CASE NO. 23-11604

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LORENZO GAROD PIERRE,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida
Hon. Jose E. Martinez, J., Presiding
D.C. Docket No. 1:22-cr-20321-JEM-1

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule No. 26.1(a)(6), *amicus* certifies that the following persons have an interest in the outcome:

1. Cato Institute, *amicus curiae*
2. Matthew P. Cavedon, counsel for *amicus curiae*
3. Michael Z. Fox, counsel for *amicus curiae*

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Respectfully submitted,

/s/ Matthew P. Cavedon

Dated: July 18, 2025

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INTEREST OF *AMICUS CURIAE*[1]

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

Among other rights the Institute seeks to protect is the right of armed self-defense, and in that regard the Institute has represented parties and appeared as amicus in several cases involving this fundamental right. *See*, *e.g.*, *United States v. Rahimi*, 602 U.S. 680 (2024); *McDonald v. Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008). Institute scholars have also published important research on the right to possess firearms. *See, e.g.*, TIMOTHY SANDEFUR, THE PERMISSION SOCIETY CH. 7 (2016).

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have been notified of and consented to the filing of this brief.

INTRODUCTION

By "requir[ing] courts to consult history to determine the scope of th[e] right," the Supreme Court's watershed opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022), aligned the Second Amendment with "how we protect other constitutional rights," particularly those found in the First and Sixth Amendments. The Court's decision in *United States v. Rahimi*, 602 U.S. 680, 692 (2024), brought further clarity, requiring courts to find a principle that is narrow, concrete, and historically grounded enough to justify a modern restriction on the Second Amendment.

Upholding § 922(g)(1) under the framework established by *Bruen* and *Rahimi* is flatly incompatible with the example set by First, Second, and Sixth Amendment jurisprudence. Historical tradition, not ephemeral legislative will, determines both the existence and the scope of exceptions to constitutional rights. Accordingly, the Second Amendment cannot be legislatively downsized through the simple expedient of proclaiming that nearly everything is a felony and everyone who commits one loses their fundamental right of armed self-defense. In short, the Government has not met its burden to square universal, lifetime disarmament of a massive class of American citizens—many of them no more harmless or irresponsible than their (as-yet) unconvicted neighbors—with the historical tradition of arms regulation that must be the touchstone of this Court's inquiry.

ARGUMENT

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

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

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

But the Court has identified "well-defined and narrowly limited" exceptions to that rule. *Id*.

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

The Court rejected the government's theory. *Id*. The laws in the government's examples were constitutional because of features distinctive to the particular false statements proscribed, i.e., that they "protect the integrity of Government processes, quite apart from merely restricting false speech." *Id.* That these three types of false statements may be enjoined does not mean that *all* "false speech should be in a general category that is presumptively unprotected." *Id.* at 722. Such a rule, the Court

warned, "has no clear limiting principle" and would "give government a broad censorial power." *Id.* at 723.

The Court has also refused to defer to legislatures' judgment about what falls within exempted categories. *Winters v. New York*, 333 U.S. 507, 519 (1948), involving a state prohibition on violent novels, marked an early attempt to "shoehorn speech about violence into obscenity." *Brown*, 564 U.S. at 793 (citing *Winters*, 333 U.S. at 514). The state court had upheld the law by defining "obscenity" to encompass books that, in the legislature's judgment, "are likely to bring about the corruption of public morals or other analogous injury to the public order." *Winters*, 333 U.S. at 514. The Court rejected that analogy. *Id*. It reached the same conclusion in *Stevens*, involving depictions of animal cruelty, and *Brown*, concerning the sale of violent videogames to children. *Brown*, 564 U.S. at 793.

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

governmental power to abridge the freedom of speech based on interest balancing." *Id*.

The Sixth Amendment. The same lessons repeat themselves in the Sixth Amendment context. There, too, the Supreme Court has countenanced only "founding-era exception[s] to the confrontation right." *Giles v. California*, 554 U.S. 353, 358 (2008). For instance, the Court has acknowledged a deeply rooted "public records" exception to the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009). At common law, a court could admit a clerk's certificate authenticating a public record without the clerk's live testimony. *Id*. In *Melendez-Diaz*, the dissent characterized clerks as "unconventional witnesses" whose contributions to cases were "far removed from the crime and the defendant." *Id.* at 347 (Kennedy, J., dissenting). It reasoned that the exception should apply to *all* such witnesses, including forensic analysts. *Id*. But the majority rejected that analogy. Historically, "a clerk's authority . . . was narrowly circumscribed." *Id*. at 322 (majority opinion). "He was permitted to certify to the correctness of a copy of a record kept in his office, but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *Id*. (cleaned up). The dissent's broad analogy did not hold.

Likewise, in *Giles*, the Court enforced the narrow bounds of the forfeiture-by-wrongdoing exception. Historically, "the exception applied only when the defendant

engaged in conduct *designed* to prevent the witness from testifying." *Giles*, 554 U.S. at 359. But the state proposed to extend that exception to *any* "intentional criminal act [that] made [a witness] unavailable to testify." *Id*. at 357. The Court declined to "create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee" and set aside "how that guarantee was historically understood." *Id*. at 374. "It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Id*. at 375.

Finally, just as courts may not analogize beyond the bounds of traditional Sixth Amendment exceptions, governments may not legislate new exceptions into existence. The state in *Smith v. Arizona* contended that experts convey others' out-of-court statements only to explain their opinions, not to establish the truth of the matter asserted. 602 U.S. 779, 794 (2024). In support, it cited state and federal evidence rules exempting such statements from the rule against hearsay. *Id*. The Court disagreed. It noted that "federal constitutional rights are not typically defined—expanded or contracted—by reference to [such] non-constitutional bodies of law." *Id*. at 794.

The Second Amendment. When *Bruen* clarified that only history and tradition could support Second Amendment exceptions, it built on a decades-long foundation for "how we protect other constitutional rights." *Bruen*, 597 U.S. at 24. It is therefore

no surprise that the Court's recent Second Amendment cases reflect the same careful hewing to tradition as its First and Sixth Amendment jurisprudence.

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

But *Bruen* rejected that attempted generalization maneuver. Instead, the Court evaluated each law to determine whether it was sufficiently similar to the "proper cause" requirement. *Id*. at 30–69. Affray laws were a poor fit because they prohibited only "bearing arms in a way that spreads 'fear' or 'terror' among the people." *Id.* at 50. They therefore did not support a "sweeping" power to pass "onerous public-carry regulations." *Id.* at 40. Historical statutes proscribing *concealed* carry did not justify New York's "*general* prohibition" on *all* modes of public carry (both concealed and open). *Id*. at 54 (emphasis added). And historical "surety statutes," which applied "only [to] those reasonably accused" of intending to do injury or breach the peace, did not validate a proper-cause requirement applicable to *all* New Yorkers. *Id*. at 57.

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

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

Ultimately, because a survey of Anglo-American history revealed only a small number of "well-defined" restrictions on public carry, New York could neither extrapolate a general power to regulate public carry nor assert legislative power to define the Second Amendment's scope. *Id*. at 70.

Rahimi held that historical tradition did permit governments to disarm certain people under domestic violence restraining orders. 602 U.S. at 698. But the historical principle the Court derived to support that law was more closely tied to historical regulations. While the government advanced various purported analogues for § 922(g)(8), the Court grounded its narrow holding on "two distinct legal regimes" that "specifically addressed firearms violence": Founding-era surety and going-armed laws. *Id.* at 694–98. These laws established a narrow, well-defined historical exception to the Second Amendment for "prohibition[s] on the possession of firearms by those found by a court to present a threat to others." *Id*. at 698. To establish that § 922(g)(8) fell within that tradition, *Rahimi* drew specific parallels between historical laws' features and § 922(g)(8)'s attributes. Both sets of laws "temporar[ily]" "restrict[ed] gun use to mitigate demonstrated threats of physical violence," following "judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 698–99.

This close alignment explained why those analogues justified § 922(g)(8), even though they did not support New York's proper-cause law in *Bruen*. "The conclusion that focused regulations like the surety laws are not a historical analogue for a *broad* prohibitory regime like New York's does not mean that they cannot be an appropriate analogue for a *narrow* one." *Id*. at 700 (emphases added).

In contrast, the Court unanimously rejected the government's much more expansive contention that the Second Amendment permitted disarming all who are not "law-abiding, responsible citizens," *Id*. at 773 (Thomas, J., dissenting) (quoting Brief for United States 6, 11–12), and by extension the supposition "that Rahimi may be disarmed simply because he is not 'responsible.'" *Id*. at 701 (majority opinion). "'Responsible' is a vague term," the Court noted, and "[i]t is unclear what such a rule would entail." *Id*.

For multiple justices, the vagueness of the word "responsible" in that context implicated concerns about excessive legislative deference. "Not a single Member of the Court adopts the Government's theory," Justice Thomas noted, not just because it "lacks any basis in our precedents," but also because it "would eviscerate the Second Amendment altogether." *Id*. at 773 (Thomas, J., dissenting). On the Government's view in *Rahimi*, "Congress could impose any firearm regulation so long as it targets 'unfit' persons. And, of course, Congress would also dictate what 'unfit' means and who qualifies. The historical understanding of the Second Amendment right would be irrelevant." *Id*. at 775 (cleaned up). It follows that "whether a person could keep, bear, or even possess firearms would be Congress's policy choice." *Id*. Justice Thomas applauded the majority's rejection of that suggestion, and cautioned courts to "remain wary of any theory in the future that would exchange the Second Amendment's boundary line . . . for vague (and

dubious) principles with contours defined by whoever happens to be in power." *Id.* at 777.

Justice Gorsuch agreed: "[W]e [do not] purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not "responsible[.]"'" *Id.* at 713 (Gorsuch, J., concurring). Instead, he explicitly analogized *Rahimi*'s Second Amendment analysis to Sixth Amendment jurisprudence. In both contexts, courts may not create exceptions to a right by "glean[ing] from historic exceptions overarching 'policies,' 'purposes,' or 'values' to guide them in future cases." *Id.* at 710 (quoting *Giles*, 554 U.S. at 374–75 (opinion of Scalia, J.)).

Finally, Justice Barrett registered her concern about excessively broad principles. She believed that in *Rahimi*, the Court had "settle[d] just the right level of generality." *Id.* at 740. But she cautioned courts to continue striking that appropriate balance moving forward, "not to read a principle at such a high level of generality that it waters down the right." *Id.*

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

CONCLUSION

This Court should decline to categorically uphold § 922(g)(1) and instead conduct a careful as-applied comparison between Mr. Pierre's prior offenses and the Government's proffered historical comparators.

Respectfully submitted,

Dated: July 18, 2025

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 11th Cir. R. 29-4 and Fed. R. App. P. 29(b)(4) because it contains 2,751 words, excluding the parts exempted by Fed. R. App. P. 32(f).
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/s/ Matthew P. Cavedon

July 18, 2025

CERTIFICATE OF SERVICE

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

/s/ Matthew P. Cavedon

July 18, 2025