Hearing before the Committee on the Judiciary on
"Protecting Public Safety After *New York State Rifle & Pistol Association v. Bruen*"
Questions for the Record
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Dear Senators Durbin and Klobuchar,

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

Questions from Senator Dick Durbin

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

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

I am aware of no other area of constitutional rights adjudication that employs the sort of historical-analogical inquiry set forth in *Bruen* as the sole means of determining constitutionality.[2] For example, despite the Supreme Court's allusion in *Bruen* to the First Amendment,[3] lower courts accurately observed before *Bruen* that the Supreme Court's freedom-of-speech doctrine has long deployed

[1] My responses are drawn in part from my forthcoming article, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming), *draft available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4408228.

[2] The closest doctrinal comparator may be the approach taken for Seventh Amendment cases. *See* Darrell A. H. Miller, Text, *History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013) (discussing Seventh Amendment doctrine in the context of the turn to historicism in Second Amendment case law). However, Seventh Amendment doctrine is distinct from *Bruen*'s approach in various ways. One distinction is that the "reliance on analogical reasoning from text, common law, history, or tradition" is "not exclusive." *Id.* at 856. Rather, Seventh Amendment doctrine applies a historical-analogical inquiry flexibly, and "[w]here history is not dispositive or an analogy not apparent," *id.* at 886, expands the inquiry, including to policy or "functional" considerations, *id.* at 886, 891 (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999)).

[3] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

means-end scrutiny.[4] Indeed, the First Amendment precedent cited by the majority itself in *Bruen* makes clear this aspect of freedom-of-speech doctrine.[5]

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

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

Looking only for exact matches in the historical record fails to comply with *Bruen*'s admonition that analogical reasoning does not require a "historical *twin*."[6] Under *Bruen*, courts must, at a minimum, derive workable *principles* from the historical laws that can mediate the analogical inquiry. In the kind of historical-analogical test that *Bruen* has created, such principles are the basis for judicial decision, so to say that courts must articulate them is simply to say that they must give reasons for their decisions.

The principles articulated must be broader than the precise sanction of the historical law, but courts will exercise discretion when deciding how broadly to define them. As I flesh out in greater detail in my forthcoming article,[7] there are good reasons to operate at a high level of generality when considering the historical scope of the right and related regulatory tradition. In particular, doing so minimizes the risk of anachronism that exists when comparing modern weapons to historical ones, and modern laws to those passed centuries ago.

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[4] *See, e.g.*, Nat'l Rifle Assn of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194, 198 (5th Cir. 2012) ("First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation.").

[5] *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny."); *Bruen*, 142 S.Ct. at 2130 (citing *Playboy Ent. Grp., Inc.*).

[6] *Bruen*, 142 S. Ct. at 2133 (emphasis in original).

[7] *See* Blocher & Ruben, *supra* note 1.

Questions from Senator Amy Klobuchar

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

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

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

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

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

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

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

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[8] *See* 18 U.S.C. § 922(g)(8).
[9] *See* 18 U.S.C. 922(g)(9).
[10] *Id.*
[11] *See* 18 U.S.C. § 921(a)(33).
[12] *See* United States v. Rahimi, 61 F.4th 443, 461 n.11 (5th Cir. 2023) (citing several articles questioning if there is a tradition supporting disarming domestic violence misdemeanants). *But see infra* notes 21-23 and accompanying text (discussing precedent finding a regulatory tradition supporting modern laws disarming domestic abusers).
[13] *Id.* at 455 n.7 ("The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. In crafting the Bill of Rights, the Founders were plainly attuned to preservation of these protections. It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process.").
[14] *Bruen*, 142 S. Ct. at 2126; *cf.* United States v. Sitladeen, __ F.4th __, 2023 WL 2765015, at *4 (8th Cir. Apr. 4, 2023) (evaluating "whether the conduct regulated by § 922(g)(5)(A) was protected by the plain text of the Second Amendment" and concluding "that it was not, as unlawfully present aliens are not within the class of persons to which the phrase 'the people' refers").

firearm regulation.[15] Answering the second question is where *Bruen*'s historical-analogical test comes into play.[16] In applying that test, in order to avoid the risk of anachronism, it will be important for courts to understand the immense differences between modern and historical values, guns, and gun violence. The domestic violence context provides a great example of such a risk.

As I described in my oral testimony, at the founding, policymakers did not view women as political or legal equals to men, and did not view domestic violence as a problem worthy of addressing through legislation. Indeed, the law protected the "husband's legal prerogative to inflict marital chastisement."[17] Thus, it is not surprising that there were not robust protections for domestic violence victims at that time.

Moreover, even if policymakers at the founding had appreciated the problem of domestic violence, there still might not have been corresponding gun regulations because, unlike today, research suggests that they were rarely used for domestic violence, which reflects the unadvanced state of firearm technology at the founding. As historian Randolph Roth has noted, "Family and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand," which were not loaded guns but rather "whips, sticks, hoes, shovels, axes, knives, feet, or fists."[18]

Further, women did not have a federal constitutional right to vote for leaders who would safeguard their interests until the Nineteenth Amendment was ratified in 1920. As a Justice of the Ohio Supreme Court recently noted in a post-*Bruen* case: "[T]he glaring flaw in *any* analysis of the United States' historical tradition of firearm regulation in relation to [modern] gun laws is that no such analysis could account for what the United States' historical tradition of firearm regulation *would have been* if women and nonwhite people had been able to vote for the representatives who determined these regulations."[19] If, historically, women favored stricter firearm policies than White men—consistent with today's overall demographic preferences[20]—then the absence of women voters may have resulted in a corresponding absence of gun laws.

Turning to your specific question, courts will thus need to look to other historical contexts besides domestic violence to derive principles that might be applied to domestic violence prohibitors today. For example, in her dissenting opinion in *Kanter v. Barr*, then-Judge Amy Coney Barrett surveyed non-domestic-violence-related laws at the founding and concluded that "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety."[21] Before *Bruen*, courts used such a historically-derived principle to assess (and uphold) modern laws protecting

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[15] *Bruen*, 142 S. Ct. at 2129-30.

[16] *Id.* at 2132-33 (stating that "central considerations when engaging in [the] analogical inquiry" are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified").

[17] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2127 (1996).

[18] Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 276 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019).

[19] State v. Philpotts, 2022-Ohio-3155, ¶ 8, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (emphasis in original).

[20] *See, e.g.*, Megan Brenan, *Stark Gender Gap in Gun Ownership, Views of Gun Laws in U.S.*, GALLUP (Dec. 2, 2022), https://news.gallup.com/poll/406238/stark-gender-gap-gun-ownership-views-gun-laws.aspx.

[21] Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting).

domestic violence victims through disarmament.[22] That same principle can play, and has played, a role in post-*Bruen* analogical reasoning.[23]

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

[23] *See, e.g.*, United States v. Guthery, No. 2:22-CR-00173-KJM, 2023 WL 2696824, at *8 (E.D. Cal. Mar. 29, 2023) (rejecting a Second Amendment challenge to 18 U.S.C. § 922(g)(8) under *Bruen* after finding, among other things, that "historical regulations cited by the government are analogous to § 922(g)(8) because they allowed the government to disarm individuals based on concerns regarding their threat to the community's safety").