No. _____

In the

Supreme Court of the United States

Eric Gerard McGinnis,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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[1] Mr. Beck was lead counsel and presented oral argument in *United States v. Davis*, 139 S. Ct. 2319 (2019).

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REPLY TO BRIEF IN OPPOSITION

A. The government bases its original-meaning argument on an overly broad reading of words that the framers did not include in the Second Amendment.

Under the government's expansive view of its own power, Congress can prohibit anyone from exercising their Second Amendment rights so long as the person is not responsible, not peaceable, or, as some courts have held, not virtuous. This would be a mistake for two primary reasons.

First, "responsible," "peaceable," and "virtuous" are broad concepts with incredibly flexible definitions, imbued with ambiguity. Do these terms, for example, refer to an individual's moral character or simply their behavior on their worst day? If it's the latter, then certainly historical figures such as Dietrich Bonhoeffer or Martin Luther King, Jr. could not qualify. If it's the former, however, how can courts apply such imprecise designations?

Historically, concepts such as responsible, peaceable, and virtuous refer to a person's overall moral character. Webster's Dictionary of the English Language (1828), for example, couches "responsible" in terms of a person's ability to repay their debts, "peaceable" as free from feuds, and "virtuous" in terms of moral goodness and chastity. Further, as described in the Initial Brief, there is little or no evidence that domestic abusers—and no evidence as to people subject to no-contact orders—were stripped of firearms. Thus, from a historical perspective, whatever these terms meant, they were not applied in circumstances resembling § 922(g)(8).

Second, the Framers could have included, in the Second Amendment, many of the limiting principles the government describes. Yet they chose not to do so. In Mr. McGinnis's view, that must account for something. While the Framers, such as the government's example of Samuel Adams (Gov't Br. in Opp. at 8), may have had differing views on how far the Second Amendment should reach, courts must honor the final version as it appears in the Constitution—stripped of any modifiers such as peaceable, responsible, or virtuous.

B. 18 U.S.C. § 922(g)(8) is always unconstitutional because it always prohibits a person from possessing a firearm in their own home for personal defense even when living alone.

The government is right to point to *United States v. Salerno*, 481 U.S. 739 (1987), which presents a high hurdle for any facial constitutional challenge. Petitioner, however, clears *Salerno*'s hurdle. 18 U.S.C. § 922(g)(8) is unconstitutional in all instances because: (1) it always prohibits a person from possessing a firearm in his or her own home for personal defense—even when living alone; and (2) it always does so without requiring that a firearm was threatened or used in domestic violence. Such a broad, untailored restriction cuts to the heart of what the Second Amendment protects: the right to bear arms in the home for self-defense.

The government attempts to mitigate § 922(g)(8)'s infirmity by pointing to the fact that its restriction is temporary. (Gov't Br. in Opp. at 8-9). Such an argument fails because any unwarranted deprivation of a fundamental right is unconstitutional, irrespective of its duration. *Rodriguez v. United States*, a Fourth Amendment case decided by this Court in 2015, provides a useful analogy. 135 S. Ct.

1609 (2015). There, a police officer prolonged the duration of a traffic stop, without reasonable suspicion, beyond the time necessary to achieve the stop's mission. *Id*. at 1612-14. The government argued that any extended seizure was *de minimis*—and therefore excusable—because of its very short (twelve minute) duration. *Id*. at 1616. This Court disagreed, holding that a constitutional violation of any length was a constitutional violation nonetheless. *See id*. ("If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' As we said in *Caballes* and reiterate today, a traffic stop 'prolonged beyond' that point is 'unlawful.'").

So too with other rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also United States v. Allen*, 542 F.2d 630, 633 (4th Cir. 1976) ("[T]he Sixth Amendment right to counsel … is so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason."). And it's hard to imagine that the Third Amendment's prohibition on quartering, for example, could be disregarded because soldiers only occupied a home for a single night. *See* U.S. Const. amend. III. The rationale for rejecting duration-exceptions to constitutional violations is obvious: to hold otherwise would mire courts in arbitrary line-drawing debates over "how long is too long." Not only is such a question impossible to answer, every court would be free to arrive at a different answer. Is Connecticut's 120-day protective order an acceptable restriction? Conn. Gen. Stat. § 46b-15(e). What about Kansas's one-year

protective order? Kan. Stat. Ann. § 60-3107(e). Does Texas's two-year protective order fall within the scope of the Second Amendment? *See* Tex. Fam. Code Ann. § 85.001(d). What about in Mississippi, where the duration is not capped by statute but wholly within the discretion of the chancery or county court? Miss. Code Ann. § 93-21-15(2)(b). Or the extreme, concrete example of Mr. Reese's fifty-year protective order? *United States v. Reese*, 627 F.3d 792, 798 (10th Cir. 2010). If this Court endorses such a rule, one can easily imagine the slippery slope that will follow, as courts try to determine whether three months, one year, two years, or a lifetime protective order is reasonably adapted to Congress's policy goal.

C. Applying the correct legal framework when evaluating restrictions on a constitutional right holds immense value that goes beyond mere abstraction.

It would be irresponsible to have confidence in a court's judgment when the court is applying the wrong legal standard to reach its conclusion. The law is a principled discipline, whose principles must be sound. This is not an abstraction; it is foundational. *Heller* is a prime example. When *Heller* was decided, all but one court—the Fifth Circuit—treated the right to bear arms as purely a collective right. *District of Columbia v. Heller*, 554 U.S. 570, 638 n.2 (2008) ("Until the Fifth Circuit's decision in *United States* v. *Emerson,* 270 F.3d 203 (2001), every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes."). Still, *Emerson* did not create a circuit split on a specific conclusion but rather on the

underlying framework. That is exactly what is happening here and is why resolving the split over the framework is important and essential.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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