

No. 26-179

IN THE

Supreme Court of the United States

TERRY BRANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

- (1) Can felons be categorically barred from firearm possession where felon-in-possession bans are presumptively lawful, felons are not entitled to Second Amendment protection, and Founding-era legislatures routinely disarmed entire groups based on status?
- (2) Does disarming the Defendant based on her history of careless disregard for legal norms comport with Founding traditions where Founding-era legislatures retained the power to execute felons of all kinds and lawmakers regularly disarmed dangerous groups and empowered judges to disarm dangerous individuals?

STATEMENT OF THE CASE

The Defendant is Convicted of a Felony After Allowing a Child in Her Care to Die

In July 2000, the 11-month-old Kenneth Drew spent the final hours of his short life alone, abandoned in a hot car while in the care of the Defendant, Terry Branders. R. at 2. Branders ran an unlicensed daycare out of her house in Alexandria, Virginia, where she cared for over 10 children at once. *Id.* She relied on her son, Nelson, to pick up and drop off the children to the daycare using a 15-passenger van. *Id.*

One day, the sleep-deprived Nelson picked up Kenneth but did not drop him off at the daycare. *Id.* Instead, Nelson dropped off all the other children, drove back to his apartment, and left Kenneth in the van while Nelson went inside to go to sleep. *Id.* Despite being responsible for Kenneth's care, the Defendant did not notice Kenneth's absence until two hours after drop-off. When she realized she had lost an 11-month-old child, she did not call 911, but rather spent an hour trying to contact her son Nelson and Kenneth's mother. *Id.* When police finally found Kenneth in the van, he had suffered severe injuries from the heat and died shortly thereafter. *Id.*

This utter failure to protect a child in her care formed the basis of Brander's conviction for felony neglect of a child under Va. Code § 18.2-371. R. at 2. She was further convicted of the misdemeanor of operating a day care without a license. R. at 3. Nelson was also convicted of felony child neglect. *Id.* In 2001, Branders received a two-year suspended sentence and probation, while Nelson was sentenced to four years of imprisonment. *Id.*

The Defendant is Convicted of Reckless Driving, Acquires a Firearm, and Stores It in A Home She Shares with a Suspected Drug Dealer

In 2020, Branders sought to escape her past by moving to Appleton, Newcoastland. R. at 3. Between her felony and her move, she was convicted of misdemeanor reckless driving for driving almost twenty miles over the speed limit, and her license was suspended for six months.

Id. The Defendant’s son moved into her Newcoastland basement to help care for her as she aged.

Id. He frequently lashed out at her and could not maintain employment, leading the Defendant to suspect he may be using and dealing drugs. R. at 3. After mentioning her son’s “scary” friends to a friend, she was given a handgun, which she stored in a drawer in her living room. *Id.*

In June 2024, the Drug Enforcement Agency, prompted by a tip about Nelson’s suspected drug-dealing activities, learned that Nelson and the Defendant lived in the same house and both had felony convictions. R. at 3-4. When DEA agents arrived at the home, the Defendant consented to a search, during which agents discovered her gun. R. at 4. She was arrested and charged with possessing a firearm as a felon pursuant to 18 U.S.C. § 922(g)(1). *Id.*

Procedural History

In July 2024, the Defendant filed a motion to dismiss the indictment, claiming Section 922(g)(1) violates the Second Amendment as applied to her. R. at 4. The Eastern District of Newcoastland granted her motion. R. at 1. It reasoned that even though the Defendant’s crime “resulted in the most horrific outcome possible,” no historical analogue “support[ed] a finding” that permanently disarmed her. R. at 6. Other than this conclusory assertion, the District Court conducted no actual historical analysis.

The Fourteenth Circuit Court of Appeals reversed, endorsing the Eighth Circuit’s reasoning that “there is no need for felony-by-felony litigation” because of the long history of categorical disarmament in this country. R. at 10 (quoting *United States v. Jackson*, 110 F.4th 1120, 1125-27 (8th Cir. 2024)). Judge Pinckney dissented, concluding after an abbreviated historical analysis that because child neglect would not have resulted in permanent disarmament in the Founding era, there was no sufficient historical analogue to support the Defendant’s disarmament. R. at 10-11.

On remand, the Defendant entered an *Alford* plea where she reserved her right to appeal the denial of her motion to dismiss and her as-applied challenge to Section 922(g)(1). R. at 12. The Fourteenth Circuit affirmed, with Judge Pinkey again dissenting. R. at 12. This Court granted certiorari. R. at 13.

SUMMARY OF THE ARGUMENT

The Court should affirm the Fourteenth Circuit's decision barring as-applied challenges to § 922(g)(1) because it correctly recognized the historical tradition of categorical disarmament in this country. However, even as applied to the Defendant, the law is constitutional because it comports with this nation's long history of disarming individuals who disregard legal norms and who are determined to be dangerous.

First, categorical disarmament is permissible because Supreme Court precedent, the text of the Second Amendment itself, and historical firearm regulation support its constitutionality. This Court, in *District of Columbia v. Heller*, and again in *United States v. Rahimi*, explicitly instructed that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,” which are “presumptively lawful.” The Second Amendment's text protects the “right of the people to keep and bear Arms,” but felons are not among “the people” protected because felons are excluded from this nation's political community. Categorical disarmament is consistent with history, as Founding-era laws often imposed status-based firearm possession bans, and disarmament is a less severe imposition on felons than the historic punishment of death.

Second, Section 922(g)(1) is constitutional as applied to the Defendant in this case because she has shown herself to be a dangerous individual who has repeatedly disregarded legal norms put in place to maintain safety. Thus, disarming her follows a rich American tradition of legislative disarmament aimed at people considered dangerous. Furthermore, it is highly

analogous to another thread of Founding-era jurisprudence: surety laws. These laws allowed the judiciary to disarm individuals it determined to be dangerous. Moreover, the conduct forming the basis of the Defendant’s felony conviction was punishable by death at the time of the Founding. Thus, disarmament is well within the legislative power. For those reasons, this Court should affirm the Fourteenth Circuit’s ruling regardless of whether an as-applied challenge is permitted.

ARGUMENT

I. This Court should affirm the opinion of the Fourteenth Circuit because felons can be categorically barred from firearm possession and because, as applied to the Defendant, Section 922(g)(1) comports with the Second Amendment.

The felon-in-possession statute rescinded the Defendant’s right to possess a firearm because she disregarded the laws of this nation, leading to the horrific death of an infant. R. at 2-4. Constitutional challenges are reviewed *de novo*. *United States v. Diaz*, 116 F.4th 458, 462 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2822 (Jun. 23, 2025). Respondents ask the Court to affirm the Fourteenth Circuit’s decision because (1) the Defendant is categorically barred from asserting a Second Amendment challenge to § 922(g)(1), and (2) even if the Defendant can challenge the statute, it is constitutional as applied to her.

A. Congress’s categorical ban on felon possession of firearms is constitutional under the Second Amendment.

Both Supreme Court precedent and historical evidence demonstrate that a categorical ban on felons’ possession of firearms does not violate the Second Amendment. Recognizing this, several circuits have barred as-applied challenges. *See, e.g., Jackson*, 110 F.4th at 1125 (“[T]here is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)”); *United States v. Duarte*, 137 F.4th 743, 761 (9th Cir. 2025), *cert. denied*, 223 L. Ed. 2d 556 (Jan. 20, 2026) (agreeing with the Eighth Circuit’s approach because “historical tradition is sufficient to uphold the application of § 922(g)(1) to all felons”). However, some other circuits have allowed

as-applied challenges. *See, e.g., Range v. Att’y General*, 124 F.4th 218, 232 (3d Cir. 2024) (holding § 922(g)(1) unconstitutional in a “narrow” decision as applied to felon with a food-stamp fraud conviction); *United States v. Williams*, 113 F.4th 637, 662 (6th Cir. 2024) (rejecting as-applied challenge by felon who robbed two people at gunpoint because his criminal record established his dangerousness). This Court should join the Eighth Circuit and its progeny in barring as-applied challenges because (1) the Supreme Court instructs that felon-in-possession laws are presumptively constitutional, (2) felons are not protected by the Second Amendment’s text, and (3) § 922(g)(1) is consistent with status-based disarmament laws and historical punishments of felonies at the time of the Founding.

1. Section 922(g)(1) is presumptively constitutional under Supreme Court precedent.

In issuing its landmark opinion in *District of Columbia v. Heller*, this Court specifically clarified that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,” which are “presumptively lawful.” 554 U.S. 570, 626–27, n. 26 (2008). It “repeat[ed] those assurances” two years later in *McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010), and again reaffirmed them in *United States v. Rahimi*, 602 U.S. 680, 699 (2024).

Bruen upheld this principle when it explicitly blessed shall-issue regimes that require background checks. *See N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 38 n.9; *Zherka v. Bondi*, 140 F.4th 68, 94 (2d Cir. 2025), *cert. denied*, 223 L. Ed. 2d 555 (Jan. 20, 2026) (reasoning that *Bruen*’s permission for “a state to decline an applicant a firearms license based on information discovered in a background check, which will often disclose prior criminal convictions, suggests that it is also permissible for the federal government to prohibit felons from possessing firearms.”). Even if the Court’s “presumptively lawful” language in *Heller* is viewed

as dicta, this Court is still “bound by Supreme Court dicta, especially when it is recent and detailed.” *See McRorey v. Garland*, 99 F.4th 831, 837 (5th Cir. 2024) (following the “presumptively lawful” language of *Heller* even as dicta because it did not conflict with *Bruen*), *but see Diaz*, 116 F.4th at 466 (disregarding the same language as dicta). Further, even as dicta, the presumption of lawfulness flows from the Court’s holding—in recognizing a right to self-defense for “law-abiding, responsible citizens,” *Heller*’s holding does not conflict with restrictions on possession by those who do not abide by this nation’s laws. 54 U.S. at 635.

Heller and *Rahimi*’s blessing of “presumptively lawful” restrictions supports a categorical approach: reading this language to instead suggest a rebuttable presumption of constitutionality would “serve to cast doubt on the constitutionality of these regulations in a range of cases despite the Court’s simultaneous statement that ‘nothing in [its] opinion should be taken to cast doubt’ on the regulations.” *Jackson*, 110 F.4th at 1128–29 (citing *Heller*, 554 U.S. at 626). Thus, § 922(g)(1) enjoys a presumption of constitutionality when it categorically bars felon firearm possession.

2. Categorical disarmament of felons does not implicate the Second Amendment because felons are not among “the people” referred to in the Amendment’s text.

Bruen instructs that a Second Amendment analysis begins by asking whether “the Second Amendment’s plain text covers an individual’s conduct.” 597 U.S. at 24. The Second Amendment provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the *people* to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II (emphasis added). The “people,” as referred to in parts of the Constitution, is “term of art” which “refers to all members of the political community, not an unspecified subset.” *Heller*, 554 U.S. at 580.

Heller protected the Second Amendment right of “law-abiding, responsible citizens,” 554 U.S. at 635, and this Court repeated this description in *Bruen*, 597 U.S. at 8. Thomas Cooley’s “massively popular” treatise, *Heller*, 54 U.S. at 616, contends that the sovereignty of “the people” arises from the “elective franchise,” from which “[c]ertain classes have been almost universally excluded,” such as “the idiot, the lunatic, and the felon.” Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 28-29 (2d ed. 1871). A constitution which allows felons to be stripped of the crucial right to vote allows felons to be excluded from the scope of Second Amendment protection because “the [electoral] franchise and the right to arms were ‘intimately linked’ in the minds of the Framers and of prior and subsequent republican thinkers.” Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480-81 (1995).

A felony conviction incurs, if not the entire forfeiture of many rights, a diminution of a felon’s privileges across many spheres of his or her life. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1800-01 (2012) (convicted felons may lose the right to hold office, serve on juries, or vote; they can also be subject to losing custody of their children, rendered ineligible for public employment, and precluded from some private employment). Thus, just as a felony conviction strips a person of inclusion in the “political community,” so too does it exclude him from “the people” protected by the Second Amendment. See *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019) (holding that a felony conviction removes one from the ambit of the Second Amendment because the court “[did] not think the public, in ratifying the Second Amendment, would have understood the right to be so expansive and limitless” as to include felons); *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (rejecting a felon’s Second Amendment challenge to § 922(g)(1)

because he “simply does not fall into the category of citizens to which the *Heller* court ascribed the Second Amendment protection”).

It would be a mistake to distinguish, as some have, electoral exclusion from disarmament under the theory that citizens hold the right to vote collectively and the right to bear arms individually. *See United States v. Watson*, 171 F.4th 1012, 1018 (7th Cir. 2026) (explaining without endorsing the individual/collective rights distinction). This distinction is meaningless because, like the electoral franchise, the right to bear arms is not a fundamental right. *See* Saul Cornell, “*Don't Know Much About History*” the Current Crisis in Second Amendment Scholarship, 29 N. Ky. L. Rev. 657, 679 (2002) (providing the historical example of the Pennsylvania Test Acts “which stripped citizens of certain civic rights, such as the right to bear arms or sit on juries, but did not deprive them of fundamental individual rights such as the right of freedom of conscience or the right to publish their sentiments on public matters.”).

Moreover, felons are not the only group to fall outside of the Second Amendment's protection—some courts have held that illegal aliens do not enjoy the Amendment’s protection because they are not “law-abiding, responsible citizens” nor “members of the political community” as defined by *Heller*. *See United States v. Medina-Cantu*, 113 F.4th 537, 540 (5th Cir. 2024); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011); *United States v. Carpio-Leon*, 701 F.3d 974, 978 (4th Cir. 2012). Thus, because felons are not “law-abiding citizens” and have been excluded from the nation’s “political community,” *Heller*, 554 U.S. at 580, 635, felons are not among “the people” protected by the Second Amendment and can be disarmed.

3. Categorical disarmament of felons is consistent with this nation's history of firearm regulation and punishment of felonies.

Even if felons are among “the people” protected by the Second Amendment, Section 922(g)(1) is constitutional because it is consistent with the long history of legislative categorical disarmament in this country and the harsh punishments felons were historically subjected to. The second step in Second Amendment analysis under *Bruen* requires the government to show that the “regulation is consistent with this Nation's historical tradition of firearm regulation.” 597 U.S. at 17. However, this historical analogue need not be a historical twin. *Rahimi*, 602 U.S. at 692.

- a. *Legislatures at the time of the Founding frequently disarmed entire classes of people.*

Section 922(g)(1) is consistent with this nation's history of firearm regulation because legislatures have always been able to determine what classes of people are dangerous and disarm them. The Court in *Rahimi* endorsed this idea when it declined to hold that legislatures lack the power to disarm “*categories* of persons thought . . . to present a special danger of misuse.” 602 U.S. at 698 (emphasis added).

Several colonies banned or regulated the sale of arms to Native Americans because many colonists believed them to be “hostile and dangerous.” *Williams*, 113 F.4th at 652. For example, the colony of Connecticut banned the sale of firearms and other “[i]nstruments of warre” “to the Indeans.” *United States v. Carbajal-Flores*, 143 F.4th 877, 885 (7th Cir. 2025), *cert. denied*, 146 S. Ct. 826 (Nov. 24, 2025). The colony of New Netherland imposed the death penalty on any citizen who provided “Guns, Powder, and Lead” to Native Americans. *Williams*, 113 F.4th at 653. The colony of New York banned Native Americans from possessing guns entirely. *Carbajal-Flores*, 143 F.4th at 885.

Similarly to Native Americans, enslaved people were also “thought to pose more immediate threats to public safety and stability and were disarmed as a matter of course.” *Watson*, 171 F.4th at 1021 (quoting *Kanter v. Barr*, 919 F. 3d 437, 458 (7th Cir. 2019) (Barrett, J. dissenting)). The colony of Georgia, as an example, mandated that an enslaved person could not “carry and make use of firearms, or any offensive weapon whatsoever” except with the permission or in the presence of a white person. *Duarte*, 137 F.4th at 765 n. 4 (Collins, J., concurring). The colony of Virginia required that “every gun, and all powder and shot, and every such club or weapon . . . found or taken in the hands, custody, or possession of any such negro, mulatto, or Indian, shall be taken away.” *Id.*

In addition to race-based prohibitions, colonial legislatures also disarmed people based on their religion. Several American colonies disarmed Catholics because they were considered “seditious and obedient to the Pope.” *Watson*, 171 F.4th at 1020. The colony of Virginia provided that “no Papist . . . may have, or keep in his house or elsewhere, . . . any arms, weapons, gunpowder or ammunition” unless he swore an oath mandated by Parliament. *Duarte*, 137 F.4th at 765 n. 2 (Collins, J., concurring). The colonies of Maryland and Pennsylvania required that any firearms found in the household of a “papist or reputed papist” be taken by government officials. *Zherka*, 140 F.4th at 86. In addition to Catholics, the followers of Anne Hutchinson also faced religion-based restrictions when they were “forced . . . to personally deliver their firearms to the authorities” of the Massachusetts Bay Colony in the late 1630s. *Id.* Notably, this disarmament was not motivated by the idea that Hutchinson’s followers physically endangered others, but instead because the governor thought they “viewed their salvation as exempting them from the law.” *Id.*

Further, during the Revolutionary period, people could be disarmed for being loyal to the British. The colony of Rhode Island required that if a suspected loyalist “sh[ould] refuse to subscribe [to an oath],” he w[ould] be “search[ed] for all arms, ammunition and warlike stores,” which w[ould] be taken. *Duarte*, 137 F.4th at 765 n. 5 (Collins, J., concurring). The colonies of Massachusetts, Virginia, Pennsylvania, North Carolina, and New Jersey, as well as the Continental Congress, banned those who refused to swear an oath of loyalty from possessing firearms. *Jackson*, 110 F.4th at 1126 (collecting statutes).

While it is true that some historical disarmament laws allowed exceptions, “history does not support the proposition that status-based disarmament laws were permissible only if they also provided a mechanism for individuals to prove that they were not too dangerous to own a firearm.” *See Zherka*, 140 F.4th at 91-92 (identifying disarmament laws that either allowed for non-dangerousness related exceptions or no exceptions at all); *see also Watson*, 171 F.4th at 1022 (concluding that “the legislature may determine that classes of people are dangerous” because some, even if not all, historical disarmament laws did not allow for exceptions).

Even though many of these historical disarmament laws are steeped in the racial and religious prejudices of the Founding era and would today violate other constitutional provisions, these historical analogues are useful “not as examples to be followed but rather, according to the analysis the Supreme Court has directed [that courts] undertake, as examples of a historical tradition of broad categorical restrictions on firearms possession.” *Zherka*, 140 F.4th at 90-91. Neither *Bruen* nor *Rahimi*, when directing courts on proper Second Amendment analysis, imposed any kind of requirement that only laws which would hold up in court today can be relied on as examples of a historical tradition of firearm regulation. Therefore, as ample

historical evidence demonstrates, Section 922(g)(1) is the modern descendant of a long line of categorical, status-based firearm regulation in this country.

- b. *Since legislatures at the time of the Founding punished felons with death, they could have imposed the lesser punishment of disarmament.*

As most felonies at the Founding were punishable by death, Section 922(g)(1) fits neatly within this nation’s history of firearm regulation on the theory that the greater punishment of death includes the lesser punishment of disarmament. This Court in *Rahimi* endorsed this theory when it reasoned that “if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament . . . is also permissible.” 602 U.S. at 699.

At the Founding, “legislatures could define a ‘serious’ crime as a felony and impose the death penalty.” *Watson*, 171 F.4th at 1023. *See also Glossip v. Gross*, 576 U.S. 863, 867 (2015) (“The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights.”). Even some nonviolent crimes were punishable by death in the Founding era. *See Watson*, 171 F.4th at 1023 (“Between 1790 to 1829 . . . the states carried out an estimated 779 executions, and did so for crimes against people (e.g., murder and rape) [and] property (e.g., arson, forgery, and horse stealing)”) (quoting Hannah Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 Cornell L. Rev. 1689, 1709 (2022)); *Zherka*, 140 F.4th at 82 (“American colonists employed” a concept of felony that was not limited to violent crimes “and imposed the death penalty for a number of nonviolent crimes”). That felons historically were subject to the most extreme deprivation of rights—namely, the right to live—demonstrates that the public at the Founding would not have “understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms.” *Medina*, 913 F.3d 152 at 158. In sum, the severe punishment that accompanied

felony convictions and the broad status-based disarmament of large swaths of the nation establish that the categorical disarmament of felons is constitutional.

B. Section 922(g)(1) mirrored Founding-era laws when it determined that the Defendant’s disregard for legal norms endangered her community and disarmed her.

The scope of the Second Amendment “is not,” and has never been, “unlimited.” *Heller*, 554 U.S. at 626. Thus, laws may restrict gun ownership so long as the law’s reasoning and operation are analogous to Founding-era restrictions. *Rahimi*, 602 U.S. at 692 (“Why and how the regulation burdens [the Second Amendment] are central to this inquiry.”). However, these laws need only be “analogous enough” to historical laws; they need not have a “historical twin.” *Id.* Moreover, statutes disarming felons like the Defendant are “presumptively lawful,” and the Defendant bears the burden of showing otherwise. *See id.* at 699 (“[Some] prohibitions, like those on the possession of firearms by ‘felons and the mentally ill,’ are ‘presumptively lawful.’”), *quoting Heller*, 554 U.S. at 627, n.26.

At the time of the Founding, legislatures regularly disarmed those they considered dangerous. *See Watson*, 171 F.4th at 1020-21 (outlining the common law and Founding-era history of disarming groups considered “threats to public safety and stability”). This power reached even those nonviolent individuals who violated “legal norms.” *See United States v. Hunt*, 123 F.4th 697, 706 (4th Cir. 2024) (“[T]he historical record contains ample support for the categorical disarmament of people ‘who have demonstrated disrespect for legal norms of society[.]’”); *Jackson*, 110 F.4th at 1127 (providing nine examples of laws that disarmed individuals “who deviated from legal norms” regardless of their “demonstrated propensity for violence”).

Moreover, early American justice stripped felons of their estates and their very right to live, executing violent and nonviolent felons alike at a rate of one every two weeks for the 30

years following ratification. Hannah Freedman, *The Modern Federal Death Penalty: A Cruel and Unusual Punishment*, 107 CORNELL L. REV. 1689, 1709 (2022) (recounting the execution of over 750 felons between 1790 and 1829, many for nonviolent crimes such as “forgery[] and horse stealing”). Since Founding-era legislatures punished felons like the Defendant with total dispossession and death, mere disarmament was well within their power. *See Rahimi*, 602 U.S. at 682 (“If imprisonment was permissible . . . then the lesser restriction of temporary disarmament . . . is also permissible.”).

The Defendant in the instant case was convicted of a felony when she disregarded legal norms and carelessly caused the death of an infant child. R. at 2-4. A law that disarms such a person to maintain public safety is highly analogous to Founding-era laws.

1. Disarmament burdens Second Amendment rights less than the death and dispossession that felons like the Defendant were subject to during the Founding era and thus fits well within the bounds of the Constitution.

When one follows the Supreme Court’s guidance to look at “how the regulation burdens [the Second Amendment],” Section 922(g)(1) is highly analogous to Founding-era laws. *See Rahimi*, 602 U.S. at 692. The only surprise that an early American would have felt from hearing about the disarmament of a felon like the Defendant would have come from the fact that the felon was being allowed to live. *See Jackson*, 110 F.4th at 1127 (Early American felons faced “death or forfeiture [of their] entire estate[,]” which “subsumed disarmament.”). Since the power to execute includes the power to disarm, a felon subject to execution at the time of the Founding was likewise subject to disarmament and remains so today. *See discussion supra* Part A.3(b).

The Defendant in this case is convicted of two crimes: a misdemeanor for operating a day care without a license, and the felony of child neglect for allowing an infant child to die in her unlicensed care. R. at 3. Courts and legislatures in the Founding era considered such

circumstances to be “manslaughter,” which they “defined to be the unlawful killing of another without malice . . . but in the commission of some unlawful act.” *Rice v. State*, 8 Mo. 561, 563 (1844); *see also, e.g., Com. v. Gable*, 1821 WL 1908, at *4 (Pa. 1821) (“manslaughter is, where it plainly appears that neither death nor any great bodily harm was intended, but death is accidentally caused by some unlawful act”); *Sutcliffe v. State*, 1849 WL 130, at *5 (Ohio Dec. 1849) (“if any person shall unlawfully kill another without malice. . . while the slayer is in the commission of some unlawful act; every such person shall be deemed guilty of manslaughter”). An archetypal example of this crime was “where one is hunting in the park of another, *without license*, and his arrow, glancing from a tree, kills another.” *Gable*, 1821 WL 1908, at *4 (emphasis supplied). This circumstance is more than just “analogous enough” to the Defendant’s conviction; it is a “dead ringer” to the instant case where the Defendant’s unlicensed conduct cost an innocent child’s life. *See Rahimi*, 602 U.S. at 692 (setting the “analogous enough” standard); R. at 3.

In the Founding era, manslaughter like that committed by the Defendant was a felony, punishable by death and dispossession unless the legislature intervened. *See United States v. Norris*, 27 F. Cas. 187, 188 (C.C.D.D.C. 1807) (“[Manslaughter] is a felony by the common law, but is within the benefit of clergy by [statute].”). In most states, legislative intervention had reduced the punishment for manslaughter to imprisonment and branding via a defense called “the benefit of clergy.” *See, e.g., State v. Pompey*, 2 Del. Cas. 113, 113 (Quar. Sess. 1798) (The Attorney General of Delaware stated of a defendant charged with manslaughter: “our Act of Assembly entitles him to benefit of clergy”). While many states granted such reprieves, legislatures could revoke the benefit of clergy and return to the full force of felony punishment. *See Crenshaw v. State*, 8 Tenn. 122, 126 (1827) (holding that when the common law entitles the

defendant to the benefit of the clergy, courts must still ask: “have our statutes against [the convicted offenses] altered the common law upon this subject?”); *Gable*, 1821 WL 1908, at *3 (“By that [statute], all claim of dispensation from punishment by benefit of clergy is abolished.”).

Thus, Founding-era legislatures retained the right to punish felons like the Defendant with execution and estate forfeiture if they chose to. *Duarte*, 137 F.4th at 758 (holding that when “legislatures made the policy choice to retreat from harsher punishments,” this did not mean that “legislatures lacked the ability to impose such punishments.”). An alternative holding would trap law and policy in amber at the time of the Founding and assume that Founding-era legislatures maximally exercised their power to regulate, despite *Rahimi*’s explicit chastisements against these fallacies. *See* 602 U.S. at 691, 739-40 (Barrett, J., concurring). Since early legislatures regularly stripped felons like the Defendant of all rights through execution, mere disarmament fell well within their power and well within the power of the legislatures of today.

2. Section 922(g)(1)’s “how” and “why” are in line with a long-held legislative tradition of disarming groups considered to be dangerous.

After addressing “how” Section 922(g)(1) burdens the Second Amendment, *Rahimi* requires a court to look for historical analogues matching “why” it does so. *See* 602 U.S. at 692. Founding-era legislatures regularly disarmed vast swaths of citizens for no offence at all. *Watson*, 171 F.4th at 1021-22 (collecting laws imposing mass disarmament on Catholics in the 1610s, Loyalists during the 1700s, and the homeless in the 1800s). While “these disarmament laws sometimes included exceptions” for those who could prove that they were “orderly and peaceable,” they often did not. *Id.*; *see also Williams*, 113 F.4th at 650-57 (collecting class wide disarmament statutes targeting people considered disloyal or otherwise “dangerous” to the American project spanning from the “ratification of the Second Amendment” into the antebellum

period). These mass disarmament laws show that Founding-era legislatures had no constitutional qualms about identifying and disarming groups that society had reason to fear. *Watson*, 171 F.4th at 1019–20 (“Legislatures deemed groups ‘dangerous’ and categorically disarmed them.”).

This “tradition of legislative disarmament” is rooted in “a perception of dangerousness” and has been a mainstay of American law from “the eighteenth and early nineteenth centuries” into “the latter nineteenth century” and through “the twentieth.” *Zherka*, 140 F.4th at 89. It stands for nothing more than the unsurprising conclusion that “the legislature may determine that classes of people are dangerous” and act to alleviate that danger through disarmament. *See Watson*, 171 F.4th at 1022. While the legislature has changed the target of this disarmament over the years, it has never given up its discretion to “make such judgments,” which are now—as always—“consistent with the Second Amendment.” *Id.* These laws are historical dead ringers for the “why” of Section 922(g)(1), which likewise uses disarmament to remedy a legislative judgment of dangerousness. *Huddleston v. U.S.*, 415 U.S. 814, 824 (1974) (“The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping ‘firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’”)

Courts cannot and should not *Lochnerize* by second-guessing the legislative assessment of dangerousness inherent in a felony conviction. While some facts about a felon might reduce the apparent danger he poses, this analysis amounts to a judicial determination of the degree of government interest in disarming the felon. This would be no different than asking “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *See Bruen*, 597 U.S. at 23–24 (forbidding the use of this “interest-balancing inquiry” to analyze Second Amendment

violations). Thus, a court’s opinion on any felon’s dangerousness (a permissible consideration under a means-ends analysis) is irrelevant under a history-and-tradition test. *Id.* Considering these factors would graft the means-end analysis that *Bruen* foreclosed onto the history-and-tradition test that *Bruen* explicated and mandated. *Id.*

Section 922(g)(1) follows the well-worn path of legislative disarmament when it leaves individuals disarmed, but with administrative pathways to re-armament. Much like the more lenient Founding-era laws, 18 U.S.C. 925(c) provides that felons “may make application . . . for relief from [their disarmament]” provided they can show that they “will not be likely to act in a manner dangerous to public safety.” This recently reinstated program “bears a striking resemblance to the individualized dangerousness determinations made by the justices of the peace of [the Founding era].” *Williams*, 113 F.4th at 661; Marc Schollett, *New federal process could restore firearm rights for some felons after decades-long pause*, News Channel 3, Sept. 15, 2026, at ¶1 (“[T]he federal government had essentially mothballed its [felon rearmament] program for more than three decades. Ten days from now, that all starts to change.”). This striking resemblance highlights yet another historical analogue for Section 922 (g)(1)’s method of operation.

Disarming the Defendant in this case is entirely consistent with the mass disarmament laws of American history. The Defendant’s status as a felon shows that the legislature has determined that her “character or temperament . . . indicate[s] a serious disregard for fundamental legal norms[,]” which is “inconsistent with the safe and prudent possession of deadly weapons.” *See Zherka*, 140 F.4th at 90-9.

This conclusion is reinforced by looking at the Defendant’s particular circumstances. She was convicted of a misdemeanor for her deadly and unlicensed daycare operation, then convicted

again for reckless driving in 2020. R. at 2-3. These repeated convictions evince a careless individual who disregards caution and society's norms, even when children's lives hang in the balance. Her shortsighted carelessness with firearms even led her to keep a handgun in a common living space she shared with someone she suspected of dealing drugs. R. at 3. In a nation where firearm-related accidents injure over 180 people a day, the danger this poses is clear. *See* Katherine A. Fowler, *Firearm injuries in the United States*, *Prev. Med.*, Oct. 2015 at 1 (finding 67,000 yearly accidental firearm injuries and 32,000 yearly accidental firearm deaths). The legislature's choice to intercede against the danger posed by armed, criminally careless individuals is in keeping not only with our nation's history—it is in keeping with common sense.

3. Section 922(g)(1) follows the same reasoning as the surety laws by authorizing the judiciary to disarm individuals adjudicated to be dangerous.

Another set of nearly ubiquitous early American laws, “surety laws,” were a form of “preventative justice” that “authorized magistrates to require individuals suspected of future misbehavior to post a bond.” *See Rahimi*, 602 U.S. at 695. Legislatures could make compliance with these surety laws a prerequisite to carrying arms at all, as the Massachusetts Assembly did. *Id.* at 696 (recounting a statute that required bond from anyone seeking to “go armed offensively”).

Like the surety laws, “the prohibition of firearms possession by persons convicted of felonies is based . . . on those persons’ prior conduct, formally admitted or proven beyond a reasonable doubt.” *Zherka*, 140 F.4th at 90–91. These laws required a hearing and finding of reasonable cause before the bond could be required, which Section 922(g)(1) supplies via the felon’s criminal conviction. *See id.* (“A complaint had to be made to a judge [who]. . . would take evidence, and—if he determined that cause existed for the charge—summon the accused, who could respond to the allegations.”). These surety laws reflect that the Founding-era

legislature could empower courts to disarm individuals found to meet legislatively set standards of dangerousness.

The Defendant met one such standard when she was convicted of a felony after her careless actions caused the death of a child in her custody. This conviction provides the judicial finding of cause for disarmament such as would have been needed under the surety laws. *See Rahimi*, 602 U.S. at 696 (laying out the requirements of the surety laws). This finding is reinforced by the Defendant's multiple misdemeanor convictions for disregarding legal norms in place to ensure public safety. R. at 3 (recounting the Defendant's convictions for reckless driving and operating a daycare without a license). Disarming the Defendant based on her fatal disregard for safety is simply streamlining and centralizing the disarmament process carried out through independent civil action via surety laws. The similarity in reasoning and operation between the disarmament of the Defendant and those disarmed under surety laws provides yet another path to recognizing the constitutionality of Section 922(g)(1) as applied to her.

CONCLUSION

For these reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

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