it's identifying those whose possession of
21 firearms presents an unusual danger beyond the
22 ordinary citizen.

23 And, again, I would draw the -- the
24 analogy to sensitive places and to dangerous and
25 unusual weapons. In each of these contexts, the

1 Court is trying to identify those arms that are
2 especially dangerous, those places where
3 carrying weapons will pose unique dangers, and
4 those categories of people who, beyond the
5 ordinary citizen, possess a -- a particular
6 danger if they have access to firearms.

7 JUSTICE BARRETT: So it's not a
8 synonym for virtue?

9 GENERAL PRELOGAR: No. We're not
10 invoking a --

11 JUSTICE BARRETT: It's not -- you're
12 not pulling in the virtuous citizenry?

13 GENERAL PRELOGAR: We are not, no. We
14 think that here there is a direct link under the
15 responsible citizens principle to danger, and we
16 think that the disarmament provision I'm
17 defending here, Section 922(g)(8), clearly
18 satisfies that link because it requires
19 individualized findings of dangerousness and a
20 legislative consensus that individuals in this
21 category present the requisite level of danger.

22 JUSTICE BARRETT: Well, then how do
23 you know? I mean, I think there would be little
24 dispute that someone who was guilty, say, or
25 even had a restraining order -- that domestic

1 violence is dangerous, okay. So someone who
2 poses a risk of domestic violence is dangerous.

3 How does the government go about
4 showing whether certain behavior qualifies as
5 dangerous? Because this might be in a
6 heartland, but then you can imagine more
7 marginal cases.

8 So you've invoked the consensus among
9 the states, tradition of dangerousness, and I
10 don't think you'd get a lot of push-back because
11 this is violence after all, domestic violence.

12 What about more marginal cases?

13 GENERAL PRELOGAR: So I think that the
14 factors we think courts could apply in this
15 context -- and I should emphasize that this is
16 subject to meaningful judicial review -- would
17 fall into a couple of different categories.

18 At the outset, I would take the class
19 of disarmament provisions that require
20 individualized findings of dangerousness and say
21 those fall in the heartland, as you just
22 suggested. We have a judicial order here that
23 specifically found that Mr. Rahimi's conduct was
24 dangerous to his intimate partner.

25 Then I think you get to the category

1 of cases where a legislature might be making
2 categorical predictive judgments that
3 individuals with a certain characteristic or
4 quality or past conduct present a danger, and
5 those, I think, can be harder cases.

6 But the factors I would point to first
7 would be the breadth of the law, because we know
8 that the Second Amendment was entire -- was
9 intended to prevent disarming wide swaths of the
10 American public. So, if it's sweeping broadly
11 or indiscriminately and capturing people we
12 think of as ordinary citizens, that's going to
13 be a problem.

14 Next, I would look at the
15 justifications and the evidence before the
16 legislature. This would operate like sensitive
17 places. You could look and see is that place,
18 in fact, dangerous if there are weapons there.
19 So too you could look at the evidence the
20 legislature was consulting with respect to its
21 judgment of dangerousness.

22 And then the third factor would be
23 that legislative consensus. And I don't want to
24 suggest that this is dispositive either way
25 because some legislatures can be the first

1 mover, and if multiple legislatures enact an
2 unconstitutional law, that doesn't give you a
3 safe harbor, but I do think that legislatures
4 are best positioned to make these kinds of
5 predictive judgments about dangerousness, and if
6 you have the kind of consensus that we see here
7 with respect to Section 922(g)(8), that's
8 entitled to a lot of weight in the analysis.

9 And I don't want to say, Justice
10 Barrett, that this is always going to be easy
11 and that these factors will cash out in obvious
12 ways. I would say that I think that this is not
13 a close case and that Section 922(g)(8) is
14 clearly constitutional and fits within the
15 category of disarming irresponsible citizens
16 under these principles.

17 JUSTICE JACKSON: But can I ask you --

18 JUSTICE BARRETT: Thank you.

19 JUSTICE JACKSON: -- a question about
20 that, though? I guess I'm trying to understand
21 whether we can really be analyzing this
22 consistent with the Bruen test at the level of
23 generality of dangerousness. I -- I wonder
24 whether we need to be taking into account how
25 historically domestic violence in particular was

1 treated so that if we had evidence that, you
2 know, men who engaged in domestic violence
3 historically were actually not perceived as then
4 dangerous from the standpoint of -- of
5 disarmament, what -- what -- what -- what would
6 we do with that in this situation?

7 GENERAL PRELOGAR: So I don't think
8 that historical attitudes about dangerousness
9 would be controlling with respect to modern-day
10 circumstances, and I would draw an analogy here
11 to dangerous and unusual weapons.

12 You know, the Court has recognized,
13 for example, that handguns were not in common
14 possession at the time of the founding and might
15 have been considered unusual weapons then. But
16 that's not what the Court would look at for
17 determining whether you could ban handguns
18 today.

19 JUSTICE JACKSON: But is that just
20 because that's a new technology? I mean, the --
21 the circumstance with respect to domestic
22 violence clearly existed back in the day, and
23 the question I guess -- I -- I'm just trying to
24 understand how the Bruen test works in a
25 situation in which there is at least some

1 evidence that domestic violence was not
2 considered to be, you know, subject to the kinds
3 of regulation that it is today.

4 And so, when we're looking under that
5 test for historical analogues, I guess, you
6 know, a series of regulations that relate to
7 disarming dangerous people, I -- I -- I need to
8 understand why that would be enough.

9 GENERAL PRELOGAR: Well, so let me try
10 to respond to the methodological point, and then
11 I want to respond to the specific questions
12 you've raised about how domestic violence was
13 treated at the founding and today.

14 On the methodological point, I don't
15 think that you could read Bruen to suggest that
16 we need regulations that specifically disarm
17 domestic abusers because that would be coming
18 dangerously close to imposing on the government
19 the requirement for an identical twin of a
20 regulation.

21 And, of course, original meaning isn't
22 dictated by the happenstance of whether there
23 was a law on the books in 1791 that happened to
24 disarm domestic abusers. I think you have to
25 come up a level of generality and use history

1 and tradition to help identify and discern the
2 enduring constitutional principles that define
3 and delimit the --

4 JUSTICE JACKSON: But what if we had a
5 --

6 GENERAL PRELOGAR: -- scope of the
7 Second Amendment right.

8 JUSTICE JACKSON: -- hypothetical --
9 what if -- what if we had a hypothetical in
10 which we actually determined based on the
11 historical record that domestic violence was not
12 considered dangerousness back in the day? I
13 mean, I -- I just don't know what we'd do with
14 that scenario.

15 GENERAL PRELOGAR: So I think, in that
16 scenario, you would recognize that it is
17 consistent with the Second Amendment's original
18 and enduring meaning that you can disarm
19 dangerous people, and the conception of what
20 regulations that permits today is not controlled
21 by founding-era applications of the principle.

22 JUSTICE JACKSON: Then what's the
23 point of going to the founding era? I mean, I
24 thought it was doing some work. But, if we're
25 still applying modern sensibilities, I don't

1 really understand the historical framing.

2 GENERAL PRELOGAR: The work that
3 history and tradition are doing is helping to
4 discern those principles in the first place.
5 The idea, for example, that you can ban firearms
6 in sensitive places, the fact is that the
7 framers didn't ban firearms in schools even
8 though they existed at the founding, but the
9 Court has already recognized that those
10 analogues and the historic banning of firearms
11 in places where they present safety concerns can
12 justify a modern-day regulation that does
13 require the banning of weapons in schools.

14 And so too here, I think the Court can
15 identify the constitutional principle, which
16 it's already articulated -- we're not asking the
17 Court to break new ground here -- and say today,
18 Section 922(g)(8) is a clear application of that
19 principle that you can disarm dangerous people.

20 And, Justice Jackson, I do want to
21 push back on the idea and the premise of your
22 question that there was evidence at the
23 founding, for example, that you couldn't disarm
24 domestic abusers. It's true that the founders
25 didn't do that, but there's no evidence to

1 suggest that they would have thought that that
2 crossed a constitutional line.

3 And the fact that domestic violence
4 was subject to a very different legal and
5 societal regime at the time and was not viewed
6 as the kind of system that warrants systematic
7 governmental interference, I think, can't be
8 held against us now that we're looking at how
9 Congress is reacting to the profound threats
10 that armed domestic violence presents.

11 JUSTICE ALITO: General, one
12 provision, one section of the provision at issue
13 here applies when a court order includes a
14 finding that the person represents a credible
15 threat to the physical safety of such intimate
16 partner or child.

17 But another provision applies when the
18 order by its terms explicitly prohibits the use,
19 attempted use, or threatened use of physical
20 force. That does not require a finding of
21 dangerousness.

22 Why is that necessary and how can that
23 be justified?

24 GENERAL PRELOGAR: I think,
25 ultimately, a court would have to find

1 dangerousness to enter a subparagraph (c)(2)
2 injunction based on the general equitable
3 principle that in order to enjoin conduct, you
4 have to think that conduct is reasonably likely
5 to occur.

6 This is a universal equitable
7 principle. It certainly applies in Texas and in
8 virtually all of the states. And I think what
9 it means is that a -- a judge who's considering
10 a request for a protective order wouldn't have a
11 basis in law to enter that subparagraph (c)(2)
12 prohibition on the use of physical force unless
13 the judge thought the force was sufficiently
14 likely to materialize.

15 JUSTICE ALITO: Well, we are told in
16 some of the amicus briefs that there are
17 situations in which the family court judge who
18 has to act quickly and may not have any
19 investigative resources faces a he/she -- a he
20 said/she said situation, and the judge just
21 says: Well, I'm going to issue an order like
22 this against both of the parties.

23 Do you agree that that occurs?

24 GENERAL PRELOGAR: No. I think that
25 that is largely a mischaracterization of what is

1 happening in the -- the state courts day in and
2 day out. With respect to mutual protective
3 orders in particular, the vast majority of
4 states -- we cite a source that counts 48 of
5 them -- either prohibit outright or
6 substantially restrict the entry of those kinds
7 of mutual protective orders.

8 And then I think the account is
9 basically trying to suggest or insinuate that
10 these state courts are nevertheless entering
11 protective orders that are not justified by the
12 facts and the law, and that just flies in the
13 face of the presumption of regularity that this
14 Court applies in this context.

15 Even the data on the ground don't bear
16 out the assertions that family courts are just
17 reflexively entering these kinds of protective
18 orders. By Respondent's own count in the
19 particular Tarrant County statistics he
20 collected, there were 522 requests for
21 protective orders, but that only resulted in 289
22 final protective orders.

23 So I think, even as a statistical
24 matter, it's incorrect to say that, invariably,
25 these orders are being entered without any basis

1 in fact or law to justify them.

2 JUSTICE ALITO: Is there anything that
3 a person who is subject to one of these orders
4 can do if the person claims that there wasn't
5 really sufficient notice or that due process
6 rights were violated in some way or that any
7 need for the protective order has expired?

8 Presumably, the person could go back
9 to the state court that entered the order, but
10 if the state court is completely unreceptive to
11 that, is there any other avenue for relief?

12 GENERAL PRELOGAR: So I think it's
13 important to parse out different aspects of the
14 question. Certainly, in a Section 922(g)(8)
15 prosecution, an individual could challenge the
16 adequacy of the notice or the hearing. And so,
17 if the argument is I didn't actually receive the
18 notice or I didn't have an opportunity to
19 participate, that would be a defense because
20 Section 922(g)(8) requires that.

21 JUSTICE ALITO: Yes. But --

22 GENERAL PRELOGAR: But --

23 JUSTICE ALITO: -- before the fact --
24 so the person -- the person thinks that he or
25 she is in danger and wants to have a firearm.

1 Is the person's only recourse to possess the
2 firearm and take -- you know, take their chances
3 if they get prosecuted?

4 GENERAL PRELOGAR: No. I mean, I
5 think the person would obviously have an ability
6 to, within the state court system, challenge the
7 entry of the protective order. But I don't
8 think there would be any basis to say you could
9 collaterally challenge that in the federal
10 prosecution. And, ultimately, this just
11 reflects the -- the history and tradition
12 demonstrating that there are certain categories
13 of people where we don't have to tolerate the
14 risks of armed domestic violence that they would
15 present, even in situations where they might
16 claim that they need to have a gun for other
17 reasons.

18 JUSTICE ALITO: There's no recourse
19 before the fact in federal court?

20 GENERAL PRELOGAR: So I think that
21 they could seek recourse in the state courts
22 themselves. They could protest the notice and
23 the opportunity for a hearing. But, if a court
24 has entered a protective order that complies
25 with the restrictions in 922(g)(8), then a

1 federal court can rely on that in enforcing this
2 prohibition.

3 JUSTICE ALITO: Is there any
4 possibility of administrative relief?

5 GENERAL PRELOGAR: I think that at the
6 state level, there are certain mechanisms in
7 place where people can seek relief. And one
8 important thing to emphasize is that these
9 protective orders are inherently time-limited.

10 It varies a little bit at the state
11 level. I've seen provisions that authorize the
12 imposition of these protective orders for six
13 months up to about five years. I think, most
14 commonly, they're in effect for just one year.
15 But, you know -- and the federal firearms
16 prohibition tracks the length and duration of
17 the protective order, so that also, I think,
18 means that the -- the disarmament lasts only so
19 long as the danger is in effect.

20 JUSTICE ALITO: One more question.
21 The Alameda County Public Defenders' amicus
22 brief says that some restraining orders are
23 permanent. Is that true? And if that is true,
24 how do you justify a permanent prohibition even
25 if the -- any danger has disappeared?

1 GENERAL PRELOGAR: So I'm not aware of
2 state law authority to -- to -- that authorizes
3 or that routinely enters permanent protective
4 orders. As I mentioned, this varies across
5 state law, so I don't want to suggest that
6 there's a universal answer here, but these
7 orders are generally time-limited or provide
8 mechanisms for courts to go back and review the
9 finding of dangerousness for purposes of
10 effectuating the -- the basic command of the
11 protective order.

12 JUSTICE ALITO: Thank you.

13 JUSTICE SOTOMAYOR: Just to be clear,
14 none of the situations that Justice Alito is
15 pointing to are the facts of this case, correct?

16 GENERAL PRELOGAR: That's right.

17 JUSTICE SOTOMAYOR: Or the facts of
18 this statute?

19 GENERAL PRELOGAR: That's right. So I
20 -- I --

21 JUSTICE SOTOMAYOR: And the
22 constitutionality of this statute is what's at
23 issue?

24 GENERAL PRELOGAR: Yes, and the Fifth
25 Circuit invalidated the statute on its face. I

1 do want to suggest that to the extent the Court
2 has been left with the impression in some of
3 these amicus briefs that the protective orders
4 are routinely entered -- are routinely entered
5 without a basis to conclude that someone
6 actually presents the individualized finding of
7 danger, I do not think there is any record or
8 evidence to support that conclusion here.

9 And I would say, again, this runs
10 counter to the presumption of regularity that
11 the Court ordinarily affords in this context,
12 but I think it also runs counter to Congress's
13 recognition and circumscribing of Section
14 922(g)(8) to ensure that it's covering those who
15 had notice and an opportunity for a hearing and,
16 therefore --

17 JUSTICE SOTOMAYOR: Counsel, in the
18 end, if there are due process failures in any
19 system, that'll be subject to a separate
20 challenge, correct?

21 GENERAL PRELOGAR: That's correct.
22 And Mr. Rahimi hasn't made a due process claim
23 here. He's not challenging Section 922(g)(8) on
24 that independent ground.

25 JUSTICE SOTOMAYOR: I'd like to go

1 back to your law-abiding or responsible citizen
2 category. I now understand why you think it's
3 -- it's appropriate. You think "dangerous" is
4 too limited because we have restrictions on the
5 age of people possessing firearms and on the
6 mentally ill, and they're not -- why do you --
7 and I understand that not necessarily dangerous,
8 but I guess their lack of responsibility or
9 judgment could be questioned, correct?

10 GENERAL PRELOGAR: What I would say is
11 we think that they are inherently dangerous,
12 even though they might not be culpable or
13 intending to create that kind of danger with
14 firearms.

15 JUSTICE SOTOMAYOR: Okay.

16 GENERAL PRELOGAR: That there's an
17 inherent risk based on their qualities or
18 characteristics that demonstrates that, as
19 compared to the ordinary citizen, allowing them
20 access to firearms is going to present that risk
21 of danger to self or others.

22 JUSTICE SOTOMAYOR: So, if we use
23 "danger" in the way you're defining it, as
24 broadly as you're defining it, you don't need
25 responsible citizen category?

1 GENERAL PRELOGAR: Yes, I think these
2 are essentially getting at the same concept. I
3 guess what I would say, Justice Sotomayor, is
4 that we have tracked the Court's own language
5 here. And I think it would be important, if the
6 Court wants to refer to concepts of
7 dangerousness, to make clear that it's not
8 backtracking from what it said in Heller and in
9 McDonald and in Bruen, that you can disarm those
10 who are not law-abiding, responsible citizens.
11 But the mentally is one of the exemplar
12 categories the Court held up to illustrate that
13 proposition.

14 And I think that the term
15 "responsible" gets at the -- the broader group
16 of people who can be disarmed even though they
17 might not be culpable precisely because of this
18 risk of danger. But, if the Court --

19 JUSTICE SOTOMAYOR: Thank you,
20 counsel.

21 JUSTICE KAVANAUGH: Can you finish
22 that answer?

23 GENERAL PRELOGAR: I was going to say
24 but, if the Court were to refer to these
25 concepts of dangerousness, I just think it would

1 be important to make clear that it's not
2 backtracking from what it has said in prior
3 cases. And it's not just that the Court has
4 referred to this concept in the abstract. It's
5 actually embedded it in various aspects of how
6 Second Amendment analysis operates.

7 So, for example, the Court has said
8 background checks are okay because they're
9 intended to decide whether you're the kind of
10 ordinary, law-abiding, responsible citizen in
11 the first place, or that when you're looking at
12 whether a weapon is dangerous and unusual, you
13 should ask is this the kind of weapon that a
14 law-abiding responsible citizen would need for
15 self-defense.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 GENERAL PRELOGAR: And so I just think
18 there's a risk of creating confusion about that.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. I guess, to get back to the beginning,
21 so why did you use the term "responsible" if
22 what you meant was dangerous?

23 I mean, "responsible" presents all
24 sorts of problems, and "dangerous" is sort of a
25 different set of considerations. I mean, if you

1 thought that our prior precedents were talking
2 about dangerous, it was a little confusing to
3 all of a sudden find "responsible" being the
4 operative term.

5 GENERAL PRELOGAR: Well, we relied on
6 the same phrasing the Court itself used when it
7 first articulated this -- this constitutional
8 principle in Heller. And so I think we were
9 trying to point out that the Court itself has
10 already recognized the category of regulation
11 that's consistent with original meaning under
12 the Second Amendment, and we just followed the
13 Court's lead in using that phrase, those who are
14 not law-abiding responsible citizens.

15 As I was just suggesting --

16 CHIEF JUSTICE ROBERTS: Well, but just
17 to be clear, your argument today is that it
18 doesn't apply to people who present a threat of
19 dangerousness? Whether you want to characterize
20 them as responsible or irresponsible, whatever,
21 the test that you're asking us to adopt turns on
22 dangerousness?

23 GENERAL PRELOGAR: Correct, for those
24 who are not responsible citizens. I do want to
25 be clear that we think there are different

1 principles that apply --

2 CHIEF JUSTICE ROBERTS: So dangerous

3 --

4 GENERAL PRELOGAR: -- with those who
5 are not law-abiding. So I just want to be clear
6 we don't think dangerousness is necessarily the
7 standard there, although there's obviously going
8 to be a lot of overlap. That's defined by its
9 own history and tradition. But we do think that
10 dangerousness defines the category of those who
11 are not responsible.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas?

14 JUSTICE THOMAS: If this were a
15 criminal proceeding, then you would have a
16 determination of what you're talking about,
17 someone would be convicted of a crime, a felony
18 assault or something.

19 But, here, you have a -- something
20 that's anticipatory or predictive, where a court
21 is -- civil court is making the determination.
22 Just from an -- an analytical standpoint, would
23 there be a difference between a criminal
24 determination and a civil determination?

25 GENERAL PRELOGAR: So I don't think

1 that it would make a difference with respect to
2 whether the legislature can create categories of
3 people who are considered dangerous or not
4 responsible, and that's very much informed by
5 history and tradition here.

6 It is not the case that the only
7 disarmament provisions that have existed over
8 time targeting those who are dangerous are
9 provisions that focused on those with criminal
10 convictions. That is, of course, an important
11 component of the law-abiding standard in
12 particular, but we have a number of examples
13 from throughout history of those who were
14 disarmed even after civil adjudications or a
15 civil-like process, and that includes --

16 JUSTICE THOMAS: Could you give me an
17 example?

18 GENERAL PRELOGAR: Sure. So, for
19 example, mental illness. This was the category
20 that Heller held up as the quintessential
21 example of those who aren't responsible, even
22 though mental illness in our legal system has
23 always been adjudicated through civil
24 proceedings.

25 That was true, for example, of

1 loyalists. The disarmament provisions on
2 loyalists were enforced through those who were
3 refusing to take a loyalty oath, and so there
4 wasn't any necessity of a criminal conviction.
5 So too with those who were intoxicated. You
6 didn't need to show that they had actually been
7 criminally convicted in order to disarm them.

8 So I think that there is a
9 longstanding tradition here of recognizing that
10 individuals can be determined through this
11 predictive judgment to be dangerous even in the
12 absence of a criminal conviction.

13 JUSTICE THOMAS: Just one last
14 question. This is a judicial determination
15 here. Would you be able to make the same
16 arguments if it had been a -- an administrative
17 determination?

18 GENERAL PRELOGAR: I think it would be
19 far more difficult to defend an executive branch
20 or an administrative determination because of a
21 separate Second Amendment principle that guards
22 against granting executive officials too much
23 discretion to decide who and who cannot have
24 firearms.

25 In the -- there was some history about

1 that in -- in England, of course, but in the
2 American legal tradition, these principles have
3 been deployed through legislative judgments or
4 through express judicial findings of
5 dangerousness. So I don't think that we could
6 point to the same history and tradition of
7 giving executive branch officials that
8 discretion.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: Suppose -- suppose
11 that a jurisdiction enacted a concealed carry
12 permitting regulation that is almost identical
13 to the one we invalidated in Bruen, except that
14 it requires an applicant to show -- to show that
15 he or she is sufficiently responsible.

16 Would that be constitutional?

17 GENERAL PRELOGAR: So, if that were
18 implemented through a system of executive
19 discretion, just as I was discussing with
20 Justice Thomas, I think that there could be
21 additional principles that come into play that
22 would guard against that kind of licensing
23 regime.

24 Now, to the extent that that kind of
25 background system was intended just to implement

1 the -- the bases for disarmament that reflect
2 legislative judgments and, you know, in other
3 words, to check for whether you have a history
4 of -- of commitment to a mental institution or a
5 criminal record or so forth, then I think those
6 objective standards could be deployed as part of
7 a background check system, and -- and Bruen
8 specifically suggested as much.

9 JUSTICE ALITO: One more question. In
10 response to my question about the provision that
11 prohibits the possession of a firearm by someone
12 against whom an order prohibiting violence has
13 been entered and the provision doesn't on its
14 face require a finding of dangerousness, as I
15 recall, your answer was that state laws
16 generally do require that and anyway, equitable
17 principles require that.

18 Now suppose someone is later
19 prosecuted for violating that provision. Could
20 -- would it be a defense for that person to say
21 that the state law in question did not require
22 such a finding and, in fact, there was no such
23 finding in my case?

24 GENERAL PRELOGAR: I don't think that
25 that would provide a basis to collaterally

1 challenge the entry of the protective order in
2 the federal prosecution. And we don't think
3 that this -- that there should be a system of
4 as-applied challenges in this context, because I
5 think that what we know is that Congress is
6 entitled to make categorical judgments,
7 predictive judgments of dangerousness based on
8 history and tradition even in -- if there are
9 really edge cases where that predictive judgment
10 wasn't actually necessary to guard against a
11 danger there.

12 But, if what you're suggesting is that
13 there might be a state out there that is
14 ordering judges to enter the subparagraph (c)(2)
15 prohibition without any basis to think that
16 physical force is likely, I think a person would
17 have a very strong due process challenge to that
18 kind of law and that law would likely be
19 invalidated on the separate basis that it
20 doesn't provide due process if it's requiring
21 courts to enter relief that the facts and the
22 law don't support.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 Justice Kagan?

1 JUSTICE KAGAN: General, there seems
2 to be a fair bit of division and a fair bit of
3 confusion about what Bruen means and what Bruen
4 requires in the lower courts.

5 And I'm wondering if you think that
6 there's any useful guidance, in addition to
7 resolving this case, but any useful guidance we
8 can give to lower courts about the methodology
9 that Bruen requires be used and how that applies
10 to cases even outside of this one?

11 GENERAL PRELOGAR: Yes. I think that
12 there are three fundamental errors and
13 methodology that this case exemplifies and that
14 we are seeing repeated in other lower courts and
15 that this case provides an opportunity for the
16 Court to clarify that Bruen should not be
17 interpreted in the way that Respondent is
18 suggesting.

19 The first error we see is that
20 Respondent has asserted here and other courts
21 have embraced the idea that the only thing that
22 matters under Bruen is regulation. In other
23 words, you can't look at all of the other
24 sources of history that usually bear on original
25 meaning.

1 And I don't think that that can be
2 squared with this Court's precedents, starting
3 with Heller, which consulted a -- a wide variety
4 of historical sources, the same kind of evidence
5 we've come forward with here about English
6 practice, state constitutional precursors,
7 treatises, commentary, state judicial decisions.
8 All of that is relevant evidence about the scope
9 of the Second Amendment right, and I think the
10 Court could make clear that it's not a
11 regulation-only test.

12 Second, I think that looking just at
13 regulations themselves, one of the fundamental
14 problems with how courts are applying Bruen is
15 the level of generality at which they're parsing
16 the historical evidence.

17 Court after court has looked at the
18 government's examples and picked them apart to
19 say: Well, taking them one by one, there's a
20 minute -- minute difference between how this
21 regulation operated in 1791 or the ensuing
22 decades and how Section 922 provisions operate
23 today. And I think that comes very close to
24 requiring us to have a dead ringer when Bruen
25 itself said that's not necessary.

1 The way constitutional interpretation
2 usually proceeds is to use history and
3 regulation to identify principles, the enduring
4 principles that define the scope of the Second
5 Amendment right. And so we think that you
6 should make clear the courts should come up a
7 level of generality and not nit-pick the -- the
8 historical analogues that we're offering to that
9 degree.

10 And, third and finally, I think that
11 in many instances, courts are placing
12 dispositive weight on the absence of regulation
13 in a circumstance where there's no reason to
14 think that that was due to constitutional
15 concerns.

16 So, for, example here, we don't have a
17 regulation disarming domestic abusers. But
18 there is nothing on the other side of the
19 interpretive question in this case to suggest
20 that anyone thought you couldn't disarm domestic
21 abusers or couldn't disarm dangerous people.
22 And in that kind of context, I think to suggest
23 that the absence of regulation bears
24 substantially on the meaning of the Second
25 Amendment is to take a wrong turn.

1 It's contrary to the situation the
2 Court confronted in Bruen where there was a lot
3 of historical evidence to say states can't
4 completely prohibit public carry, and against
5 that evidence, you might say that the absence of
6 regulation is significant.

7 But, here, there's nothing on the
8 other side of this interpretive question, and I
9 think that that just shows that you shouldn't
10 hold the absence of a direct regulation against
11 us.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: Good morning,
16 General. I want to follow up on your response
17 to Justice Kagan, I think your second response,
18 the level of generality question.

19 Do you -- do you think the level of
20 generality -- I take your point you've got
21 surety laws, you've got affray laws, you've got
22 a lot of historical evidence, maybe not the
23 historical twin.

24 And -- and you're saying we should
25 overlook that in the same way I think you would

1 say -- I want to make sure you'd say the
2 analysis also applies similarly to the -- to the
3 right side of the ledger, the regulation side on
4 the right side. We're not looking for is -- is
5 it -- is it a Fowler or is it -- is it a musket.

6 Is -- is that a fair understanding of
7 -- of -- of how you see the law?

8 GENERAL PRELOGAR: Yes. We think that
9 it applies in both directions, both in
10 understanding the right itself and in
11 understanding the limitations that are built
12 into that right.

13 JUSTICE GORSUCH: Okay. And you --
14 you had a discussion about the length of time
15 that some of these orders last, and you
16 emphasized that you're only arguing for a
17 temporary dispossession.

18 And I -- I guess I -- I'm wondering,
19 on a facial challenge, do we need to get into
20 any of that, right? Is -- normally, we ask on a
21 facial challenge, is there any set of
22 circumstances in which the dispossession would
23 be lawful? And there may be an as-applied if
24 it's a lifetime ban. That would come to us and
25 that would be a separate question. Is that how

1 you see it too?

2 GENERAL PRELOGAR: I agree that that
3 would be a separate question, yes. I think that
4 there is good reason to reject as-applied
5 challenges if and when they come before the
6 Court --

7 JUSTICE GORSUCH: Sure.

8 GENERAL PRELOGAR: -- because of the
9 categorical judgments that we think history and
10 tradition support, but I acknowledge that here
11 it's only a facial challenge.

12 JUSTICE GORSUCH: Okay. And -- and
13 along the same lines on the facial challenge
14 aspect of it, do we need to resolve (c)(2) and
15 the questions that Justice Alito was asking
16 given that the -- the -- the defendant, the
17 plaintiff before us -- the Respondent, sorry,
18 is -- is -- is -- has been adjudicated under
19 (c)(1) and we actually have a finding of a
20 credible threat. The dangerousness argument
21 seems most apparent there. And we don't know
22 much about how all states administer (c)(2)
23 regimes.

24 GENERAL PRELOGAR: So I agree that
25 this is a facial challenge, and the Court could

1 confine its analysis to (c)(1). I guess I would
2 make just two responses to that.

3 JUSTICE GORSUCH: Sure.

4 GENERAL PRELOGAR: One is to say that
5 I think it's going to be difficult for the Court
6 to avoid the (c)(2) issue.

7 JUSTICE GORSUCH: Of course.

8 GENERAL PRELOGAR: We ourselves have a
9 pending petition where the Fifth Circuit has
10 invalidated an application of the statute in a
11 (c)(2) context. So unless you want to see me
12 here again next term on this issue, I would say
13 that --

14 JUSTICE GORSUCH: Always delighted to
15 see you, General.

16 (Laughter.)

17 GENERAL PRELOGAR: -- the issue has
18 been fully briefed, and we think it's an
19 important part of the statute.

20 But the second thing I would say is
21 that even if you wanted to confine your analysis
22 to (c)(1), I do think that at the very least,
23 you would have to reject some of the key
24 premises of Respondent's arguments in this case,
25 and that relates to the colloquy I had with

1 Justice Kagan, for example, the level of
2 generality --

3 JUSTICE GORSUCH: Right.

4 GENERAL PRELOGAR: -- at which he's
5 parsing the regulations, the fact we don't have
6 a domestic violence example in particular, his
7 arguments that legislatures just can't disarm
8 anybody, that persons can't be disarmed, that
9 kind of thing.

10 JUSTICE GORSUCH: I follow all of
11 that. Got you. And the same thing goes with
12 due process. We don't have a due process
13 challenge before us, and so we don't need to
14 resolve any of that either.

15 GENERAL PRELOGAR: That's correct. He
16 did not make a due process claim here.

17 JUSTICE GORSUCH: Okay. And then,
18 lastly, some lower courts have recognized a
19 duress defense in -- to 922 charges. You know,
20 someone's invaded their home and they use it in
21 self- -- a gun that they have illegally in
22 self-defense.

23 What's the government's view on that?

24 GENERAL PRELOGAR: So, you know, I --
25 I want to be careful here because I haven't

1 actually reviewed the cases that you must be
2 referring to where those defenses --

3 JUSTICE GORSUCH: Yeah, there are a
4 few out there.

5 GENERAL PRELOGAR: -- have been made.
6 I would have to take a look at those to provide
7 you with a well-thought-out government view on
8 that issue. Obviously, we recognize that there
9 are distinctive legal doctrines like necessity
10 and defense that can come into play. And so I'm
11 sorry that I don't have a --

12 JUSTICE GORSUCH: What would you
13 counsel us to do about them? I know it's not
14 fair standing at the podium not having reviewed
15 them, but there are these historical common-law
16 defenses of necessity and duress when it's not
17 aimed at the -- the subject of the protective
18 order, but a home invasion, for example.

19 GENERAL PRELOGAR: So I would urge the
20 Court not to say anything about those doctrines
21 here where we've got a facial challenge and
22 where, certainly, Mr. Rahimi isn't making that
23 kind of defense to a Section 922(g)(8)
24 conviction. I would save for another day how
25 the Court might think about those issues where

1 they're squarely presented.

2 JUSTICE GORSUCH: Thank you very much.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: Just to follow up
6 on your colloquies with the Chief Justice and
7 Justice Sotomayor, I just want to make sure I
8 have the terminology exactly correct as you see
9 it.

10 One category you think the government
11 can prohibit possession by those who are not
12 law-abiding, and you said that encompasses
13 serious offenses, is that correct?

14 GENERAL PRELOGAR: That's correct,
15 which we would define by felony-level
16 punishment.

17 JUSTICE KAVANAUGH: Okay. And the
18 second is the government can prohibit possession
19 by those who are not responsible, and by that,
20 you mean those who are dangerous, is that
21 correct?

22 GENERAL PRELOGAR: Yes, those whose
23 possession of firearms would present a danger to
24 themselves or others, but they don't have to be
25 intentionally dangerous, which gets at the

1 culpability question.

2 JUSTICE KAVANAUGH: Good. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: My question is on
6 the law-abiding and responsible also. I guess I
7 understood our use of that phrase in our prior
8 cases to describe the would-be gun owners in
9 those cases. Like, we're not talking about who
10 might be able to be disarmed. There might be
11 other people, but all of those people were
12 law-abiding and responsible, and there was no
13 allegation that they weren't.

14 But it seems to me that in your brief
15 and in parts of the argument the government is
16 asking for that to be a test. But I don't think
17 we presented it as a test. Do you see a reason
18 for us to use that as the test, law-abiding and
19 responsible, given some of the ambiguities in
20 that phrase?

21 GENERAL PRELOGAR: So I wouldn't
22 describe it as a test. I guess what I would do
23 is describe it as the relevant category, the
24 shorthand to get at the idea that legislatures,
25 consistent with the Second Amendment, can take

1 action to disarm particular types of people
2 whose possession of weapons present these types
3 of concerns, either that they have committed
4 serious crimes or present a danger.

5 And I would use this as shorthand in
6 the same way the Court has referred to the
7 sensitive places principle or the dangerous and
8 unusual weapons principle.

9 JUSTICE BARRETT: So could I just say
10 it's dangerousness? Let's say that I agree with
11 you that when you look back at surety laws and
12 the affray laws, et cetera, that it shows that
13 the legislature can make judgments to disarm
14 people consistently with the Second Amendment
15 based on dangerousness.

16 GENERAL PRELOGAR: We certainly --

17 JUSTICE BARRETT: Why can't I just say
18 that?

19 GENERAL PRELOGAR: We certainly agree
20 that that's what history and tradition show. We
21 think that defines the scope of the category of
22 those who are not responsible. We don't think
23 dangerousness is the standard with law-abiding,
24 and I recognize you might have some different
25 views on that, Justice Barrett. You don't need

1 to resolve that issue here. This is a -- this
2 is a case just about someone who is not
3 responsible in the form of being dangerous.

4 So, yes, we would be happy with a
5 decision that says legislatures for time
6 immemorial throughout American history have been
7 able to disarm those who are dangerous.

8 JUSTICE BARRETT: But you're trying to
9 save, like, the range issue. So you're not
10 applying dangerousness to the crimes?

11 GENERAL PRELOGAR: That's correct. We
12 think that there are additional arguments that
13 can be made to defend felon disarmament and that
14 those depend on the unique history and tradition
15 with respect to criminal conduct. And so we
16 would hope to have the opportunity to present
17 those arguments and perhaps --

18 JUSTICE BARRETT: In that case
19 perhaps.

20 GENERAL PRELOGAR: -- persuade you in
21 a future case, yes.

22 JUSTICE BARRETT: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes. Just to

1 clarify in response to what you said to Justice
2 Barrett, the determination of dangerousness
3 would be evaluated based on what modern
4 legislatures think counts as dangerous? We're
5 not bound to what qualified as dangerous back in
6 the day?

7 GENERAL PRELOGAR: That's correct. We
8 think that once the Court recognizes the
9 principle that history and tradition support
10 this durable principle that you can disarm
11 dangerous people, then the question becomes for
12 any follow-on challenge whether the legislature
13 with respect to a particular category has
14 appropriately deemed these individuals dangerous
15 and, therefore, fitting within that historical
16 tradition.

17 And I think the inquiry there would
18 not be confined to how the founders thought
19 about dangerousness. Instead, it would turn on
20 some of the factors that I was discussing
21 earlier with Justice Barrett about the breadth
22 of the law, the evidence that supports the
23 legislative judgment --

24 JUSTICE JACKSON: The kinds of things
25 we used --

1 GENERAL PRELOGAR: -- and the
2 consensus.

3 JUSTICE JACKSON: The kinds of things
4 we used to look at with the tiers of scrutiny,
5 what's the justification for this? Is that what
6 you're saying?

7 GENERAL PRELOGAR: No, I don't think
8 that this is just a revival of some form of
9 means and scrutiny because we wouldn't be asking
10 the -- a court to balance the intrusion on the
11 individual interest against the weight of the
12 government's interest. Instead, this is about
13 whether the legislature has properly classified
14 a law as falling within the principle in the
15 first place.

16 And so it's not about balancing
17 between those two different interests but,
18 rather, about looking at the legislature's
19 predictive judgment of dangerousness and
20 determining ultimately whether it's justified.

21 JUSTICE JACKSON: All right. So let
22 me just ask you about your first methodology --
23 methodological error that you identified in
24 response to Justice Kagan. You say that the
25 courts are focusing too much just on regulation,

1 legislation, and not on other indicia of what
2 the historical tradition is.

3 But, when you were talking with
4 Justice Thomas at the beginning, you seemed to
5 suggest that the tradition with respect to
6 slaves and Native Americans would not be subject
7 to consideration for this. In other words, only
8 the regulation as it relates to certain segments
9 of society, I guess, count underneath this
10 historic traditions test?

11 GENERAL PRELOGAR: Well, the reason we
12 haven't invoked those other laws is because we
13 think they were applications of a separate
14 principle under the Second Amendment, which is
15 that those who are not considered among the
16 people can be disarmed. That, of course, has
17 the textual hook, and the Court in Heller
18 defined that as those who are not part of the
19 political community. And when we looked at how
20 those laws operated, they traditionally stripped
21 the affected individuals from all rights to
22 participate in the political community --

23 JUSTICE JACKSON: I understand that --

24 GENERAL PRELOGAR: -- and, therefore
25 --

1 JUSTICE JACKSON: -- but where does
2 that leave us with respect to the application of
3 our test? I'm trying to understand if there's a
4 flaw in the history and traditions kind of
5 framework to the extent that when we're looking
6 at history and tradition, we're not considering
7 the history and tradition of all of the people
8 but only some of the people as per the
9 government's articulation of the test?

10 GENERAL PRELOGAR: Well, I certainly
11 think that those laws are a part of history. We
12 don't think that they're a part of history that
13 are directly relevant to the separate question
14 at issue here. And so we've instead pointed to
15 a variety of other laws that we think more
16 clearly bear on the issue of when legislatures
17 can disarm even those who are among the people.

18 JUSTICE JACKSON: All right. And,
19 finally, let me just ask you prospectively from
20 the standpoint of a legislator today -- I mean,
21 we've been talking about sort of the
22 retrospective view of this, you know, when
23 there's an existing gun control measure that's
24 being challenged, how do we determine by looking
25 at history whether or not it's constitutional.

1 But let's say I'm a legislator today
2 in Maine, for example, and I'm very concerned
3 about what has happened in that community, and
4 my people, the constituents, are asking me to do
5 something.

6 Do you read Bruen, as step one, being
7 go to the archives and try to determine whether
8 or not there's some historical analogue for the
9 kinds of legislation that I'm considering?

10 GENERAL PRELOGAR: No. I think that
11 Bruen requires a close look at history and
12 tradition and analogue to the extent they exist
13 and are relevant for purposes of articulating
14 the principle.

15 But, once you have the principle
16 locked in -- and, here, the principle would be
17 you can disarm those who are not responsible or
18 dangerous, however the Court wants to phrase
19 it -- then I don't think it's necessary to
20 effectively repeat that same historical
21 analogical analysis for purposes of determining
22 whether a modern-day legislature's disarmament
23 provision fits within the category.

24 Instead, I think you would look at the
25 factors I was articulating earlier in response

1 to Justice Barrett's question about the evidence
2 before the legislature of dangerousness, the
3 consensus view, whether legislatures routinely
4 think of this circumstance as being dangerous,
5 the breadth of the law, and other factors along
6 those lines.

7 JUSTICE JACKSON: But, if the
8 principle has not yet been established, what do
9 I do as a legislator?

10 GENERAL PRELOGAR: So I think, if
11 there is no relevant principle that a law would
12 slot into, like sensitive place regulation or
13 dangerous person regulation, then you would
14 conduct the Bruen analysis in order to help try
15 to identify those principles of the Constitution
16 that define the scope of the Second Amendment
17 right, but it wouldn't just be a hunt for a
18 particular, precise historical analogue.

19 I -- I think that that's really a
20 caricature of Bruen, and that would make the
21 Second Amendment a true outlier because there's
22 no constitutional right that's dictated
23 exclusively by whether there happened to be a
24 parallel law on the books in 1791.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Wright.

4 ORAL ARGUMENT OF J. MATTHEW WRIGHT
5 ON BEHALF OF THE RESPONDENT

6 MR. WRIGHT: Thank you, Mr. Chief
7 Justice, and may it please the Court:

8 My friend described several times the
9 government's principle that in this case, they
10 are not relying on any analogues that were
11 directed at people who were not part of the
12 people, outside the community, the national or
13 political community entirely.

14 That means loyalist laws are entirely
15 off the analogical spectrum here because
16 loyalists were also pervasively deprived of all
17 of the rights of the people and citizenship.
18 They were enemies. The government said so in
19 its Bruen amicus brief.

20 In response to Justice Gorsuch's
21 question about how the courts of appeals handle
22 the issue of self-defense, necessity, duress, we
23 cite a case on page 11 of our brief, United
24 States versus Penn, I remember that case very
25 well, it will show you how they handle it.

1 There's effectively not one. I mean, even brief
2 fleeting possession that lasts a little bit
3 longer while being chased by people, not enough.
4 So there is no real keeping for self-defense
5 exception to this principle.

6 And in regards to I think it was
7 Justice Alito's question of duration of
8 protective orders, by default, they can be
9 permanent in Alabama, Colorado, Montana,
10 Washington. No specific limit in Florida,
11 Michigan, North Dakota, Vermont. Ten years in
12 Arkansas, five years in California, Ohio, South
13 Dakota, and in Texas, where the default is two
14 years, if the judge finds or a finding is made
15 that felony violence was committed, it can be
16 five years and the time is tolled, for instance,
17 when someone's in jail. And so, while it may be
18 the case that if we counted noses, exactly 51 or
19 52 are around a year or so, it is not the case
20 that they are short.

21 Now the danger with any kind of
22 historical inquiry is like the person looking
23 down a well. So it feels like what the
24 government is doing is looking down the dark
25 well of American history and seeing only a

1 reflection of itself in the 20th and 21st
2 Century and saying that's what history shows.

3 When Congress enacted Section
4 922(g)(8) in 1994, it acted without the benefit
5 of Heller, McDonald, and Bruen, so we shouldn't
6 be surprised that they missed the mark. They
7 made a one-sided proceeding that is short, a
8 complete proxy for a total denial of a
9 fundamental and individual constitutional right.

10 At this time, I would welcome
11 questions from the Court.

12 JUSTICE THOMAS: Counsel, would you
13 take a few -- a bit of your time to recount
14 exactly what happened below in this case, not in
15 the district court but in state court?

16 MR. WRIGHT: So what happened in state
17 court we know very little about for certain. We
18 have the order, which was attached as an exhibit
19 to the federal complaint, and the order reflects
20 certain findings.

21 We have shown that those findings are
22 incredibly common in this one county in Texas,
23 but if you did an electronic search of appellate
24 cases in Texas with the words "credible threat"
25 and "physical safety," I think you would only

1 fine three unpublished appellate cases all from
2 this county.

3 So there are words in it, but it
4 wasn't a disputed type of finding. It was an
5 agreed order. So my client, who was
6 unrepresented, and a -- a district attorney, a
7 Tarrant County assistant district attorney,
8 entered into a stipulation. The order was
9 entered. The language is in the order. It's in
10 the joint appendix, you can read it, and -- and
11 that's it.

12 Now I believe that, Justice Thomas,
13 more happened. You could -- we can figure out
14 what happened if we pulled out the records, but
15 those aren't relevant. What happens in the
16 civil proceeding doesn't matter for purposes of
17 922(g)(8).

18 JUSTICE THOMAS: Well, I think what's
19 -- what does matter is we're assuming
20 dangerousness or irresponsibility. Take your
21 pick. And we are -- we have a very thin record,
22 and I'm trying to get a sense of what actually
23 happened in this case.

24 MR. WRIGHT: So there are allegations
25 that were taken in the federal pre-sentence

1 report, and -- and those are the ones that made
2 their way into the opinion below.

3 And if I could then distinguish
4 between the facts that the court found for
5 purposes of fixing a sentence in this case and
6 the facts that could be contested at a jury, the
7 facts that are the subject of the guilty plea,
8 the ones that are essential to the conviction,
9 in terms of the former category, there was a
10 finding that there was, you know, a physical
11 assault, that someone had attempted to intervene
12 and that Mr. Rahimi had fired a gun into the air
13 at that time. Those -- and -- and -- and there
14 are pending charges right now in Tarrant County
15 for three misdemeanor offenses that are the same
16 allegations that are the -- so -- so the -- the
17 federal pre-sentence report found that those
18 actions preceded and were the cause for the
19 protective order.

20 JUSTICE SOTOMAYOR: I --

21 JUSTICE GORSUCH: Oh, please.

22 JUSTICE SOTOMAYOR: Go ahead.

23 JUSTICE GORSUCH: Are you sure?

24 JUSTICE SOTOMAYOR: Yes.

25 JUSTICE GORSUCH: Okay. Counsel,

1 you -- you -- you mentioned the self-defense,
2 duress, necessity concerns in your opening. But
3 this is a facial challenge, right, so we have to
4 ask is it unconstitutional in any application,
5 and that would include cases where those
6 circumstances don't exist. We don't have to
7 address those in this case, do we?

8 MR. WRIGHT: Your Honor, I think you
9 do have to address them because the existence of
10 such a defense is part of the crime, the
11 definition of the crime. And so, if, as the
12 lower courts have consistently held, there
13 either is no such defense or it is hen's tooth
14 rare, then that plays into --

15 JUSTICE GORSUCH: Hen's tooth rare. I
16 haven't heard that in a while. I like that.

17 MR. WRIGHT: That -- that plays into
18 the facial analysis of the statute. And I think
19 one of the areas we diverge with my friend is
20 this facial versus as-applied distinction, which
21 even this Court I was happy to read finds that
22 distinction amorphous sometimes. I certainly
23 do.

24 But, in this case, by a facial
25 challenge, we mean the elements, specifically

1 target conduct, that is explicitly protected by
2 the plain text of the Second Amendment.

3 JUSTICE GORSUCH: And if -- if --
4 if -- if I were to disagree with you on that,
5 though, there -- there would be an as-applied
6 challenge available later in those cases, right?

7 MR. WRIGHT: An as-applied challenge
8 -- well, if you were to disagree with me, yes,
9 that's correct, Justice Gorsuch.

10 JUSTICE GORSUCH: And the same thing
11 when it comes to temporary dispossession. I
12 understand your concern about permanent
13 dispossession, but, again, that isn't what's
14 necessarily before us in a facial challenge,
15 where we have to ask is it unconstitutional in
16 all of its applications, right?

17 MR. WRIGHT: Your Honor, that -- that
18 test for faciality, I -- I think, is primarily
19 remedial. It typically comes up in the civil
20 context where someone is suing to enjoin the
21 enforcement of a statute and -- and so the
22 Salerno test it's called, you know, comes into
23 play as to, typically, that assumes there is a
24 valid application or a space of valid
25 application of the statute, and then the

1 complaint is either there's too much outside or
2 my case is outside or something like that.

3 Ours is a facial challenge in the way
4 that Lopez was a facial challenge, where the
5 facts of Lopez were clearly within Congress's
6 power under the Commerce Clause. This Court
7 found the facts of that case were Person A was
8 going to pay Lopez \$40 to give that gun to
9 Person C after school.

10 That's within the commerce power, but
11 the statute itself was not within Congress's
12 power to enact. And so that statute failed as
13 it then existed, the pre-amendment version of
14 the Gun-Free School Zones Act, on its face.

15 JUSTICE BARRETT: I -- I just wanted
16 to go back to your conversation with Justice
17 Thomas, and I guess this touches on what you
18 just said to Justice Gorsuch about the thinness
19 of the proceeding in state court.

20 She did submit a sworn affidavit
21 giving quite a lot of detail about the various
22 threats, right? So it's not like he just showed
23 up and the judge said credible finding of
24 violence?

25 MR. WRIGHT: So, Justice Barrett, I

1 know that to be true. And I personally looked
2 at it, that's correct. And it's a matter of
3 public record that you can see that.

4 JUSTICE BARRETT: I -- I've got it.

5 MR. WRIGHT: Right. So -- so -- and I
6 don't mean to suggest that. I mean that in
7 terms of what was necessary for the federal
8 prosecution, so what we could have defended this
9 case on if it went to the jury, the federal
10 jury, I mean, for the criminal prosecution.
11 What happened before, whether it was good or
12 bad, doesn't matter under the statute.

13 And we take that as a given from this
14 Court's decision in Lewis, where there's sort of
15 a -- a conceded constitutional problem with the
16 underlying felony prosecution.

17 JUSTICE GORSUCH: Well, you -- you
18 haven't raised a due process challenge to the
19 underlying felony prosecution either, right?

20 MR. WRIGHT: Well, Your Honor, and,
21 again --

22 JUSTICE GORSUCH: It's a Second
23 Amendment challenge strictly speaking.

24 MR. WRIGHT: That's correct, Your
25 Honor. And we take that from Lewis. Lewis says

1 what Congress intended when it passed the Gun
2 Control Act in 1968 was those matters are off
3 the table.

4 So, in Lewis, there's no doubt there
5 is a constitutional violation and a violation of
6 due process under this Court's holding.
7 However, there is no Fifth Amendment claim
8 against a felon in possession of prosecution,
9 even if the underlying felony is concededly
10 unlawful and unconstitutional.

11 So we take that as a given when we
12 come to a statute like this, that even if we
13 could show a due process issue with respect to
14 the issuance of the protective order, that would
15 be no defense against the federal prosecution.

16 But, if I'm wrong about that, I'm
17 happy to hear it.

18 JUSTICE GORSUCH: And it would have
19 been in the state prosecution, though?

20 MR. WRIGHT: I'm sorry?

21 JUSTICE GORSUCH: It would have been
22 in the state prosecution potentially in the
23 state protective order proceeding and you could
24 have had a due process argument and raised it
25 there.

1 MR. WRIGHT: You're right, Justice
2 Gorsuch, and that gets to a really important
3 point here. Because Congress has made this sort
4 of a per se automatic disarmament and it has
5 tied it to the issuance of a protective order,
6 there is no due process required before a court
7 enters an order enjoining me from committing
8 physical abuse against someone else. That is
9 not a protected right.

10 So what we have is a proceeding that's
11 designed to adjudicate small rights or no rights
12 at all. And then, based on the results of that
13 proceeding and even the findings that are
14 entered in that proceeding, we take very
15 consequential actions that go against an
16 individual's fundamental right to keep arms, of
17 citizenship.

18 So I do not believe -- at least I'm
19 not aware of any due process that would apply
20 with respect to the part of the order that
21 922(g)(8) cares about, the one that says you
22 cannot abuse that person. And so, in that
23 sense, there's no due process claim we could
24 raise.

25 So that's -- so that's the thing.

1 Congress has taken a big right, the Second
2 Amendment, and has --

3 JUSTICE GORSUCH: You're -- you're not
4 saying that before a protective order is
5 entered, there's no due process rights that an
6 individual has, are you? I mean, is that a
7 position you really want to take?

8 MR. WRIGHT: For a (g)(8) order, so an
9 order that forbids further abuse.

10 JUSTICE GORSUCH: I'm talking about in
11 state court.

12 MR. WRIGHT: Right. Right. So --

13 JUSTICE GORSUCH: You're saying
14 there's no -- the Due Process Clause is silent
15 before a protective order can be entered against
16 an individual?

17 MR. WRIGHT: To the extent that the
18 only remedy granted by that order is forbidding
19 abuse, forbidding physical abuse, I don't think
20 that you have any right to due process before
21 that is entered because you have no right to
22 abuse anyone. It's just not. The incentives --

23 JUSTICE GORSUCH: You have no right to
24 murder someone, but we give you a trial.

25 MR. WRIGHT: Right. So --

1 JUSTICE GORSUCH: Right? And so
2 there's always process before a right or life,
3 liberty, or property is taken from you of some
4 kind. What measure of due process depends upon
5 facts, circumstances -- I -- I'm not -- I'm not
6 talking about that. But I'm surprised to hear
7 you say that the Fifth and the Fourteenth
8 Amendments' Due Process Clauses don't apply to
9 an individual who is being subject to a
10 protective order.

11 MR. WRIGHT: I think depending on what
12 the protective order required. So those --
13 those probably do kick in in the same way that
14 if this were a -- a true disarmament proceeding.
15 So this Court I don't think has announced the
16 criteria that would be required in something
17 like a red flag law, but something like that.
18 So everyone's attention is focused on the loss
19 of firearm rights.

20 There would be certain requirements.
21 And we could argue about it. I would submit it
22 would probably need to be clear and convincing
23 evidence, but it would certainly need to be
24 fundamentally fair because this is a fundamental
25 right.

1 That's not what any state does for a
2 civil protective order. There's typically no
3 incentive and often no real opportunity to
4 contest the issuance of the order. And in many
5 cases, people are happy to consent to the orders
6 because they don't want to be around the person
7 anymore either.

8 JUSTICE BARRETT: But, counsel, I just
9 want to clarify, you're right you don't have,
10 you know, the right to commit violence against
11 anyone, but this protective order says a whole
12 lot more than that. I mean, he's prohibited
13 from communicating with his family, with going
14 within 200 yards of her residence. So I think
15 that paints a little bit of a different picture
16 in the due process rights that might apply.

17 MR. WRIGHT: I agree, Your Honor, that
18 the Due Process Clause would impose limits
19 against involuntary termination of access to
20 one's children, for instance. So I don't mean
21 to suggest -- and -- and, Justice Gorsuch, if
22 that's what I implied, I don't mean to. I don't
23 mean to suggest that the Due Process Clause
24 doesn't -- it doesn't matter what happens in one
25 of these proceedings.

1 JUSTICE JACKSON: So, counsel --

2 JUSTICE KAGAN: Mr. Wright, may -- may
3 I ask just about your basic argument here? And
4 I'm just going to read you a sentence from the
5 brief, and I want to know whether, you know,
6 that's your essential argument.

7 It says, "The government has yet to
8 find even a single American jurisdiction that
9 adopted a similar ban while the founding
10 generation walked the earth."

11 So is that what we should be looking
12 for? And if we don't find that similar ban, we
13 say that the government has no right to do
14 anything?

15 MR. WRIGHT: Your Honor, I think
16 that's largely what Bruen says. However, I
17 don't think it has to be so narrow. So, if the
18 government could affirmatively prove from the
19 historical tradition of either American firearms
20 laws or even I would be willing to spot them the
21 way that we have treated other fundamental
22 constitutionally protected rights, if they could
23 tie it to one of those historical traditions,
24 that would be good enough under the logic of
25 Bruen, if not the exact rule we're disputing

1 now.

2 JUSTICE KAGAN: I guess I'm not quite
3 sure what the answer means. I mean, I took that
4 sentence to be saying we're looking for a
5 regulation that even if it's not every jot and
6 tittle is essentially targeting the same kind of
7 conduct as the regulation under review.

8 And, you know, the Solicitor General
9 told us that was the wrong approach, that what
10 Bruen really directs courts to do is to think
11 about the various principles that were operating
12 at that time, whether those principles gave rise
13 to a particular regulation that was
14 near-identical to the one under review.

15 And -- and so I guess I'm asking you
16 to comment on those two ways of understanding
17 Bruen.

18 MR. WRIGHT: I think both
19 methodological positions lead to the same
20 result, which is affirmance of the decision
21 below. It's not just something that is about
22 domestic violence or a ban that's punishable by
23 exactly 10 years. In other words, that's the
24 way that some of the amici have described what
25 we're arguing for.

1 I'm saying there's no ban, there's no
2 history of bans for people who were part of the
3 national community. They don't exist. I'm
4 saying that the plain text of the Second
5 Amendment, the way that it distinguished from
6 the English common-law tradition, I'm saying
7 that the early commentators like St. George
8 Tucker and William Rawle, they all said, if
9 you're just keeping the firearm --

10 JUSTICE KAGAN: So -- but that does
11 suggest, I mean, that you're looking for a ban
12 on domestic violence. And, you know, 200 some
13 years ago, the problem of domestic violence was
14 conceived very differently. People had a
15 different understanding of the harm. People had
16 a different understanding of the right of
17 government to try to prevent the harm. People
18 had different understandings with respect to
19 pretty much every aspect of the problem.

20 So, if you're looking for a ban on
21 domestic violence, it's not going to be there.

22 MR. WRIGHT: Justice Kagan, I'm
23 looking for a ban. I'm looking for a ban, some
24 criminal punishment for just the keeping of a
25 firearm. That's what I'm looking for. And it's

1 based not on the loss of status of citizenship,
2 you know, or being outside the community. I'm
3 looking for a ban that applies to a
4 rights-holding American citizen. I mean, that's
5 -- I'd start with that.

6 Short of that, again -- and I suspect
7 the response to that is this Court has
8 tentatively approved felon in possession. But
9 felon are so different. They have all kinds of
10 process. There's a long tradition of denying
11 people convicted of infamous crimes all manner
12 of rights of citizenship or not.

13 So, if I could just set that aside,
14 there's no ban because, at the time, when the
15 people of the time actually wrote about it, they
16 wrote that there's no right to misuse a firearm.
17 So the allegations that have been made against
18 my client, we do not contend that behavior is
19 protected by the Second Amendment.

20 The behavior that's protected is the
21 keeping of arms. The behavior that is also
22 protected is the carrying of arms, but I would
23 concede -- I would concede there is a strong
24 historical tradition of providing more
25 restrictions against the right to public carry

1 because that's where you encounter other people.

2 This is someone who's keeping a
3 firearm in his own home. The oldest American
4 tradition at least of a federal government,
5 someone who everyone agreed was subject to the
6 Second Amendment, passing that kind of law, was
7 1968. This tie is older than that so-called
8 tradition, Your Honor. It -- it just -- it's
9 20th Century, late 20th Century. And so we
10 disagree at a very fundamental level of whether
11 there is this tradition.

12 JUSTICE ALITO: So you -- your
13 argument is that except for someone who has been
14 convicted of a felony, a person may not be
15 prohibited from possessing a firearm in the
16 home, is that correct?

17 MR. WRIGHT: I would add one more
18 caveat to it, Justice Alito, and that is if
19 severe criminal punishment will result, because
20 that is something that Heller itself and Bruen
21 itself took into this balance, because what --
22 the right that's protected is the right of
23 someone who, by keeping the firearm, you know,
24 is used -- for lawful -- someone who's keeping a
25 firearm for lawful purposes, how does this

1 regulation infringe on that? If it is a small
2 fine or even loss of the weapon, maybe that
3 doesn't violate that right. You could make it
4 illegal, you're prohibited from keeping a
5 weapon, but if we figured out that you had a
6 weapon in your bedroom, you -- you -- you may
7 have to pay for it, you know, but you're not
8 going to go to prison for 10 or 15 years.
9 You're not going to get felony liability.

10 I think all of those things together
11 are incredibly important about this ban because
12 they are -- it is not based on loss of rights of
13 citizenship. It is applied against
14 rights-holders. It is a total ban. And it is
15 punishable by an incredible amount of prison
16 time.

17 JUSTICE ALITO: So let me give you
18 this example. Suppose a state judge determines
19 after a hearing that a man has repeatedly
20 threatened to shoot the members of his family,
21 has brandished the gun, has terrified them, and
22 orders the man not -- enters a restraining order
23 preventing that man from possessing a firearm
24 any place, including in the home.

25 Is that constitutional?

1 MR. WRIGHT: I think the answer is
2 probably yes if he -- I think it probably is. I
3 would want to know more about what the
4 historical tradition showed, but, certainly,
5 courts have always had broad power against the
6 people who are brought before them. And --

7 JUSTICE ALITO: So --

8 MR. WRIGHT: -- I think that would be
9 consistent with the historical --

10 JUSTICE ALITO: So the difference you
11 see between that order and prosecution for --
12 for violating the order is the fact that the
13 latter imposes a -- a felony punishment?

14 MR. WRIGHT: That's one difference,
15 and it's an important difference under this
16 Court's case law. Another difference is that
17 the defendant had a real opportunity, you know,
18 in standing before the court to say either,
19 number one, I didn't do that or, number two,
20 something was wrong with me, I'll never do that
21 again. But -- and I'll move across the country
22 so I can assure you that they will be safe, but
23 I'm very frightened to be, you know, without my
24 arms.

25 So you would have a chance to entreat

1 with the person who's putting in a restriction.
2 If the restriction itself was unlawful, the
3 person would have a chance to appeal it to a
4 higher authority, to an appellate court and say
5 this judge got it wrong, you know, this is not
6 lawful either under the Constitution or under
7 this state's substantive law.

8 All of those things are different in
9 the situation that you describe, and I think
10 they are constitutionally significant
11 differences between that and what we have here.

12 CHIEF JUSTICE ROBERTS: So are you
13 suggesting, if there's a sufficient showing of
14 dangerousness, that can be a basis for disarming
15 even with respect to possession in the home?

16 MR. WRIGHT: Again, it's a -- it's a
17 much closer question for me because it is -- I
18 have yet to see a -- a historical example of
19 that applied against a citizen. And it would
20 certainly be a last resort type of situation.
21 So --

22 CHIEF JUSTICE ROBERTS: Well, to the
23 extent that's pertinent, you don't have any
24 doubt that your client's a dangerous person, do
25 you?

1 MR. WRIGHT: Your Honor, I would want
2 to know what "dangerous person" means at the
3 moment.

4 CHIEF JUSTICE ROBERTS: Well, it means
5 someone who's shooting, you know, at people.
6 That's a good start.

7 (Laughter.)

8 MR. WRIGHT: So -- so that's fair.
9 I'll say this. If a -- imagine a statute that
10 had been written that was the what Zackey Rahimi
11 has been accused of statute, and very prescient
12 legislatures, you know, way ahead of the game.

13 If you've done all of these nine
14 things and it's proven to a constitutionally
15 significant level of abstraction, you don't get
16 to keep your gun, we're going to come and take
17 it from you, and -- and you just -- sorry, you
18 just don't. Constitutional, 100 percent.

19 JUSTICE KAGAN: I thought you just
20 said no. I thought you said there's no history
21 of any kind of ban for anything that doesn't
22 relate to felonies.

23 MR. WRIGHT: And -- and -- and I -- I
24 want to be clear that the -- there is no one
25 that I found anyway. I think it would stem from

1 a court's either historical equitable powers or,
2 you know, the rights of the government to
3 literally protect someone from imminent danger
4 to life and limb.

5 There are examples, some of the early
6 justice of the peace manuals that talk about.
7 If you see someone who is on the way to commit a
8 crime with a weapon, you can take the weapon
9 away from them and you don't have to institute
10 proceedings immediately. However, you do have
11 to institute them pretty quick after that.

12 JUSTICE BARRETT: I'm so confused,
13 because I thought your argument was that there
14 was no history or tradition, as Justice Kagan
15 just said, of this kind -- of disarmament in
16 this circumstance, but now it kind of sounds
17 like your objection is just to the process.

18 Like, are you making Judge Ho's
19 argument only?

20 MR. WRIGHT: No, Your Honor, I'm not
21 making Judge Ho's argument only. The -- the law
22 that's before us right now is a ban. It's a ban
23 passed by a legislature. And it -- it is --
24 you -- you can't get around it. You -- you
25 can't even ask the state court to say, you know,

1 I'll accept a protection order, a stay away
2 order, just give me permission to keep firearms
3 for my own self-defense. That will not prevent
4 this ban from kicking in.

5 And it has severe penalties that
6 result from it, and it applies everywhere, even
7 in the home. I think all of those things
8 together make this statute unconstitutional. I
9 understood the question to be, what about
10 something else? Would that be constitutional?

11 And I think so, but we would need to
12 know -- we'd need to do a full workup on the
13 history and tradition that supported that. You
14 know, that's -- that's something that I don't
15 think this Court can answer in this case because
16 there's no such law before the Court.

17 CHIEF JUSTICE ROBERTS: Well, but
18 it -- it's a facial challenge.

19 MR. WRIGHT: Right.

20 CHIEF JUSTICE ROBERTS: And I
21 understand your answer to say that there will be
22 circumstances where someone could be shown to be
23 sufficiently dangerous that the firearm can be
24 taken from him.

25 MR. WRIGHT: Yes.

1 CHIEF JUSTICE ROBERTS: And why isn't
2 that the end of the case?

3 MR. WRIGHT: Because --

4 CHIEF JUSTICE ROBERTS: All you need
5 to do is show that there are circumstances in
6 which the statute can be constitutionally
7 applied.

8 MR. WRIGHT: Because this statute,
9 it's -- it -- it doesn't take anyone's firearm
10 from them. I mean -- I mean, that's -- that's
11 one way that it would be different, because
12 there is a historical tradition of separating
13 people from their firearms when there's an
14 imminent threat of lawful violence on the way to
15 do it.

16 And I think, again, it's consistent
17 with the Court's traditional equitable powers
18 that if nothing short of surrender would protect
19 life and limb, the court's going to be able to
20 order surrender in the same way that if the
21 police see that someone has, you know, suicidal,
22 they have reason to believe they're suicidal, of
23 course, the police can go and take the firearm
24 away from them. They can't keep it forever and
25 they can't put somebody in prison for 10 years

1 because he had the firearm there.

2 JUSTICE JACKSON: So I hear you
3 isolating bans by the legislature as opposed to
4 circumstances in which a court might have
5 particular facts in this way.

6 Is that what you're doing? You're
7 sort of saying, bans by the legislature are a
8 different thing than we have facts of imminent
9 potential danger and someone runs to the court,
10 there might be a history and tradition of that,
11 but you see that as different than a ban by the
12 legislature such as what is happening here?

13 MR. WRIGHT: Yes.

14 JUSTICE JACKSON: All right. So I
15 guess I'm just trying to understand, maybe this
16 is an aside, but your brief does indicate that
17 you are aware of historical bans, laws banning
18 firearm possession by disfavored categories of
19 people.

20 And -- and the government talks about
21 this as well. And so do you agree with the
22 government that those kinds of bans we don't
23 look at or care about when we're trying to
24 figure out whether or not there's history and
25 tradition here?

1 MR. WRIGHT: Yes. And I don't want to
2 speak for my friend. I understood the
3 government's position to be we don't look at
4 those laws in this case. It sounds like they
5 may still be on the table for some other person
6 who's outside the political community.

7 I say you don't look at them at all
8 because, number one, they're awful, they're
9 terrible laws. We should not give credence to a
10 suggestion that a -- a legislator in 1870 in the
11 south -- you know, we should -- so we should not
12 --

13 JUSTICE JACKSON: But we have a
14 history and traditions test. I -- I guess I --
15 I'm a little troubled by having a history and
16 traditions test that also requires some sort of
17 culling of the history so that only certain
18 people's history counts.

19 So what do we do with that? Isn't
20 that a flaw with respect to the test?

21 MR. WRIGHT: Your Honor, I think what
22 you do is the Bruen test starts with the text.
23 And so, ultimately, historical tradition as I
24 understand it is something the Court does to
25 make sure its textual interpretation is correct

1 and consistent with the original understanding
2 of the amendment.

3 So, in a situation that you're
4 describing, those laws, they were not people who
5 were part of the community. They never -- they
6 weren't seen as the people. And when these laws
7 were challenged, including in this very Court,
8 that was the reason. Well -- well, this Court
9 was not dealing with a disarmament law but other
10 laws that targeted those groups.

11 JUSTICE JACKSON: So does that mean
12 only Reconstruction Era as opposed to -- sorry,
13 only Foundational Era as opposed to
14 Reconstruction Era sources are on the table
15 here?

16 MR. WRIGHT: For purposes of the
17 Second Amendment, as -- and applied against the
18 federal government, yes, absolutely. It is only
19 Founding Era sources and immediately after the
20 Founding Era.

21 So people who understood they were
22 bound by that, like, again, I don't see these
23 two steps of Bruen as completely separate
24 pieces, you know, you pass the text point and
25 you move on. The Court is trying to get at the

1 meaning of the text, the original public meaning
2 of the text.

3 JUSTICE JACKSON: And in your view
4 with respect to domestic violence, are we
5 looking for history and tradition in the
6 Reconstruction Era about how regulation was
7 happening in the circumstance of domestic
8 violence or no?

9 MR. WRIGHT: I don't --

10 JUSTICE JACKSON: I mean, the
11 government says it can be done at the level of
12 regulation of dangerous people with respect to
13 firearms. But you seem to be suggesting -- and
14 I think this is going back to a question that
15 Justice Kagan asked -- that what we're looking
16 for is Reconstruction Era sources, I suppose,
17 that applied to the regulation of white
18 Protestant men related to domestic violence.

19 Is that sort of the level that we are
20 focused on when we're trying to find a history
21 and tradition?

22 MR. WRIGHT: No, Your Honor. And --
23 and -- and I may not have been clear before. I
24 think it's the Founding Era and not the
25 Reconstruction Era when we're talking about the

1 -- the federal government.

2 JUSTICE JACKSON: I apologize, the
3 Founding Era.

4 MR. WRIGHT: And -- and -- and it has
5 got to be the people, someone who would have
6 been understood to be part of the people, a
7 rights-holding citizen --

8 MR. WRIGHT: Right. The people doing
9 what, though? Do we drill down further and say
10 it's the people, which in that case did not
11 include all the people, but, fine, we've
12 identified the relevant people who are being
13 regulated. Is it enough that they were being
14 regulated with respect to just dangerousness, or
15 are we looking for a regulation concerning this
16 set of circumstances?

17 MR. WRIGHT: It doesn't have to be
18 specific to domestic violence. I'm not saying
19 that.

20 JUSTICE JACKSON: Okay.

21 MR. WRIGHT: Violence, interpersonal
22 violence, dueling, any -- robbery. So, in other
23 words, society understood violence, understood
24 dangerous people. Danger existed, but they
25 rejected at every point the type of

1 dangerousness disarmament principle that the
2 government is advocating.

3 JUSTICE KAGAN: Do you think that the
4 Congress can disarm people who are mentally ill,
5 who have been committed to mental institutions?

6 MR. WRIGHT: Setting aside an
7 enumerated powers problem, so they're in the
8 District of Columbia or something like that,
9 there's definitely a tradition for restricting
10 sale or provision of weapons to the mentally ill
11 that -- all the -- all the -- all the examples
12 that the government has cited are late. They're
13 post-Civil War sources, I think, for that. If
14 not -- so I think maybe is the answer to the
15 tradition.

16 JUSTICE KAGAN: I'll tell you the
17 honest truth, Mr. Wright. I feel like you're
18 running away from your argument, you know,
19 because the implications of your argument are
20 just so untenable that you have to say no,
21 that's not really my argument.

22 I mean, it just seems to me that your
23 argument applies to a wide variety of disarming
24 actions, bans, what have you, that -- that we
25 take for granted now because it's -- it's so

1 obvious that people who have guns pose a great
2 danger to others and you don't give guns to
3 people who have the kind of history of domestic
4 violence that your client has or to the mentally
5 ill or what have you.

6 So I guess -- you know, I guess I'm
7 asking you to clarify your argument because you
8 seem to be running away from it because you
9 can't stand what the consequences of it are.

10 MR. WRIGHT: Your Honor, I am running
11 away from interest balancing because I
12 understand that that same sort of argument could
13 have been made in Bruen, could have been made in
14 Heller, could have been made in McDonald, and,
15 in fact, were made in all of those cases, right?

16 Legislatures have made a judgment that
17 it is dangerous to have people carrying weapons
18 about. Legislature made a judgment it is
19 dangerous for handguns specifically to be
20 possessed. And the Court didn't defer to those
21 late or mid-20th century judgments or even early
22 20th century judgments about dangerousness in
23 that scenario.

24 Instead, the Court said we are going
25 to follow our understanding of the original

1 public meaning of the text and -- as illuminated
2 by the historical tradition of firearms
3 regulation at the margins. So I -- I guess
4 that's what I want to say is that if there's no
5 such tradition -- so if you couldn't -- I -- I'm
6 supposing that we would find examples of people
7 having firearms removed from them if they are in
8 imminent danger to others.

9 That historical record has not been
10 built in this case because that's not the kind
11 of law that we have. I do believe that it's
12 there, and I could give some additional examples
13 where I think we can find support for that. But
14 if not, if there were no historical support for
15 that, we would be left with what the text says,
16 which is you have a right to keep arms.

17 And so in that sense, that would --
18 that would end.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: Briefly. You -- just
23 to be clear, what you're arguing, you say that
24 the proceedings in state court -- let's assume
25 that -- that there was no 922 consequence. What

1 would be the effect of that order? Would you --
2 you would not be challenging that order?

3 MR. WRIGHT: Well, I wouldn't be
4 challenging the order, but --

5 JUSTICE THOMAS: Yeah.

6 MR. WRIGHT: -- but -- but -- but Mr.
7 Rahimi might.

8 JUSTICE THOMAS: My question -- the
9 reason I am asking you that, you made the point
10 that that was a small matter and it has huge
11 consequences. I think you said that even if
12 Respondent moved to another state or across the
13 country, the consequences would be the same,
14 even though he would present no danger in Texas.

15 And just to be clear, are you --
16 you're not challenging the state court aspect of
17 this?

18 MR. WRIGHT: That's -- that's correct,
19 Your Honor.

20 JUSTICE THOMAS: But solely -- and
21 your language was it was a per se violation or
22 automatic violation of 922, and that is your
23 problem?

24 MR. WRIGHT: The -- the possession of
25 firearms. It's the bootstrapping of what is a

1 proceeding that is one-sided and does not having
2 any kind of historical connection to the loss of
3 citizenship rights, bootstrapping that as like a
4 conclusive presumption that to a right that the
5 federal Constitution guarantees against
6 Congress.

7 JUSTICE THOMAS: So there was some
8 talk about possibly challenging this under the
9 Due Process Clause later on or a -- as-applied
10 challenge to this. How would -- how would you
11 see that taking place if this is an automatic
12 disarmament?

13 MR. WRIGHT: I -- I will be interested
14 to read how it would proceed. My understanding
15 is that you can't raise it in a 922(g)
16 prosecution. I base that on Lewis and on what
17 we understand Congress's intent to be in
18 enacting these categorical bans.

19 In the state court itself, when it's
20 been raised in state courts, they typically
21 point to the federal statute and say, well,
22 Congress -- you know, Congress said it's okay,
23 so -- so, you know, if you have this kind of
24 order, then you lose. So I think 922(g)(8)
25 plays a role in that sense.

1 And if the issue is that you have tied
2 a larger constitutional right to sort of a
3 smaller right, it's not clear what -- what
4 imposes that due process requirement on the
5 state court. And so I think that this was an
6 agreed order because he doesn't have counsel, he
7 doesn't have the ability to do it, and -- and
8 he's ultimately willing, I guess, to -- to
9 submit, maybe to avoid the attorneys' fees,
10 which is a way that they apparently get people
11 to agree to these orders.

12 That would not be a fundamentally fair
13 system, if it were a red flag or a disarmament
14 provision.

15 CHIEF JUSTICE ROBERTS: Justice Alito?
16 Justice Sotomayor?
17 Justice Kagan?
18 Justice Gorsuch?
19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: One specific thing
21 in the government's reply brief that I want to
22 get your response to. At page 21 of the reply
23 brief, the government notes the background check
24 system that Congress has created to prevent the
25 sale of firearms to prohibited persons.

1 Domestic violence protective orders are promptly
2 incorporated into that system. It's resulted in
3 more than 75,000 denials, the government says,
4 based on these protective orders in the last 25
5 years.

6 According to the government, under
7 your argument, that system could no longer stop
8 persons subject to those domestic violence
9 protective orders from buying firearms. Just
10 want to get your response to that.

11 MR. WRIGHT: I think that's wrong for
12 a couple of reasons, Justice Kavanaugh. First
13 of all, the same system incorporates state
14 prohibitions against firearm possession, and so
15 if there is a lawful provision imposed by state
16 law or by a judge in a court, it could be
17 incorporated into the background check system.

18 Second, I would have to concede that
19 there is a historical tradition of limiting who
20 citizens, people within the community, could
21 provide weapons to outside the community, if you
22 will. And so it could be that that historical
23 tradition would support a restriction on
24 commercial sale of arms. That's an example that
25 -- LRJ was one that's -- maybe has a different

1 framework. So that would -- that's an argument
2 that could be made in favor of that sort of
3 provision or sort of background check process
4 that would not go away with 922(g)(8).

5 And just as a highly technical matter,
6 I understand that to be a function of 922(d)(8),
7 which, again, is restricting what the licensed
8 firearms dealer can do, not (g)(8), which is the
9 restriction on possession by the citizen. This
10 is what my client went to prison for.

11 And so I -- but, on the other hand, if
12 you have a right to possess a firearm, then
13 certainly the acquisition of a firearm is
14 closely connected to that and constitutional
15 implications would come into play. So I just
16 don't have a firm view on whether or not a law
17 that operated more like some of the earliest
18 20th century laws that sort of dealt with
19 acquisition of firearms, that might survive
20 constitutional scrutiny.

21 JUSTICE KAVANAUGH: So it's possible
22 the government's correct in what it says?

23 MR. WRIGHT: It's possible -- no -- I
24 don't think --

25 JUSTICE KAVANAUGH: Is that what you

1 just said?

2 MR. WRIGHT: No, I don't think it's
3 possible. It is possible that it would be
4 unconstitutional to deny people the right to
5 purchase a firearm from a licensed dealer, yes,
6 I think that is possible.

7 But I suspect that both existing law
8 and constitutional laws would allow many of
9 those same people to be denied if we worked our
10 way through the relevant provisions that are
11 keeping them from doing it.

12 JUSTICE KAVANAUGH: Okay. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: So the restraining
16 order prevented your client from possessing a
17 firearm, and it also immediately suspended his
18 handgun license. Was that unconstitutional?

19 MR. WRIGHT: Your Honor, just to take
20 issue with the second part of the question
21 first, that language, suspending handgun
22 license, that's in all of these Tarrant County
23 orders. That's part of the boilerplate --

24 JUSTICE BARRETT: But, still, it says
25 it's ordered that his handgun license is

1 immediately suspended.

2 MR. WRIGHT: Right.

3 JUSTICE BARRETT: So let's -- let's go
4 with the -- with the order's language. Did that
5 violate the Second Amendment, putting 922 aside?

6 MR. WRIGHT: I think to answer that
7 question, then we -- we would bring the whole
8 record, the record that was before the court, in
9 terms, and -- and the client agreed to the
10 order. So it would be very difficult --

11 JUSTICE BARRETT: But you're going --
12 you're going back to the process.

13 MR. WRIGHT: Right.

14 JUSTICE BARRETT: You know, she had
15 the affidavit. Let's -- let's imagine they --
16 they go back and forth. Let's -- let's imagine
17 it's a more fulsome process and she actually
18 testifies and he cross-examines her. Whatever.
19 Let's assume there is no process problem.

20 Would it be unconstitutional then to
21 deprive your client of his handgun license in
22 his -- his -- prohibit him from possessing a
23 firearm? Because I -- I assume that -- you've
24 said there's no analogue of -- of this kind of
25 -- of domestic violence thing.

1 MR. WRIGHT: Right. Or the analogue
2 would be in terms of what courts could do
3 through equitable powers otherwise. I think
4 that would have to be the analogue.

5 JUSTICE BARRETT: But -- but they
6 can't, through equitable powers, do something
7 that would violate the Constitution, right?

8 MR. WRIGHT: Right. Right. So if the
9 finding was that nothing short of surrender of
10 firearms would prevent damage to life and limb,
11 that would be constitutional. So I -- I don't
12 know if that answers your question or not.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: I guess I'm just
16 trying to get a clear answer to whether or not
17 we're looking for historical analogues related
18 to domestic violence or something broader.

19 You -- you -- you suggested -- and
20 your brief I'm now revisiting suggests that the
21 government cites no laws punishing members of
22 the American political community for possessing
23 firearms in their own homes based on
24 dangerousness, irresponsibility, crime
25 prevention, violent history, or any other

1 character trait.

2 So you just say there are no bans that
3 relate to any of those things.

4 MR. WRIGHT: That's my understanding
5 of the historical record that we have in this
6 case, yes.

7 JUSTICE JACKSON: And if the
8 government were to convince us that there was a
9 ban related to, say, dangerousness do you lose?
10 I thought your point was even if there is some
11 dangerousness tradition, it has to be about
12 domestic violence?

13 MR. WRIGHT: That's not my point, Your
14 Honor.

15 JUSTICE JACKSON: Okay.

16 MR. WRIGHT: That's -- that's --
17 that's not something that we're -- people could
18 argue that, but I don't think anybody -- none of
19 our amici have argued that. Certainly, there's
20 some point at which someone could be separated
21 from a firearm.

22 This law doesn't do that at all for
23 anyone. This is just: Can you be punished for
24 keeping a firearm? And I think that the -- the
25 text of the Constitution says no, the early

1 commentators would say no, at least as far as
2 Congress doing it, and the historical tradition
3 all say no.

4 So in terms the level of abstraction,
5 I don't see how this case presents that because
6 there's just nothing, no bans. No bans against
7 rights holders.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, General?

12 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
13 ON BEHALF OF THE PETITIONER

14 GENERAL PRELOGAR: Thank you, Mr.
15 Chief Justice.

16 My friend began his argument this
17 morning in response to a question from Justice
18 Kagan saying that he does read Bruen to require
19 the government to come forward with a precise
20 historical analogue in order to justify a
21 modern-day firearms regulation.

22 I think that is a clearly incorrect
23 reading of Bruen. Unfortunately, it's a
24 profound misreading that many lower courts have
25 been adopting. And I think that it's important

1 for the Court to understand the destabilizing
2 consequences of that reading in the lower
3 courts.

4 Just last week a court invalidated
5 Section 922(g)(1), the felon prohibition
6 statute, on its face as applied to the most
7 violent and horrific crimes imaginable on the
8 theory that the government didn't have a
9 sufficiently precise historical analogue to
10 justify a permanent ban on felons.

11 Many courts now, several district
12 courts, have credited as-applied challenges to
13 Section 922(g)(1) by armed career criminals who
14 have multiple convictions for aggravated
15 assault, drug trafficking, armed robbery,
16 clearly violent crimes, because we don't have a
17 sufficient analogue disarming those subject to
18 precisely those crimes at the founding. And a
19 court has also invalidated on its face the
20 provision of federal law that prohibits
21 possession of firearms with obliterated serial
22 numbers, again on the theory that we don't have
23 a founding era analogue that is sufficiently
24 precise that says you have to serialize firearms
25 possession.

1 I think that those are clearly
2 untenable results. They are profoundly
3 destabilizing, and Bruen doesn't require them.

4 Once the Court corrects the
5 misinterpretation of Bruen, then I think the
6 constitutional principle is clear. You can
7 disarm dangerous persons. And under that
8 principle, Section 922(g)(8) is an easy case.
9 It's an easy case for three reasons.

10 First, it requires an individualized
11 finding of dangerousness. Now, I think I heard
12 my friend to concede today that those kinds of
13 individualized findings of dangerousness do
14 suffice for disarmament, and he questions
15 whether the process in state court judicial
16 proceedings is sufficient.

17 But that ultimately is a procedural
18 claim that should be adjudicated under the Due
19 Process Clause. And I think that it ignores two
20 fundamental features that are relevant here.
21 First, the Section 922(g)(8) guarantees notice
22 and a hearing. It only permits disarmament in
23 those situations so the most fundamental
24 protection of due process is validated under
25 this provision.

1 And, second, that there is a
2 presumption of regularity that exists in this
3 context. And to -- to say or suggest that all
4 of these state court procedural orders,
5 protective orders, are fundamentally flawed or
6 inherently unreliable, I think, would override
7 that presumption in this case and be profoundly
8 unsettling for the state courts that are on the
9 front lines here trying to protect victims of
10 domestic violence.

11 I think as well that these principles
12 equally demonstrate subparagraphs (c)(2)'s
13 validity. We think that there is an inherent
14 requirement that the Court find that the threat
15 of physical force is likely to occur in order to
16 justify entering that kind of judicial finding,
17 and that provides a basis to uphold Section
18 922(g)(8) with respect to all of its
19 applications.

20 The second reason why this is an easy
21 case is because there is a legislative
22 consensus. It is not just Congress, but 48
23 states and territories share this view that
24 armed domestic violence needs to be guarded
25 against and that disarmament is a permissible

1 legislative response. And so I think that
2 further fortifies the congressional judgment.

3 And the third reason why Section
4 922(g)(8) should be an easy case is because it
5 does guard against a profound harm. A woman who
6 lives in a house with a domestic abuser is five
7 times more likely to be murdered if he has
8 access to a gun.

9 And it's not just the harms in the
10 home. It extends to the public and to police
11 officers as well. I was struck by the data
12 showing that armed -- that -- that domestic
13 violence calls are the most dangerous type of
14 call for a police officer to respond to in this
15 country. And for those officers who die in the
16 line of duty, virtually all of them are murdered
17 with handguns.

18 Section 922(g)(8) takes account of
19 those concerns, and here history and tradition
20 confirm common sense. Congress can disarm armed
21 domestic abusers in light of those profound
22 concerns.

23 So we'd ask the Court to correct the
24 Fifth Circuit's methodological errors and
25 reverse.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:37 a.m., the case
5 was submitted.)

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