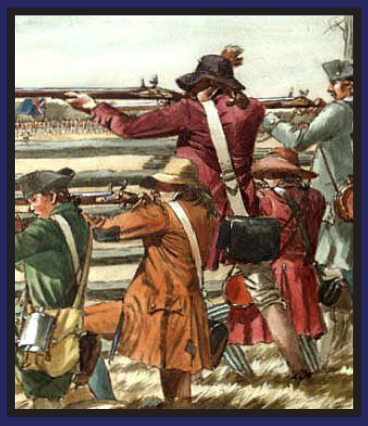
2024 SUPPLEMENT FOR

FIREARMS LAW AND THE SECOND AMENDMENT:

Regulation, Rights, and Policy

3rd Edition



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What an amazing time to study the Second Amendment! The Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* told lower courts to decide Second Amendment cases based on text and historical tradition (THT) instead of the interest-balancing test that most had previously been using. Many issues that had previously been litigated under interest-balancing are being relitigated under THT.

Whatever one's personal views on which test is better, *Bruen* makes the Second Amendment field wide open, with relatively little precedent compared to other constitutional provisions, like the First and Fourth Amendments. In the vast majority of these cases, a court can issue a decision based on prior cases, without looking into what the Fourth Amendment meant in the Founding Era, or at other historical times.

In contrast, for the Second Amendment, the legal history, starting in the colonial period, *is* the controlling precedent. Novel modern laws may be justified by analogy to older laws. Post-*Bruen*, litigants are making pro/con arguments about analogies for particular laws.

Despite many complaints about the *Bruen*'s method, the Supreme Court applied it without much difficulty in *United States v. Rahimi*, holding 8-to-1 that the federal ban on arms possession by those subject to domestic violence restraining was constitutional. Although the dissent disagreed with the outcome, it agreed on applying *Bruen*'s methodology.

We believe that *Firearms Law and the Second Amendment* is the single best source for the legal-history inquiry required by *Bruen*. It provides the legal history of arms control and arms rights from early England up to the present. Several of the online chapters cover other societies around the world, ancient and modern. Although these are not necessarily relevant in an American courtroom, they provide additional perspectives on the fundamental and enduring questions of social regulation of the use of force.

This 2024 Supplement begins with an excerpt from *Bruen*, including a short introduction setting up the case.

After the *Bruen* material, this Supplement then proceeds in the usual manner for supplements. For the sections in the textbook for which there is new material (mainly Chapters 8-10 and 13-16), a parallel section of the Supplement describes important new cases, statutes, regulations, or scholarship. An excerpt of *Rahimi* appears in Chapter 13.A.

As this Supplement shows, the post-*Bruen* world is seeing a great deal of litigation on a wide diversity of issues. Many of these issues would be good topics for class papers or law journal articles. We wish you an enjoyable and successful semester of learning about one of the most dynamic and interesting fields of modern constitutional law.

The Authors

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New York State Rifle & Pistol Association v. Bruen

A. BACKGROUND FOR BRUEN

The Supreme Court's 2008 *District of Columbia v. Heller* (Ch. 11.A) affirmed one's right to "keep" a functional and accessible firearm in the home. What about the right to "bear," or carry?

Before *Bruen*, most states had "shall issue" handgun carry licensing laws. That is, if an applicant met certain statutory criteria (*e.g.*, minimum age, passing a fingerprint background check, safety training), then the applicant "shall" be issued a concealed carry permit.

Several of the shall-issue states allowed for bounded discretion. For example, in Colorado a sheriff may deny a concealed carry permit to an applicant with a clean record if the sheriff has specific evidence that the applicant could be a danger to self or others. Should the applicant appeal the denial, the burden of proof is on the sheriff.

Between *Heller* and *Bruen*, the "bear arms" cases in the shall-issue states mainly involved secondary issues — such as whether State A had to recognize a permit by a traveler from State B, or whether a permit could be denied for a conviction of violating a statute that was later held unconstitutional.

The more fundamental cases, involving the core right to bear arms arose in the "may issue" states. Hawaii issued carry permits only to on-duty security guards. New Jersey and Maryland issued to applicants who proved they were facing a specific deadly threat from a particular individual. California, New York, and Massachusetts had much geographical variation. In some counties (California or New York) or towns (Massachusetts), permits were readily issued to qualified applicants, as in a shall-issue system. In others, permits were denied unless the individual could prove a unique risk of victimization, distinct from that of the general public.

Eventually, *Bruen* would hold the may-issue laws of the six above states unconstitutional. But before that, they all had been upheld by the decisions of the First, Second, Third, Fourth, and Ninth Circuits. The D.C. Circuit held the District of Columbia's may-issue system unconstitutional. The Seventh Circuit did the same for Illinois's then-unique no-carry law, under which public carry for ordinary citizens was banned.

The Circuit split on the right to bear arms had persisted for years, and the Court had never granted any of the many certiorari petitions on the issue. The cases are described in Chapter 14.A (Carrying Handguns for Self-Defense in Public Places) and Chapter 11.C.4 (post-McDonald dissents from cert. denials). Nevertheless, persistent firearms-rights advocates brought new cases, knowing that they would quickly lose in the lower courts, and hoping to be vehicles for a certiorari grant. That strategy came up short in *Rogers v. Grewel*, involving a New Jersey bill that further reduced carry permits. By 7-2, the Supreme Court denied review in 2020, with a dissent from Justices Clarence Thomas and Brett M. Kavanaugh. Ch. 11.C.4.c. In 2021, the Court granted certiorari in the case now known as *New York State Rifle & Pistol Association v. Bruen*.

As you read *Bruen*, you will of course evaluate the strengths and weaknesses of the majority opinion and the dissent. Also look for what kinds of controls on arms-bearing *Bruen* authorizes or forbids. Perhaps most importantly, identify general rules that *Bruen* lays down for Second Amendment cases. Within the excerpt, cross-references (e.g., the majority's citation to a page of the dissent), are to the slip opinion.

B. THE BRUEN *DECISION*

N.Y. State Rifle & Pistol Ass'n v. Bruen

597 U.S. 1 (2022)

Thomas, J., delivered the opinion of the Court, in which Roberts, C.J., and Alito, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Alito, J., filed a concurring opinion. Kavanaugh, J., filed a concurring opinion, in which Roberts, C.J., joined. Barrett, J., filed a concurring opinion. Breyer, J., filed a dissenting opinion, in which Sotomayor and Kagan, JJ., joined.

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.

The parties nevertheless dispute whether New York's licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria.

But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.

I

A

New York State has regulated the public carry of handguns at least since the early 20th century. . .

. . . It is a crime in New York to possess "any firearm" without a license, whether inside or outside the home, punishable by up to four years in prison or a $5,000 fine for a felony offense, and one year in prison or a $1,000 fine for a misdemeanor. Meanwhile, possessing a loaded firearm outside one's home or place of business without a license is a felony punishable by up to 15 years in prison.

A license applicant who wants to possess a firearm *at home* (or in his place of business) must convince a "licensing officer" — usually a judge or law enforcement officer — that, among other things, he is of good moral character, has no history of crime or mental illness, and that "no good cause exists for the denial of the license." If he wants to carry a firearm *outside* his home or place of business for self-defense, the applicant must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." To secure that license, the applicant must prove that "proper cause exists" to issue it. If an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment.

No New York statute defines "proper cause." But New York courts have held that an applicant shows proper cause only if he can "demonstrate a special need for self-protection distinguishable from that of the general community." This "special need" standard is demanding. For example, living or working in an area "'noted for criminal activity'" does not suffice. Rather, New York courts generally require evidence "of particular threats, attacks or other extraordinary danger to personal safety."

When a licensing officer denies an application, judicial review is limited. New York courts defer to an officer's application of the proper-cause standard unless it is "arbitrary and capricious." In other words, the decision "must be upheld if the record shows a rational basis for it." The rule leaves applicants little recourse if their local licensing officer denies a permit. . .

II

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-

defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. . .

Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961).

A

Since *Heller* and *McDonald*, the two-step test that Courts of Appeals have developed to assess Second Amendment claims proceeds as follows. At the first step, the government may justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." *E.g.*, *Kanter* v. *Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (internal quotation marks omitted). *But see United States* v. *Boyd*, 999 F.3d 171, 185 (3d Cir. 2021) (requiring claimant to show "'a burden on conduct falling within the scope of the Second Amendment's guarantee'"). The Courts of Appeals then ascertain the original scope of the right based on its historical meaning. *E.g.*, *United States* v. *Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017). If the government can prove that the regulated conduct falls beyond the Amendment's original scope, "then the analysis can stop there; the regulated activity is categorically unprotected." *United States* v. *Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (internal quotation marks omitted). But if the historical evidence at this step is "inconclusive or suggests that the regulated activity is *not* categorically unprotected," the courts generally proceed to step two. *Kanter*, 919 F.3d at 441 (internal quotation marks omitted).

At the second step, courts often analyze "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Ibid.* (internal quotation marks omitted). The Courts of Appeals generally maintain "that the core Second Amendment right is limited to self-defense *in the home*." *Gould*, 907 F.3d at 671 (emphasis added). *But see Wrenn*, 864 F.3d at 659 ("[T]he Amendment's core generally covers carrying in public for self defense"). If a "core" Second Amendment right is burdened, courts apply "strict scrutiny" and ask whether the Government can prove that the law is "narrowly tailored to achieve a compelling governmental interest." *Kolbe* v. *Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (internal quotation marks omitted).

Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is "substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. [4] Both respondents and the United States largely agree with this consensus, arguing that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right.

B

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

1

To show why *Heller* does not support applying means-end scrutiny, we first summarize *Heller*'s methodological approach to the Second Amendment.

In *Heller*, we began with a "textual analysis" focused on the "'normal and ordinary'" meaning of the Second Amendment's language. 554 U. S. at 576-77, 578. That analysis suggested that the Amendment's operative clause — "the right of the people to keep and bear Arms shall not be infringed" — "guarantee[s] the individual right to possess and carry weapons in case of confrontation" that does not depend on service in the militia. *Id.* at 592.

From there, we assessed whether our initial conclusion was "confirmed by the historical background of the Second Amendment." *Ibid.* We looked to history because "it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right." *Ibid.* The Amendment "was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors." *Id.* at 599 (alterations and internal quotation marks omitted). After surveying English history dating from the late 1600s, along with American colonial views leading up to the founding, we found "no

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[4] See *Association of N. J. Rifle & Pistol Clubs, Inc. v. Attorney General N. J.*, 910 F.3d 106, 117 (3d Cir. 2018); *accord Worman v. Healey*, 922 F.3d 26, 33, 36-39 (1st Cir. 2019); *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 127-128 (2d Cir. 2020); *Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021); *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194-195 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019); *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260, n.34 (11th Cir. 2012); *United States v. Class*, 930 F.3d 460, 463, 442 U.S. App. D.C. 257 (D.C. Cir. 2019).

doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595.

We then canvassed the historical record and found yet further confirmation. That history included the "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment," *id.* at 600-601, and "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.* at 605. When the principal dissent charged that the latter category of sources was illegitimate "postenactment legislative history," *id.* at 662, n.28, (opinion of Stevens, J.), we clarified that "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification" was "a critical tool of constitutional interpretation," *id.* at 605, (majority opinion).

In assessing the postratification history, we looked to four different types of sources. First, we reviewed "[t]hree important founding-era legal scholars [who] interpreted the Second Amendment in published writings." *Ibid.* Second, we looked to "19th-century cases that interpreted the Second Amendment" and found that they "universally support an individual right" to keep and bear arms. *Id.* at 610. Third, we examined the "discussion of the Second Amendment in Congress and in public discourse" after the Civil War, "as people debated whether and how to secure constitutional rights for newly freed slaves." *Id.* at 614. Fourth, we considered how post-Civil War commentators understood the right.

After holding that the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of that right. We noted that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Ibid.* For example, we found it "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" that the Second Amendment protects the possession and use of weapons that are "'in common use at the time.'" *Id.* at 627, (first citing 4 W. Blackstone, Commentaries on the Laws of England 148-49 (1769); then quoting *United States* v. *Miller*, 307 U.S. 174, 179, (1939)). That said, we cautioned that we were not "undertak[ing] an exhaustive historical analysis today of the full scope of the Second Amendment" and moved on to considering the constitutionality of the District of Columbia's handgun ban. 554 U.S. at 627.

We assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition. Although we noted that the ban "would fail constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," *id.* at 628-29, we did not

engage in means-end scrutiny when resolving the constitutional question. Instead, we focused on the historically unprecedented nature of the District's ban, observing that "[f]ew laws in the history of our Nation have come close to [that] severe restriction." *Id.* at 629. Likewise, when one of the dissents attempted to justify the District's prohibition with "founding-era historical precedent," including "various restrictive laws in the colonial period," we addressed each purported analogue and concluded that they were either irrelevant or "d[id] not remotely burden the right of self-defense as much as an absolute ban on handguns." *Id.* at 631-632; *see id.* at 631-634. Thus, our earlier historical analysis sufficed to show that the Second Amendment did not countenance a "complete prohibition" on the use of "the most popular weapon chosen by Americans for self-defense in the home." *Id.* at 629.

2

As the foregoing shows, *Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.

Moreover, *Heller* and *McDonald* expressly rejected the application of any "judge-empowering 'interest-balancing inquiry' that 'asks 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.'" *Heller*, 554 U.S. at 634, (quoting *id.* at 689-90, (BREYER, J., dissenting)); *see also McDonald*, 561 U.S. at 790-91, (plurality opinion) (the Second Amendment does not permit — let alone require — "judges to assess the costs and benefits of firearms restrictions" under means-end scrutiny). We declined to engage in means-end scrutiny because "[t]he very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. We then concluded: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Ibid.*

Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt. Dissenting in *Heller*, JUSTICE BREYER's proposed standard — "ask[ing] whether [a] 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," *id.* at 689-690, (dissenting opinion) — simply expressed a classic formulation of intermediate scrutiny in a slightly different way, see *Clark* v. *Jeter*, 486 U.S. 456, 461(1988) (asking whether the challenged law is "substantially related to

an important government objective"). In fact, JUSTICE BREYER all but admitted that his *Heller* dissent advocated for intermediate scrutiny by repeatedly invoking a quintessential intermediate scrutiny precedent. *See Heller*, 554 U.S. at 690, 696, 704-05, (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, (1997)). Thus, when *Heller* expressly rejected that dissent's "interest-balancing inquiry," 554 U.S. at 634 (internal quotation marks omitted), it necessarily rejected intermediate scrutiny.

In sum, the Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny. We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg*, 366 U.S. at 50 n.10.

C

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms. 554 U.S. at 582, 595, 606, 618, 634-35. In that context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. *See Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600, 620, n.9 (2003). And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment's protections. See, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 468-471 (2010) (placing the burden on the government to show that a type of speech belongs to a "historic and traditional categor[y]" of constitutionally unprotected speech "long familiar to the bar" (internal quotation marks omitted)).

And beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims. If a litigant asserts the right in court to "be confronted with the witnesses against him," U.S. Const., Amdt. 6, we require courts to consult history to determine the scope of that right. See, *e.g.*, *Giles* v. *California*, 554 U.S. 353, 358 (2008) ("admitting only those exceptions [to the Confrontation Clause] established at the time of the founding" (internal quotation marks omitted)). Similarly, when a litigant claims a violation of his rights under the Establishment Clause, Members of

this Court "loo[k] to history for guidance." *American Legion* v. *American Humanist Assn.*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion). We adopt a similar approach here.

To be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." *McDonald*, 561 U.S. at 803-804, (Scalia, J., concurring). But reliance on history to inform the meaning of constitutional text — especially text meant to codify a *pre-existing* right — is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field. *Id.* at 790-791 (plurality opinion).[6]

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*, 554 U.S. at 635. It is this balance — struck by the traditions of the American people — that demands our unqualified deference.

D

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the

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[6] The dissent claims that *Heller*'s text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to "resolv[e] difficult historical questions" or engage in "searching historical surveys." *Post*, at 26, 30. We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve uncertainties. W. Baude & S. Sachs, Originalism and the Law of the Past, 37 L. & Hist. Rev. 809, 810-811 (2019). For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Courts are thus entitled to decide a case based on the historical record compiled by the parties.

Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Heller itself exemplifies this kind of straightforward historical inquiry. One of the District's regulations challenged in *Heller* "totally ban[ned] handgun possession in the home." *Id.* at 628. The District in *Heller* addressed a perceived societal problem — firearm violence in densely populated communities — and it employed a regulation — a flat ban on the possession of handguns in the home — that the Founders themselves could have adopted to confront that problem. Accordingly, after considering "founding-era historical precedent," including "various restrictive laws in the colonial period," and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional. *Id.* at 631; *see also id.* at 634 (describing the claim that "there were somewhat similar restrictions in the founding period" a "false proposition").

New York's proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: "handgun violence," primarily in "urban area[s]." *Ibid.* Following the course charted by *Heller*, we will consider whether "historical precedent" from before, during, and even after the founding evinces a comparable tradition of regulation. *Id.* at 631. And, as we explain below, we find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question.

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution — and a Second Amendment — "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland*, 17 U.S. 316 (1819) (emphasis deleted). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated. See, *e.g.*, *United States* v. *Jones*, 565 U.S. 400, 404-05 (2012) (holding that installation of a tracking device was "a physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted").

We have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply "only [to] those arms in existence in the 18th

century." 554 U.S. at 582. "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Ibid.* (citations omitted). Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. *Cf. Caetano* v. *Massachusetts*, 577 U.S. 411, 411-12 (2016) (*per curiam*) (stun guns).

Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy — a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." C. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993). . . .

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense. As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599); *see also id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right"). Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "'*central*'" considerations when engaging in an analogical inquiry. *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599.)[7]

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our

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[7] This does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the "product of an interest balancing *by the people*," not the evolving product of federal judges. *Heller*, 554 U.S. at 635 (emphasis altered). Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances, and contrary to the dissent's assertion, there is nothing "[i]roni[c]" about that undertaking. *Post*, at 30. It is not an invitation to revise that balance through means-end scrutiny.

ancestors would never have accepted." *Drummond* v. *Robinson*, 9 F.4th 217, 226 (3d Cir. 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. . . .

Consider, for example, *Heller*'s discussion of "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited — *e.g.*, legislative assemblies, polling places, and courthouses — we are also aware of no disputes regarding the lawfulness of such prohibitions. *See* D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229-36, 244-47 (2018); *see also* Brief for Independent Institute as *Amicus Curiae* 11-17. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Although we have no occasion to comprehensively define "sensitive places" in this case, we do think respondents err in their attempt to characterize New York's proper-cause requirement as a "sensitive-place" law. In their view, "sensitive places" where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." Brief for Respondents 34. It is true that people sometimes congregate in "sensitive places," and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. *See* Part III-B, *infra*. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

Like *Heller*, we "do not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." 554 U.S. at 626. And we acknowledge that "applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins." *Heller* v. *District of Columbia*, 670 F.3d 1244, 1275 (CADC 2011) (Kavanaugh, J., dissenting). "But that is hardly unique to the Second Amendment. It is an essential component

of judicial decisionmaking under our enduring Constitution." *Ibid.* We see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims.

III. . .

A

It is undisputed that petitioners Koch and Nash — two ordinary, law-abiding, adult citizens — are part of "the people" whom the Second Amendment protects. *See Heller*, 554 U.S. at 580. Nor does any party dispute that handguns are weapons "in common use" today for self-defense. *See id.* at 627; *see also Caetano*, 577 U.S. at 411-412. We therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct — carrying handguns publicly for self-defense.

We have little difficulty concluding that it does. Respondents do not dispute this. Nor could they. Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms. As we explained in *Heller*, the "textual elements" of the Second Amendment's operative clause — "the right of the people to keep and bear Arms, shall not be infringed" — "guarantee the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. *Heller* further confirmed that the right to "bear arms" refers to the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting *Muscarello* v. *United States*, 524 U.S. 125 (1998) (Ginsburg, J., dissenting); internal quotation marks omitted).

This definition of "bear" naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often "keep" firearms in their home, at the ready for self-defense, most do not "bear" (*i.e.*, carry) them in the home beyond moments of actual confrontation. To confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections.

Moreover, confining the right to "bear" arms to the home would make little sense given that self-defense is "the *central component* of the [Second Amendment] right itself." *Heller*, 554 U.S. at 599; *see also McDonald*, 561 U.S. at 767. After all, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, and confrontation can surely take place outside the home.

Although we remarked in *Heller* that the need for armed self-defense is perhaps "most acute" in the home, *id.* at 628, we did not suggest that the need was insignificant elsewhere. Many Americans hazard greater danger outside the home than in it. *See Moore* v. *Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) ("[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a

rough neighborhood than in his apartment on the 35th floor of the Park Tower"). The text of the Second Amendment reflects that reality.

The Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to "bear" arms in public for self-defense.

B

Conceding that the Second Amendment guarantees a general right to public carry, respondents instead claim that the Amendment "permits a State to condition handgun carrying in areas 'frequented by the general public' on a showing of a non-speculative need for armed self-defense in those areas," Brief for Respondents 19 (citation omitted). To support that claim, the burden falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct.

Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.

We categorize these historical sources because, when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Heller*, 554 U.S. at 634-35 (emphasis added). The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. It is one thing for courts to "reac[h] back to the 14th century" for English practices that "prevailed up to the 'period immediately before and after the framing of the Constitution.'" *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (ROBERTS, C.J., dissenting). It is quite another to rely on an "ancient" practice that had become "obsolete in England at the time of the adoption of the Constitution" and never "was acted upon or accepted in the colonies." *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935).

As with historical evidence generally, courts must be careful when assessing evidence concerning English common-law rights. The common law, of course, developed over time. *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 533 n.28 (1983); *see also Rogers* v. *Tennessee*, 532 U.S. 451, 461 (2001). And English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution. Even "the words of *Magna Charta*" — foundational as they were to the rights of America's forefathers — "stood for

very different things at the time of the separation of the American Colonies from what they represented originally" in 1215. *Hurtado v. California*, 110 U.S. 516, 529 (1884). Sometimes, in interpreting our own Constitution, "it [is] better not to go too far back into antiquity for the best securities of our liberties," *Funk* v. *United States*, 290 U.S. 371, 382 (1933), unless evidence shows that medieval law survived to become our Founders' law. A long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice.

Similarly, we must also guard against giving postenactment history more weight than it can rightly bear. It is true that in *Heller* we reiterated that evidence of "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" represented a "critical tool of constitutional interpretation." 554 U.S. at 605. We therefore examined "a variety of legal and other sources to determine *the public understanding* of [the Second Amendment] after its . . . ratification." *Ibid.* And, in other contexts, we have explained that "'a regular course of practice' can 'liquidate & settle the meaning of ' disputed or indeterminate 'terms & phrases'" in the Constitution. *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting Letter from J. Madison to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)). . . . In other words, we recognize that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *NLRB* v. *Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment); *see also Myers* v. *United States*, 272 U.S. 52, 174 (1926); *Printz* v. *United States*, 521 U.S. 898, 905 (1997).

But to the extent later history contradicts what the text says, the text controls. "'[L]iquidating' indeterminacies in written laws is far removed from expanding or altering them." *Gamble* v. *United States*, 139 S. Ct. 1960, 1987 (2019) (THOMAS, J., concurring); *see also* Letter from J. Madison to N. Trist (Dec. 1831), in 9 Writings of James Madison 477 (G. Hunt ed. 1910). Thus, "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Heller*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting); *see also Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246, 2258-59 (2020).

As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." 554 U.S. at 614; *cf. Sprint Communications Co.*, 554 U.S. at 312 (ROBERTS, C.J., dissenting) ("The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]"). And we made clear in *Gamble* that *Heller*'s interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence "only after surveying what it regarded as a

wealth of authority for its reading — including the text of the Second Amendment and state constitutions." *Gamble*, 139 S. Ct. 1960, 1976 (majority opinion). In other words, this 19th-century evidence was "treated as mere confirmation of what the Court thought had already been established." *Ibid.*

A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. *See*, *e.g.*, *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. 243 (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. See, *e.g.*, *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020) (slip op., at 7); *Timbs* v. *Indiana*, 139 S. Ct. 682, 686-87 (2019); *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. *See*, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 42-50 (2004) (Sixth Amendment); *Virginia* v. *Moore*, 553 U.S. 164, 168-69 (2008) (Fourth Amendment); *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 122-25 (2011) (First Amendment).

We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). *See*, *e.g.*, A. Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998); K. Lash, Re-Speaking the Bill of Rights: A New Doctrine of Incorporation (Jan. 15, 2021) (manuscript, at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766917 ("When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings"). We need not address this issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.

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With these principles in mind, we turn to respondents' historical evidence. Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is

there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.[9] We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement. Under *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional.

1

Respondents' substantial reliance on English history and custom before the founding makes some sense given our statement in *Heller* that the Second Amendment "codified a right 'inherited from our English ancestors.'" 554 U.S. at 599 (quoting *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897)); *see also Smith* v. *Alabama*, 124 U.S. 465, 478 (1888). But this Court has long cautioned that the English common law "is not to be taken in all respects to be that of America." *Van Ness* v. *Pacard*, 27 U.S. 137 (1829) (Story, J., for the Court). Thus, "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions *as they were when the instrument was framed and adopted*," not as they existed in the Middle Ages. *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) (emphasis added); *see also United States* v. *Reid*, 53 U.S. 361 (1852).

We interpret the English history that respondents and the United States muster in light of these interpretive principles. We find that history ambiguous at best and see little reason to think that the Framers would have thought it applicable in the New World. It is not sufficiently probative to defend New York's proper-cause requirement.

To begin, respondents and their *amici* point to several medieval English regulations from as early as 1285 that they say indicate a longstanding

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[9] To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes, under which "a general desire for self-defense is sufficient to obtain a [permit]." *Drake v. Filko*, 724 F.3d 426, 442 (3rd Cir. 2013) (Hardiman, J., dissenting). Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." *Ibid.* And they likewise appear to contain only "narrow, objective, and definite standards" guiding licensing officials, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969), rather than requiring the "appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)—features that typify proper-cause standards like New York's. That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.

tradition of restricting the public carry of firearms. *See* 13 Edw. 1, 102. The most prominent is the 1328 Statute of Northampton (or Statute), passed shortly after Edward II was deposed by force of arms and his son, Edward III, took the throne of a kingdom where "tendency to turmoil and rebellion was everywhere apparent throughout the realm." N. Trenholme, The Risings in the English Monastic Towns in 1327, 6 Am. Hist. Rev. 650, 651 (1901). At the time, "[b]ands of malefactors, knights as well as those of lesser degree, harried the country, committing assaults and murders," prompted by a more general "spirit of insubordination" that led to a "decay in English national life." K. Vickers, England in the Later Middle Ages 107 (1926).

The Statute of Northampton was, in part, "a product of . . . the acute disorder that still plagued England." A. Verduyn, The Politics of Law and Order During the Early Years of Edward III, 108 Eng. Hist. Rev. 842, 850 (1993). It provided that, with some exceptions, Englishmen could not "come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." 2 Edw. 3 c.3 (1328).

Respondents argue that the prohibition on "rid[ing]" or "go[ing] . . . armed" was a sweeping restriction on public carry of self-defense weapons that would ultimately be adopted in Colonial America and justify onerous public-carry regulations. Notwithstanding the ink the parties spill over this provision, the Statute of Northampton — at least as it was understood during the Middle Ages — has little bearing on the Second Amendment adopted in 1791. The Statute of Northampton was enacted nearly 20 years before the Black Death, more than 200 years before the birth of Shakespeare, more than 350 years before the Salem Witch Trials, more than 450 years before the ratification of the Constitution, and nearly 550 years before the adoption of the Fourteenth Amendment.

The Statute's prohibition on going or riding "armed" obviously did not contemplate handguns, given they did not appear in Europe until about the mid-1500s. *See* K. Chase, Firearms: A Global History to 1700, p.61 (2003). Rather, it appears to have been centrally concerned with the wearing of armor. See, *e.g.*, Calendar of the Close Rolls, Edward III, 1330-1333, p.131 (Apr. 3, 1330) (H. Maxwell-Lyte ed. 1898); *id.* at 243 (May 28, 1331); *id.* Edward III, 1327-1330, at 314 (Aug. 29, 1328) (1896). If it did apply beyond armor, it applied to such weapons as the "launcegay," a 10- to 12-foot-long lightweight lance. *See* 7 Rich. 2 c.13 (1383); 20 Rich. 2 c.1 (1396).

The Statute's apparent focus on armor and, perhaps, weapons like launcegays makes sense given that armor and lances were generally worn or carried only when one intended to engage in lawful combat or — as most early

violations of the Statute show — to breach the peace. *See*, *e.g.*, Calendar of the Close Rolls, Edward III, 1327-1330, at 402 (July 7, 1328); *id.* Edward III, 1333-1337, at 695 (Aug. 18, 1336) (1898). Contrast these arms with daggers. In the medieval period, "[a]lmost everyone carried a knife or a dagger in his belt." H. Peterson, Daggers and Fighting Knives of the Western World 12 (2001). While these knives were used by knights in warfare, "[c]ivilians wore them for self-protection," among other things. *Ibid.* Respondents point to no evidence suggesting the Statute applied to the smaller medieval weapons that strike us as most analogous to modern handguns.

When handguns were introduced in England during the Tudor and early Stuart eras, they did prompt royal efforts at suppression. For example, Henry VIII issued several proclamations decrying the proliferation of handguns, and Parliament passed several statutes restricting their possession. *See*, *e.g.*, 6 Hen. 8 c.13, §1 (1514); 25 Hen. 8 c.17, §1 (1533); 33 Hen. 8 c.6 (1541); Prohibiting Use of Handguns and Crossbows (Jan. 1537), in 1 Tudor Royal Proclamations 249 (P. Hughes & J. Larkin eds. 1964). But Henry VIII's displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy. Henry VIII worried that handguns threatened Englishmen's proficiency with the longbow — a weapon many believed was crucial to English military victories in the 1300s and 1400s, including the legendary English victories at Crécy and Agincourt. *See* R. Payne-Gallwey, The Crossbow 32, 34 (1903); L. Schwoerer, Gun Culture in Early Modern England 54 (2016) (Schwoerer).

Similarly, James I considered small handguns — called dags — "utterly unserviceable for defence, Militarie practise, or other lawful use." A Proclamation Against Steelets, Pocket Daggers, Pocket Dagges and Pistols (R. Barker printer 1616). But, in any event, James I's proclamation in 1616 "was the last one regarding civilians carrying dags," Schwoerer 63. "After this the question faded without explanation." *Ibid.* So, by the time Englishmen began to arrive in America in the early 1600s, the public carry of handguns was no longer widely proscribed.

When we look to the latter half of the 17th century, respondents' case only weakens. As in *Heller*, we consider this history "[b]etween the [Stuart] Restoration [in 1660] and the Glorious Revolution [in 1688]" to be particularly instructive. 554 U.S. at 592. During that time, the Stuart Kings Charles II and James II ramped up efforts to disarm their political opponents, an experience that "caused Englishmen . . . to be jealous of their arms." *Id.* at 593.

In one notable example, the government charged Sir John Knight, a prominent detractor of James II, with violating the Statute of Northampton because he allegedly "did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B. 1686). Chief Justice Herbert explained that the

Statute of Northampton had "almost gone in *desuetudinem*," *Rex* v. *Sir John Knight*, 1 Comb. 38, 38-39, 90 Eng. Rep. 330 (K. B. 1686), meaning that the Statute had largely become obsolete through disuse.[10] And the Chief Justice further explained that the act of "go[ing] armed *to terrify* the King's subjects" was "a great offence at the *common law*" and that the Statute of Northampton "is but an affirmance of that law." 3 Mod. at 118, 87 Eng. Rep. at 76 (first emphasis added). Thus, one's conduct "will come within the Act," — *i.e.*, would terrify the King's subjects — only "where the crime shall appear to be malo animo," 1 Comb., at 39, 90 Eng. Rep., at 330, with evil intent or malice. Knight was ultimately acquitted by the jury.[11]

Just three years later, Parliament responded by writing the "predecessor to our Second Amendment" into the 1689 English Bill of Rights, *Heller*, 554 U.S.

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[10] Another medieval firearm restriction — a 1541 statute enacted under Henry VIII that limited the ownership and use of handguns (which could not be shorter than a yard) to those subjects with annual property values of at least £100, see 33 Hen. 8 c.6, §§1-2 — fell into a similar obsolescence. As far as we can discern, the last recorded prosecutions under the 1541 statute occurred in 1693, neither of which appears to have been successful. See *King and Queen v. Bullock*, 4 Mod. 147, 87 Eng. Rep. 315 (K. B. 1693); *King v. Litten*, 1 Shower, K. B. 367, 89 Eng. Rep. 644 (K. B. 1693). It seems that other prosecutions under the 1541 statute during the late 1600s were similarly unsuccessful. See *King v. Silcot*, 3 Mod. 280, 280-281, 87 Eng. Rep. 186 (K. B. 1690); *King v. Lewellin*, 1 Shower, K. B. 48, 89 Eng. Rep. 440 (K. B. 1689); cf. *King and Queen v. Alsop*, 4 Mod. 49, 50-51, 87 Eng. Rep. 256, 256-257 (K. B. 1691). By the late 1700s, it was widely recognized that the 1541 statute was "obsolete." 2 R. Burn, The Justice of the Peace, and Parish Officer 243, n. (11th ed. 1769); see also, *e.g.*, The Farmer's Lawyer 143 (1774) ("entirely obsolete"); 1 G. Jacob, Game-Laws II, Law-Dictionary (T. Tomlins ed. 1797); 2 R. Burn, The Justice of the Peace, and Parish Officer 409 (18th ed. 1797) (calling the 1541 statute "a matter more of curiosity than use").

In any event, lest one be tempted to put much evidentiary weight on the 1541 statute, it impeded not only public carry, but further made it unlawful for those without sufficient means to "kepe in his or their houses" any "handgun." 33 Hen. 8 c.6, §1. Of course, this kind of limitation is inconsistent with *Heller*'s historical analysis regarding the Second Amendment's meaning at the founding and thereafter. So, even if a severe restriction on keeping firearms in the home may have seemed appropriate in the mid-1500s, it was not incorporated into the Second Amendment's scope. We see little reason why the parts of the 1541 statute that address public carry should not be understood similarly.

We note also that even this otherwise restrictive 1541 statute, which generally prohibited shooting firearms in any city, exempted discharges "for the defence of [one's] p[er]son or house." §4. Apparently, the paramount need for self-defense trumped the Crown's interest in firearm suppression even during the 16th century.

[11] The dissent discounts *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, because it only "arguably" supports the view that an evil-intent requirement attached to the Statute of Northampton by the late 1600s and early 1700s. But again, because the Second Amendment's bare text covers petitioners' public carry, the respondents here shoulder the burden of demonstrating that New York's proper-cause requirement is consistent with the Second Amendment's text and historical scope. To the extent there are multiple plausible interpretations of *Sir John Knight's Case*, we will favor the one that is more consistent with the Second Amendment's command.

at 593, guaranteeing that "Protestants . . . may have Arms for their Defence suitable to their Conditions, and as allowed by Law," 1 Wm. & Mary c.2, §7, in 3 Eng. Stat. at Large 417 (1689). Although this right was initially limited—it was restricted to Protestants and held only against the Crown, but not Parliament — it represented a watershed in English history. Englishmen had "never before claimed . . . the right of the individual to arms." Schwoerer 156. And as that individual right matured, "by the time of the founding," the right to keep and bear arms was "understood to be an individual right protecting against both public and private violence." *Heller*, 554 U.S. at 594.

To be sure, the Statute of Northampton survived both *Sir John Knight's Case* and the English Bill of Rights, but it was no obstacle to public carry for self-defense in the decades leading to the founding. Serjeant William Hawkins, in his widely read 1716 treatise, confirmed that "no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People." 1 Pleas of the Crown 136. To illustrate that proposition, Hawkins noted as an example that "Persons of Quality" were "in no Danger of Offending against this Statute by wearing common Weapons" because, in those circumstances, it would be clear that they had no "Intention to commit any Act of Violence or Disturbance of the Peace." *Ibid.*; *see also* T. Barlow, The Justice of Peace 12 (1745). Respondents do not offer any evidence showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people. In fact, the opposite seems to have been true. As time went on, "domestic gun culture [in England] softened" any "terror" that firearms might once have conveyed. Schwoerer 4. Thus, whatever place handguns had in English society during the Tudor and Stuart reigns, by the time we reach the 18th century — and near the founding — they had gained a fairly secure footing in English culture.

At the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

2

Respondents next point us to the history of the Colonies and early Republic, but there is little evidence of an early American practice of regulating public carry by the general public. This should come as no surprise — English subjects founded the Colonies at about the time England had itself begun to eliminate restrictions on the ownership and use of handguns.

In the colonial era, respondents point to only three restrictions on public carry. For starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation. In any event, even looking at these laws on their own terms, we are not convinced that they regulated public carry akin to the New York law before us.

Two of the statutes were substantively identical. Colonial Massachusetts and New Hampshire both authorized justices of the peace to arrest "all Affrayers, Rioters, Disturbers, or Breakers of the Peace, and such as shall ride or go armed Offensively . . . by Night or by Day, in Fear or Affray of Their Majesties Liege People." 1692 Mass. Acts and Laws no. 6, pp. 11-12; *see* 1699 N.H. Acts and Laws ch. 1. Respondents and their *amici* contend that being "armed offensively" meant bearing any offensive weapons, including firearms. In particular, respondents' *amici* argue that "'offensive'" arms in the 1600s and 1700s were what Blackstone and others referred to as "'dangerous or unusual weapons,'" Brief for Professors of History and Law as *Amici Curiae* 7 (quoting 4 Blackstone, Commentaries, at 148-149), a category that they say included firearms, *see also post* (BREYER, J., dissenting).

Respondents, their *amici*, and the dissent all misunderstand these statutes. Far from banning the carrying of any class of firearms, they merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself. For instance, the Massachusetts statute proscribed "go[ing] armed Offensively . . . in Fear or Affray" of the people, indicating that these laws were modeled after the Statute of Northampton to the extent that the statute would have been understood to limit public carry *in the late 1600s*. Moreover, it makes very little sense to read these statutes as banning the public carry of all firearms just a few years after Chief Justice Herbert in *Sir John Knight's Case* indicated that the English common law did not do so.

Regardless, even if respondents' reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*. At most, respondents can show that colonial legislatures sometimes prohibited the carrying of "dangerous and unusual weapons" — a fact we already acknowledged in *Heller*. *See* 554 U.S. at 627. Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those "in common use at the time," as opposed to those that "are highly unusual in society at large." *Ibid.* (internal quotation marks omitted). Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. They are, in fact, "the quintessential self-defense weapon." *Id.* at 629. Thus, even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

The third statute invoked by respondents was enacted in East New Jersey in 1686. It prohibited the concealed carry of "pocket pistol[s]" or other "unusual or unlawful weapons," and it further prohibited "planter[s]" from carrying all pistols unless in military service or, if "strangers," when traveling through the

Province. An Act Against Wearing Swords, &c., ch. 9, in Grants, Concessions, and Original Constitutions of the Province of New Jersey 290 (2d ed. 1881) (Grants and Concessions). These restrictions do not meaningfully support respondents. The law restricted only concealed carry, not all public carry, and its restrictions applied only to certain "unusual or unlawful weapons," including "pocket pistol[s]." *Ibid.* It also did not apply to all pistols, let alone all firearms. "Pocket pistols" had barrel lengths of perhaps 3 or 4 inches, far smaller than the 6-inch to 14-inch barrels found on the other belt and hip pistols that were commonly used for lawful purposes in the 1600s. J. George, English Pistols and Revolvers 16 (1938); *see also*, *e.g.*, 14 Car. 2 c. 3, §20 (1662); H. Peterson, Arms and Armor in Colonial America, 1526-1783, p.208 (1956) (Peterson). Moreover, the law prohibited only the *concealed* carry of pocket pistols; it presumably did not by its terms touch the open carry of larger, presumably more common pistols, except as to "planters."[13] In colonial times, a "planter" was simply a farmer or plantation owner who settled new territory. R. Lederer, Colonial American English 175 (1985); New Jersey State Archives, J. Klett, Using the Records of the East and West Jersey Proprietors 31 (rev. ed. 2014), https://www.nj.gov/state/archives/pdf/proprietors.pdf. While the reason behind this singular restriction is not entirely clear, planters may have been targeted because colonial-era East New Jersey was riven with "strife and excitement" between planters and the Colony's proprietors "respecting titles to the soil." *See* W. Whitehead, East Jersey Under the Proprietary Governments 150-51 (rev. 2d ed. 1875); *see also* T. Gordon, The History of New Jersey 49 (1834).

In any event, we cannot put meaningful weight on this solitary statute. First, although the "planter" restriction may have prohibited the public carry of pistols, it did not prohibit planters from carrying long guns for self-defense — including the popular musket and carbine. *See* Peterson 41. Second, it does not appear that the statute survived for very long. By 1694, East New Jersey provided that no slave "be permitted to carry any gun or pistol . . . into the woods, or plantations" unless their owner accompanied them. Grants and Concessions 341. If slave-owning planters were prohibited from carrying pistols, it is hard to comprehend why slaves would have been able to carry them in the planter's presence. Moreover, there is no evidence that the 1686 statute survived the 1702 merger of East and West New Jersey. *See* 1 Nevill, Acts of the General Assembly of the Province of New-Jersey (1752). At most eight

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[13] Even assuming that pocket pistols were, as East Jersey in 1686 deemed them, "unusual or unlawful," it appears that they were commonly used at least by the founding. *See*, *e.g.*, G. Neumann, The History of Weapons of the American Revolution 150-51 (1967); *see also* H. Hendrick, P. Paradis, & R. Hornick, Human Factors Issues in Handgun Safety and Forensics 44 (2008).

years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment.

Respondents next direct our attention to three late-18th-century and early-19th-century statutes, but each parallels the colonial statutes already discussed. One 1786 Virginia statute provided that "no man, great nor small, [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country." Collection of All Such Acts of the General Assembly of Virginia ch. 21, p.33 (1794).[14] A Massachusetts statute from 1795 commanded justices of the peace to arrest "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Acts and Laws ch. 2, p.436, in Laws of the Commonwealth of Massachusetts. And an 1801 Tennessee statute likewise required any person who would "publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person" to post a surety; otherwise, his continued violation of the law would be "punished as for a breach of the peace, or riot at common law." 1801 Tenn. Acts pp. 260-61.

A by-now-familiar thread runs through these three statutes: They prohibit bearing arms in a way that spreads "fear" or "terror" among the people. As we have already explained, Chief Justice Herbert in *Sir John Knight's Case* interpreted this *in Terrorem Populi* element to require something more than merely carrying a firearm in public. Respondents give us no reason to think that the founding generation held a different view. Thus, all told, in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry.

3

Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and "surety" statutes. None of these restrictions imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime.

Common-Law Offenses. As during the colonial and founding periods, the common-law offenses of "affray" or going armed "to the terror of the people" continued to impose some limits on firearm carry in the antebellum period. But

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[14] The Virginia statute all but codified the existing common law in this regard. See G. Webb, The Office and Authority of a Justice of Peace 92 (1736) (explaining how a constable "may take away Arms from such who ride, or go, offensively armed, in Terror of the People").

as with the earlier periods, there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.

For example, the Tennessee attorney general once charged a defendant with the common-law offense of affray, arguing that the man committed the crime when he "'arm[ed] himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people.'" *Simpson* v. *State*, 13 Tenn. 356, 358 (1833). More specifically, the indictment charged that Simpson "with force and arms being arrayed in a warlike manner . . . unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray." *Id.* at 361. The Tennessee Supreme Court quashed the indictment, holding that the Statute of Northampton was never part of Tennessee law. *Id.* at 359. But even assuming that Tennesseans' ancestors brought with them the common law associated with the Statute, the *Simpson* court found that if the Statute had made, as an "independent ground of affray," the mere arming of oneself with firearms, the Tennessee Constitution's Second Amendment analogue had "completely abrogated it." *Id.* at 360. At least in light of that constitutional guarantee, the court did not think that it could attribute to the mere carrying of arms "a necessarily consequent operation as terror to the people." *Ibid.*

Perhaps more telling was the North Carolina Supreme Court's decision in *State* v. *Huntly*, 25 N.C. 418 (1843) (*per curiam*). Unlike the Tennessee Supreme Court in *Simpson*, the *Huntly* court held that the common-law offense codified by the Statute of Northampton was part of the State's law. *See* 25 N.C. at 421-22. However, consistent with the Statute's long-settled interpretation, the North Carolina Supreme Court acknowledged "that the carrying of a gun" for a lawful purpose "*per se* constitutes no offence." *Id.* at 422-23. Only carrying for a "wicked purpose" with a "mischievous result . . . constitute[d a] crime." *Id.* at 423; *see also* J. Haywood, The Duty and Office of Justices of Peace 10 (1800); H. Potter, The Office and Duties of a Justice of the Peace 39 (1816).[15] Other state courts likewise recognized that the common law did not punish the carrying of deadly weapons *per se*, but only the carrying of such weapons "for

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[15] The dissent concedes that *Huntly*, 25 N.C. 418, recognized that citizens were "'at perfect liberty' to carry for 'lawful purpose[s].'" But the dissent disputes that such "lawful purpose[s]" included self-defense, because *Huntly* goes on to speak more specifically of carrying arms for "business or amusement." *Id.* at 422-23. This is an unduly stingy interpretation of *Huntly*. In particular, *Huntly* stated that "the citizen is at perfect liberty to carry his gun" "[f]or *any* lawful purpose," of which "business" and "amusement" were then mentioned. *Ibid.* (emphasis added). *Huntly* then contrasted these "lawful purpose[s]" with the "wicked purpose . . . to terrify and alarm." *Ibid.* Because there is no evidence that *Huntly* considered self-defense a "wicked purpose," we think the best reading of *Huntly* would sanction public carry for self-defense, so long as it was not "in such [a] manner as naturally will terrify and alarm." *Id.* at 423. ["Business or amusement" was a legal term of art that encompassed all lawful activities. *See* Ch. 2.F.5 n.36. —EDS.]

the purpose of an affray, and in such manner as to strike terror to the people." *O'Neill* v. *State*, 16 Ala. 65, 67 (1849). Therefore, those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so.

Statutory Prohibitions. In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. As we recognized in *Heller*, "the majority of the 19th-century courts to consider the question held that [these] prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. Respondents unsurprisingly cite these statutes — and decisions upholding them — as evidence that States were historically free to ban public carry.

In fact, however, the history reveals a consensus that States could *not* ban public carry altogether. Respondents' cited opinions agreed that concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry. That was true in Alabama. *See State* v. *Reid*, 1 Ala. 612, 616, 619-621 (1840). It was also true in Louisiana. *See State* v. *Chandler*, 5 La. 489, 490 (1850). Kentucky, meanwhile, went one step further — the State Supreme Court *invalidated* a concealed-carry prohibition. *See Bliss* v. *Commonwealth*, 12 Ky. 90 (1822).[20]

The Georgia Supreme Court's decision in *Nunn* v. *State*, 1 Ga. 243 (1846), is particularly instructive. Georgia's 1837 statute broadly prohibited "wearing" or "carrying" pistols "as arms of offence or defence," without distinguishing between concealed and open carry. 1837 Ga. Acts 90, §1. To the extent the 1837 Act prohibited "carrying certain weapons *secretly*," the court explained, it was "valid." *Nunn*, 1 Ga., at 251. But to the extent the Act also prohibited "bearing arms *openly*," the court went on, it was "in conflict with the Constitutio[n] and *void*." *Ibid.*; *see also Heller*, 554 U.S. at 612. The Georgia Supreme Court's treatment of the State's general prohibition on the public carriage of handguns indicates that it was considered beyond the constitutional pale in antebellum America to altogether prohibit public carry.

Finally, we agree that Tennessee's prohibition on carrying "publicly or privately" any "belt or pocket pisto[l]," 1821 Tenn. Acts ch. 13, p.15, was, on its face, uniquely severe, *see Heller*, 554 U.S. at 629. That said, when the Tennessee Supreme Court addressed the constitutionality of a substantively

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[20] With respect to Indiana's concealed-carry prohibition, the Indiana Supreme Court's reasons for upholding it are unknown because the court issued a one-sentence *per curiam* order holding the law "not unconstitutional." *Mitchell*, 3 Blackf. at 229. Similarly, the Arkansas Supreme Court upheld Arkansas' prohibition, but without reaching a majority rationale. *See Buzzard*, 4 Ark. 18. The Arkansas Supreme Court would later adopt Tennessee's approach, which tolerated the prohibition of all public carry of handguns except for military-style revolvers. *See*, *e.g.*, *Fife v. State*, 31 Ark. 455 (1876).

identical successor provision, *see* 1870 Tenn. Acts ch. 13, §1, p.28, the court read this language to permit the public carry of larger, military-style pistols because any categorical prohibition on their carry would "violat[e] the constitutional right to keep arms." *Andrews* v. *State*, 50 Tenn. 165, 187 (1871); *see also Heller*, 554 U.S. at 629 (discussing *Andrews*).

All told, these antebellum state-court decisions evince a consensus view that States could not altogether prohibit the public carry of "arms" protected by the Second Amendment or state analogues.[22]

Surety Statutes. In the mid-19th century, many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public. Although respondents seize on these laws to justify the proper-cause restriction, their reliance on them is misplaced. These laws were not *bans* on public carry, and they typically targeted only those threatening to do harm.

As discussed earlier, Massachusetts had prohibited riding or going "armed offensively, to the fear or terror of the good citizens of this Commonwealth" since 1795. In 1836, Massachusetts enacted a new law providing:

> "If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided." Mass. Rev. Stat., ch. 134, §16.

In short, the Commonwealth required any person who was reasonably likely to "breach the peace," and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm. Between 1838 and 1871, nine other jurisdictions adopted variants of the Massachusetts law.

Contrary to respondents' position, these "reasonable-cause laws" in no way represented the "direct precursor" to the proper-cause requirement. While New

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[22] The Territory of New Mexico made it a crime in 1860 to carry "any class of pistols whatever" "concealed or otherwise." 1860 Terr. of N. M. Laws §§1-2, p.94. This extreme restriction is an outlier statute enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights, and its constitutionality was never tested in court. Its value in discerning the original meaning of the Second Amendment is insubstantial. Moreover, like many other stringent carry restrictions that were localized in the Western Territories, New Mexico's prohibition ended when the Territory entered the Union as a State in 1911 and guaranteed in its State Constitution that "[t]he people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. Const., Art. II, §6 (1911).

York presumes that individuals have *no* public carry right without a showing of heightened need, the surety statutes *presumed* that individuals had a right to public carry that could be burdened only if another could make out a specific showing of "reasonable cause to fear an injury, or breach of the peace."[24] As William Rawle explained in an influential treatise, an individual's carrying of arms was "sufficient cause to require him to give surety of the peace" only when "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them." A View of the Constitution of the United States of America 126 (2d ed. 1829). Then, even on such a showing, the surety laws did not *prohibit* public carry in locations frequented by the general community. Rather, an accused arms-bearer "could go on carrying without criminal penalty" so long as he "post[ed] money that would be forfeited if he breached the peace or injured others — a requirement from which he was exempt if *he* needed self-defense." *Wrenn*, 864 F.3d at 661.

Thus, unlike New York's regime, a showing of special need was required only *after* an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee rather than a ban. All told, therefore, "[u]nder surety laws . . . everyone started out with robust carrying rights" and only those reasonably accused were required to show a special need in order to avoid posting a bond. *Ibid.* These antebellum special-need requirements "did not expand carrying for the responsible; it shrank burdens on carrying by the (allegedly) reckless." *Ibid.*

One Court of Appeals has nonetheless remarked that these surety laws were "a severe constraint on anyone thinking of carrying a weapon in public." *Young*, 992 F.3d at 820. That contention has little support in the historical record. Respondents cite no evidence showing the average size of surety postings. And given that surety laws were "intended merely for prevention" and were "not meant as any degree of punishment," 4 Blackstone, Commentaries, at 249, the burden these surety statutes may have had on the right to public carry was likely too insignificant to shed light on New York's proper-cause standard — a violation of which can carry a 4-year prison term or a $5,000 fine. In *Heller*, we noted that founding-era laws punishing unlawful discharge "with a small fine and forfeiture of the weapon . . ., not with significant criminal penalties," likely did not "preven[t] a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him." 554 U.S. at 633-634. Similarly, we have little reason to think that the hypothetical possibility

[24] It is true that two of the antebellum surety laws were unusually broad in that they did not expressly require a citizen complaint to trigger the posting of a surety. See 1847 Va. Acts ch. 14, §16; W. Va. Code, ch. 153, §8 (1868).

of posting a bond would have prevented anyone from carrying a firearm for self-defense in the 19th century.

Besides, respondents offer little evidence that authorities ever enforced surety laws. The only recorded case that we know of involved a justice of the peace *declining* to require a surety, even when the complainant alleged that the arms-bearer "'did threaten to beat, wou[n]d, mai[m], and kill'" him. Brief for Professor Robert Leider et al. as *Amici Curiae* 31 (quoting *Grover* v. *Bullock*, No. 185 (Worcester Cty., Aug. 13, 1853)); *see* E. Ruben & S. Cornell, Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context, 125 Yale L.J. Forum 121, 130, n.53 (2015). And one scholar who canvassed 19th-century newspapers — which routinely reported on local judicial matters — found only a handful of other examples in Massachusetts and the District of Columbia, all involving black defendants who may have been targeted for selective or pretextual enforcement. *See* R. Leider, Constitutional Liquidation, Surety Laws, and the Right To Bear Arms 15-17, in New Histories of Gun Rights and Regulation (J. Blocher, J. Charles, & D. Miller eds.) (forthcoming); *see also* Brief for Professor Robert Leider et al. as *Amici Curiae* 31-32. That is surely too slender a reed on which to hang a historical tradition of restricting the right to public carry.[25]

Respondents also argue that surety statutes were severe restrictions on firearms because the "reasonable cause to fear" standard was essentially *pro forma*, given that "merely carrying firearms in populous areas breached the peace" *per se*. But that is a counterintuitive reading of the language that the surety statutes actually used. If the mere carrying of handguns breached the peace, it would be odd to draft a surety statute requiring a complainant to demonstrate "reasonable cause to fear an injury, or breach of the peace," rather than a reasonable likelihood that the arms-bearer carried a covered weapon. After all, if it was the nature of the weapon rather than the manner of carry that was dispositive, then the "reasonable fear" requirement would be redundant.

Moreover, the overlapping scope of surety statutes and criminal statutes suggests that the former were not viewed as substantial restrictions on public carry. For example, when Massachusetts enacted its surety statute in 1836, it reaffirmed its 1794 criminal prohibition on "go[ing] armed offensively, to the terror of the people." Mass. Rev. Stat., ch. 85, §24. And Massachusetts continued to criminalize the carrying of various "dangerous weapons" well

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[25] The dissent speculates that the absence of recorded cases involving surety laws may simply "show that these laws were normally followed." Perhaps. But again, the burden rests with the government to establish the relevant tradition of regulation, and, given all of the other features of surety laws that make them poor analogues to New York's proper-cause standard, we consider the barren record of enforcement to be simply one additional reason to discount their relevance.

after passing the 1836 surety statute. *See*, *e.g.*, 1850 Mass. Acts ch. 194, §1, p.401; Mass. Gen. Stat., ch. 164, §10 (1860). Similarly, Virginia had criminalized the concealed carry of pistols since 1838, *see* 1838 Va. Acts ch. 101, §1, nearly a decade before it enacted its surety statute, *see* 1847 Va. Acts ch. 14, §16. It is unlikely that these surety statutes constituted a "severe" restraint on public carry, let alone a restriction tantamount to a ban, when they were supplemented by direct criminal prohibitions on specific weapons and methods of carry.

To summarize: The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry — concealed carry — so long as they left open the option to carry openly.

None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

4

Evidence from around the adoption of the Fourteenth Amendment also fails to support respondents' position. For the most part, respondents and the United States ignore the "outpouring of discussion of the [right to keep and bear arms] in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves" after the Civil War. *Heller*, 554 U.S. at 614. Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden. Nevertheless, we think a short review of the public discourse surrounding Reconstruction is useful in demonstrating how public carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens.

A short prologue is in order. Even before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public. Writing for the Court in *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857), Chief Justice Taney offered what he thought was a parade of horribles that would result from recognizing that free blacks were citizens of the United States. If blacks were citizens, Taney fretted, they would be entitled to the privileges and immunities of citizens, including the right "to keep and carry arms *wherever they went*." *Id.* at 417 (emphasis added). Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that

public carry was a component of the right to keep and bear arms — a right free blacks were often denied in antebellum America.

After the Civil War, of course, the exercise of this fundamental right by freed slaves was systematically thwarted. This Court has already recounted some of the Southern abuses violating blacks' right to keep and bear arms. *See McDonald*, 561 U.S. at 771 (noting the "systematic efforts" made to disarm blacks); *id.* at 845-47 (THOMAS, J., concurring in part and concurring in judgment); *see also* S. Exec. Doc. No. 43, 39th Cong., 1st Sess., 8 (1866) ("Pistols, old muskets, and shotguns were taken away from [freed slaves] as such weapons would be wrested from the hands of lunatics").

In the years before the 39th Congress proposed the Fourteenth Amendment, the Freedmen's Bureau regularly kept it abreast of the dangers to blacks and Union men in the postbellum South. The reports described how blacks used publicly carried weapons to defend themselves and their communities. For example, the Bureau reported that a teacher from a Freedmen's school in Maryland had written to say that, because of attacks on the school, "[b]oth the mayor and sheriff have warned the colored people to go armed to school, (which they do)" and that the "[t]he superintendent of schools came down and brought [the teacher] a revolver" for his protection. Cong. Globe, 39th Cong., 1st Sess., 658 (1866); *see also* H.R. Exec. Doc. No. 68, 39th Cong., 2d Sess., 91 (1867) (noting how, during the New Orleans riots, blacks under attack "defended themselves . . . with such pistols as they had").

Witnesses before the Joint Committee on Reconstruction also described the depredations visited on Southern blacks, and the efforts they made to defend themselves. One Virginia music professor related that when "[t]wo Union men were attacked . . . they drew their revolvers and held their assailants at bay." H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p.110 (1866). An assistant commissioner to the Bureau from Alabama similarly reported that men were "robbing and disarming negroes upon the highway," H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 297 (1866), indicating that blacks indeed carried arms publicly for their self-protection, even if not always with success. *See also* H.R. Exec. Doc. No. 329, 40th Cong., 2d Sess., 41 (1868) (describing a Ku Klux Klan outfit that rode "through the country . . . robbing every one they come across of money, pistols, papers, &c."); *id.* at 36 (noting how a black man in Tennessee had been murdered on his way to get book subscriptions, with the murderer taking, among other things, the man's pistol).

Blacks had "procured great numbers of old army muskets and revolvers, particularly in Texas," and "employed them to protect themselves" with "vigor and audacity." S. Exec. Doc. No. 43, 39th Cong., 1st Sess., at 8. Seeing that government was inadequately protecting them, "there [was] the strongest desire on the part of the freedmen to secure arms, revolvers particularly." H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 3, at 102.

On July 6, 1868, Congress extended the 1866 Freedmen's Bureau Act, *see* 15 Stat. 83, and reaffirmed that freedmen were entitled to the "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to keep and bear arms*." §14, 14 Stat. 176 (1866) (emphasis added). That same day, a Bureau official reported that freedmen in Kentucky and Tennessee were still constantly under threat: "No Union man or negro who attempts to take any active part in politics, or the improvement of his race, is safe a single day; and nearly all sleep upon their arms at night, and carry concealed weapons during the day." H.R. Exec. Doc. No. 329, 40th Cong., 2d Sess., at 40.

Of course, even during Reconstruction the right to keep and bear arms had limits. But those limits were consistent with a right of the public to peaceably carry handguns for self-defense. For instance, when General D.E. Sickles issued a decree in 1866 pre-empting South Carolina's Black Codes — which prohibited firearm possession by blacks — he stated: "The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons. . . . And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms." Cong. Globe, 39th Cong., 1st Sess., at 908-909; *see also McDonald*, 561 U.S. at 847-48 (opinion of THOMAS, J.). Around the same time, the editors of The Loyal Georgian, a prominent black-owned newspaper, were asked by "A Colored Citizen" whether "colored persons [have] a right to own and carry fire arms." The editors responded that blacks had "the *same* right to own and carry fire arms that *other* citizens have." The Loyal Georgian, Feb. 3, 1866, p.3, col. 4. And, borrowing language from a Freedmen's Bureau circular, the editors maintained that "[a]ny person, white or black, may be disarmed if convicted of making an improper or dangerous use of weapons," even though "no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others." *Ibid.* (quoting Circular No. 5, Freedmen's Bureau, Dec. 22, 1865); *see also McDonald*, 561 U.S. at 848-49 (opinion of THOMAS, J.).[27]

As for Reconstruction-era state regulations, there was little innovation over the kinds of public-carry restrictions that had been commonplace in the early

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[27] That said, Southern prohibitions on concealed carry were not always applied equally, even when under federal scrutiny. One lieutenant posted in Saint Augustine, Florida, remarked how local enforcement of concealed-carry laws discriminated against blacks: "To sentence a negro to several dollars' fine for carrying a revolver concealed upon his person, is in accordance with an ordinance of the town; but still the question naturally arises in my mind, 'Why is this poor fellow fined for an offence which is committed hourly by every other white man I meet in the streets?'" H.R. Exec. Doc. No. 57, 40th Cong., 2d Sess., 83 (1867); see also H.R. Rep. No. 16, 39th Cong., 2d Sess., 427 (1867).

19th century. For instance, South Carolina in 1870 authorized the arrest of "all who go armed offensively, to the terror of the people," 1870 S.C. Acts p.403, no. 288, §4, parroting earlier statutes that codified the common-law offense. That same year, after it cleaved from Virginia, West Virginia enacted a surety statute nearly identical to the one it inherited from Virginia. *See* W. Va. Code, ch. 153, §8. Also in 1870, Tennessee essentially reenacted its 1821 prohibition on the public carry of handguns but, as explained above, Tennessee courts interpreted that statute to exempt large pistols suitable for military use.

Respondents and the United States, however, direct our attention primarily to two late-19th-century cases in Texas. In 1871, Texas law forbade anyone from "carrying on or about his person . . . any pistol . . . unless he has reasonable grounds for fearing an unlawful attack on his person." 1871 Tex. Gen. Laws §1. The Texas Supreme Court upheld that restriction in *English* v. *State*, 35 Tex. 473 (1871). The Court reasoned that the Second Amendment, and the State's constitutional analogue, protected only those arms "as are useful and proper to an armed militia," including holster pistols, but not other kinds of handguns. *Id.* at 474-75. Beyond that constitutional holding, the *English* court further opined that the law was not "contrary to public policy," *id.* at 479, given that it "ma[de] all necessary exceptions" allowing deadly weapons to "be carried as means of self-defense," and therefore "fully cover[ed] all wants of society," *id.* at 477.

Four years later, in *State* v. *Duke*, 42 Tex. 455 (1875), the Texas Supreme Court modified its analysis. The court reinterpreted Texas' State Constitution to protect not only military-style weapons but rather all arms "as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense." *Id.* at 458. On that understanding, the court recognized that, in addition to "holster pistol[s]," the right to bear arms covered the carry of "such pistols at least as are not adapted to being carried concealed." *Id.* at 458-59. Nonetheless, after expanding the scope of firearms that warranted state constitutional protection, *Duke* held that requiring any pistol-bearer to have "'reasonable grounds fearing an unlawful attack on [one's] person'" was a "legitimate and highly proper" regulation of handgun carriage. *Id.* at 456, 459-60. *Duke* thus concluded that the 1871 statute "appear[ed] to have respected the right to carry a pistol openly when needed for self-defense." *Id.* at 459.

We acknowledge that the Texas cases support New York's proper-cause requirement, which one can analogize to Texas' "reasonable grounds" standard. But the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900. *See* W. Va. Code, ch. 148, §7 (1887). The West Virginia Supreme Court upheld that prohibition, reasoning that *no* handguns of any kind were protected by the Second Amendment, a rationale endorsed by no other court during this period. *See State* v. *Workman*, 14 S. E.

9, 11 (1891). The Texas decisions therefore provide little insight into how postbellum courts viewed the right to carry protected arms in public.

In the end, while we recognize the support that postbellum Texas provides for respondents' view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not "stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense" in public. 554 U.S. at 632.

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Finally, respondents point to the slight uptick in gun regulation during the late-19th century — principally in the Western Territories. As we suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. *See id.* at 614.[28] Here, moreover, respondents' reliance on late-19th-century laws has several serious flaws even beyond their temporal distance from the founding.

The vast majority of the statutes that respondents invoke come from the Western Territories. Two Territories prohibited the carry of pistols in towns, cities, and villages, but seemingly permitted the carry of rifles and other long guns everywhere. *See* 1889 Ariz. Terr. Sess. Laws no. 13, §1, p.16; 1869 N.M. Laws ch. 32, §§1-2, p.72.[29] Two others prohibited the carry of *all* firearms in towns, cities, and villages, including long guns. *See* 1875 Wyo. Terr. Sess. Laws ch. 52, §1; 1889 Idaho Terr. Gen. Laws §1, p.23. And one Territory completely prohibited public carry of pistols *everywhere*, but allowed the carry of "shot-guns or rifles" for certain purposes. See 1890 Okla. Terr. Stats., Art. 47, §§1-2, 5, p.495.

These territorial restrictions fail to justify New York's proper-cause requirement for several reasons. First, the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry. For starters, "[t]he very transitional and temporary character of the American [territorial] system" often "permitted legislative improvisations which might not have been

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[28] We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.

[29] The New Mexico restriction allowed an exception for individuals carrying for "the lawful defence of themselves, their families or their property, and the same being then and there threatened with danger." 1869 Terr. of N. M. Laws ch. 32, §1, p.72. The Arizona law similarly exempted those who have "reasonable ground for fearing an unlawful attack upon his person." 1889 Ariz. Terr. Sess. Laws no. 13, §2, p.17.

tolerated in a permanent setup." E. Pomeroy, The Territories and the United States 1861-1890, p.4 (1947). These territorial "legislative improvisations," which conflict with the Nation's earlier approach to firearm regulation, are most unlikely to reflect "the origins and continuing significance of the Second Amendment" and we do not consider them "instructive." *Heller*, 554 U.S. at 614.

The exceptional nature of these western restrictions is all the more apparent when one considers the miniscule territorial populations who would have lived under them. To put that point into perspective, one need not look further than the 1890 census. Roughly 62 million people lived in the United States at that time. Arizona, Idaho, New Mexico, Oklahoma, and Wyoming combined to account for only 420,000 of those inhabitants — about two-thirds of 1% of the population. *See* Dept. of Interior, Compendium of the Eleventh Census: 1890, Part I.-Population 2 (1892). Put simply, these western restrictions were irrelevant to more than 99% of the American population. We have already explained that we will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city, "that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms" in public for self-defense. *Heller*, 554 U.S. at 632. Similarly, we will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also "contradic[t] the overwhelming weight" of other, more contemporaneous historical evidence. *Heller*, 554 U.S. at 632.

Second, because these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality. When States generally prohibited both open and concealed carry of handguns in the late-19th century, state courts usually upheld the restrictions when they exempted army revolvers, or read the laws to exempt at least that category of weapons. See, *e.g.*, *Haile* v. *State*, 38 Ark. 564, 567 (1882); *Wilson* v. *State*, 33 Ark. 557, 560 (1878); *Fife* v. *State*, 31 Ark. 455, 461 (1876); *State* v. *Wilburn*, 66 Tenn. 57, 60 (1872); *Andrews*, 50 Tenn., at 187.[30] Those state courts that upheld broader prohibitions without qualification generally operated under a fundamental misunderstanding of the right to bear arms, as expressed in *Heller*. For example, the Kansas Supreme Court upheld a complete ban on public carry enacted by the city of Salina in 1901 based on the rationale that

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[30] Many other state courts during this period continued the antebellum tradition of upholding concealed carry regimes that seemingly provided for open carry. *See*, *e.g.*, *State v. Speller*, 86 N.C. 697 (1882); *Chatteaux v. State*, 52 Ala. 388 (1875); *Eslava v. State*, 49 Ala. 355 (1873); *State v. Shelby*, 2 S. W. 468 (1886); *Carroll v. State*, 28 Ark. 99 (1872); *cf. Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897) (remarking in dicta that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons").

the Second Amendment protects only "the right to bear arms as a member of the state militia, or some other military organization provided for by law." *Salina* v. *Blaksley*, 72 Kan. 230, 232 (1905). That was clearly erroneous. *See Heller*, 554 U.S. at 592.

Absent any evidence explaining *why* these unprecedented prohibitions on *all* public carry were understood to comport with the Second Amendment, we fail to see how they inform "the origins and continuing significance of the Amendment." *Id.* at 614; *see also* The Federalist No. 37, at 229 (explaining that the meaning of ambiguous constitutional provisions can be "liquidated and ascertained *by a series of particular discussions and adjudications*" (emphasis added)).

Finally, these territorial restrictions deserve little weight because they were — consistent with the transitory nature of territorial government — short lived. Some were held unconstitutional shortly after passage. *See In re Brickey*, 8 Idaho 597, (1902). Others did not survive a Territory's admission to the Union as a State. See Wyo. Rev. Stat., ch. 3, §5051 (1899) (1890 law enacted upon statehood prohibiting public carry only when combined with "intent, or avowed purpose, of injuring [one's] fellow-man"). Thus, they appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation.

Beyond these Territories, respondents identify one Western State — Kansas — that instructed cities with more than 15,000 inhabitants to pass ordinances prohibiting the public carry of firearms. See 1881 Kan. Sess. Laws §§1, 23, pp. 79, 92.[31] By 1890, the only cities meeting the population threshold were Kansas City, Topeka, and Wichita. Even if each of these three cities enacted prohibitions by 1890, their combined population (93,000) accounted for only 6.5% of Kansas' total population. Although other Kansas cities may also have restricted public carry unilaterally,[32] the lone late-19th-century state law respondents identify does not prove that Kansas meaningfully restricted public carry, let alone demonstrate a broad tradition of States doing so.

At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an

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[31] In 1875, Arkansas prohibited the public carry of all pistols. *See* 1875 Ark. Acts p.156, §1. But this categorical prohibition was also short lived. About six years later, Arkansas exempted "pistols as are used in the army or navy of the United States," so long as they were carried "uncovered, and in [the] hand." 1881 Ark. Acts p.191, no. 96, §§1, 2.

[32] In 1879, Salina, Kansas, prohibited the carry of pistols but broadly exempted "cases when any person carrying [a pistol] is engaged in the pursuit of any lawful business, calling or employment" and the circumstances were "such as to justify a prudent man in carrying such weapon, for the defense of his person, property or family." Salina, Kan., Rev. Ordinance No. 268, §2.

American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. *Heller*, 554 U.S. at 581. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public. *Klenosky*, 428 N.Y.S. 2d at 257.

IV

The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring.

I join the opinion of the Court in full but add the following comments in response to the dissent.

I

Much of the dissent seems designed to obscure the specific question that the Court has decided, and therefore it may be helpful to provide a succinct summary of what we have actually held. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), the Court concluded that the Second Amendment protects the right to keep a handgun in the home for self-defense. *Heller* found that the

Amendment codified a preexisting right and that this right was regarded at the time of the Amendment's adoption as rooted in "'the natural right of resistance and self-preservation.'" *Id.* at 594. "[T]he inherent right of self-defense," *Heller* explained, is "central to the Second Amendment right." *Id.* at 628.

Although *Heller* concerned the possession of a handgun in the home, the key point that we decided was that "the people," not just members of the "militia," have the right to use a firearm to defend themselves. And because many people face a serious risk of lethal violence when they venture outside their homes, the Second Amendment was understood at the time of adoption to apply under those circumstances. The Court's exhaustive historical survey establishes that point very clearly, and today's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose.

That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* v. *Chicago*, 561 U.S. 742 (2010), about restrictions that may be imposed on the possession or carrying of guns.

In light of what we have actually held, it is hard to see what legitimate purpose can possibly be served by most of the dissent's lengthy introductory section. Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years? Does the dissent think that laws like New York's prevent or deter such atrocities? Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home? And how does the dissent account for the fact that one of the mass shootings near the top of its list took place in Buffalo? The New York law at issue in this case obviously did not stop that perpetrator.

What is the relevance of statistics about the use of guns to commit suicide? Does the dissent think that a lot of people who possess guns in their homes will be stopped or deterred from shooting themselves if they cannot lawfully take them outside?

The dissent cites statistics about the use of guns in domestic disputes, but it does not explain why these statistics are relevant to the question presented in this case. How many of the cases involving the use of a gun in a domestic dispute occur outside the home, and how many are prevented by laws like New York's?

The dissent cites statistics on children and adolescents killed by guns, but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home? Our decision, as noted, does not expand the categories of people who may lawfully possess a gun, and federal law generally forbids the possession of a

handgun by a person who is under the age of 18, 18 U.S.C. §§922(x)(2)-(5), and bars the sale of a handgun to anyone under the age of 21, §§922(b)(1), (c)(1).[1]

The dissent cites the large number of guns in private hands — nearly 400 million — but it does not explain what this statistic has to do with the question whether a person who already has the right to keep a gun in the home for self-defense is likely to be deterred from acquiring a gun by the knowledge that the gun cannot be carried outside the home. And while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.

No one apparently knows how many of the 400 million privately held guns are in the hands of criminals, but there can be little doubt that many muggers and rapists are armed and are undeterred by the Sullivan Law. Each year, the New York City Police Department (NYPD) confiscates thousands of guns, and it is fair to assume that the number of guns seized is a fraction of the total number held unlawfully. The police cannot disarm every person who acquires a gun for use in criminal activity; nor can they provide bodyguard protection for the State's nearly 20 million residents or the 8.8 million people who live in New York City. Some of these people live in high-crime neighborhoods. Some must traverse dark and dangerous streets in order to reach their homes after work or other evening activities. Some are members of groups whose members feel especially vulnerable. And some of these people reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury.

Ordinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to

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[1] The dissent makes no effort to explain the relevance of most of the incidents and statistics cited in its introductory section. Instead, it points to studies (summarized later in its opinion) regarding the effects of "shall issue" licensing regimes on rates of homicide and other violent crimes. I note only that the dissent's presentation of such studies is one-sided. *See* RAND Corporation, Effects of Concealed-Carry Laws on Violent Crime (Apr. 22, 2022), https://www.rand.org/research/gun-policy/analysis/concealed-carry/violent-crime-html; *see also* Brief for William English et al. as *Amici Curiae* 3 ("The overwhelming weight of statistical analysis on the effects of [right-to-carry] laws on violent crime concludes that RTC laws do not result in any statistically significant increase in violent crime rates"); Brief for Arizona et al. as *Amici Curiae* 12 ("[P]opulation-level data on licensed carry is extensive, and the weight of the evidence confirms that objective, non-discriminatory licensed-carry laws have two results: (1) statistically significant reductions in some types of violent crime, or (2) no statistically significant effect on overall violent crime"); Brief for Law Enforcement Groups et al. as *Amici Curiae* 12 ("[O]ver the period 1991-2019 the inventory of firearms more than doubled; the number of concealed carry permits increased by at least sevenfold," but "murder rates fell by almost half, from 9.8 per 100,000 people in 1991 to 5.0 per 100,000 in 2019" and "[v]iolent crimes plummeted by over half ").

2.5 million times per year. Brief for Law Enforcement Groups et al. as *Amici Curiae* 5. A Centers for Disease Control and Prevention report commissioned by former President Barack Obama reviewed the literature surrounding firearms use and noted that "[s]tudies that directly assessed the effect of actual defensive uses of guns . . . have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies." Institute of Medicine and National Research Council, Priorities for Research To Reduce the Threat of Firearm-Related Violence 15-16 (2013) (referenced in Brief for Independent Women's Law Center as *Amicus Curiae* 19-20).

Many of the *amicus* briefs filed in this case tell the story of such people. Some recount incidents in which a potential victim escaped death or serious injury only because carrying a gun for self-defense was allowed in the jurisdiction where the incident occurred. Here are two examples. One night in 1987, Austin Fulk, a gay man from Arkansas, "was chatting with another man in a parking lot when four gay bashers charged them with baseball bats and tire irons. Fulk's companion drew his pistol from under the seat of his car, brandished it at the attackers, and fired a single shot over their heads, causing them to flee and saving the would-be victims from serious harm." Brief for DC Project Foundation et al. as *Amici Curiae* 31.

On July 7, 2020, a woman was brutally assaulted in the parking lot of a fast food restaurant in Jefferson City, Tennessee. Her assailant slammed her to the ground and began to drag her around while strangling her. She was saved when a bystander who was lawfully carrying a pistol pointed his gun at the assailant, who then stopped the assault and the assailant was arrested. *Ibid.* (citing C. Wethington, Jefferson City Police: Legally Armed Good Samaritan Stops Assault, ABC News 6, WATE.com (July 9, 2020), https://www.wate.com/news/local-news/jefferson-city-police-legally-armed-good-samaritan-stops-assault/).

In other incidents, a law-abiding person was driven to violate the Sullivan Law because of fear of victimization and as a result was arrested, prosecuted, and incarcerated. See Brief for Black Attorneys of Legal Aid et al. as *Amici Curiae* 22-25.

Some briefs were filed by members of groups whose members feel that they have special reasons to fear attacks. See Brief for Asian Pacific American Gun Owners Association as *Amicus Curiae*; Brief for DC Project Foundation et al. as *Amici Curiae*; Brief for Black Guns Matter et al. as *Amici Curiae*; Brief for Independent Women's Law Center as *Amicus Curiae*; Brief for National African American Gun Association, Inc., as *Amicus Curiae*.

I reiterate: All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional.

II

This brings me to Part II-B of the dissent, which chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit. The record before us, however, tells us everything we need on this score. At argument, New York's solicitor general was asked about an ordinary person who works at night and must walk through dark and crime-infested streets to get home. Tr. of Oral Arg. 66-67. The solicitor general was asked whether such a person would be issued a carry permit if she pleaded: "[T]here have been a lot of muggings in this area, and I am scared to death." *Id.* at 67. The solicitor general's candid answer was "in general," no. *Ibid.* To get a permit, the applicant would have to show more — for example, that she had been singled out for attack. *Id.* at 65; *see also id.* at 58. A law that dictates that answer violates the Second Amendment.

III

My final point concerns the dissent's complaint that the Court relies too heavily on history and should instead approve the sort of "means-end" analysis employed in this case by the Second Circuit. Under that approach, a court, in most cases, assesses a law's burden on the Second Amendment right and the strength of the State's interest in imposing the challenged restriction. This mode of analysis places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun. Two examples illustrate the point.

The first is the Second Circuit's decision in a case the Court decided two Terms ago, *New York State Rifle & Pistol Assn., Inc.* v. *City of New York*, 140 S.Ct. 1525 (2020). The law in that case affected New York City residents who had been issued permits to keep a gun in the home for self-defense. The city recommended that these permit holders practice at a range to ensure that they are able to handle their guns safely, but the law prohibited them from taking their guns to any range other than the seven that were spread around the city's five boroughs. Even if such a person unloaded the gun, locked it in the trunk of a car, and drove to the nearest range, that person would violate the law if the nearest range happened to be outside city limits. The Second Circuit held that the law was constitutional, concluding, among other things, that the restriction was substantially related to the city's interests in public safety and crime prevention. *See New York State Rifle & Pistol Assn., Inc.* v. *New York*, 883 F.3d 45, 62-64 (2018). But after we agreed to review that decision, the city repealed the law and admitted that it did not actually have any beneficial effect on public safety. *See* N.Y. Penal Law Ann. §400.00(6); Suggestion of Mootness in *New York State Rifle & Pistol Assn., Inc.* v. *City of New York*, O.T. 2019, No. 18-280, pp. 5-7.

Exhibit two is the dissent filed in *Heller* by JUSTICE BREYER, the author of today's dissent. At issue in *Heller* was an ordinance that made it impossible for any District of Columbia resident to keep a handgun in the home for self-defense. See 554 U.S. at 574-75. Even the respondent, who carried a gun on the job while protecting federal facilities, did not qualify. *Id.* at 575-76. The District of Columbia law was an extreme outlier; only a few other jurisdictions in the entire country had similar laws. Nevertheless, JUSTICE BREYER's dissent, while accepting for the sake of argument that the Second Amendment protects the right to keep a handgun in the home, concluded, based on essentially the same test that today's dissent defends, that the District's complete ban was constitutional. See *id.* at 689, 722, (under "an interest-balancing inquiry. . ." the dissent would "conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it").

Like that dissent in *Heller*, the real thrust of today's dissent is that guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit.[3] That argument was rejected in *Heller*, and while the dissent protests that it is not rearguing *Heller*, it proceeds to do just that.

Heller correctly recognized that the Second Amendment codifies the right of ordinary law-abiding Americans to protect themselves from lethal violence by possessing and, if necessary, using a gun. In 1791, when the Second Amendment was adopted, there were no police departments, and many families lived alone on isolated farms or on the frontiers. If these people were attacked, they were on their own. It is hard to imagine the furor that would have erupted if the Federal Government and the States had tried to take away the guns that these people needed for protection.

Today, unfortunately, many Americans have good reason to fear that they will be victimized if they are unable to protect themselves. And today, no less than in 1791, the Second Amendment guarantees their right to do so.

JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, concurring.

The Court employs and elaborates on the text, history, and tradition test that *Heller* and *McDonald* require for evaluating whether a government regulation infringes on the Second Amendment right to possess and carry guns

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[3] If we put together the dissent in this case and Justice Breyer's *Heller* dissent, States and local governments would essentially be free to ban the possession of all handguns, and it is unclear whether its approach would impose any significant restrictions on laws regulating long guns. The dissent would extend a very large measure of deference to legislation implicating Second Amendment rights, but it does not claim that such deference is appropriate when any other constitutional right is at issue.

for self-defense. See *District of Columbia* v. *Heller*, 554 U.S. 570, (2008); *McDonald* v. *Chicago*, 561 U.S. 742, (2010). Applying that test, the Court correctly holds that New York's outlier "may-issue" licensing regime for carrying handguns for self-defense violates the Second Amendment.

I join the Court's opinion, and I write separately to underscore two important points about the limits of the Court's decision.

First, the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court's decision does not affect the existing licensing regimes — known as "shall-issue" regimes — that are employed in 43 States.

The Court's decision addresses only the unusual discretionary licensing regimes, known as "may-issue" regimes, that are employed by 6 States including New York. As the Court explains, New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. Those features of New York's regime — the unchanneled discretion for licensing officials and the special-need requirement — in effect deny the right to carry handguns for self-defense to many "ordinary, law-abiding citizens." *see also Heller*, 554 U.S. at 635. The Court has held that "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767, (quoting *Heller*, 554 U.S. at 599). New York's law is inconsistent with the Second Amendment right to possess and carry handguns for self-defense.

By contrast, 43 States employ objective shall-issue licensing regimes. Those shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. Brief for Arizona et al. as *Amici Curiae* 7. Unlike New York's may-issue regime, those shall-issue regimes do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense. As petitioners acknowledge, shall-issue licensing regimes are constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice. Tr. of Oral Arg. 50-51.

Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.

Second, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment "is neither a regulatory straightjacket nor a regulatory blank check." Properly interpreted, the Second Amendment allows

a "variety" of gun regulations. *Heller*, 554 U.S. at 636. As Justice Scalia wrote in his opinion for the Court in *Heller*, and JUSTICE ALITO reiterated in relevant part in the principal opinion in *McDonald*:

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]
>
> "We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Heller*, 554 U.S. at 626-627 & n.26 (citations and quotation marks omitted); *see also McDonald*, 561 U.S. at 786 (plurality opinion).

With those additional comments, I join the opinion of the Court.

JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to highlight two methodological points that the Court does not resolve. First, the Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution. Scholars have proposed competing and potentially conflicting frameworks for this analysis, including liquidation, tradition, and precedent. The limits on the permissible use of history may vary between these frameworks (and between different articulations of each one). To name just a few unsettled questions: How long after ratification may subsequent practice illuminate original public meaning? *Cf. McCulloch* v. *Maryland*, 17 U.S. 316 (1819) (citing practice "introduced at a very early period of our history"). What form must practice take to carry weight in constitutional analysis? *See Myers* v. *United States*, 272 U.S. 52 (1926) (citing a "legislative exposition of the Constitution . . . acquiesced in for a long term of years"). And may practice settle the meaning of individual rights as well as structural provisions? *See* Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 49-51 (2019) (canvassing arguments). The

historical inquiry presented in this case does not require us to answer such questions, which might make a difference in another case.

Second and relatedly, the Court avoids another "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Bill of Rights was ratified in 1791. Here, the lack of support for New York's law in either period makes it unnecessary to choose between them. But if 1791 is the benchmark, then New York's appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little). *Cf. Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246, 2258-89 (2020) (a practice that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition" informing our understanding of the First Amendment). So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving postenactment history more weight than it can rightly bear."

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), https://www.cdc.gov/violenceprevention/firearms/fastfact.html. Since the start of this year (2022), there have been 277 reported mass shootings — an average of more than one per day. See Gun Violence Archive (last visited June 20, 2022), https://www.gunviolencearchive.org. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. J. Goldstick, R. Cunningham, & P. Carter, Current Causes of Death in Children and Adolescents in the United States, 386 New England J. Med. 1955 (May 19, 2022) (Goldstick).

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States' efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes.

First, the Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. As a result, it may well rest its decision on a mistaken understanding of how New York's law operates in practice. Second, the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that

justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents. Third, the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York's law, the Court fails to correctly identify and analyze the relevant historical facts. Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York's law is not "consistent with the Nation's historical tradition of firearm regulation."

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. The Second Circuit has done so and has held that New York's law does not violate the Second Amendment. *See Kachalsky* v. *County of Westchester*, 701 F.3d 81, 97-99, 101 (2012). I would affirm that holding.

I

The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. A. Karp, Estimating Global Civilian-Held Firearms Numbers, Small Arms Survey 4 (June 2018), https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-Firearms-Numbers.pdf. . . .

Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. *Cf.* Brief for Educational Fund To Stop Gun Violence et al. as *Amici Curiae* 17-18 (Brief for Educational Fund) (citing studies showing that, within the United States, "states that rank among the highest in gun ownership also rank among the highest in gun deaths" while "states with lower rates of gun ownership have lower rates of gun deaths"). In 2015, approximately 36,000 people were killed by firearms nationwide. M. Siegel et al., Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States, 107 Am. J. Pub. Health 1923 (2017). Of those deaths, 22,018 (or about 61%) were suicides, 13,463 (37%) were homicides, and 489 (1%) were unintentional injuries. *Ibid.* On top of that, firearms caused an average of 85,694 emergency room visits for nonfatal injuries each year between 2009 and 2017. E. Kaufman et al., Epidemiological Trends in Fatal and Nonfatal Firearm Injuries in the US, 2009-2017, 181 JAMA Internal Medicine 237 (2021) (Kaufman).

Worse yet, gun violence appears to be on the rise. By 2020, the number of firearm-related deaths had risen to 45,222, CDC, Fast Facts, or by about 25%

since 2015. That means that, in 2020, an average of about 124 people died from gun violence every day. *Ibid.* . . . And the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular. *See* CDC, Age-Adjusted Rates of Firearm-Related Homicide, by Race, Hispanic Origin, and Sex — National Vital Statistics System, United States, 2019, at 1491 (Oct. 22, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7042a6-H.pdf (documenting 34.9 firearm-related homicides per 100,000 population for non-Hispanic Black men in 2019, compared to 7.7 such homicides per 100,000 population for men of all races). . .

The dangers posed by firearms can take many forms. Newspapers report mass shootings occurring at an entertainment district in Philadelphia, Pennsylvania (3 dead and 11 injured); an elementary school in Uvalde, Texas (21 dead); a supermarket in Buffalo, New York (10 dead and 3 injured); a series of spas in Atlanta, Georgia (8 dead); a busy street in an entertainment district of Dayton, Ohio (9 dead and 17 injured); a nightclub in Orlando, Florida (50 dead and 53 injured); a church in Charleston, South Carolina (9 dead); a movie theater in Aurora, Colorado (12 dead and 50 injured); an elementary school in Newtown, Connecticut (26 dead); and many, many more. . . . Since the start of this year alone (2022), there have already been 277 reported mass shootings — an average of more than one per day. Gun Violence Archive; *see also* Gun Violence Archive, General Methodology, https://www.gunviolencearchive.org/methodology (defining mass shootings to include incidents in which at least four victims are shot, not including the shooter).

And mass shootings are just one part of the problem. Easy access to firearms can also make many other aspects of American life more dangerous. Consider, for example, the effect of guns on road rage. In 2021, an average of 44 people each month were shot and either killed or wounded in road rage incidents, double the annual average between 2016 and 2019. S. Burd-Sharps & K. Bistline, Everytown for Gun Safety, Reports of Road Rage Shootings Are on the Rise (Apr. 4, 2022), https://www.everytownresearch.org/reports-of-road-rage-shootings-are-on-the-rise/. Some of those deaths might have been avoided if there had not been a loaded gun in the car. See *ibid.*; Brief for American Bar Association as *Amicus Curiae* 17-18; Brief for Educational Fund 20-23 (citing studies showing that the presence of a firearm is likely to increase aggression in both the person carrying the gun and others who see it).

The same could be said of protests: A study of 30,000 protests between January 2020 and June 2021 found that armed protests were nearly six times more likely to become violent or destructive than unarmed protests. Everytown for Gun Safety, Armed Assembly: Guns, Demonstrations, and Political Violence in America (Aug. 23, 2021), https://www.everytownresearch.org/report/armed-assembly-guns-demonstrations-and-political-violence-in-america/ (finding that 16% of armed protests turned violent, compared to less than 3% of unarmed protests). Or domestic disputes: Another study found that a woman

is five times more likely to be killed by an abusive partner if that partner has access to a gun. Brief for Educational Fund 8 (citing A. Zeoli, R. Malinski, & B. Turchan, Risks and Targeted Interventions: Firearms in Intimate Partner Violence, 38 Epidemiologic Revs. 125 (2016); J. Campbell et al., Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1092 (2003)). Or suicides: A study found that men who own handguns are three times as likely to commit suicide than men who do not and women who own handguns are seven times as likely to commit suicide than women who do not. D. Studdert et al., Handgun Ownership and Suicide in California, 382 New England J. Med. 2220, 2224 (June 4, 2020).

Consider, too, interactions with police officers. The presence of a gun in the hands of a civilian poses a risk to both officers and civilians. *Amici* prosecutors and police chiefs tell us that most officers who are killed in the line of duty are killed by firearms; they explain that officers in States with high rates of gun ownership are three times as likely to be killed in the line of duty as officers in States with low rates of gun ownership. Brief for Prosecutors Against Gun Violence as *Amicus Curiae* 23-24; Brief for Former Major City Police Chiefs as *Amici Curiae* 13-14, and n.21, (citing D. Swedler, M. Simmons, F. Dominici, & D. Hemenway, Firearm Prevalence and Homicides of Law Enforcement Officers in the United States, 105 Am. J. Pub. Health 2042, 2045 (2015)). They also say that States with the highest rates of gun ownership report four times as many fatal shootings of civilians by police officers compared to States with the lowest rates of gun ownership. Brief for Former Major City Police Chiefs as *Amici Curiae* 16 (citing D. Hemenway, D. Azrael, A. Connor, & M. Miller, Variation in Rates of Fatal Police Shootings Across US States: The Role of Firearm Availability, 96 J. Urb. Health 63, 67 (2018)).

These are just some examples of the dangers that firearms pose. There is, of course, another side to the story. I am not simply saying that "guns are bad." See *ante* (ALITO, J., concurring). Some Americans use guns for legitimate purposes, such as sport (*e.g.*, hunting or target shooting), certain types of employment (*e.g.*, as a private security guard), or self-defense. Balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Consider, for one thing, that different types of firearms may pose different risks and serve different purposes. The Court has previously observed that handguns, the type of firearm at issue here, "are the most popular weapon chosen by Americans for self-defense in the home." *District of Columbia* v.

Heller, 554 U.S. 570, 629 (2008). But handguns are also the most popular weapon chosen by perpetrators of violent crimes. In 2018, 64.4% of firearm homicides and 91.8% of nonfatal firearm assaults were committed with a handgun. Dept. of Justice, Bureau of Justice Statistics, G. Kena & J. Truman, Trends and Patterns in Firearm Violence, 1993-2018, pp. 5-6 (Apr. 2022). Handguns are also the most commonly stolen type of firearm — 63% of burglaries resulting in gun theft between 2005 and 2010 involved the theft of at least one handgun. Dept. of Justice, Bureau of Justice Statistics, L. Langton, Firearms Stolen During Household Burglaries and Other Property Crimes, 2005-2010, p.3 (Nov. 2012).

Or consider, for another thing, that the dangers and benefits posed by firearms may differ between urban and rural areas. See generally Brief for City of Chicago et al. as *Amici Curiae* (detailing particular concerns about gun violence in large cities). Firearm-related homicides and assaults are significantly more common in urban areas than rural ones. For example, from 1999 to 2016, 89.8% of the 213,175 firearm-related homicides in the United States occurred in "metropolitan" areas. M. Siegel et al., The Impact of State Firearm Laws on Homicide Rates in Suburban and Rural Areas Compared to Large Cities in the United States, 1991-2016, 36 J. Rural Health 255 (2020).

JUSTICE ALITO asks why I have begun my opinion by reviewing some of the dangers and challenges posed by gun violence and what relevance that has to today's case. All of the above considerations illustrate that the question of firearm regulation presents a complex problem — one that should be solved by legislatures rather than courts. What kinds of firearm regulations should a State adopt? Different States might choose to answer that question differently. They may face different challenges because of their different geographic and demographic compositions. A State like New York, which must account for the roughly 8.5 million people living in the 303 square miles of New York City, might choose to adopt different (and stricter) firearms regulations than States like Montana or Wyoming, which do not contain any city remotely comparable in terms of population or density. For a variety of reasons, States may also be willing to tolerate different degrees of risk and therefore choose to balance the competing benefits and dangers of firearms differently.

The question presented in this case concerns the extent to which the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes. The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence that I have just described. I fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them.

II . . .

B

As the Court recognizes, New York's licensing regime traces its origins to 1911, when New York enacted the "Sullivan Law," which prohibited public carriage of handguns without a license. See 1911 N.Y. Laws ch. 195, §1, p.443. Two years later in 1913, New York amended the law to establish substantive standards for the issuance of a license. See 1913 N.Y. Laws ch. 608, §1, pp. 1627-1629. Those standards have remained the foundation of New York's licensing regime ever since — a regime that the Court now, more than a century later, strikes down as unconstitutional.

As it did over 100 years ago, New York's law today continues to require individuals to obtain a license before carrying a concealed handgun in public. N.Y. Penal Law Ann. §400.00(2); *Kachalsky*, 701 F.3d at 85-86. Because the State does not allow the open carriage of handguns at all, a concealed-carry license is the only way to legally carry a handgun in public. This licensing requirement applies only to handguns (*i.e.*, "pistols and revolvers") and short-barreled rifles and shotguns, not to all types of firearms.

To obtain a concealed-carry license for a handgun, an applicant must satisfy certain eligibility criteria. Among other things, he must generally be at least 21 years old and of "good moral character." §400.00(1). And he cannot have been convicted of a felony, dishonorably discharged from the military, or involuntarily committed to a mental hygiene facility. *Ibid.* If these and other eligibility criteria are satisfied, New York law provides that a concealed-carry license "shall be issued" to individuals working in certain professions, such as judges, corrections officers, or messengers of a "banking institution or express company." §400.00(2). Individuals who satisfy the eligibility criteria but do not work in one of these professions may still obtain a concealed-carry license, but they must additionally show that "proper cause exists for the issuance thereof." §400.00(2)(f).

The words "proper cause" may appear on their face to be broad, but there is "a substantial body of law instructing licensing officials on the application of this standard." [*Kachalsky*] at 86. New York courts have interpreted proper cause "to include carrying a handgun for target practice, hunting, or self-defense." *Ibid.* When an applicant seeks a license for target practice or hunting, he must show "'a sincere desire to participate in target shooting and hunting.'" *Ibid.* When an applicant seeks a license for self-defense, he must show "'a special need for self-protection distinguishable from that of the general community.'" 701 F.3d at 86. . . . In most counties, the licensing officer is a local judge. *Kachalsky*, 701 F.3d at 87 n.6. . . . If the officer denies an application, the applicant can obtain judicial review under Article 78 of New York's Civil Practice Law and Rules. *Kachalsky*, 701 F.3d at 87. New York courts will then review whether the denial was arbitrary and capricious. *Ibid.*

In describing New York's law, the Court recites the above facts but adds its own gloss. It suggests that New York's licensing regime gives licensing officers too much discretion and provides too "limited" judicial review of their decisions; that the proper cause standard is too "demanding"; and that these features make New York an outlier compared to the "vast majority of States". But on what evidence does the Court base these characterizations? Recall that this case comes to us at the pleading stage. The parties have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record. Thus, at this point, there is no record to support the Court's negative characterizations, as we know very little about how the law has actually been applied on the ground. . . .

Even accepting the Court's line between "may issue" and "shall issue" regimes and assuming that its tally (7 "may issue" and 43 "shall issue" jurisdictions) is correct, that count does not support the Court's implicit suggestion that the seven "may issue" jurisdictions are somehow outliers or anomalies. The Court's count captures only a snapshot in time. It forgets that "shall issue" licensing regimes are a relatively recent development. Until the 1980s, "may issue" regimes predominated. As of 1987, 16 States and the District of Columbia prohibited concealed carriage outright, 26 States had "may issue" licensing regimes, 7 States had "shall issue" regimes, and 1 State (Vermont) allowed concealed carriage without a permit. Congressional Research Service, Gun Control: Concealed Carry Legislation in the 115th Congress 1 (Jan. 30, 2018). Thus, it has only been in the last few decades that States have shifted toward "shall issue" licensing laws. Prior to that, most States operated "may issue" licensing regimes without legal or practical problem.

Moreover, even considering, as the Court does, only the present state of play, its tally provides an incomplete picture because it accounts for only the number of States with "may issue" regimes, not the number of people governed by those regimes. By the Court's count, the seven "may issue" jurisdictions are New York, California, Hawaii, Maryland, Massachusetts, New Jersey, and the District of Columbia. Together, these seven jurisdictions comprise about 84.4 million people and account for over a quarter of the country's population. Thus, "may issue" laws can hardly be described as a marginal or outdated regime.

And there are good reasons why these seven jurisdictions may have chosen not to follow other States in shifting toward "shall issue" regimes. The seven remaining "may issue" jurisdictions are among the most densely populated in the United States . . .

As I explained above, densely populated urban areas face different kinds and degrees of dangers from gun violence than rural areas. It is thus easy to see why the seven "may issue" jurisdictions might choose to regulate firearm carriage more strictly than other States.

New York and its *amici* present substantial data justifying the State's decision to retain a "may issue" licensing regime. The data show that stricter gun regulations are associated with lower rates of firearm-related death and injury. *See, e.g.*, Brief for Citizens Crime Commission of New York City as *Amicus Curiae* 9-11; Brief for Former Major City Police Chiefs as *Amici Curiae* 9-12; Brief for Educational Fund 25-28; Brief for Social Scientists et al. as *Amici Curiae* 9-19. In particular, studies have shown that "may issue" licensing regimes, like New York's, are associated with lower homicide rates and lower violent crime rates than "shall issue" licensing regimes. For example, one study compared homicide rates across all 50 States during the 25-year period from 1991 to 2015 and found that "shall issue" laws were associated with 6.5% higher total homicide rates, 8.6% higher firearm homicide rates, and 10.6% higher handgun homicide rates. Siegel, 107 Am. J. Pub. Health, at 1924-1925, 1927. Another study longitudinally followed 33 States that had adopted "shall-issue" laws between 1981 and 2007 and found that the adoption of those laws was associated with a 13%-15% increase in rates of violent crime after 10 years. Donohue, 16 J. Empirical Legal Studies, at 200, 240. Numerous other studies show similar results. *See*, *e.g.*, Siegel, 36 J. Rural Health, at 261 (finding that "may issue" laws are associated with 17% lower firearm homicide rates in large cities); C. Crifasi et al., Association Between Firearm Laws and Homicide in Urban Counties, 95 J. Urb. Health 383, 387 (2018) (finding that "shall issue" laws are associated with a 4% increase in firearm homicide rates in urban counties); M. Doucette, C. Crifasi, & S. Frattaroli, Right-to-Carry Laws and Firearm Workplace Homicides: A Longitudinal Analysis (1992-2017), 109 Am. J. Pub. Health 1747, 1751 (Dec. 2019) (finding that States with "shall issue" laws between 1992 and 2017 experienced 29% higher rates of firearm-related workplace homicides); Brief for Social Scientists et al. as *Amici Curiae* 15-16, and nn.17-20 (citing "thirteen . . . empirical papers from just the last few years linking ["shall issue"] laws to higher violent crime").

JUSTICE ALITO points to competing empirical evidence that arrives at a different conclusion. But these types of disagreements are exactly the sort that are better addressed by legislatures than courts. The Court today restricts the ability of legislatures to fulfill that role. It does so without knowing how New York's law is administered in practice, how much discretion licensing officers in New York possess, or whether the proper cause standard differs across counties. And it does so without giving the State an opportunity to develop the evidentiary record to answer those questions. Yet it strikes down New York's licensing regime as a violation of the Second Amendment.

III

A

How does the Court justify striking down New York's law without first considering how it actually works on the ground and what purposes it serves?

The Court does so by purporting to rely nearly exclusively on history. It requires "the government [to] affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of 'the right to keep and bear arms.'" Beyond this historical inquiry, the Court refuses to employ what it calls "means-end scrutiny." That is, it refuses to consider whether New York has a compelling interest in regulating the concealed carriage of handguns or whether New York's law is narrowly tailored to achieve that interest. Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far.

The Court concedes that no Court of Appeals has adopted its rigid history-only approach. To the contrary, every Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment. *Ibid.*; *ante*, at 10, n.4 (majority opinion) (listing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D. C. Circuits). At the first step, the Courts of Appeals use text and history to determine "whether the regulated activity falls within the scope of the Second Amendment." *Ezell* v. *Chicago*, 846 F.3d 888, 892 (7th Cir. 2017). If it does, they go on to the second step and consider "'the strength of the government's justification for restricting or regulating'" the Second Amendment right. *Ibid.* In doing so, they apply a level of "means-ends" scrutiny "that is proportionate to the severity of the burden that the law imposes on the right": strict scrutiny if the burden is severe, and intermediate scrutiny if it is not. *National Rifle Assn. of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195, 198, 205 (5th Cir. 2012).

The Court today replaces the Courts of Appeals' consensus framework with its own history-only approach. That is unusual. We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade. The Court attempts to justify its deviation from our normal practice by claiming that the Courts of Appeals' approach is inconsistent with *Heller*. In doing so, the Court implies that all 11 Courts of Appeals that have considered this question misread *Heller*.

To the contrary, it is this Court that misreads *Heller*. The opinion in *Heller* did focus primarily on "constitutional text and history,", but it did *not* "rejec[t] . . . means-end scrutiny," as the Court claims.. The *Heller* Court concluded that the Second Amendment's text and history were sufficiently clear to resolve that question: The Second Amendment, it said, does include such an individual right. There was thus no need for the Court to go further — to look beyond text and history, or to suggest what analysis would be appropriate in other cases where the text and history are not clear. . . .

The majority further made clear that its rejection of freestanding interest balancing did *not* extend to traditional forms of means-end scrutiny. It said: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." [*Id.* at 634]. To illustrate this point, it cited as an example the First Amendment right to free speech. *Id.* at 635. Judges, of course, regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret or apply the First Amendment. *See*, *e.g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, (2000) (applying strict scrutiny); *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 186, 189-190, (1997) (applying intermediate scrutiny). The majority therefore cannot have intended its opinion, consistent with our First Amendment jurisprudence, to be read as rejecting all traditional forms of means-end scrutiny.

As *Heller*'s First Amendment example illustrates, the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history "accords with how we protect other constitutional rights." As the Court points out, we do look to history in the First Amendment context to determine "whether the expressive conduct falls outside of the category of protected speech." But, if conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. And the degree of scrutiny we apply often depends on the type of speech burdened and the severity of the burden. See, *e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (applying strict scrutiny to laws that burden political speech); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to time, place, and manner restrictions); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-66, (1980) (applying intermediate scrutiny to laws that burden commercial speech).

Additionally, beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions. *See*, *e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny under the First Amendment to laws that restrict free exercise of religion in a way that is not neutral and generally applicable); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Equal Protection Clause to race-based classifications); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny under the Equal Protection Clause to sex-based classifications); *see also Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) ("When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness").

The upshot is that applying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional

anomaly. Rather, it is the Court's rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous.

B

The Court's near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its "ends") against the methods used to achieve those objectives (its "means"). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.

The Court's insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

Consider *Heller* itself. That case, fraught with difficult historical questions, illustrates the practical problems with expecting courts to decide important constitutional questions based solely on history. The majority in *Heller* undertook 40 pages of textual and historical analysis and concluded that the Second Amendment's protection of the right to "keep and bear Arms" historically encompassed an "individual right to possess and carry weapons in case of confrontation" — that is, for self-defense. 554 U.S. at 592; *see also id.* at 579-619. Justice Stevens' dissent conducted an equally searching textual and historical inquiry and concluded, to the contrary, that the term "bear Arms" was an idiom that protected only the right "to use and possess arms in conjunction with service in a well-regulated militia." *Id.* at 651. I do not intend to relitigate *Heller* here. I accept its holding as a matter of *stare decisis*. I refer to its historical analysis only to show the difficulties inherent in answering historical questions and to suggest that judges do not have the expertise needed to answer those questions accurately.

For example, the *Heller* majority relied heavily on its interpretation of the English Bill of Rights. Citing Blackstone, the majority claimed that the English Bill of Rights protected a "'right of having and using arms for self-preservation and defence.'" *Id.* at 594 (quoting 1 Commentaries on the Laws of England 140 (1765)). The majority interpreted that language to mean a private right to bear

arms for self-defense, "having nothing whatever to do with service in a militia." 554 U.S. at 593. Two years later, however, 21 English and early American historians (including experts at top universities) told us in *McDonald* v. *Chicago*, 561 U.S. 742 (2010), that the *Heller* Court had gotten the history wrong: The English Bill of Rights "did not . . . protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars." Brief for English/Early American Historians as *Amici Curiae* in *McDonald* v. *Chicago*, O.T. 2009, No. 08-1521, p.2. Rather, these *amici* historians explained, the English right to "have arms" ensured that the Crown could not deny Parliament (which represented the people) the power to arm the landed gentry and raise a militia — or the right of the people to possess arms to take part in that militia — "should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation." *Id.* at 2-3. Thus, the English right did protect a right of "self-preservation and defence," as Blackstone said, but that right "was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives," *i.e.*, Parliament. *Id.* at 7-8. The Court, not an expert in history, had misread Blackstone and other sources explaining the English Bill of Rights.

And that was not the *Heller* Court's only questionable judgment. The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. 554 U.S. at 586. Linguistics experts now tell us that the majority was wrong to do so. See, *e.g.*, Brief for Corpus Linguistics Professors and Experts as *Amici Curiae* (Brief for Linguistics Professors); Brief for Neal Goldfarb as *Amicus Curiae*; Brief for Americans Against Gun Violence as *Amicus Curiae* 13-15. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase "bear arms," and they concluded that the phrase was overwhelmingly used to refer to "'war, soldiering, or other forms of armed action by a group rather than an individual.'" Brief for Linguistics Professors 11, 14; *see also* D. Baron, Corpus Evidence Illuminates the Meaning of Bear Arms, 46 Hastings Const. L. Q. 509, 510 (2019) ("Non-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent"); *id.* at 510-11 (reporting 900 instances in which "bear arms" was used to refer to military or collective use of firearms and only 7 instances that were either ambiguous or without a military connotation).

These are just two examples. Other scholars have continued to write books and articles arguing that the Court's decision in *Heller* misread the text and history of the Second Amendment. *See generally, e.g.*, M. Waldman, The Second Amendment (2014); S. Cornell, The Changing Meaning of the Right To Keep and Bear Arms: 1688-1788, in Guns in Law 20-27 (A. Sarat, L. Douglas,

& M. Umphrey eds. 2019); P. Finkelman, The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court, 37 Cardozo L. Rev. 623 (2015); D. Walker, Necessary to the Security of Free States: The Second Amendment as the Auxiliary Right of Federalism, 56 Am. J. Legal Hist. 365 (2016); W. Merkel, *Heller* as Hubris, and How *McDonald* v. *City of Chicago* May Well Change the Constitutional World as We Know It, 50 Santa Clara L. Rev. 1221 (2010).

I repeat that I do not cite these arguments in order to relitigate *Heller*. I wish only to illustrate the difficulties that may befall lawyers and judges when they attempt to rely *solely* on history to interpret the Constitution. In *Heller*, we attempted to determine the scope of the Second Amendment right to bear arms by conducting a historical analysis, and some of us arrived at very different conclusions based on the same historical sources. Many experts now tell us that the Court got it wrong in a number of ways. That is understandable given the difficulty of the inquiry that the Court attempted to undertake. The Court's past experience with historical analysis should serve as a warning against relying exclusively, or nearly exclusively, on this mode of analysis in the future.

Failing to heed that warning, the Court today does just that. Its near-exclusive reliance on history will pose a number of practical problems. First, the difficulties attendant to extensive historical analysis will be especially acute in the lower courts. The Court's historical analysis in this case is over 30 pages long and reviews numerous original sources from over 600 years of English and American history. Lower courts — especially district courts — typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching historical surveys that the Court's approach requires. Tellingly, even the Courts of Appeals that have addressed the question presented here (namely, the constitutionality of public carriage restrictions like New York's) "have, in large part, avoided extensive historical analysis." *Young* v. *Hawaii*, 992 F.3d 765, 784-785 (9th Cir. 2021) (collecting cases). In contrast, lawyers and courts are well equipped to administer means-end scrutiny, which is regularly applied in a variety of constitutional contexts.

Second, the Court's opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history. . . . Other than noting that its history-only analysis is "neither a . . . straightjacket nor a . . . blank check," the Court offers little explanation of how stringently its test should be applied. Ironically, the only two "relevan[t]" metrics that the Court does identify are "how and why" a gun control regulation "burden[s the] right to armed self-defense." In other words, the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why) — even as it rejects the utility of means-end scrutiny.

What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. The Court believes that some historical laws and decisions cannot justify upholding modern regulations because, it says, they were outliers. It explains that just two court decisions or three colonial laws are not enough to satisfy its test. But the Court does not say how many cases or laws would suffice "to show a tradition of public-carry regulation." Other laws are irrelevant, the Court claims, because they are too dissimilar from New York's concealed-carry licensing regime. But the Court does not say what "representative historical analogue," short of a "twin" or a "dead ringer," would suffice. Indeed, the Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history's crowd. At worst, they create a one-way ratchet that will disqualify virtually any "representative historical analogue" and make it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security.

Third, even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions. As an initial matter, many aspects of the history of firearms and their regulation are ambiguous, contradictory, or disputed. Unsurprisingly, the extent to which colonial statutes enacted over 200 years ago were actually enforced, the basis for an acquittal in a 17th-century decision, and the interpretation of English laws from the Middle Ages (to name just a few examples) are often less than clear. And even historical experts may reach conflicting conclusions based on the same sources. *Compare, e.g.*, P. Charles, The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review, 60 Clev. St. L. Rev. 1, 14 (2012), *with* J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 104 (1994). As a result, history, as much as any other interpretive method, leaves ample discretion to "loo[k] over the heads of the [crowd] for one's friends." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 377 (2012).

Fourth, I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court's apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. Society at the founding was "predominantly rural." C. McKirdy, Misreading the Past: The Faulty Historical Basis Behind the Supreme Court's Decision in District of Columbia v. Heller, 45 Capital U. L. Rev. 107, 151 (2017). In 1790, most of America's relatively small population of just four million people lived on farms or in small towns. *Ibid.* Even New York City, the largest American city then, as it is now, had a population of just 33,000 people. *Ibid.* Small founding-era towns are unlikely to have faced the same degrees and types of

risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs. *Id.* at 152 ("For the most part, a population living on farms and in very small towns did not create conditions in which firearms created a significant danger to the public welfare").

This problem is all the more acute when it comes to "modern-day circumstances that [the Framers] could not have anticipated." *Heller*, 554 U.S. at 721-722, (BREYER, J., dissenting). How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting "ghost guns" constructed with the aid of a three-dimensional printer? *See, e.g.*, White House Briefing Room, FACT SHEET: The Biden Administration Cracks Down on Ghost Guns, Ensures That ATF Has the Leadership It Needs To Enforce Our Gun Laws (Apr. 11, 2022), https://whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/. Or modern laws requiring all gun shops to offer smart guns, which can only be fired by authorized users? *See, e.g.*, N.J. Stat. Ann. §2C:58-2.10(a). Or laws imposing additional criminal penalties for the use of bullets capable of piercing body armor? *See, e.g.*, 18 U.S.C. §§921(a)(17)(B), 929(a).

The Court's answer is that judges will simply have to employ "analogical reasoning." But, as I explained above, the Court does not provide clear guidance on how to apply such reasoning. Even seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances. The Court affirms *Heller*'s recognition that States may forbid public carriage in "sensitive places." But what, in 21st-century New York City, may properly be considered a sensitive place? Presumably "legislative assemblies, polling places, and courthouses," which the Court tells us were among the "relatively few" places "where weapons were altogether prohibited" in the 18th and 19th centuries. On the other hand, the Court also tells us that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines th[at] category . . . far too broadly." So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums? The Court does not say.

Although I hope — fervently — that future courts will be able to identify historical analogues supporting the validity of regulations that address new technologies, I fear that it will often prove difficult to identify analogous technological and social problems from Medieval England, the founding era, or the time period in which the Fourteenth Amendment was ratified. Laws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern

problems. And as technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at "analogical reasoning" will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable.

IV

Indeed, the Court's application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. Laws regulating the public carriage of weapons existed in England as early as the 13th century and on this Continent since before the founding. Similar laws remained on the books through the ratifications of the Second and Fourteenth Amendments through to the present day. Many of those historical regulations imposed significantly stricter restrictions on public carriage than New York's licensing requirements do today. Thus, even applying the Court's history-only analysis, New York's law must be upheld because "historical precedent from before, during, and . . . after the founding evinces a comparable tradition of regulation."

A. England.

The right codified by the Second Amendment was "'inherited from our English ancestors.'" *Heller*, 554 U.S. at 599 (quoting *Robertson* v. *Baldwin*, 165 U.S. 275, 281, (1897)). And some of England's earliest laws regulating the public carriage of weapons were precursors of similar American laws enacted roughly contemporaneously with the ratification of the Second Amendment. I therefore begin, as the Court does, with the English ancestors of New York's laws regulating public carriage of firearms.

The relevant English history begins in the late-13th and early-14th centuries, when Edward I and Edward II issued a series of orders to local sheriffs that prohibited any person from "going armed." *See* 4 Calendar of the Close Rolls, Edward I, 1296-1302, p.318 (Sept. 15, 1299) (1906); *id.* at 588 (July 16, 1302); 5 *id.* Edward I, 1302-1307, at 210 (June 10, 1304) (1908); *id.* Edward II, 1307-1313, at 52 (Feb. 9, 1308) (1892); *id.* at 257 (Apr. 9, 1310); *id.* at 553 (Oct. 12, 1312); *id.* Edward II, 1323-1327, at 560 (Apr. 28, 1326) (1898); 1 Calendar of Plea and Memoranda Rolls of the City of London, 1323-1364, p.15 (Nov. 1326) (A. Thomas ed. 1926). Violators were subject to punishment, including "forfeiture of life and limb." *See, e.g.*, 4 Calendar of the Close Rolls, Edward I, 1296-1302, at 318 (Sept. 15, 1299) (1906). Many of these royal edicts contained exemptions for persons who had obtained "the king's special licence." *See ibid.*; 5 *id.* Edward I, 1302-1307, at 210 (June 10, 1304); *id.* Edward II,

1307-1313, at 553 (Oct. 12, 1312); *id.* Edward II, 1323-1327, at 560 (Apr. 28, 1326). Like New York's law, these early edicts prohibited public carriage absent special governmental permission and enforced that prohibition on pain of punishment.

The Court seems to suggest that these early regulations are irrelevant because they were enacted during a time of "turmoil" when "malefactors . . . harried the country, committing assaults and murders." *Ante*, at 31 (internal quotation marks omitted). But it would seem to me that what the Court characterizes as a "right of armed self-defense" would be more, rather than less, necessary during a time of "turmoil." The Court also suggests that laws that were enacted before firearms arrived in England, like these early edicts and the subsequent Statute of Northampton, are irrelevant. But why should that be? Pregun regulations prohibiting "going armed" in public illustrate an entrenched tradition of restricting public carriage of weapons. That tradition seems as likely to apply to firearms as to any other lethal weapons — particularly if we follow the Court's instruction to use analogical reasoning. And indeed, as we shall shortly see, the most significant prefirearm regulation of public carriage — the Statute of Northampton — was in fact applied to guns once they appeared in England. *See Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B. 1686)

The Statute of Northampton was enacted in 1328. 2 Edw. 3, 258, c. 3. By its terms, the statute made it a criminal offense to carry arms without the King's authorization. It provided that, without such authorization, "no Man great nor small, of what Condition soever he be," could "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." *Ibid.* For more than a century following its enactment, England's sheriffs were routinely reminded to strictly enforce the Statute of Northampton against those going armed without the King's permission. *See* Calendar of the Close Rolls, Edward III, 1330-1333, at 131 (Apr. 3, 1330) (1898); 1 Calendar of the Close Rolls, Richard II, 1377-1381, at 34 (Dec. 1, 1377) (1914); 2 *id.* Richard II, 1381-1385, at 3 (Aug. 7, 1381) (1920); 3 *id.* Richard II, 1385-1389, at 128 (Feb. 6, 1386) (1921); *id.* at 399-400 (May 16, 1388); 4 *id.* Henry VI, 1441-1447, at 224 (May 12, 1444) (1937); *see also* 11 Tudor Royal Proclamations, The Later Tudors: 1553-1587, pp. 442-445 (Proclamation 641, 21 Elizabeth I, July 26, 1579) (P. Hughes & J. Larkin eds. 1969).

The Court thinks that the Statute of Northampton "has little bearing on the Second Amendment," in part because it was "enacted . . . more than 450 years before the ratification of the Constitution." The statute, however, remained in force for hundreds of years, well into the 18th century. See 4 W. Blackstone, Commentaries 148-49 (1769) ("The offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public

peace, by terrifying the good people of the land; *and is particularly prohibited by the Statute of Northampton*" (first emphasis in original, second emphasis added)). It was discussed in the writings of Blackstone, Coke, and others. *See ibid.*; W. Hawkins, 1 Pleas of the Crown 135 (1716) (Hawkins); E. Coke, The Third Part of the Institutes of the Laws of England 160 (1797). And several American Colonies and States enacted restrictions modeled on the statute. *See infra*, at 40-42. There is thus every reason to believe that the Framers of the Second Amendment would have considered the Statute of Northampton a significant chapter in the Anglo-American tradition of firearms regulation.

The Court also believes that, by the end of the 17th century, the Statute of Northampton was understood to contain an extratextual intent element: the intent to cause terror in others. The Court relies on two sources that arguably suggest that view: a 1686 decision, *Sir John Knight's Case*, and a 1716 treatise written by Serjeant William Hawkins. But other sources suggest that carrying arms in public was prohibited *because* it naturally tended to terrify the people. *See*, *e.g.*, M. Dalton, The Country Justice 282-83 (1690) ("[T]o wear Armor, or Weapons not usually worn . . . seems also be a breach, or means of breach of the Peace . . . ; *for* they strike a fear and terror in the People" (emphasis added)). According to these sources, terror was the natural consequence — not an additional element — of the crime.

I find this view more persuasive in large part because it is not entirely clear that the two sources the Court relies on actually support the existence of an intent-to-terrify requirement. Start with *Sir John Knight's Case*, which, according to the Court, considered Knight's arrest for walking "'about the streets'" and into a church "'armed with guns.'" (quoting *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep., at 76). The Court thinks that Knight's acquittal by a jury demonstrates that the Statute of Northampton only prohibited public carriage of firearms with an intent to terrify. But by now the legal significance of Knight's acquittal is impossible to reconstruct. Brief for Patrick J. Charles as *Amicus Curiae* 23, n.9. The primary source describing the case (the English Reports) was notoriously incomplete at the time *Sir John Knight's Case* was decided. *Id.* at 24-25. And the facts that historians can reconstruct do not uniformly support the Court's interpretation. The King's Bench required Knight to pay a surety to guarantee his future good behavior, so it may be more accurate to think of the case as having ended in "a conditional pardon" than acquittal. *Young*, 992 F.3d at 791; *see also Rex* v. *Sir John Knight*, 1 Comb. 40, 90 Eng. Rep. 331 (K. B. 1686). And, notably, it appears that Knight based his defense on his loyalty to the Crown, not a lack of intent to terrify. 3 The Entring Book of Roger Morrice 1677-1691: The Reign of James II, 1685-1687, pp. 307-308 (T. Harris ed. 2007).

Similarly, the passage from the Hawkins treatise on which the Court relies states that the Statute of Northampton's prohibition on the public carriage of weapons did not apply to the "wearing of Arms . . . unless it be accompanied

with such Circumstances as are apt to terrify the People." Hawkins 136. But Hawkins goes on to enumerate relatively narrow circumstances where this exception applied: when "Persons of Quality . . . wea[r] common Weapons, or hav[e] their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them," or to persons merely wearing "privy Coats of Mail." *Ibid.* It would make little sense if a narrow exception for nobility, see Oxford English Dictionary (3d ed., Dec. 2012), https://www.oed.com/view/Entry/155878 (defining "quality," A.I.5.a), and "privy coats of mail" were allowed to swallow the broad rule that Hawkins (and other commentators of his time) described elsewhere. That rule provided that "there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is . . . strictly prohibited by [the Statute of Northampton]." Hawkins 135. And it provided no exception for those who attempted to "excuse the wearing such Armour in Publick, by alleging that . . . he wears it for the Safety of his Person from . . . Assault." *Id.* at 136. In my view, that rule announces the better reading of the Statute of Northampton — as a broad prohibition on the public carriage of firearms and other weapons, without an intent-to-terrify requirement or exception for self-defense.

Although the Statute of Northampton is particularly significant because of its breadth, longevity, and impact on American law, it was far from the only English restriction on firearms or their carriage. See, *e.g.*, 6 Hen. 8 c. 13, §1 (1514) (restricting the use and ownership of handguns); 25 Hen. 8 c. 17, §1 (1533) (same); 33 Hen. 8 c. 6, §§1-2 (1541) (same); 25 Edw. 3, st. 5, c. 2 (1350) (making it a "Felony or Trespass" to "ride armed covertly or secretly with Men of Arms against any other, to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance") (brackets and footnote omitted). Whatever right to bear arms we inherited from our English forebears, it was qualified by a robust tradition of public carriage regulations.

As I have made clear, I am not a historian. But if the foregoing facts, which historians and other scholars have presented to us, are even roughly correct, it is difficult to see how the Court can believe that English history fails to support legal restrictions on the public carriage of firearms.

B. The Colonies.

The American Colonies continued the English tradition of regulating public carriage on this side of the Atlantic. In 1686, the colony of East New Jersey passed a law providing that "no person or persons . . . shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province." An Act Against Wearing Swords, &c., ch. 9, in Grants, Concessions, and Original Constitutions of the Province of New Jersey 290 (2d ed. 1881). East New Jersey also specifically prohibited

"planter[s]" from "rid[ing] or go[ing] armed with sword, pistol, or dagger." *Ibid.* Massachusetts Bay and New Hampshire followed suit in 1692 and 1771, respectively, enacting laws that, like the Statute of Northampton, provided that those who went "armed Offensively" could be punished. An Act for the Punishing of Criminal Offenders, 1692 Mass. Acts and Laws no. 6, pp. 11-12; An Act for the Punishing of Criminal Offenders, 1771 N.H. Acts and Laws ch. 6, §5, p.17.

It is true, as the Court points out, that these laws were only enacted in three colonies. But that does not mean that they may be dismissed as outliers. They were successors to several centuries of comparable laws in England, and predecessors to numerous similar (in some cases, materially identical) laws enacted by the States after the founding. And while it may be true that these laws applied only to "dangerous and unusual weapons," that category almost certainly included guns, see Charles, 60 Clev. St. L. Rev., at 34, n.181 (listing 18th century sources defining "'offensive weapons'" to include "'Fire Arms'" and "'Guns'"); *State* v. *Huntly*, 25 N.C. 418, 422 (1843) (*per curiam*) ("A gun is an 'unusual weapon,' wherewith to be armed and clad"). Finally, the Court points out that New Jersey's ban on public carriage applied only to certain people or to the concealed carriage of certain smaller firearms. But the Court's refusal to credit the relevance of East New Jersey's law on this basis raises a serious question about what, short of a "twin" or a "dead ringer," qualifies as a relevant historical analogue.

C. The Founding Era.

The tradition of regulations restricting public carriage of firearms, inherited from England and adopted by the Colonies, continued into the founding era. Virginia, for example, enacted a law in 1786 that, like the Statute of Northampton, prohibited any person from "go[ing] nor rid[ing] armed by night nor by day, in fairs or markets, or in other places, in terror of the Country." 1786 Va. Acts, ch. 21. And, as the Court acknowledges, "public-carry restrictions proliferate[d]" after the Second Amendment's ratification five years later in 1791. Just a year after that, North Carolina enacted a law whose language was lifted from the Statute of Northampton virtually verbatim (vestigial references to the King included). Collection of Statutes, pp. 60-61, ch. 3 (F. Martin ed. 1792)[1] Other States passed similar laws in the late-18th and 19th centuries. *See, e.g.*, 1795 Mass. Acts and Laws ch. 2, p.436 ; 1801 Tenn.

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[1] [The validity of this statute is dubious, as indicated by the supposed reference to "the King." The State of North Carolina later officially declared that the book "was utterly unworthy of the talents and industry of the distinguished compiler, omitting many statutes, always in force, and inserting many others, which never were, and never could have been in force, either in the Province, or in the State." *Preface of the Commissioners of 1838*, Revised Code of North Carolina xiii (1855).–EDS.]

Acts pp. 260-261; 1821 Me. Laws p.285; *see also* Charles, 60 Clev. St. L. Rev. at 40, n.213 (collecting sources).

The Court discounts these laws primarily because they were modeled on the Statute of Northampton, which it believes prohibited only public carriage with the intent to terrify. I have previously explained why I believe that preventing public terror was one *reason* that the Statute of Northampton prohibited public carriage, but not an *element* of the crime. And, consistent with that understanding, American regulations modeled on the Statute of Northampton appear to have been understood to set forth a broad prohibition on public carriage of firearms without any intent-to-terrify requirement. See Charles, 60 Clev. St. L. Rev. at 35, 37-41; J. Haywood, A Manual of the Laws of North-Carolina, pt. 2, p.40 (3d ed.1814); J. Ewing, The Office and Duty of a Justice of the Peace 546 (1805).

The Court cites three cases considering common-law offenses, but those cases do not support the view that only public carriage in a manner likely to terrify violated American successors to the Statute of Northampton. If anything, they suggest that public carriage of firearms was not common practice. At least one of the cases the Court cites, *State* v. *Huntly*, wrote that the Statute of Northampton codified a pre-existing common-law offense, which provided that "riding or going armed with dangerous or unusual weapons, is a crime against the public peace, *by* terrifying the good people of the land." 25 N.C. at 420-421 (quoting 4 Blackstone, Commentaries, at 149; emphasis added). *Huntly* added that "[a] gun is an 'unusual weapon'" and that "[n]o man amongst us carries it about with him, as one of his every-day accoutrements — as a part of his dress — and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment." 25 N.C. at 422. True, *Huntly* recognized that citizens were nonetheless "at perfect liberty" to carry for "lawful purpose[s]" — but it specified that those purposes were "business or amusement." *Id.* at 422-23. New York's law similarly recognizes that hunting, target shooting, and certain professional activities are proper causes justifying lawful carriage of a firearm. The other two cases the Court cites for this point similarly offer it only limited support — either because the atextual intent element the Court advocates was irrelevant to the decision's result, see *O'Neill* v. *State*, 16 Ala. 65 (1849), or because the decision adopted an outlier position not reflected in the other cases cited by the Court, see *Simpson* v. *State*, 13 Tenn. 356, 360 (1833). The founding-era regulations — like the colonial and English laws on which they were modeled — thus demonstrate a longstanding tradition of broad restrictions on public carriage of firearms.

D. The 19th Century.

Beginning in the 19th century, States began to innovate on the Statute of Northampton in at least two ways. First, many States and Territories passed

bans on concealed carriage or on any carriage, concealed or otherwise, of certain concealable weapons. For example, Georgia made it unlawful to carry, "unless in an open manner and fully exposed to view, any pistol, (except horseman's pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives, manufactured and sold for the purpose of offence and defence." Ga. Code §4413 (1861). Other States and Territories enacted similar prohibitions. See, *e.g.*, Ala. Code §3274 (1852) (banning, with limited exceptions, concealed carriage of "a pistol, or any other description of fire arms"); *see also ante*, at 44, n.16 (majority opinion) (collecting sources). And the Territory of New Mexico appears to have banned all carriage whatsoever of "any class of pistols whatever," as well as "bowie kni[ves,] . . . Arkansas toothpick[s], Spanish dagger[s], slung-shot[s], or any other deadly weapon." 1860 Terr. of N.M. Laws §§1-2, p.94. These 19th-century bans on concealed carriage were stricter than New York's law, for they prohibited concealed carriage with at most limited exceptions, while New York permits concealed carriage with a lawfully obtained license. Moreover, as *Heller* recognized, and the Court acknowledges, "the majority of the 19th-century courts to consider the question held that [these types of] prohibitions on carrying concealed weapons *were lawful* under the Second Amendment or state analogues." 554 U.S. at 626 (emphasis added).

The Court discounts this history because, it says, courts in four Southern States suggested or held that a ban on concealed carriage was only lawful if open carriage or carriage of military pistols was allowed. The Court also cites *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822), which invalidated Kentucky's concealed-carry prohibition as contrary to that State's Second Amendment analogue. *Bliss* was later overturned by constitutional amendment and was, as the Court appears to concede, an outlier. Several of these decisions, however, emphasized States' leeway to regulate firearms carriage as necessary "to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence." *State* v. *Smith*, 11 La. Ann. 633 (1856); *see also Andrews* v. *State*, 50 Tenn. 165, 179-180 (1871) (stating that "the right to *keep*" rifles, shotguns, muskets, and repeaters could not be "*infringed* or *forbidden*," but "[t]heir *use* [may] be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right"); *State* v. *Reid*, 1 Ala. 612, 616 (1840) (recognizing that the constitutional right to bear arms "necessarily . . . leave[s] with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals"). And other courts upheld concealed-carry restrictions without any reference to an exception allowing open carriage, so it is far from clear that the cases the Court cites represent a consensus view. See *State* v. *Mitchell*, 3 Blackf. 229 (Ind. 1833); *State* v. *Buzzard*, 4 Ark. 18 (1842). And, of course, the

Court does not say whether the result in this case would be different if New York allowed open carriage by law-abiding citizens as a matter of course.

The second 19th-century innovation, adopted in a number of States, was surety laws. Massachusetts' surety law, which served as a model for laws adopted by many other States, provided that any person who went "armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon," and who lacked "reasonable cause to fear an assualt [*sic*]," could be made to pay a surety upon the "complaint of any person having reasonable cause to fear an injury, or breach of the peace." Mass. Rev. Stat., ch. 134, §16 (1836). Other States and Territories enacted identical or substantially similar laws. These laws resemble New York's licensing regime in many, though admittedly not all, relevant respects. Most notably, like New York's proper cause requirement, the surety laws conditioned public carriage in at least some circumstances on a special showing of need.

The Court believes that the absence of recorded cases involving surety laws means that they were rarely enforced. Of course, this may just as well show that these laws were normally followed. In any case, scholars cited by the Court tell us that "traditional case law research is not especially probative of the application of these restrictions" because "in many cases those records did not survive the passage of time" or "are not well indexed or digitally searchable." E. Ruben & S. Cornell, Firearms Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context, 125 Yale L.J. Forum 121, 130-131, n.53 (2015). On the contrary, "the fact that restrictions on public carry were well accepted in places like Massachusetts and were included in the relevant manuals for justices of the peace" suggests "that violations were enforced at the justice of peace level, but did not result in expensive appeals that would have produced searchable case law." *Id.* at 131 n.53 (citation omitted). The surety laws and broader bans on concealed carriage enacted in the 19th century demonstrate that even relatively stringent restrictions on public carriage have long been understood to be consistent with the Second Amendment and its state equivalents.

E. Postbellum Regulation.

After the Civil War, public carriage of firearms remained subject to extensive regulation. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess., 908 (1866) ("The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons"). Of course, during this period, Congress provided (and commentators recognized) that firearm regulations could not be designed or enforced in a discriminatory manner. See *ibid.*; Act of July 16, 1866, §14, 14 Stat. 176-177 (ensuring that all citizens were entitled to the "full and equal benefit of all laws . . . including the constitutional right to keep and bear arms . . . without respect to race or color, or previous

condition of slavery"); *see also* The Loyal Georgian, Feb. 3, 1866, p.3, col. 4. But that by-now uncontroversial proposition says little about the validity of nondiscriminatory restrictions on public carriage, like New York's.

. . . Most notably, many States and Western Territories enacted stringent regulations that prohibited *any* public carriage of firearms, with only limited exceptions. For example, Texas made it a misdemeanor to carry in public "any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offense or defense" absent "reasonable grounds for fearing an [immediate and pressing] unlawful attack." 1871 Tex. Gen. Laws ch. 34, §1. Similarly, New Mexico made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory." 1869 Terr. of N.M. Laws ch. 32, §1. New Mexico's prohibition contained only narrow exceptions for carriage on a person's own property, for self-defense in the face of immediate danger, or with official authorization. *Ibid.* Other States and Territories adopted similar laws. See, *e.g.*, 1875 Wyo. Terr. Sess. Laws ch. 52, §1; 1889 Idaho Terr. Gen. Laws §1, p.23; 1881 Kan. Sess. Laws §23, p.92; 1889 Ariz. Terr. Sess. Laws no. 13, §1, p.16.

When they were challenged, these laws were generally upheld. P. Charles, The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters, 64 Clev. St. L. Rev. 373, 414 (2016); *see also ante*, at 56-57 (majority opinion) (recognizing that postbellum Texas law and court decisions support the validity of New York's licensing regime); *Andrews*, 50 Tenn. at 182 (recognizing that "a man may well be prohibited from carrying his arms to church, or other public assemblage," and that the carriage of arms other than rifles, shot guns, muskets, and repeaters "may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances").

The Court's principal answer to these broad prohibitions on public carriage is to discount gun control laws passed in the American West. It notes that laws enacted in the Western Territories were "rarely subject to judicial scrutiny." But, of course, that may well mean that "[w]e . . . can assume it settled that these" regulations were "consistent with the Second Amendment." See *ante*, at 21 (majority opinion). The Court also reasons that laws enacted in the Western Territories applied to a relatively small portion of the population and were comparatively short lived. But even assuming that is true, it does not mean that these laws were historical aberrations. To the contrary, bans on public carriage in the American West and elsewhere constitute just one chapter of the centuries-old tradition of comparable firearms regulations described above.

F. The 20th Century.

The Court disregards "20th-century historical evidence." But it is worth noting that the law the Court strikes down today is well over 100 years old,

having been enacted in 1911 and amended to substantially its present form in 1913. That alone gives it a longer historical pedigree than at least three of the four types of firearms regulations that *Heller* identified as "presumptively lawful." 554 U.S. at 626-27 & n.26; see C. Larson, Four Exceptions in Search of a Theory: *District of Columbia* v. *Heller* and Judicial *Ipse Dixit*, 60 Hastings L.J. 1371, 1374-1379 (2009) (concluding that "'prohibitions on the possession of firearms by felons and the mentally ill [and] laws imposing conditions and qualifications on the commercial sale of arms'" have their origins in the 20th century); *Kanter* v. *Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons"). Like JUSTICE KAVANAUGH, I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding. But unlike JUSTICE KAVANAUGH, I find the disconnect between *Heller*'s treatment of laws prohibiting, for example, firearms possession by felons or the mentally ill, and the Court's treatment of New York's licensing regime, hard to square. The inconsistency suggests that the Court today takes either an unnecessarily cramped view of the relevant historical record or a needlessly rigid approach to analogical reasoning.

The historical examples of regulations similar to New York's licensing regime are legion. Closely analogous English laws were enacted beginning in the 13th century, and similar American regulations were passed during the colonial period, the founding era, the 19th century, and the 20th century. Not all of these laws were identical to New York's, but that is inevitable in an analysis that demands examination of seven centuries of history. At a minimum, the laws I have recounted *resembled* New York's law, similarly restricting the right to publicly carry weapons and serving roughly similar purposes. That is all that the Court's test, which allows and even encourages "analogical reasoning," purports to require.

In each instance, the Court finds a reason to discount the historical evidence's persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

V

We are bound by *Heller* insofar as *Heller* interpreted the Second Amendment to protect an individual right to possess a firearm for self-defense.

But *Heller* recognized that that right was not without limits and could appropriately be subject to government regulation. 554 U.S. at 626-627. *Heller* therefore does not require holding that New York's law violates the Second Amendment. In so holding, the Court goes beyond *Heller*.

. . . [T]he history, as it appears to me, seems to establish a robust tradition of regulations restricting the public carriage of concealed firearms. To the extent that any uncertainty remains between the Court's view of the history and mine, that uncertainty counsels against relying on history alone. In my view, it is appropriate in such circumstances to look beyond the history and engage in what the Court calls means-end scrutiny. Courts must be permitted to consider the State's interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives.

The Second Circuit has previously done just that, and it held that New York's law does not violate the Second Amendment. *See Kachalsky*, 701 F.3d at 101. It first evaluated the degree to which the law burdens the Second Amendment right to bear arms. *Id.* at 93-94. It concluded that the law "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," but does not burden the right to possess a firearm in the home, where *Heller* said "'the need for defense of self, family, and property is most acute.'" *Kachalsky*, 701 F.3d at 93-94 (quoting *Heller*, 554 U.S. at 628). The Second Circuit therefore determined that the law should be subject to heightened scrutiny, but not to strict scrutiny and its attendant presumption of unconstitutionality. 701 F.3d at 93-94. In applying such heightened scrutiny, the Second Circuit recognized that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." *Id.* at 97. I agree. As I have demonstrated above, see *supra*, at 3-9, firearms in public present a number of dangers, ranging from mass shootings to road rage killings, and are responsible for many deaths and injuries in the United States. The Second Circuit then evaluated New York's law and concluded that it is "substantially related" to New York's compelling interests. *Kachalsky*, 701 F.3d at 98-99. To support that conclusion, the Second Circuit pointed to "studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Id.* at 99. We have before us additional studies confirming that conclusion. And we have been made aware of no less restrictive, but equally effective, alternative. After considering all of these factors, the Second Circuit held that New York's law does not unconstitutionally burden the right to bear arms under the Second Amendment. I would affirm that holding.

New York's Legislature considered the empirical evidence about gun violence and adopted a reasonable licensing law to regulate the concealed

carriage of handguns in order to keep the people of New York safe. The Court today strikes down that law based only on the pleadings. It gives the State no opportunity to present evidence justifying its reasons for adopting the law or showing how the law actually operates in practice, and it does not so much as acknowledge these important considerations. Because I cannot agree with the Court's decision to strike New York's law down without allowing for discovery or the development of any evidentiary record, without considering the State's compelling interest in preventing gun violence and protecting the safety of its citizens, and without considering the potentially deadly consequences of its decision, I respectfully dissent.

C. THE FOUR GVRs

A week after *Bruen*, the Supreme Court granted certiorari in four cases, vacated their judgments, and remanded them — a procedure often referred to as a "GVR" — for reconsideration in light of *Bruen.*

Two involved state statutes for the confiscation of magazines holding more than 10 rounds. In the California case, the district court held the law unconstitutional, as did a 2-1 Ninth Circuit panel. But a divided en banc Ninth Circuit reversed and upheld the law. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated* 2022 WL 2347579. In the New Jersey case, the district judge upheld the challenged statute, as did a 2-1 Third Circuit panel. The petition for rehearing en banc fell short by one judge's vote. *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Attorney General N.J.*, 974 F.3d 237 (3d Cir. 2020), *vacated* 2022 WL 2347576.

The third case involved a challenge to Maryland's ban on many semiautomatic rifles. This case, like *Bruen*, was contrary to circuit precedent, *Kolbe v. Hogan* (Ch. 15.A). In *Kolbe*, the district court upheld the ban under intermediate scrutiny, but a 2-1 Fourth Circuit panel said that strict scrutiny should have been used. A divided Fourth Circuit, sitting en banc, ruled that the arms at issue were outside the scope of Second Amendment protection or, alternatively, the law was constitutional under intermediate scrutiny. The post-*Bruen* grant, vacate, and remand was in *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), *vacated* 2022 WL 2347601.

While the above cases are certain to continue, the final case with a GVR may not. *Young v. State of Hawaii* started as a *pro se* case by a fisherman who wanted to carry a handgun when angling in remote areas. *Young* went one way before a panel and the other way en banc. The en banc majority held that there is no right to "bear arms" outside one's property. *Young v. State of Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc). The Hawaii Attorney General advised sheriff's offices to begin issuing concealed carry permits. All procedural rules

about permitting, such as fees, background checks, etc., still apply.[2] So presumably, Hawaii County will issue Mr. Young a permit.

D. BRUEN *RULES*

Chapter 12.A. presented some rules from *Heller* and *McDonald*. Below are some from *Bruen*:

The core rule

> The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need.[3]

The core test

Second Amendment cases should be decided by "text, as informed by history." *Id.*at 2127 The "standard for applying the Second Amendment is as follows":

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[4]

As with any constitutional issue, the first question to ask is whether the conduct implicates the constitutional text. If a Fourth Amendment litigant sued because "[t]he police officer stared at me for half an hour while I ate at the diner," the court would dismiss the complaint, because staring at a person in a public place is neither a "search" nor a "seizure," so there is no Fourth Amendment issue.

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[2] Hawaii Attorney General, Op. No. 22-02 (July 7, 2022). For similar directives, *see* Massachusetts Attorney General and Executive Office of Public Safety, "Joint Advisory Regarding the Massachusetts Firearms Licensing System After the Supreme Court's Decision in *New York State Rifle & Pistol Association v. Bruen*"; Maryland Attorney General, letter to Captain Andrew Rossignol, Commander of the Maryland State Police Licensing Division; New Jersey Attorney General Enforcement Directive No. 22-07.

[3] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (quoting *McDonald*, 561 U.S. at 780).

[4] *Id.* at 2129-30 (quotation omitted).

Similarly, with the First Amendment, a threshold question is whether a government action implicates "the freedom of speech." Under current precedent, a municipal ordinance that pool halls must close by 11 p.m. does not raise a "freedom of speech" issue, even though the ordinance limits conversation while playing pool. Conversely, students wearing black armband to public school to protest the Vietnam War does implicate "the freedom of speech." Even though no words are used, a message is expressed.[5]

In a Second Amendment context, a litigant who complains about extremely strict federal regulations for the manufacture of sarin nerve gas will have his case dismissed, with no need for consideration of the legal history of the regulation of nerve gas. *Heller* states that "dangerous and unusual weapons" are not protected by the Second Amendment.[6] Sarin is obviously dangerous and unusual.

The burden of proof is on the government

Assuming that a restricted activity does implicate the right to keep arms or the right to bear arms, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[7]

Judges do not bear the burden of researching legal history. "Courts are thus entitled to decide a case based on the historical record compiled by the parties."[8] "Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden."[9]

The judiciary should not defer to the legislature

> "[W]hile … judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. It is this balance — struck by the traditions of the American people — that demands our unqualified deference."[10]

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[5] *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).
[6] 554 U.S. at 627.
[7] *Bruen*, 142 S. Ct., at 2127.
[8] *Id.* at 2130 n.5.
[9] *Id.* at 2150.
[10] *Id.* at 2131 (quoting *Heller*, 554 U.S. at 635).

What history matters most?

"Not all history is created equal" — because "'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*'"[11] Most important, according to *Bruen*, is the Founding Era, when the Second Amendment was ratified. Also important is Reconstruction — a period some historians call "The Second Founding" — when the Fourteenth Amendment was enacted in part of make the Second Amendment enforceable about state and local governments.

What if the 1791 era meaning of the right to arms was different from the Reconstruction era meaning? The majority opinion and Justice Barrett's concurrence both acknowledge, that the answer is unresolved. In *Bruen*, answering the question was unnecessary, because the evidence of a robust Second Amendment right to bear arms during Reconstruction was just as strong as it was for the original Founding Period.[12]

As for other historical periods:

- "English practices that 'prevailed up to the "period immediately before and after the framing of the Constitution"" and were "'acted upon or accepted in the colonies'" are relevant.[13]
- The colonial period is relevant to the extent that it informed the original understanding of the Second Amendment.[14]
- "'[H]ow the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century'" is "'a critical tool of constitutional interpretation'" "'to determine *the public understanding* of a legal text in the period after its enactment or ratification.'"[15]
- However, one must "guard against giving postenactment history more weight than it can rightly bear."[16] "[T]o the extent later history contradicts what the text says, the text controls."[17] "'[P]ostratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'"[18]

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[11] *Id.* at 2136 (quoting *Heller* at 634-35) (emphasis in *Bruen*). This is the most-quoted sentence from *Heller*, since it applies to constitutional interpretation in general, not just the Second Amendment.

[12] *Id.* at 2138; *see also id.* at 2162-63 (Barret, J., concurring).

[13] *Id.* at 2136 (quoting *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting) and *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935)).

[14] *Id.* at 2142-44.

[15] *Id.* at 2127-28, 2153-54 & n.28 (quoting *Heller*, 554 U.S. at 605)

[16] *Id.*

[17] *Id.* at 2137.

[18] *Id.* (quoting *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d at 1274, n.6 (Kavanaugh, J., dissenting)).

    - Late-nineteenth-century laws, however, "cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." [19] The late 19th century is important insofar as it provides "confirmation of what . . . had already been established" by earlier history.[20]
    - "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence"[21]
- "[A] regular course of practice' can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution."[22]
- "[L]iquidating' indeterminacies in written laws is far removed from expanding or altering them."[23]
- "In other words, we recognize that 'where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.'"[24]
- "To the extent there are multiple plausible interpretations of *Sir John Knight's Case*, we will favor the one that is more consistent with the Second Amendment's command."[25] Presumably this principle applies to other arguably ambiguous precedents.

Historical Analogies

A valid modern restriction can be "a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[26]

Bruen does not purport to "exhaustively" define how judges may consider how laws are "relevantly similar." *Bruen* does offer some guidelines:

- "[C]ourts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'"[27]

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[19] *Id.* at 2153-54.
[20] *Id.* at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1976 (2019)).
[21] *Id.* at 2154 n.28.
[22] *Id.* at 2136 (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020)) (internal quotation marks omitted).
[23] *Id.* at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring)).
[24] *Id.* at 2137 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)).
[25] *Id.* at 2141 n.11.
[26] *Id.* at 2133.
[27] *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

- Analogy "does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the 'product of an interest balancing by the people,' not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances. . . . It is not an invitation to revise that balance through means-end scrutiny."[28]
- "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[29]
- "[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."[30]
- "[I]f some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality."[31]
- "[O]ther cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[32]

A modern gun control and a possible historical analogue must be "relevantly similar." To consider relevant similarity, *Heller* and *McDonald* point to "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[33]

- "How" means: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense."[34]

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[28] *Id.* at 2133 n.7.
[29] *Id* at 2131.
[30] *Id.*
[31] *Id.* at 2131.
[32] *Id.* at 2132.
[33] *Id.* at 2132-33. *Heller* and *McDonald* declared that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* at 2133 (citing *McDonald*, 561 U.S. 767).
[34] *Id.*

- "Why" means: "whether that burden is comparably justified."[35]

Rules for the right to bear arms

- "*[T]he manner* of public carry" is "subject to reasonable regulation." For example, the legislature may ban concealed carry as long as open carry is lawful.[36]
- Firearms may be forbidden in certain "sensitive places." [37]
- "[C]ourts can use analogies to those [19th century and before] historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible."[38]
- "[E]xpanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly" and would "eviscerate the general right to publicly carry arms for self-defense."[39]
- "To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'general desire for self-defense is sufficient to obtain a [permit].' . . . Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily

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[35] *Id.* The second metric, the "why," is very important. It prevents historic, burdensome laws that were enacted for one purpose from being used as a basis to impose burdens for other purposes. As Mark Frassetto, an attorney for Everytown for Gun Safety, writes, "Militia and fire prevention laws imposed substantial burdens on founding era gun owners." In his view, courts should uphold laws that impose equally substantial burdens "regardless of the underlying motivation for regulation." Mark Frassetto, *The Duty to Bear Arms: Historical Militia Law, Fire Prevention Law, and the Modern Second Amendment*, *in* New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society (Jacob Charles, Joseph Blocher & Darrell Miller eds.) (Oxford Univ. Pr. forthcoming). *Bruen* expressly forbids this methodology.

[36] "The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation . . . States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly." *Bruen*, 142 S. Ct. at 2150.

[37] *Id.* at 2133 (citing David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 205, 229-236 (2018) and Brief for Independent Institute as *Amicus Curiae Supporting Petitioners)*. Note: the Independent Institute is a think tank in Oakland, California. David Kopel works at the Independence Institute, a think tank in Denver.

[38] *Id.* at 2133.

[39] *Id.* at 2134.

prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry."[40]

- "[S]hall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.' And they likewise appear to contain only 'narrow, objective, and definite standards' guiding licensing officials, rather than requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion.'"[41]
- "[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry."[42]

NOTES & QUESTIONS

1. **CQ:** The now-rejected Two-Part Test (TPT) (a.k.a Two-Step Test) used by most but not all lower federal courts post-*Heller* is examined in depth in Chapter 12. Most of the excerpted cases in Chapters 13-16 used the TPT. As you read them you can form your own conclusions about how well the test was working. However, it should be noted that there is a selection bias in the cases that were selected for the textbook, for the same reason that there is case selection bias in all law school textbooks. We chose the best-written opinions on the most important issues. There were many TPT cases whose reasoning was relatively superficial or weak, and we did not deem them worthy of students' time.

For a broader overview of the TPT, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 Duke L.J. 1433 (2018) (TPT is working well); David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 Duke L.J. Online 79 (2018) (problems in the Second, Fourth, and Ninth Circuits); George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 Duke L.J. Online 41 (2018) (Professors Ruben and Blocher present evidence of judicial underenforcement, which would be more apparent if their study had focused on final case outcomes).

2. *Analogy "metrics." Bruen* offers two central self-defense "metrics" from *Heller* and *McDonald*, but does not claim these metrics are the only ones that

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[40] *Id.* at 2138 n.9 (citing *Drake v. Filko*, 724 F.3d 426, 442 (3d. Cir. 2013) (Hardiman, J., dissenting); *Heller*, 554 U.S. at 635).
[41] *Id.* (citations omitted).
[42] *Id.*

can be used. While the *Bruen* metrics focus on self-defense, the right to arms is for all "lawful purposes." *Heller*, 554 U.S. at 625; *McDonald*, 561 U.S. at 78. For example, recreational arms activities, such as hunting or target shooting, are in themselves part of the right. Additionally, they build skills for defense of self and others. Can you describe analogical metrics that account for "lawful purposes" besides self-defense?

3. The *Bruen* text, if read strictly, would seem to limit additions to the list to "*new*" types of sensitive places. This would rule out carry bans on types of places that were well-known in the eighteenth or nineteenth century, such as municipal parks. At present, there is much variance in state law on sensitive places, even in states that have generally respected the right to bear arms. If you wish, examine your state's laws about where licensed carry is prohibited. Which areas of prohibition are most sensible? Which are most constitutionally sound based on analogy to the "sensitive places" enumerated in *Bruen* and *Heller*: courthouses, polling places, legislative assemblies, schools, and government buildings? Which are "*new*" (emphasis in *Bruen*) in that they did not exist in the nineteenth century or before?

4. *Bruen* warns against "exorbitant" fees for carry permits. Georgetown law professor Randy Barnett described the $505 cost of obtaining a D.C. permit. Thereafter, the D.C. cost is $235 triennially for permit renewals. In Barnett's view, some of the mandatory training was essential information for students to know about D.C.'s rules about deadly force, sensitive places, and so on. But he considered the 18 hours of training to be excessive, and mainly for the purpose of erecting barriers to applicants. Unlike many jurisdictions, D.C. mandates that all the training must take place in person in classrooms. Many other states allow training on-line at one's own pace, plus in-person live fire training at a range. "I can afford all this, of course, though I cannot say the same for all other citizens of D.C.," Barnett concluded. Randy Barnett, *A Minor Impact on Gun Laws But a Potentially Momentous Shift in Constitutional Method*, SCOTUSBlog.com (June 27, 2022). Are the D.C. fees and costs vulnerable to constitutional challenge?

5. While joining Justice Thomas's opinion in full, Justice Kavanaugh wrote a concurring opinion, joined by Chief Justice Roberts. They stated that "a mental health records check" could be part of a shall-issue system. *Id.* at 2162. Mental health records are already checked for all retail gun purchases, and for all concealed carry permit applications, pursuant to the National Instant Check System, which has a database of all persons who have been adjudicated a "mental defective" and hence prohibited for life from firearms possession. Chs. 9.C.3.d, 13.E. Would additional mental health investigations — such as

requiring persons who are seeing a therapist to waive confidentiality — be constitutional?

6. **CQ:** Justice Barrett's concurrence asks, "Should courts rely on original understanding as of 1791, when the Second Amendment was ratified, or also 1868, when the Fourteenth Amendment made the Second Amendment enforceable against the States?" What do you think? Can you think of cases where the choice might make a difference?

7. *The rise of shall issue.* Starting around the turn of the twentieth century, states began adopting may-issue laws for concealed carry. The first shall-issue law was enacted by Washington State in 1961.[43] By 2022, forty-four states, plus the District of Columbia and Puerto Rico, allowed concealed carry either with a shall-issue permit, or with no need for a permit (25 states). Of the 25 permitless concealed carry states, all but Vermont issue optional permits under a shall-issue system. (The optional permit is useful for travel to another states, and in some states for carry in certain areas that would otherwise be not allowed.) Is *Bruen*'s approval of shall-issue systems based on originalism? On pragmatism? For exploration of the issue, see Adam M. Samaha, *Is Bruen Constitutional? On The Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. Rev. 1928 (2023)

8. *How many are too few?* The *Bruen* opinion notes examples of historic laws that prohibited handgun carry most of the time. *Bruen* contrasts them with the mainstream approach. They are:

- East Jersey, which for a while was separate from West Jersey. "Planters" (frontiersman) were allowed to carry long guns but not handguns. "[W]e cannot put meaningful weight on this solitary statute . . . At most eight years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment."[44]
- Three colonial statutes against carrying arms "Offensively" to cause "Fear." The *Bruen* majority did not believe that such laws banned peaceable carry. Regardless, "we doubt that three colonial regulations could suffice to show a tradition of public-carry regulation."[45] In other words, 3/13 = 23% is not enough.
- "Tennessee, meanwhile, enacted in 1821 a broader law that prohibited carrying, among other things, "belt or pocket pistols, either public or

[43] Wash. RCW 9.41.070.
[44] *Bruen* at 2143–44.
[45] *Id.*

private," except while traveling. 1821 Tenn. Acts ch. 13, §1, p.15."[46] "That said, when the Tennessee Supreme Court addressed the constitutionality of a substantively identical successor provision, see 1870 Tenn. Acts ch. 13, §1, p.28, the court read this language to permit the public carry of larger, military-style pistols because any categorical prohibition on their carry would "violat[e] the constitutional right to keep arms." *Andrews* v. *State*, 50 Tenn. 165, 187 (1871)."[47] The Tennessee 1821 ban, like Georgia's 1837 ban, might count for nothing; the Georgia Supreme Court held that a ban on open carry violated the Second Amendment, and the Tennessee Court adopted a saving construction to allow open carry of large handguns.[48]

- Arkansas prohibited all public carry of pistols in 1875 but changed the law in 1881 to allow open carry of large pistols in the hand.[49]
- The Kansas legislature in 1881 told three large cities to prohibit public carry. It is not claimed that any of the cities did so, and they accounted for under 7% of the Kansas population.
- Texas in 1871 and West Virginia in 1887 banned handgun carry except while traveling or when the carrier had "reasonable grounds" to fear for his safety.[50] The West Virginia statute did not count, as it was supported by the state supreme court's theory "that *no* handguns of any kind were protected by the Second Amendment, a rationale endorsed by no other court during this period. See *State* v. *Workman*, 14 S. E. 9, 11 (1891)."[51] As for Texas (where the case law affirmed at least the right to keep nonconcealable handguns), "we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not 'stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense' in public. 554 U. S., at 632."[52]
- Five Western Territories:
    - The Territory of New Mexico made it a crime in 1860 to carry "any class of pistols whatever" "concealed or otherwise." 1860 Terr. of N.M. Laws §§1-2, p.94. This extreme restriction is an outlier statute enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights, and its constitutionality was never

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[46] *Id.* at 2146 n.16.
[47] *Id.* at 2147
[48] *Id.* (discussing *Nunn v. State*, 1 Ga. 243 (1846)).
[49] *Id.* at 2155 n.31.
[50] *Id.* at 2153.
[51] *Id.*
[52] *Id.* (quoting *Heller*, 554 U. S., at 632).

tested in court. Its value in discerning the original meaning of the Second Amendment is insubstantial. Moreover, like many other stringent carry restrictions that were localized in the Western Territories, New Mexico's prohibition ended when the Territory entered the Union as a State in 1911 and guaranteed in its State Constitution that "[t]he people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." N. M. Const., Art. II, §6 (1911).[53]
    - New Mexico in 1869 modified the above to ban handgun carrying in towns, while allowing long gun carry. Arizona enacted a similar statute in 1889.[54]
    - Idaho in 1889 and Wyoming in 1875 banned all gun carrying in town.
    - Oklahoma 1890 banned pistol carrying and limited long gun carry.
    - "[W]e will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence."
- "Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense."[55]

As you consider how other historic arms laws may or may not be precedents for particular types of modern laws, consider the historic laws in light of *Bruen*'s list of insufficient laws. Are the other laws more numerous, or longer-lasting, than the collection of laws in *Bruen* that were held insufficient to override the constitutional text? many of these jurisdictions amended their laws over time and upon entry to the union.[56] *See also* Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 Sup. Ct. Rev. 49 (suggesting various ways in which courts in constitutional cases can identify whether a particular law should be considered an "outlier.")

9. *New York legislature vs. Bruen*. Using a "message of necessity" to short circuit the normal New York constitutional rule that a bill must be available to legislators and the public for three days before it is passed (N.Y. Const., art. III, §14), the New York legislative leadership and Governor Kathy Hochul introduced a bill on a Friday morning in early July, and enacted it that afternoon. It takes effect on Sept. 1, 2022.

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[53] *Id.* at 2147 n.22.
[54] *Id.* at 2154.
[55] *Id.* at 2147 n.22, 2153-55.
[56] *See* Ch. 7.H.

The New York State Sheriffs' Association criticized "thoughtless, reactionary action, just to make a political statement," and "the burdensome, costly, and unworkable nature of many of the new laws' provisions." "We do not support punitive licensing requirements that aim only to restrain and punish law-abiding citizens who wish to exercise their Second Amendment rights."[57] The New York Association of [County] Clerks wrote to the governor, "[i]n haste to pass the new regulations as a reaction to the recent United States Supreme Court ruling, the process as it stands now will be riddled with complex, confusing and redundant barriers of compliance."[58]

Where will concealed carry permit holders be allowed to carry? "Probably some streets," she explained.[59]

The new law designates an enormous variety of places as "sensitive locations." Not only does the law prohibit concealed carry licensees from bringing their guns into these locations, the law makes felons of proprietors, owners, and employees who simply possess arms in the location.[60] Thus, a doctor who runs his or her own practice cannot have a handgun in a lock box in his or her office. A church cannot have volunteer security guards, such as the former police officer who thwarted a mass shooter at the New Life Church in Colorado Springs in 2007.[61] The same goes for every school of any level, government or independent, regardless of what school wants.

Under the new law, licensed carry is also banned in all forms of public transportation, including in one's own car on a ferry. All these restrictions defy *Bruen*'s rule that "*new*" (emphasis in original) types of "sensitive places" may be authorized by analogy to sensitive places from the nineteenth century and before. Ferries, churches, doctors' offices, entertainment facilities, and restaurants with a liquor license that serve meals to customers who don't order drinks are not "new." Firearms possession is also forbidden at "any gathering of individuals to collectively express their constitutional rights to protest or assemble."[62] In other words, if two dozen members of the county branch of New York's Conservative Party gather anywhere (even in a private home) for a meeting, they may not protect themselves.

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[57] New York State Sheriffs' Association, *Statement Concerning New York's new Firearms Licensing Laws*, July 6, 2022.

[58] Wendy Wright, *NY county clerks question feasibility of enacting gun permit changes*, SpectrumLocalNews.com (Rochester) (July 18, 2022).

[59] Luis Ferré-Sadurní & Grace Ashford, *N.Y. Democrats to Pass New Gun Laws in Response to Supreme Court Ruling*, N.Y. Times (June 30, 2022).

[60] N.Y. Penal Law §265.01-e.

[61] *Security Guard Who Stopped Shooter Credits God*, CNN.com (Dec. 10, 2007); Judy Keen & Andrea Stone, *This Month's Mass Killings a Reminder of Vulnerability*, USA Today (Dec. 21, 2007); Jeanne Assam, God, The Gunman & Me (2010). New Life Church is a megachurch; there were thousands of worshippers present in the sanctuary when the killer entered.

[62] N.Y. Penal Law §265.01-e(2)(s).

Beyond the enumerated list of sensitive locations, bringing a gun into *any* building is a felony, unless the owner has posted a permission sign or granted express permission.[63] Permit applicants must submit "a list of former and current social media accounts of the applicant from the past three years."[64]

10. *California's "good moral character" statute.* California's handgun carry licensing statute includes a requirement that the applicant be of "good moral character." After *Bruen* was announced, California Attorney General Rob Bonta proposed to use the policy of the Riverside County Sheriff's Department: "Legal judgments of good moral character can include . . . *absence of hatred and racism*, fiscal stability[.]"[65] He added that "social media accounts" were fair game for inquiry. Denials could be based on "[a]ny arrest in the last five years, regardless of the disposition," or any conviction in the last seven.[66]

UCLA law professor Eugene Volokh suggests that it is unconstitutional to deny the exercise of constitutional rights because of an arrest without a conviction. Likewise, under the First Amendment, "[t]he government can't restrict ordinary citizens' actions — much less their constitutionally protected actions — based on the viewpoints that they express." Volokh is also skeptical about the denial of rights for "[l]ack of 'fiscal stability' — which may simply mean being very poor or insolvent." Eugene Volokh, *State Attorney General Suggests Considering Applicants' Ideological Viewpoints in Denying Carry Licenses*, Reason, Volokh Conspiracy (June 26, 2022).

Are California's policies good ideas? Does *Bruen* suggest anything about whether they are constitutional?

11. For Professor Kopel's analysis of some amicus briefs supporting Respondents in *Bruen*, see *Surprising Support for the Right to Bear Arms: Reading the Cited Sources from Everytown's Amicus Brief*, Reason, Volokh Conspiracy (Nov. 3, 2021); *Social science on the right to bear arms: Doomsday warnings don't hold up*, Reason.com (Nov. 2, 2021); *Corpus Linguistics and the Second Amendment: Support for the Right to Bear Arms for All Purposes*, Reason.com, (Oct. 29, 2021); *Amnesty International Brief Against Right to Bear Arms*, Reason.com (Oct. 13, 2021).

12. *Criticism of the historical test.* There was little or no criticism of the first, history-and-tradition-based, prong of the Two-Part Test (Ch. 12.B) before

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[63] *Id.* at §265.01–d.
[64] *Id.* at §400(1)(f)(iv).
[65] California Department of Justice, Office of the Attorney General, *U.S. Supreme Court's Decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843*, OAG-2022-02, June 24, 2022.
[66] *Id.*

Bruen was decided. Indeed, many scholars supported the test as a whole, *see, e.g.*, Ruben & Blocher, *supra* Note 1, and the courts applying it did not typically, if at all, complain about the test. That changed after *Bruen* was handed down.

Professor Jacob D. Charles criticizes *Bruen* and offers prospective advice to legislators enacting gun control laws in *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67 (2023). Based on analysis of approximately 200 post-*Bruen* lower court cases, he argues that *Bruen*'s text and history test is unworkable. He is particularly critical of *Bruen*'s rule that historical legislative choice *not* to enact gun control based on well-known social problems should be construed to imply that gun control is not a constitutionally permissible solution to that problem.

Professor Charles suggests that courts should appoint "neutral historical experts" to help them decide gun control cases — a suggestion at odds with *Bruen*'s express rule that that parties have the burden of introducing historical evidence, as they do with other evidence.

Finally, he urges legislators enacting new gun control laws "to be explicit about four types of evidence for the law's constitutionality that track *Brue*n's new demands: the purpose for the law, the expected burden on armed self-defense, the precise nature of the problem to which the law is directed, and the historical tradition from which the law springs."

Professor Charles's suggestion would undoubtedly be helpful to government lawyers tasked with defending gun control laws. However, the suggestion has not been followed. For example, when the New Jersey legislature enacted severe restrictions on where licensed concealed carry is allowed, Senate President John Sweeney stated that the bill had been researched and was certainly constitutional. But when the law was challenged in federal district court, the Judge ended up having to do her own historical research and criticized the New Jersey Attorney General for being unwilling or unable to provide historical information that could be used as analogies in support of the new statute. *Koons v. Platkin*, 2023 WL 3478604 (D.N.J. May 16, 2023).

Professors Joseph Blocher and Eric Ruben also criticize *Bruen*'s requirement that modern courts must reason by historical analogy to decide cases about issues such as "3D-printed guns, large-capacity magazines, obliterated serial numbers, and the possession of guns on subways or by people subject to domestic violence restraining orders. *Originalism-by-Analogy and Second Amendment Adjudication*, Yale L.J. (forthcoming). They urge courts to 1. "discern workable principles of relevant similarity — the sine qua non of analogical reasoning — to compare historical and modern laws." 2. "account for the fundamental differences between past and present, for example by adjusting the level of generality at which the historical inquiry is conducted." And 3. "recognize that — precisely because it requires comparison of past and

present — *Bruen* preserves an important role for empirics and legislative deference."

Judges, both in opinions and elsewhere, have also complained about *Bruen* and engaged in what some call "uncivil obedience." *See* George A. Mocsary, *Treating Young Adults as Citizens*, 27 Tex. Rev. L. & Pol. 607, 619-20 (2023) (citing examples). Uncivil obedience by lower court judges "take[s] the Supreme Court's opinions at face value and pursue[s] the logic of the opinions to their ends" to arrive at absurd or unreasonable outcomes for the purpose of criticizing the opinion and making it more difficult for the Supreme Court to "hold[] the line laid down in *Bruen*." Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 Wm. & Mary L. Rev. 79 (2023) (quoting Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 Wm. & Mary L. Rev. 1, 14 (2018)). Professors Denning and Reynolds have previously studied lower court resistance to *Heller* (Ch. 11.A) and *Lopez v. United States* (Ch. 9.B.3.a).

Before *Bruen* the first, history-based, step in the Two-Part Test served to filter out cases from Second Amendment protection. That is, if the plaintiff's claim failed at step one, the inquiry was over and the plaintiff lost. If the plaintiff's claim passed step one, the plaintiff could (and usually did) still lose at step two under the very government-favoring version applied at step two. Might this explain why judges and scholars, who admittedly favor narrower gun rights are now speaking out against the *Bruen* test? If the test is truly unworkable, should it not also be unworkable as part of the Two-Part Test? If it were as unworkable as many now claim, would you expect at least some of those now complaining about the test to have made similar complaints — that it's impossible to perform, that it leads to unreliable results, etc. — before it was divorced from step two? The closest pre-*Bruen* expression of complaint was multiple courts "assuming without deciding" (and similar language) that the conduct at issue was protected by the Second Amendment, and ruling that the regulation passed step two.

What does the text of *Bruen* say about empirics and legislative deference?

13. *Is means-ends scrutiny inescapable?* Professors Denning and Reynolds describe *Heller* as a "minimalist" opinion and *Bruen* as a "maximalist" one. They argue that, to justify *Bruen*'s rejection of tiered scrutiny, "Justice Thomas had to 'retcon' Heller — reading back into the latter decision the analytical framework adopted in *Bruen*. Denning & Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 Wm. & Mary L. Rev. 79, 84 (2023). Do you agree? Consider *Heller II* (Ch. 12.D), in which two judges of the D.C. Circuit read *Heller* as allowing them to adopt tiers of scrutiny, whereas dissenting then-Judge Kavanaugh argued that *Heller*'s methodology was text and history, not tiered scrutiny.

They also address what they call "the *Heller* safe harbor" of "presumptively lawful" gun controls, which Justice Kavanaugh's *Bruen* concurrence quotes in full: "Critics at the time questioned whether these could be squared with the self-conscious originalism of the rest of the [*Heller*] opinion. This tension is only heighted by *Bruen*'s text-history-tradition only approach."

Stephen Halbrook and Professor Nelson Lund argue back and forth about *Bruen* in three articles. Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, 23 Federalist Soc'y Rev. 279 (2022); Stephen Halbrook, *Text-and-History or Means-End Scrutiny in Second Amendment Cases? A Response to Professor Nelson Lund's Critique of Bruen*, 24 Federalist Soc'y Rev. 54 (2023); Nelson Lund, *Stephen P. Halbrook's Confused Defense of Bruen's Novel Interpretive Rule*, Geo. Mason L. Stud. Rsch. Paper No. LS 23-03. The two authors agree that *Heller* and *Bruen* were correctly decided on text and history. They also agree that many post-*Heller* lower courts misused tiers of scrutiny, and that *Bruen*'s repudiation of the Two-Step Test was proper. Halbrook, fully supportive of *Bruen*, argues that text, history, and analogies are the only proper bases for courts to decide Second Amendment cases.

According to Lund, the Court has repeatedly issued *ipse dixits* in support of certain gun controls that cannot be plausibly upheld by text-history-analogy: namely the "presumptively lawful" list in *Heller*, and the blessing of fairly-administered shall-issue carry licensing (Ch. 10.D.6.b) in *Bruen*. He disagrees with Halbrook's dismissal of these as dicta, and with Halbrook's efforts to justify shall issue based on history. In Lund's view, the *ipse dixits* show that "means-end" analysis still has a role post-*Bruen*, if that analysis does not upset the balance struck by the Founding generation. While part of the Lund-Halbrook debate is about *Heller* said, perhaps the key disagreement is between what *Bruen* explicitly says (Halbrook) versus what *Bruen* does (Lund).

Bruen has been criticized for not allowing courts to engage in means-end balancing, and therefore to contradict decades of precedent. *See*, *e.g.*, Albert W. Alschuler, *Twilight-Zone Originalism: The Supreme Court's Peculiar Reasoning in New York State Pistol & Rifle Association v. Bruen*, 32 Wm. & Mary Bill of Rights J. (2023). Professor Bruce Ledewitz disagrees. *No Balancing for Anti-Constitutional Government Conduct*, 2023 U. Ill. L. Rev. Online 80 (2023). Looking at First Amendment and other constitutional precedents, he distinguishes "unconstitutional" laws from "anti-constitutional" laws. For "unconstitutional" laws, the legislature recognized that constitutional rights were important, but struck a defective balance. For example, a law that banned all cigar advertising within a thousand feet of school recognized the First Amendment right of commercial speech but went too far in creating no-advertising zones that encompassed almost the entirety of most cities. The law was held unconstitutional based on the Supreme Court's four-part *Central Hudson* intermediate scrutiny test for commercial speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In contrast, an "anti-

constitutional" law forbade "graphic sexually explicit subordination of women through pictures and/or words." *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). Because the law did not apply to "obscenity," but was far broader, it was held unconstitutional without resort to a balancing test. In Ledewitz's words, "the ordinance, by its terms, rejected the First Amendment's commitment that the government may not censure ideas regardless of how damaging those ideas are."

The law in question in *Bruen* was plainly anti-constitutional because it rejected the idea that ordinary people have a right to bear arms. However, writes Ledewitz, non-prohibitory regulations of carrying — such as requiring 18 hours of training for a carry permit — are not anti-unconstitutional; they are, at most potentially unconstitutional, to the extent that the government does not meet its burden of showing that the regulation is not excessive. Ledewitz predicts that, notwithstanding what *Bruen* says about balancing, the Court will uphold some regulations based on balancing — as long as the legislature is not acting from "anti-constitutional" hostility to the right itself.

15. Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 Stanford L. Rev. Online 30 (2023). Historic justifications for modern gun controls often rely on laws that are rightly considered repellant today, such as laws against enslaved persons, free persons of color, or religious minorities. The author suggests that such laws should not be considered off-limits as precedents for modern gun control. "Without a full picture of past laws — the prosaic and prejudiced alike — courts risk impermissibly narrowing the range of legislative options the ratifiers understood to be consistent with the right to keep and bear arms. And constricting that authority too tightly would be to usurp the people's power to rule themselves." Does Professor Charles's suggestion fit with Bruen's "Why" — "whether that burden is comparably justified"? Should racist and similarly repellent laws be a legitimate basis for justifying modern regulations?

16. *Licensing*. A Massachusetts statute, Mass. G.L. ch. 140, § 131(d)(x), requires police chiefs to deny a Firearms Identification Card, which is necessary to possess a firearm and is a prerequisite for a License to Carry, to "unsuitable" individuals. "A determination of unsuitability shall be based on reliable, articulable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety or a risk of danger to self or others." Citing *Bruen*, a state district court reversed a police chief's denial based on domestic violence and drug incidents in 2010 and 2014. Neither resulted in conviction, but the applicant admitted the truth of the accusations. The court held that disarming the dangerous is constitutional, but

the standards of "suggests" and "may create a risk" were too nebulous. *Westbrook v. Pratt*, no. 2317CV0154 (Holyoke Dist. Ct., May 20, 2024).

17. *Bruen in the lower courts*. One survey of post-*Bruen* cases reports three types of approaches by lower courts: "In one camp, courts have employed tight analogical reasoning, perhaps even requiring historical twins, to uphold a challenged regulation. Others have merely required loose analogues or a handful of historical laws to do the same. Finally, other courts—based entirely on either dicta in Heller and Bruen or pre-Bruen circuit precedent—have declined to conduct a historical inquiry entirely." Leo Bernabei, *Bruen as Heller: Text, History, and Tradition in the Lower Courts*, 92 Fordham L. Rev. Online 1 (2024).

18. *Legislative silence.* A short essay by Frederick Vars criticizes *Bruen* for limiting permissible gun controls to the type that historically existed in the United States. "Legislative inaction, therefore, defines the scope of the Second Amendment. The key question is not what past legislatures did, but rather what past legislatures did not do." Frederick E. Vars, *The Dog That Didn't Bark is Rewriting the Second Amendment*, N.Y.U. L. Rev. Forum (May 5, 2024). **CQ:** How does the Court's *Rahimi* decision address the issue of legislative inaction?

19. *Common Use.* Recall *Heller*'s statement that the Second Amendment protects arms that are "in common use" but not arms that are "dangerous and unusual." How should courts meld the *Heller* rule with *Bruen*? Some courts have held that "common use" is a "step zero" test, to determine if the plain text of the Second Amendment applies at all. Others examine "common use" in the context of whether a particular restriction is consistent with the history and tradition of arms regulation in America. *See* Jamie G. Mcwilliam, *The Relevance of 'In Common Use' After Bruen*, 2023 Harv. J.L. & Pub. Pol'y Per Curiam 37 (arguing for latter approach).

20. *Burden shifting*. Recall *Heller*'s list of certain "presumptively lawful" types of gun controls. The Kavanaugh-Roberts concurrence in *Bruen* quoted that language in full. To integrate *Bruen* and *Heller*, one author suggests that while *Bruen* places the burden of proof to justify a gun control on the government, in cases involving the "presumptively lawful" gun controls, and laws similar to them, the challengers to those laws should bear the burden of overcoming the presumption. Kevin G. Schascheck II, *Recalibrating Bruen: The Merits of Historical Burden-Shifting in Second Amendment Cases*, 11 Belmont L. Rev. 38 (2023).

21. *Bruen Implementation.* Professor Eugene Volokh notes four typical justifications for government restrictions on individual rights:

> (1) by showing that the restriction is outside the scope of the right, as defined by text, original meaning, and other factors; (2) by showing that it only modestly burdens the exercise of the right; (3) by showing that it serves sufficiently strong countervailing government interests; or (4) by showing that the government has special power as proprietor when it comes to behavior that uses its property.

While *Bruen* takes the third item off the table, and mainly focuses on the first item, Volokh suggests that *Bruen* still allows justifications based on "modest burdens" (such as fairly applied Shall Issue licensing for concealed carry permits) and for government as proprietor (as in some bans on carry on government property). Eugene Volokh, *Implementing the Right to Keep and Bear Arms after Bruen*, 98 N.Y.U. L. Rev. 1950 (2023).

22. *Applying Bruen to Other Rights.* In a criminal violation for wire fraud, the defendant argued that certain regulations violated the Sixth Amendment's Compulsory Process Clause, if that clause were analyzed under the original public meaning standard used in *Bruen*. The First Circuit rejected the argument, because controlling Supreme Court precedent provides a different analytical mode for compulsory process cases. *United States v. Crater*, 93 F.4th 581, 587-88 (1st Cir. 2024). If the *Bruen* originalist framework *were* applied to other rights, what might change?

23. Several post-*Bruen* courts have asked as parts of their analyses whether they need to look for "distinctly similar" or "relevantly similar" comparator historical laws. *United States v. Daniels*, 77 F.4th 337, 342 (2024), stated the inquiry as follows:

> *Bruen* helpfully gave us two conceptual pathways. If the modern regulation addresses "a general societal problem that has persisted since the 18th century," then "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." But if a modern law addresses "unprecedented societal concerns or dramatic technological changes," it calls for a "more nuanced approach." We must reason by analogy to determine whether older regulations are "relevantly similar" to the modern law.

But *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (2024 Supp. Ch. 13.A), made no such distinction. What, if any, are the consequences of having two "conceptual pathways" under *Bruen*? Is this what *Bruen* intended?

24. *Doesn't Bruen Still Require More than One-Step?* What is the reader supposed to make of: "Despite the popularity of this two-step approach, it is

one step too many." *Bruen*, at 19. Was this intended to be a limitation on the number of steps necessary to analyze Second Amendment claims, even under the new *Bruen* test, or was it something else?

A class discussion on how situational awareness is important when interpreting the language of case holdings might be helpful here. The Supreme Court's prior cases dealing with the Second Amendment — *Heller* and *McDonald* — both, specifically rejected any use of the existing tier-based (strict, intermediate, rational basis) standards of review. Indeed, *Bruen* says it was only providing a remedial lesson in the interpretation of *Heller. Id. at* 17 ("Today, we decline to adopt that two-part approach. In keeping with *Heller,* we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.")

That entire section of the *Bruen* opinion is a critique of the two-step approach in which circuit courts were engaging, including interest-balancing tests to determine whether conduct was (or was not) deemed part of the "core right" — before the adjudicating court even reached the ultimate question of whether a challenged law or statute violated the Second Amendment. In other words, the *threshold* question (with the burden on the challenger to the law/statute) of whether there is even a Second Amendment claim is now a one-step (though still contestable) inquiry under *Bruen*.

The remaining steps, after the burden shifts to the government, may contain many steps. (Or is the inquiry merely multi-faceted?) Is there an analogous law? What time frame did it become law? Was it actually a legitimate form of weapons control, or was it an attempt to control disfavored groups like slaves, free Blacks, Native Americans, recent immigrants, the working poor? Is the ancient law a close enough fit to the modern law to satisfy the *Bruen* test as modified (slightly) by *Rahimi* (2024 Supp. Ch. 13.A)? This is certainly more than one, two, or even three steps.

When discussing standards of review, the Supreme Court has noted that strict scrutiny was often "fatal in fact" in First Amendment cases. *See Bartnicki v. Vopper,* 532 U.S. 514, 548-49 (2001) (C.J. Rehnquist, J. Scalia, and J. Thomas, dissenting); *see also Adarand Constructors v. Pena,* 515 U.S. 200, 236 (1995) (J. O'Connor discussing how tiered standards of review can be counter-productive in race-based classifications.) In cases where strict scrutiny was applied, the analysis often stopped at step-one if the plain text of the relevant amendment forbade the government's policy. (*Cf. Korematsu v. United States,* 323 U.S. 214 (1944) (Government's internment in concentration camps of Japanese Americans upheld as valid race-based classification, *overruled in Students for Fair Admissions, Inc., v. President & Fellows of Harv. Coll.,* 600 U.S. 181 (2023)). In many ways, *Bruen*'s threshold question is even more nuanced than challenges under the First Amendment and Equal Protection clause.

Read in context, the discussion of "one-step-too-many" while, formalizing a standard of review for Second Amendment claims, was not intended to create a new straightjacket, but to announce a new approach to constitutional adjudication that requires research and analysis of the original public meaning of the Second Amendment, and that includes the context in which that right was ratified. Case analysis should be approached in the same way. *See* George A. Mocsary, *In Denial About the Obvious: Upending the Rhetoric of the Modern Second Amendment*, 2023-2024 Cato Sup. Ct. Rev. 127 (forthcoming 2024) (describing how *Bruen* demands, and *Rahimi* (2024 Supp. Ch. 13.A) applies, traditional common-law analysis of Second Amendment precedents to determine the constitutionality of firearm regulations based on the amendment's original meaning).

CHAPTER 1

FIREARM FACTS, DATA, AND SOCIAL SCIENCE

A. CHALLENGES OF EMPIRICAL ASSESSMENTS OF FIREARMS POLICY

The Rand Study was updated again on July 16, 2024. *See* Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States (4th ed. 2024). The 475-page update provides data and synthesis of scientific research published through February 2023. For five outcomes, including defensive gun use, research either is unavailable or almost entirely inconclusive. The update explains:

> The lack of research on a wide range of outcomes makes it difficult or impossible to conduct a comprehensive cost-benefit analysis of the gun policies. For instance, some of the strongest evidence we found suggests that CAP [child-access prevention] laws could reduce firearm injuries or deaths among children. But restricting access to guns could also prevent gun owners from accessing their weapons in an emergency. The lack of research on defensive gun use means that we do not have a way of directly estimating how the benefits of these laws (in terms of the number of child lives saved) compare with the possible costs (in terms of forgone opportunities for self-defense).

Supportive evidence was found that (1) CAP/safe storage laws reduce self-inflicted fatal or nonfatal firearms injuries, unintentional firearm injuries and deaths, and firearm homicides among children and youth; (2) stand-your-ground laws are associated with increases in firearm homicides and in total homicides; (3) shall-issue concealed-carry laws increase total homicides, firearm homicides, and overall violent crimes; and (4) increasing the minimum age required to purchase firearms above that set by federal law can reduce suicides among young people. The study found only limited evidence that background checks on private firearm sales reduce firearm homicides. The evidence was inconclusive as to the effects "assault weapon" bans have on mass shootings and their fatalities, and only limited evidence shows that high-capacity magazine bans may reduce mass shootings and associated fatalities. The third edition continued to emphasize the need for both more rigorous

research and significantly-increased methodological quality in current research.

Consistent with the Urbatsch study and Yamane article cited in Chapter 1.A of the printed book, Rutgers University researchers report that many Americans — especially women and minorities new to gun ownership — continue to decline to reveal their gun ownership when questioned by strangers. Allison E. Bond, et al., *Predicting Potential Underreporting of Firearm Ownership in a Nationally Representative Sample, Social Psychiatry and Psychiatric Epidemiology* (June 23, 2023); *see* J.D. Tuccille, *The Ranks of Gunowners Grow, and So Does Their Resistance to Scrutiny*, Reason (July 5, 2023) (summarizing the Bond study). They worry that these survey respondents are not being reached with messaging about firearm safety and secure firearm storage, but their deeper concern is that such evasion frustrates the accuracy of academic research into the prevalence of gun ownership.

> The implications of false denials of firearms ownership are substantial. First, such practices would result in an underestimation of firearms ownership rates and diminish our capacity to test the association between firearm access and various firearm violence-related outcomes. Furthermore, such practices would skew our understanding of the demographics of firearm ownership, such that we would overemphasize the characteristics of those more apt to disclose. Third, the mere existence of a large group of individuals who falsely deny firearm ownership highlights that intervention aimed at promoting firearm safety (e.g., secure firearm storage) may fail to reach communities in need.

Tuccille points out that the study's authors didn't actually identify anybody who denied gun ownership as a gun owner, but rather built statistical profiles of confirmed gun owners and applied those profiles to estimate the probability that a secretive respondent was lying about not owning guns.

The researchers also speculated about why respondents withhold such information, as Tuccille explains:

> "It may be that a percentage of firearm owners are concerned that their information will be leaked and the government will take their firearms or that researchers who are from universities that are typically seen as liberal and anti-firearm access will paint firearm owners in a bad light," the authors allowed. They also speculated that many respondents falsely denying owning guns may come from communities that are traditionally unfriendly to gun ownership. That's an interesting possibility considering that nearly half of all those designated as potential gun owners are unmarried urban women of color. In fact, as the study points out, *many* new gun owners are women and minorities. . . .
>
> "Our results highlight the potential that several groups, particularly women and individuals living in urban environments, may be prone to falsely denying firearm ownership," adds the Rutgers report.

Tuccille concludes that "[a]cademic researchers and policymakers who draw from their work clearly regret such opacity. But they should cast the blame not on gun owners, but on the activists and politicians who vilified the exercise of self-defense rights and who drove growing numbers of Americans to evade scrutiny."

For a helpful source on gun facts about "assault weapons," children and guns, availability of guns, crimes and guns, mass shootings, police and guns, guns and crime prevention, concealed carry, accidental deaths & injuries, etc., see gunfacts.info. As with other research sources, verify the data independently whenever possible.

B. AMERICAN GUN OWNERSHIP

1. Gun Ownership by Number

Gun sales have surged since 2020, spurred by rioting, increasing urban crime, political turmoil, and COVID. From March 2020 to March 2022, 18 percent of U.S. households purchased a firearm, according to survey data from NORC at the University of Chicago. Press Release, *One in Five American Households Purchased a Gun During the Pandemic,* NORC (Mar. 24, 2022). Over this period, one in 20 American adults (5 percent) purchased a gun for the first time and the percentage of U.S. adults living in a household with a gun increased to 46 percent. "Increasing gun sales during the pandemic were driven in nearly equal parts by people purchasing a gun for the first time and existing gun owners purchasing additional firearms," said NORC's John Roman. "New gun owners during the pandemic were much more likely to be younger and People of Color compared to pre-pandemic gun owners in America."

According to a separate study published in the *Annals of Internal Medicine,* "[a]n estimated 2.9% of U.S. adults (7.5 million) became new gun owners from 1 January 2019 to 26 April 2021. Most (5.4 million) had lived in homes without guns." Matthew Miller, et al., *Firearm Purchasing During the COVID-19 Pandemic: Results From the 2021 National Firearms Survey,* 175 Ann. Intern. Med. 219 (Feb. 2022).

In May 2022, William D. English, Ph.D., a political economist and assistant professor at Georgetown University, published the *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (May 13, 2022), Georgetown McDonough School of Business Research Paper No. 4109494. From the abstract:

> This report summarizes the findings of a national survey of firearms ownership and use conducted between February 17th and March 23rd, 2021 by the professional survey firm Centiment. This survey, which is part of a larger book project, aims to provide the most comprehensive assessment of

> firearms ownership and use patterns in America to date. This online survey was administered to a representative sample of approximately fifty-four thousand U.S. residents aged 18 and over, and it identified 16,708 gun owners who were, in turn, asked in depth questions about their ownership and their use of firearms, including defensive uses of firearms.
>
> Consistent with other recent survey research, the survey finds an overall rate of adult firearm ownership of 31.9%, suggesting that in excess of 81.4 million Americans aged 18 and over own firearms.

Additional findings from this survey are reported in the sections below.[67]

Two studies considered violence with firearms that occurred during the COVID pandemic, when gun sales were surging. One found that U.S. and state-specific risks of gun violence were 30% higher during the COVID-19 pandemic (March 2020 to March 2021) compared to the same period pre-pandemic. Paddy Ssentongo et al., *Gun Violence Incidence During the COVID-19 Pandemic is Higher Than Before the Pandemic in the United States*, 11 Sci. Rep. 20654 (2021). The other concluded that

> Nationwide, firearm purchasing and firearm violence increased substantially during the first months of the coronavirus pandemic. At the state level, the magnitude of the increase in purchasing was not associated with the magnitude of the increase in firearm violence. Increases in purchasing may have contributed to additional firearm injuries from domestic violence in April and May. Results suggest much of the rise in firearm violence during our study period was attributable to other factors. . .

Julia P. Schleimer, et al., *Firearm Purchasing and Firearm Violence During the Coronavirus Pandemic in the United States: A Cross-Sectional Study,* 8 Inj. Epidemiology 43 (2021).

The National Shooting Sports Foundation, a gun-industry trade association, reports that gun sales for 2023 totaled nearly 15.9 million, only slightly lower than the 16.4 million sold in 2022. Sales during the 4th quarter of 2023 were up 4.6 percent over the same period in 2022. Larry Keane, *Americans Charted Record Book Year for Firearms in 2023, with 2024 Looming Large Too,* NSSF (Jan. 8, 2024).

Pew Research Center published a summary of key facts about guns in the United States in July 2024. Katherine Schaeffer, *Key Facts About Americans and Guns,* Pew Research Center (July 24, 2024). About 40% of U.S. adults say they live in a household with at least one gun, including 32% who say they own

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[67] *The New York Times* published an article in June 2024 critical of Dr. English's motives and methodology. Mike McIntire & Jodi Kantor, *The Gun Lobby's Hidden Hand in the 2nd Amendment Battle,* N.Y. Times (June 18, 2024). Dr. English refuted the *Times*' claims in an article published shortly thereafter in *The Wall Street Journal.* William English, *Antigun Activists Ambushed Me,* Wall St. J. (June 26, 2024).

a gun. Reasons given for having a firearm are personal protection (72%), hunting (32%), sport shooting (30%), collecting (15%), and being required for work (7%). Forty-two percent of those who do not have a gun could see themselves owing one in the future. About six-in-ten adults (58%) favor stricter gun laws. According to an April 2024 survey, public remains divided over whether it is more important to protect gun rights (51%) or control gun ownership (48%), which represents a shift of 4% toward gun rights since April 2022. Similarly, 52% say that gun ownership increases safety, while 47% say that it reduces safety.

A NBC News national poll taken in November 2023 shows that 52% of registered voters say they or someone in their household owns a gun, which is the highest share of voters since the poll asked the question beginning in 1999 and a 6% increase since 2019. Alexandra Marquez, *Poll: Gun Ownership Reaches Record High with American Electorate,* NBC News (Nov. 21, 2023).

3. Gun Ownership by Type

From William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (Sept. 28, 2022):

> The average gun owner owns about 5 firearms, and handguns are the most common type of firearm owned. 48.0% of gun owners – about 39 million individuals — have owned magazines that hold over 10 rounds (up to 542 million such magazines in total), and 30.2% of gun owners – about 24.6 million individuals — have owned an AR-15 or similarly styled rifle (up to 44 million such rifles in total). . . . In total, Americans own over 415 million firearms, consisting of approximately 171 million handguns, 146 million rifles, and 98 million shotguns.

4. Gun Ownership by Demographics

In the aforementioned study published in the *Annals of Internal Medicine,* researchers noted that "[a]pproximately half of all new gun owners were female (50% in 2019 and 47% in 2020 to 2021), 20% were Black (21% in 2019 and in 2020–2021), and 20% were Hispanic (20% in 2019 and 19% in 2020–2021)." Matthew Miller, et al., *Firearm Purchasing During the COVID-19 Pandemic: Results From the 2021 National Firearms Survey,* 175 Ann. Intern. Med. 219 (Feb. 2022).

From William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (Georgetown McDonough Sch. of Bus. Research Paper No. 4109494, 2022): "Demographically, gun owners are diverse. 42.2% are female and 57.8% are male. Approximately 25.4% of Blacks own firearms, 28.3% of Hispanics own firearms, 19.4% of Asians own firearms, and 34.3% of Whites own firearms."

C. DEFENSIVE GUN USE: FREQUENCY AND RESULTS

2. The Frequency of Defensive Gun Use

c. Other Surveys

From William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022):

> The survey further finds that approximately a third of gun owners (31.1%) have used a firearm to defend themselves or their property, often on more than one occasion, and it estimates that guns are used defensively by firearms owners in approximately 1.67 million incidents per year. Handguns are the most common firearm employed for self-defense (used in 65.9% of defensive incidents), and in most defensive incidents (81.9%) no shot was fired. Approximately a quarter (25.2%) of defensive incidents occurred within the gun owner's home, and approximately half (53.9%) occurred outside their home, but on their property. About one out of ten (9.1%) defensive gun uses occurred in public, and about one out of thirty (3.2%) occurred at work.
>
> A majority of gun owners (56.2%) indicate that they carry a handgun for self-defense in at least some circumstances, and about 35% of gun owners report carrying a handgun with some frequency. We estimate that approximately 20.7 million gun owners (26.3%) carry a handgun in public under a "concealed carry" regime; and 34.9% of gun owners report that there have been instances in which they had wanted to carry a handgun for self-defense, but local rules did not allow them to carry.

The Gun Violence Archive compiles data on defensive gun uses from news reports. It recorded 1,187 such incidents in the United States in 2023. One study examined a subset of defensive gun uses from 2019 as reported by the Gun Violence Archive and found that the victim discharged a firearm in almost 90 percent of the cases. David Hemenway, et al., *Defensive Gun Use: What Can We Learn From News Reports,* 9 Inj. Epidemiology 19 (2022). According to the Rand Study, this "suggest[s] that news sources fail to capture incidents where guns are used defensively but no individuals are shot." Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States 12 (4th ed. 2024).

The Heritage Foundation tracks reported defensive gun uses in the United States. The database is not intended to be comprehensive. Heritage Foundation, *Defensive Gun Uses in the U.S.* (updated July 19, 2024).

According to the Colorado Violent Death Reporting System, part of the state's Center for Health & Environmental Data, 24.7% of Colorado firearm

homicides from 2016-20 are justifiable self-defense. Colorado Ctr. Health Env't Data, Firearm Deaths in Colorado 2016-2021 3 fig. 4 (Oct. 2022).

E. FIREARM SUICIDES

A study published in July 2024 examines whether state gun laws are associated with firearm suicides and homicides in children (<18). Krista Haines, et al., Child Firearm-Related Homicide and Suicide by State Legislation in the US (2009-2020), J. Am. Coll. Surg. (July 11, 2024) (forthcoming). Results showed that states with child access prevention (CAP)/negligent storage laws had lower suicide mortality rates across all firearm types (handguns and long guns). No significant differences in mean suicide death rates when comparing states with or without firearm laws regulating minimum age youth possession, minimum age youth purchase and sale, or intentional CAP. Additionally, there were no differences in homicide mortality rates for all firearm types in states with and without such laws.

F. FIREARM VIOLENT CRIME

The United States Surgeon General released an advisory on violence with firearms on June 25, 2024, calling it a "public health crisis." Vivek Murthy, U.S. Surgeon General, *Firearm Violence: A Public Health Crisis in America* (2024). One writer criticizes the report because it contains multiple cites to questionable data from the Gun Violence Archive. Lee Williams, *Citing Fake Mass-Shooting Data, US Surgeon General Declares 'Gun Violence' a Public Health Crisis,* Substack: The Gun Writer (June 25, 2024). For further discussion of the Gun Violence Archive's definition of mass shooting, see Section M.1. below.

1. Homicides

The Pew Research Center reports that data from the Centers for Disease Control and Prevention (CDC) show that more Americans died of gun-related injuries in 2021 than in any other year on record, with record numbers of both murders and suicides committed with firearms. John Gramlich, *What the Data Says About Gun Deaths in the U.S.,* Pew Research Center (Apr. 26, 2023). A record total of 48,830 people died, with 26,328 suicides (54%), 20,958 murders (43%), 549 from accidents, 537 involved law enforcement, and 458 had undetermined circumstances. The record 48,830 firearm-related deaths in 2021 reflected a 23% since 2019, before the onset of the coronavirus pandemic.

Provisional data from the CDC show that 48,117 people died from gun-related deaths in 2022, representing a 1.9% decline from 2021. There were 6.8% (1,366) fewer homicides with firearms in 2022. *See* Johns Hopkins Bloomberg Sch. of Pub. Health, CDC Provisional Data: Gun Suicides Reach All-time High in 2022, Gun Homicides Down Slightly from 2021 (July 27, 2023).

Philip J. Cook & Audrey Vila, *Gun Violence in Durham, NC, 2017-2021: Investigation and Court Processing of Fatal and Nonfatal Shootings*, Duke Univ. (Feb. 2023):

> In 2020, there were 66% more shooting victims in Durham than in the previous year, an unprecedented increase. While high rates of gun violence are a chronic problem in Durham, this surge in 2020 made the search for solutions more urgent than ever. Effective law enforcement is a key to gun violence prevention. The Durham Police Department (DPD) is on the front line of the city's response to gun violence, and in particular is responsible for investigating criminal shootings, arresting suspected perpetrators, and providing the Durham District Attorney's Office with evidence required for a successful prosecution of the defendants. Its success in accomplishing these tasks has a direct influence on gun violence rates. . . .
>
> One specific purpose of this report has been to document the disparities between fatal and nonfatal shooting incidents with respect to how they are investigated by the police and processed in court. Nonfatal shootings are sometimes called "almoscides" to highlight the fact that whether the victim lives or dies in a criminal shooting is largely a matter of chance. The mixes of circumstances, motives, and characteristics of victims and shooters are similar. For that reason, it is reasonable to claim that solving nonfatal shooting cases is as important for prevention purposes as solving fatal shooting cases. The goal is to prevent shootings, period. Yet despite this logic, Durham, like other jurisdictions, is much more likely to solve fatal than nonfatal shootings, and that is true despite the fact that nonfatal shootings generally have a key witness (the victim) who is lacking from fatal cases. Much of the explanation for this disparity appears to be with respect to the greater priority and resources devoted to the investigation of fatal shootings. This report may be helpful in making the case for increasing the priority for investigations and prosecutions of nonfatal shootings.

Although official data has not been released, some preliminary reports indicate that firearm homicide in the United States declined in 2023. Center for American Progress, *In 2023, Gun Violence Trended Down Across the Country* (Jan. 31, 2024). The analysis was based on data from the Gun Violence Archive, which is based on law enforcement and media reports.

G. HOW CRIMINALS OBTAIN GUNS

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) published the *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis — Volume Two* in January 2023. It focuses on

data, information, and analysis relating to crime guns recovered by law enforcement during domestic and international investigations between 2017 and 2021. The report's conclusion on domestic tracing states:

> The results presented in this section are consistent with the findings of prior ATF reports and academic research on the illicit acquisition of firearms by prohibited persons. Traced crime guns typically originate from the legal supply chain of manufacture (or import), distribution, and retail sale. Crime guns may change hands a number of times after that first retail sale, and some of those transactions may be a theft or violate one or more regulations on firearm commerce. Individuals who are prohibited due to their criminal records or other conditions are unlikely to purchase directly from a licensed federal firearms dealer. Instead, prohibited persons determined to get crime guns acquire them through underground crime gun markets that involve unregulated transactions with acquaintances and illicit "street" sources. Many ATF crime gun trafficking investigations involve close-to-retail diversions of crime guns from legal firearms commerce including straw purchasing from FFLs, trafficking by FFLs, and illegal transfers by unlicensed sellers. A variety of illegally transferred crime guns sources sustain underground crime gun markets that supply prohibited persons and other dangerous individuals. (footnotes omitted).

H. RACE, GUN CRIME, AND VICTIMIZATION

Sharone Mitchell Jr., a former Chicago public defender, urged that the Supreme Court should strike down New York's restrictive gun laws in *Bruen* "because of their disproportionate and devastating impact on Black and brown communities." He explains that "[w]hile I support policies that actually stem the flow of guns, prevent violence, and heal those who have been harmed, I also support ending the way we criminalize gun possession. I do this because there is no Second Amendment on the South Side of Chicago." Mitchell also advocates for alternative gun violence prevention programs, such as the "Interrupters Model," which "pays and trains trusted insiders of a community to anticipate where violence will occur and intervene before it erupts." Sharone Mitchell Jr., *There's No Second Amendment on the South Side of Chicago: Why Public Defenders are Standing with the New York State Rifle and Pistol Association in the Supreme Court,* The Nation (Nov. 12, 2021).

Christopher Lau, *Interrupting Gun Violence,* 104 Boston U.L. Rev. 769 (2024). From the abstract:

> Against the backdrop of declining crime rates, gun violence and gun-related homicides have only risen over the last three years. Just as it historically has, the brunt of that violence has been borne by poor Black and brown communities. These communities are especially impacted: they are not only far more likely to be the victims of gun violence, but are also the primary targets of police surveillance and harassment. People of color are disproportionately prosecuted for gun crimes, which, in part, prompted the

Black Public Defenders Amicus Brief in support of expanding gun rights in *New York State Rifle & Pistol Ass'n v. Bruen*. Recognizing that the carceral approach of policing and prosecution has failed to prevent gun violence and has harmed Black and brown communities, this Article sets forth community violence interruption groups as a promising decarceral alternative. Violence interruption groups address violence by working with the people who are most impacted by cyclical gun violence and intervene by mediating conflicts, defusing imminent violence, and encouraging people to give up their firearms. Building on the work of abolitionist scholars and organizers, this Article centers the role of Violence Interrupters as an important alternative to policing and punitive prosecution. It explores legal changes that might minimize the legal barriers to violence interruption, including statutory reform, mens rea reform, expansion of the Second Amendment, and recognition of an innocent possession defense.

I. YOUTH CRIME

Natalie Chwalisz, *Beating the Gun — One Conversation at a Time? Evaluating the Impact of DC's "Cure the Streets" Public Health Intervention Against Gun Violence*, Crime & Delinq. (Apr. 3, 2023). From the abstract:

> Violence interrupters (VI) operate as mediators after gang-involved shootings to stop retributory shootings. While some cities, like Chicago, have seen initial success, other cities, such as Boston, Newark, and Phoenix have seen little or mixed effects. This is the first evaluation of the Washington DC intervention. . . . My findings indicate that the program was not effective in reducing gun violence.

Kaleb Malone, et al., *Project Inspire Pilot Study: A Hospital-Led, Comprehensive Intervention Reduces Gun Violence Among Juveniles Delinquent Of Gun Crimes*, 95 J. Trauma & Acute Care 137 (2023). From the abstract:

> **Background:** . . . While there is no nationally accepted juvenile rate of recidivism, previous literature reveals rearrest rates from 50% to 80% in high-risk youth, and some reports show that up to 40% of delinquent juveniles are incarcerated in adult prisons before the age of 25 years. We hypothesize that Project Inspire, a hospital-led comprehensive intervention, reduces recidivism among high-risk teens.
>
> **Methods**: Led by a level 1 trauma center, key community stakeholders including the juvenile court, city, and city police department joined forces to create a community-wide program aimed at curbing gun violence in high-risk individuals. Participants, aged 13 to 18 years, are selected by the juvenile gun court. They underwent a rigorous 3-week program with a curriculum incorporating the following: trauma-informed training and confidence building, educational/professional development, financial literacy,

entrepreneurship, and career-specific job shadowing and mentorship. Rates of recidivism were measured annually.

Results: Project Inspire has hosted two classes in 2018 and 2019, graduating nine participants aged 14 to 17 years. Sixty-seven percent were Black. All were males. At 1 year, none of the graduates reoffended. At 2 years, one participant reoffended. At 3 years, no additional participants reoffended. No graduate reoffended as a juvenile. Thus, the overall rate of recidivism for Project Inspire is 11% to date. Eighty-nine percent of graduates received a diploma, general educational development, or obtained employment.

Conclusion: Project Inspire is a hospital-led initiative that effectively reduces recidivism among juveniles delinquent of gun crimes. This sets the framework for trauma centers nationwide to lead in establishing impactful, comprehensive, gun-violence intervention strategies.

Level of evidence: Prognostic and Epidemiological; Level V.

Eustina G. Kwon, et al., *Association of Community Vulnerability and State Gun Laws With Firearm Deaths in Children and Adolescents Aged 10 to 19 Years*, JAMA Network Open (May 24, 2023). From the abstract:

Objective To assess the rate of death due to assault-related firearm injury stratified by community-level social vulnerability and state-level gun laws in a national cohort of youths aged 10 to 19 years.

Design, Setting, and Participants This national cross-sectional study used the Gun Violence Archive to identify all assault-related firearm deaths among youths aged 10 to 19 years occurring in the US between January 1, 2020, and June 30, 2022.

Exposure Census tract–level social vulnerability (measured by the Centers for Disease Control and Prevention social vulnerability index [SVI]; categorized in quartiles as low [<25th percentile], moderate [25th-50th percentile], high [51st-75th percentile], or very high [>75th percentile]) and state-level gun laws (measured by the Giffords Law Center gun law scorecard rating; categorized as restrictive, moderate, or permissive).

Results Among 5813 youths aged 10 to 19 years who died of an assault-related firearm injury over the 2.5-year study period, the mean (SD) age was 17.1 (1.9) years, and 4979 (85.7%) were male. The death rate per 100 000 person-years in the low SVI cohort was 1.2 compared with 2.5 in the moderate SVI cohort, 5.2 in the high SVI cohort, and 13.3 in the very high SVI cohort. The mortality rate ratio of the very high SVI cohort compared with the low SVI cohort was 11.43 (95% CI, 10.17-12.88). When further stratifying deaths by the Giffords Law Center state-level gun law scorecard rating, the stepwise increase in death rate (per 100 000 person-years) with increasing SVI persisted, regardless of whether the Census tract was in a state with restrictive gun laws (0.83 in the low SVI cohort vs 10.11 in the very high SVI cohort), moderate gun laws (0.81 in the low SVI cohort vs 13.18 in the very high SVI cohort), or permissive gun laws (1.68 in the low SVI cohort vs 16.03 in the very high SVI cohort). The

death rate per 100 000 person-years was higher for each SVI category in states with permissive compared with restrictive gun laws (eg, moderate SVI: 3.37 vs 1.71; high SVI: 6.33 vs 3.78).

Conclusions and Relevance In this study, socially vulnerable communities in the US experienced a disproportionate number of assault-related firearm deaths among youths. Although stricter gun laws were associated with lower death rates in all communities, these gun laws did not equalize the consequences on a relative scale, and disadvantaged communities remained disproportionately impacted. While legislation is necessary, it may not be sufficient to solve the problem of assault-related firearm deaths among children and adolescents.

K. DOES GUN OWNERSHIP REDUCE CRIME?

5. Lawful Defensive Carry of Firearms

b. Do Concealed-Carry Laws Affect the Crime Rate?

Social science studies differ as to whether there is a predictive relationship between less restrictive concealed-carry laws and increased violent crime. While the RAND Corporation's 2020 metastudy found that *inconclusive* evidence that state shall-issue concealed-carry laws have any effects on total homicides, firearm homicides, robberies, assaults, and rape, the 2024 update found *supportive* evidence that shall-issue laws may increase total homicides, firearm homicides and violent crimes. The update also concluded that permitless-carry laws have *uncertain* effects on total homicides, and that both shall-issue and permitless-carry laws have uncertain effects on mass shootings. Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States 363-86, 388-90 (4th ed. 2024).

Some new studies show a correlation between the number of concealed-carry licenses and violent crime. *E.g.,* Richard Stansfield, et al., *The Relationship between Concealed Carry Licenses and Firearm Homicide in the US: A Reciprocal County-Level Analysis,* 100 J. Urban Health 657 (2023); John J. Donohue, et al., *Why Does Right-to-Carry Cause Violent Crime to Increase?,* National Bureau of Economic Research, Working Paper No. 30190 (rev. June 2023).

Other recent studies show that less restrictive concealed-carry laws have little or no effect on homicide or other violent crime rates. In one state-level study, researchers found no evidence that right-to-carry laws have increased crime. Carlisle E. Moody & Thomas B. Marvell, *The Right-to-Carry Laws: A Critique of the 2014 Version of Aneja, Donohue, and Zhang,"* 15 Econ. J. Watch 51 (2018). Another state-level study found that right-to-carry laws have no

significant effects on the overall violent or property crime rates, and actually led to medium-term decreases in murder rates. Wei Shi & Lung-fei Lee, *The Effects of Gun Control on Crimes: A Spatial Interactive Fixed Effects Approach*, 55 Empirical Econ. 233 (2018). A sophisticated study by Dr. William English, a Georgetown economics professor, shows that when one tracks actual concealed carry permit issuance over time, rather than the cruder "binary" methodology that merely looks at crime rates before and after a restrictive law is lifted, more permissive carry has no significant effect on violent crime or homicide rates. William English, *The Right to Carry Has Not Increased Crime: Improving an Old Debate Through Better Data on Permit Growth Over Time* 34 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 3887151, 2021). Mitchell L. Doucette, et al., *Impact of Changes to Concealed-Carry Weapons Laws on Fatal and Nonfatal Violence Crime, 1980-2019,* 192 Amer. J. Epidemiology 342 (2023). This study found that uncertain effects of shall-issue laws on the firearm homicide rate. A study performed by the Center for Justice Research at Bowling Green State University shows that in six of eight largest cities in Ohio, there was less gun crime after the state permitless-carry law took effect. Melissa W. Burek & Julia C. Bell, *Pre- and Post-Outcomes: Ohio's Permitless Carry Law,* Ctr. for Just. Rsch. (Jan. 3, 2024).

Other studies suggesting that restrictive carry laws reduce crime, as opposed to "shall-issue" regimes have methodological flaws:

- John Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis,* 16 J. Empirical L. Stud. 198 (2019). This study estimated increases in violent crime generally with more lenient shall-issue laws. The RAND metastudy questions the reliability of Donohue's synthetic control model, explaining that "when controls are made up of just a few states, as they were in this case, their usefulness for identifying causal effects may be compromised." RAND 2d ed. at 291-92. Professor English subjected this study to a detailed critique. English at 5-36.
- Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923 (2017), and Cassandra K. Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. Urban Health 383 (2018). Siegel and colleagues estimated that shall-issue laws are associated with significantly higher rates of total, firearm-related, and handgun-related homicides. Crifasi and colleagues estimated that right-to-carry laws were associated with a 7% (corrected) increase in firearm homicide in large, urban counties. The RAND metastudy classified both studies as having "serious methodological problems." RAND 2d ed. at 298-99.

K. Alexander Adams & Youngsung Kim, *The Impact of Liberalized Concealed Carry Laws on Homicide: An Assessment* (Feb. 23, 2023). From the abstract:

> This paper uses panel data from 1980 to 2018 in all 50 U.S. states and the District of Columbia to examine the relationship between liberalized concealed carry laws, homicide, and firearm homicide. Multivariate regression analysis was conducted with state and time fixed effects. A general-to-specific procedure was also used to reduce the arbitrariness of choosing control variables in the crime equation. Various robustness checks were also employed, including the use of a generalized synthetic control model. The relationship between shall-issue and constitutional carry laws and homicide were statistically insignificant at the 1%, 5%, and even 10% level. The results were robust to multiple alternative model specifications. We find no evidence that looser concealed carry laws pose a significant public health or criminological risk.

John R. Lott, Carlisle E. Moody, & Rujun Wang, *Concealed Carry Permit Holders Across the United States: 2023* (Dec. 2023). From the abstract:

> Despite the 2022 U.S. Supreme Court's decision in New York State Rifle and Pistol Association v. Bruen affirming a constitutional right to bear arms, there hasn't been a huge surge in the number of Concealed Carry Permit holders across the United States. Instead, it dropped slightly, down 0.5% from 2022 record high to 21.8 million. A major cause of the marginal decline is that 27 states now have Constitutional Carry laws after Nebraska's Permitless Concealed Carry law took effect on September 2, 2023. In other words, people in those twenty-seven states are allowed to carry concealed handguns without permits, representing 65% of the land in the country and 44% of the population in 2022. Unlike gun ownership surveys that may be affected by people's unwillingness to answer personal questions, concealed handgun permit data is the only really "hard data" that we have, but it becomes a less accurate measure as more states become Constitutional Carry states.
>
> Among the findings of our report:
>
> - Last year, the number of permit holders dropped for the first time since we started collecting this data in 2011, decreasing 0.5% from 2022 record high to 21.8 million. The main reason for the drop is that the number of permits declines gradually in the Constitutional Carry states even though it is clear that more people are legally carrying.
> - 8.4% of American adults have permits. Outside of the restrictive states of California and New York, about 10.1% of adults have a permit.
> - In seventeen states, more than 10% of adults have permits. Kentucky and Virginia have fallen slightly below 10% this year. Kentucky's fell after passing a Constitutional Carry law in 2019, meaning that people no longer need a permit to carry. The concealed carry rates for Michigan and Oregon have risen to above 10% in 2023.
> - Alabama has the highest concealed carry rate — 27.8%. Indiana is second with 23.0%, and Colorado is third with 16.5%.

- Six states now have over 1 million permit holders: Alabama, Florida, Georgia, Indiana, Pennsylvania, and Texas. Florida is the top state with 2.56 million permits.
- Twenty-seven states have adopted Constitutional Carry for their entire state, meaning that a permit is no longer required. Because of these Constitutional Carry states, the concealed carry permits number does not paint a full picture of how many people are legally carrying across the nation. Many residents still choose to obtain permits so that they can carry in other states that have reciprocity agreements, but while permits are increasing in the non-Constitutional Carry states (317,185), permits fell even more in the Constitutional Carry ones even though more people are clearly carrying in those states (485,013).
- A survey we conducted with McLaughlin and Associates found that 15.6% of general election voters carry concealed handguns.

M. MASS SHOOTINGS

1. Defining "Mass Shooting"

The 2024 Rand Study again notes how different definitions of "mass shooting" lead to vastly disparate numbers for total mass shootings: "Examining more-recent data for 2023, we see that estimates range between eight mass shootings (The Violence Project, undated) and 656 mass shootings (Gun Violence Archive, undated-a)." Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States 10 (4th ed. 2024). The study also distinguishes "mass public shootings," which occur in public locations and are not connected to other criminal activity or primarily target the perpetrator's family members. "Between 1976 and 2018, about 18 percent of mass killings were mass public shootings." Smart, at 11.

For examples of how media sources tend to use the highest figures when reporting mass shooting numbers, see Lee Williams, *Media Fact Check: How Fake Mass-Shooting Data Produces Fake News*, Second Amendment Foundation Investigative Journalism Project (June 4, 2024).

Tristan Bridges, et al., *Database Discrepancies In Understanding the Burden of Mass Shootings In the United States, 2013–2020*, 22 Lancet Reg'l Health — Americas (June 2023). From the summary:

> **Background**
> The United States experiences more mass shootings than any other nation in the world. Various entities have sought to collect data on this phenomenon, but there is no scholarly consensus regarding how best to define mass shootings. As a result, existing datasets include different incidents, limiting our understanding of the impact of mass gun violence in the U.S.
>
> **Methods**

> We compared five datasets of mass shootings for each year included in five databases (2013–2020) and identified overlaps between each database's incidents. These overlaps and divergences between datasets persisted after applying the strictest fatality threshold (four or more) in mass shootings scholarship and policy.
>
> **Findings**
> The datasets collectively include 3155 incidents, but the number of incidents included in each individual dataset varies from 57 to 2955 incidents. Only 25 incidents (0.008% of all incidents) are included in all five datasets. This finding persists even when applying the strictest criteria for mass shootings (four or more fatalities).
>
> **Interpretation**
> Data discrepancies prevent us from understanding the public health impact of mass gun violence. These discrepancies result from a lack of scholarly consensus on how to define mass shootings, likely the downstream consequence of the politicization of gun violence research. We argue for a broad definition of a mass shooting and a government-supported data collection program to remedy these discrepancies. Such steps can improve the quality of research and support policy-making and journalism on the subject.

Further reading: Marisa Booty, et al., *Describing a "Mass Shooting": The Role of Databases in Understanding Burden*, 6 Inj. Epidemiology 47 (2019).

4. Mass Shootings and "Assault Weapons"

Recent studies show no deterrent effects between that "assault weapon" bans and mass shootings. *See* Rosanna Smart et al., The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States 265-78 (4th ed. 2024) (evidence is inconclusive that "assault weapon" bans and high-capacity magazine bans have any effect on total homicides and firearm homicides; evidence also is inconclusive that "assault weapon" bans reduce mass shootings); Daniel Webster et al., *Evidence Concerning the Regulation of Firearms Design, Sale, and Carrying on Fatal Mass Shootings in the United States*, 19 Criminology & Pub. Pol'y 171, 188 (2020) ("[B]ans on assault weapons had no clear effects on either the incidence of mass shootings or on the incidence of victim fatalities from mass shootings."); Michael Siegel, et al., *The Relation Between State Gun Laws and the Incidence and Severity of Mass Public Shootings in the United States, 1976-2018*, 44 L. & Hum. Behv. 347 (2020) (finding uncertain associations between state "assault weapon" bans and mass shootings incidents and fatalities).

The flawed DiMaggio study discussed in the printed book still is being used to show that the federal "assault weapon" ban in effect from 1994-2004 significantly reduced mass-shooting fatalities. *See* Michael J. Klein, M.D., *Yes, the 1994 federal assault weapons ban saved lives*, Chicago Sun-Times (Dec. 24,

2022). Dr. Klein was a co-author of the DiMaggio study and argues in this article that the risk of dying in a mass shooting was 70% lower during the period the federal ban was in effect. His claims were disputed, however, by Professors E. Gregory Wallace and George A. Mocsary. *See* E. Gregory Wallace & George A. Mocsary, *Fact-Check: Mass Shootings Actually Increased During the Federal 'Assault Weapons' Ban*, The Federalist (Jan. 31, 2023). The 2024 Rand Study excluded the DiMaggio study from consideration because of the absence of a comparison group (mass shooting deaths were included in both the numerator and denominator). Smart, at 274 n.21.

CHAPTER 3
THE COLONIES

B. SPORADIC DISARMAMENT OF DISSIDENTS

2. Early Firearms Regulation and Prohibition

c. Sporadic Disarmament of Dissidents

On page 197, please add the following paragraph between the third and fourth paragraphs in this section:

In 1643 Virginia, the royal governor imprisoned, disarmed, and banished 118 recent Puritan immigrants; they moved to Maryland. *See* Charles Campbell, History of the Colony and Ancient Dominion of Virginia 211-12 (1860). After an attempted assassination of King William III in England in 1696, the royal governor of New York confiscated the firearms of all ten Catholic men in the colony. Shona Johnston, Papists in a Protestant World: The Catholic Anglo-Atlantic in the Seventeenth Century 219-20 (2011) (Ph.D. dissertation, Geo. U.).

On the same page, please note the following correction to the text discussing Maryland's "Papist" statute:

The text cites a Maryland bill that provided for forfeiture of arms owned by "Papists" during the French & Indian War. 52 of the Archives of Maryland 450. The cited source, however, includes bills that were introduced into the Maryland legislature but not enacted. While the bill appears to have passed the lower house, it was rejected by the upper house. Upper House Journal at 296-97, 474-75 (Governor's speech noting rejection of militia bill), 640-41 (bill rejected again in the October 1756 legislative session).

NOTES & QUESTIONS

6. [New Note] **CQ:** Recall from Chapter 2.H that before England's Glorious Revolution of 1688, disarmament of religious dissenters was a frequent abuse of the despotic Stuart kings. Then the 1689 English Bill of Rights (Ch. 2.H.4) was enacted to require "That the Subjects which are Protestants, may have

Arms for their Defence suitable to their Conditions, and as al- lowed by Law." 1 Wm. & Mary ch. 2, §7. The American colonists had been guaranteed all "the rights of Englishmen," Ch. 3.A, which from 1689 onward included the English Bill of Rights. Which, if any, of the American disarmaments of colonial religious minorities violated the English Bill of Rights?

CHAPTER 5
THE NEW CONSTITUTION

D. THE SECOND AMENDMENT

1. Contemporaneous Commentary on the Second Amendment

NOTES & QUESTIONS

16. [New Note] Recall James Madison's notes for his speech introducing the Bill of Rights in Congress that the English Bill of Rights was defective because it only protected "arms to Protestts." Ch. 2.H.6. If the First Amendment's Free Exercise Clause had not been enacted, the Second Amendment by its own force forbid religious discrimination in arms rights" For example, a post-9/11 law to disarm Muslim citizens of the United States. **CQ:** Recall various disarmament programs that were enacted in the British American colonies before independence. Would any of those programs, which might have been compliant with English law at the time (no written right before 1689; Protestants-only thereafter) have been consistent with the Second Amendment?

17. [New Note] **CQ:** Madison also chose to omit the 1689 English text "suitable to their Conditions." In the decades before and after the Second Amendment, American laws did not restrict arms rights based on wealth. As the Tennessee Supreme Court stated regarding the Tennessee constitution, the English Bill of Rights's "Conditions" were "abrogated"; "all free citizens" have the right, "without any qualification whatever, as to their kind and nature." *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 360 (1833) (Ch. 6.B.2 Note 4).

18. *Natural law.* One scholar suggests that the best originalist interpretation of the Second Amendment should focus on natural law.

> The Second Amendment was a determination, by the Founders, of the ius naturale principle of self-defense. This principle promotes a "common good" that is simultaneously individual—defense against immediate personal violence—and collective—defense of the nation against foreign aggressors and unjust rulers, both of whom would act against the common good. Applying this framework results in an interpretation that supports a strong right to keep and bear arms, while simultaneously justifying many of the historical limitations that have been put forward to argue against such a right.

Jamie G. McWilliam, *A Classical Legal Interpretation of the Second Amendment*, 28 Tex. Rev. L. & Pol. 125 (2024).

F. POST-RATIFICATION LEGISLATION AND COMMENTARY

1. The Militia Acts

NOTES & QUESTIONS

13. [New Note] *Military subordination to the civil power.* With variations in language, 48 state constitutions declare: "in all cases the military should be under strict subordination to, and governed by, the civil power." One scholar traces the Military Subordination Clauses to "roots in English anxieties over the memory of an independent standing army" during the British Civil Wars (Ch. 22.H.2), "the colonists' protests against British soldiers, and the unsuccessful push to include the clause in the Federal Constitution." The author suggests that the "Founding Era meaning and the Founding Generation's reaction to historical analogs to today's private militias confirms strong historical support" for states being allowed to forbid private militias. Alden A. Fletcher, *Strict Subordination: The Origins of Civil Control of Private Military Power in State Constitutions*, 14 Harv. Nat'l. Sec. J. 254 (2023).

CHAPTER 6

THE RIGHT TO ARMS, MILITIAS, AND SLAVERY IN THE EARLY REPUBLIC AND ANTEBELLUM PERIODS

B. ANTEBELLUM CASE LAW ON THE RIGHT TO ARMS UNDER STATE AND FEDERAL CONSTITUTIONS

6. [New Section] *Nonfirearm Arms*

Bruen's emphasis on legal history and analogies has sent litigants scurrying to learn about historic laws regarding nonfirearms arms, which might serve as analogies to support various modern laws.

The full history of every American state or colonial statute restricting a particular type of nonfirearm weapon is described in David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. (forthcoming 2024). This Section is based on that article, and citations may be found therein.

The most common target of regulation was the Bowie knife, starting in 1837. By the end of the century, most states outside the northeast had specific statutes regulating them. A "Bowie knife" was not a new type of knife, but was a marketing term applied to a wide variety of knives useful for offense or defense. Many Bowie knife laws also applied to "dirks" (another broad term for fighting knives) and daggers (a two-edged knife with a thin blade).

The majority approach involved one or more of the following regulations: prohibiting concealed carry while not restricting open carry, forbidding sales to minors, or imposing extra punishment for use in a violent crime, such a duel.

A few jurisdictions went further, as in the Tennessee Bowie knife law that was upheld in *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840) (Ch. 6.B.2). Several southern states imposed annual personal property taxes on Bowie knives, at a level that, within a few years, would cumulatively exceed the knife's purchase price. The Georgia Supreme Court in *Nunn v. State*, 1 Ga. 243 (1846) (Ch. 6.B.1) held unconstitutional a statute against Bowie knives, most

handguns, and a variety of other weapons. While the prohibition of concealed carry was upheld, the laws against open carry, sales, and possession were held to violate the Second Amendment.

Some laws enacted before 1900 covered other specific weapons, such as sword canes (a sword concealed in a walking stick). Metallic knuckles were also regulated.

Flexible impact weapons were another target of regulation. All these weapons can be said to fit in the general category of "sap" — a small, concealable, flexible, weighted bludgeon. A typical sap is a flexible leather case with a weight at one end. It is extremely easy to make such a weapon at home. For example, take a sock and put some pocket change or a few tablespoons of sand or dirt in the toe. Grasp the sock by the other end. You now have a flexible impact weapon. You can swing it and strike whoever is attacking you.

While a sap blow to the head can be lethal, saps are usually nonlethal, albeit capable to inflicting serious injury, like a broken bone. They are easy to conceal. Unlike firearms, saps are nearly silent, and unlike firearms or knives, saps rarely create sanguinary wounds.

The most commonly regulated type of sap was the slungshot (sometimes called a "colt"). Originally invented by sailors for casting mooring lines, the slungshot was fairly long compared to other saps, and thus allowed strikes from a longer distance.

The "blackjack" is shorter, and had become a law enforcement favorite by the end of the nineteenth century. Also on the shorter side was the "sand club," whose name indicates the material used for its weighted load.

As with Bowie knives, there were various laws for the above items against concealed carry, sales to minors, or use in a violent crime.

Cannons were subject to little regulation, other than laws restricting discharge in cities or towns.

Today, litigants argue about whether laws such as concealed carry bans for Bowie knives are proper analogies for laws banning the possession of common firearms. *Compare*, *e.g.*, *Barnett v. Raoul*, 2023 WL 3160285 (S.D. Ill., Apr. 28, 2023) (concealed carry restrictions and the like are not precedents for possession bans) *with* *Bevis v. City of Naperville*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023) (they are). Hearing both cases in a consolidated appeal, the Seventh Circuit adopted the latter view. *See* *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023).

Before 1900, general bans on the possession of particular types of arms by persons who were recognized as having civil rights were rare. The closest analogies for modern possession bans might be general bans on sales, and also perhaps punitive taxes on sales or possession.

Following is a summary of all state or territorial sales ban for particular types of nonfirearm arms, enacted before 1900:

- *Bowie knife.* Sales bans in Georgia, Tennessee, and later in Arkansas. Georgia ban held to violate the Second Amendment in *Nunn*. Prohibitive transfer or occupational vendor taxes in Alabama and Florida, which were repealed. Personal property taxes at levels high enough to discourage possession by poor people in Mississippi, Alabama, and North Carolina.
- *Dirk.* Georgia (1837) (held to violate Second Amendment in *Nunn*); Arkansas (1881).
- *Sword cane.* Georgia (1837) (held to violate the Second Amendment in *Nunn*), Arkansas (1881).
- *Slungshot or "colt."* Sales bans in nine states or territories. The Kentucky ban was later repealed. Illinois also banned possession.
- *Metallic knuckles.* Sales bans in six states, later repealed in Kentucky. Illinois also banned possession.
- *Sand club or blackjack.* New York (1881).

Kopel and Greenlee argue that the sales or high-tax laws for Bowie and other knives were too rare to create an established tradition under *Bruen*. The sales bans for slungshots (9 states or territories) and metallic knuckles (6 states) may come closer. Although the sociology of nineteenth-century possession of slungshots and metallic knuckles is not well-developed, it seems unlikely that these arms were so rare as to be considered "dangerous and unusual" under *Heller*.

However, *Heller* states that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. It is at least possible that slungshots and metallic knuckles were mainly used by criminals rather than by law-abiding citizens.

CHAPTER 7
THE WAR, RECONSTRUCTION, AND BEYOND

C. THE CONGRESSIONAL RESPONSE: THE FOURTEENTH AMENDMENT, THE FREEDMEN'S BUREAU ACTS, AND THE CIVIL RIGHTS ACT

13. [New Note] *Cruikshank* stated that the right to arms was not created by the Constitution, but was already in existence. The natural law implications for modern Second Amendment jurisprudence are explored in Jamie G. McWilliam, *What* Cruikshank *Really Means for the Second Amendment*, 2024 U. Ill. L. Rev. 20.

H. LATE NINETEENTH-CENTURY STATE LAWS AND CASES

4. Florida, Vigilantism, Lynching, and Winchester Repeaters

c. Florida's Statute on Handguns, Winchesters, and Repeaters

NOTES & QUESTIONS

4. [New Note] *Evidence of Discriminatory Enforcement.* Noting that *Bruen* treats facially neutral laws that were enforced in a discriminatory manner as not being persuasive precedents or analogs for modern gun control, one article examines enforcement of North Carolina's 1879 concealed carry ban in New Hanover County from 1879 through 1908. The article finds that the ban, while sometimes enforced against whites, was disproportionately enforced against blacks, and that sentences for the latter were significantly more severe. Andrew Willinger, *Bruen's Enforcement Puzzle: Unearthing and Adjudicating the Historical Enforcement Record in Second Amendment Cases*, 99 Notre Dame L. Rev. (forthcoming 2024).

J. SELF-DEFENSE

5. Stand Your Ground

NOTES & QUESTIONS

5. [Add to end of Note] Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. Cal. L. Rev. 509 (2023) (the pretrial immunity phase for self-defense cases should be abolished; self-defense should be only an affirmative defense at trial, like duress or insanity).

6. [New Note] *Judicial developments.* Under the laws of most states, a person who is attacked in a public place and need not retreat before using deadly force, if such force is legally permissible, based on the severity of an attack. In other states, including Minnesota by judicial rule, a person outside her home must retreat, if safe retreat is possible. The Minnesota Supreme Court in a 4-2 decision recently created a supplemental rule, different from all other states: a person in a public place must retreat before *displaying* a deadly weapon. *Minnesota v. Blevins*, No. A22-0432 (Minn., July 31, 2024).

If you shoot someone, then you can, depending on the facts, argue that the shooting was justifiable self-defense. But what if you fire warning shots, and testify that you never intended to injure the other person? A divided Ohio Supreme Court held that warning shots can be a form of justifiable self-defense. *State v. Wilson*, 174 Ohio St.3d 476 (2024).

If you had been on the Minnesota or Ohio Supreme Courts, how would you have ruled, and why?

7. [New Note] *Recent scholarship*. For decades some feminist scholars have urged that standard rules of self-defense, such as imminence, ought to be relaxed for women who kill domestic abusers. A new article, synthesizing much prior research, is Inès Zamouri, *Self-Defense, Responsibility, and Punishment: Rethinking the Criminalization of Women Who Kill Their Abusive Intimate Partners*, 30 UCLA J. Gender & L. 203 (2023).

In England in former times, an "outlaw" was a person who was formally denied the protection of the law. Thus, anyone could kill or injure an outlaw, with no risk of judicial punishment. Jacob Charles and Darrell Miller argue that modern doctrines of self-defense, defense of property, and citizen's arrest authorize so much private violence that they create a new form of outlawry, and they go to far in delegating the government's authority over when to use violence. Jacob D. Charles & Darrell A.H. Miller, *The New Outlawry*, 108 Colum. L. Rev. 1195 (2024).

In a similar vein, Eric Ruben criticizes statutes, which exist in about a quarter of states, that require pretrial screening that is intended to prevent

the prosecution of individuals who acted in self-defense. Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. Cal. L. Rev. 509 (2023).

The doctrine of defense of habitation allows use of deadly force in some situations in one's home, the curtilage of the home, automobile, or workplace. Cynthia Lee, pointing out instances where an individual, such as someone who innocently made a mistake about an address and rang the wrong doorbell, was shot, argues that the doctrine should be curtailed. Cynthia Lee, *Firearms and the Homeowner: Defending the Castle, the Curtilage, and Beyond*, 108 Minn. L. Rev. 2889 (2024).

A person who is the initial aggressor in a fight is generally not allowed to claim self-defense except in special circumstances, such as after withdrawing from the fight. Another article by Prof. Lee proposes that trial courts should "give an initial aggressor instruction whenever an individual outside the home displays a firearm in a threatening manner or points that firearm at another person, is charged with a crime, and then claims they acted in self-defense." Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. Rev. 1 (2022).

What pro and con arguments can you make for the above proposals?

CHAPTER 8

A NEW AND DANGEROUS CENTURY

A. ALIENS

NOTES & QUESTIONS

9. [New Note] Are noncitizens part of "the people" who are protected by the Second Amendment? For an argument they are not, see John Cicchitti, *The Second Amendment and Citizenship: Why "The People" Does Not Include Noncitizens*, 30 Geo. Mason L. Rev. 525 (2023). In *United States v. Heriberto Carbajal-Flores*, No. 20-cr-00613 (N.D. Ill. Mar. 8, 2024), a federal district court held that 18 U.S.C. § 922(g)(5)'s ban on illegal immigrants owning guns violates the Second Amendment. See Matt Larosiere, *Analysis: All Immigrants are Part of 'The People' Protected by the Second Amendment*, The Reload (Mar. 17, 2024), for a supportive analysis of the district court's decision.

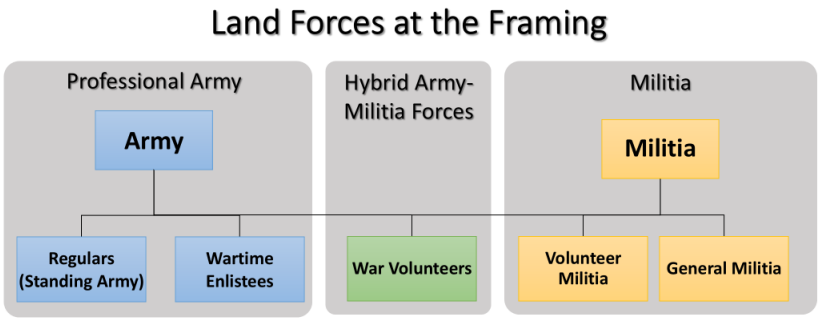
B. CHANGES IN THE MILITIA AND OTHER FEDERAL AND STATE MILITARY FORCES

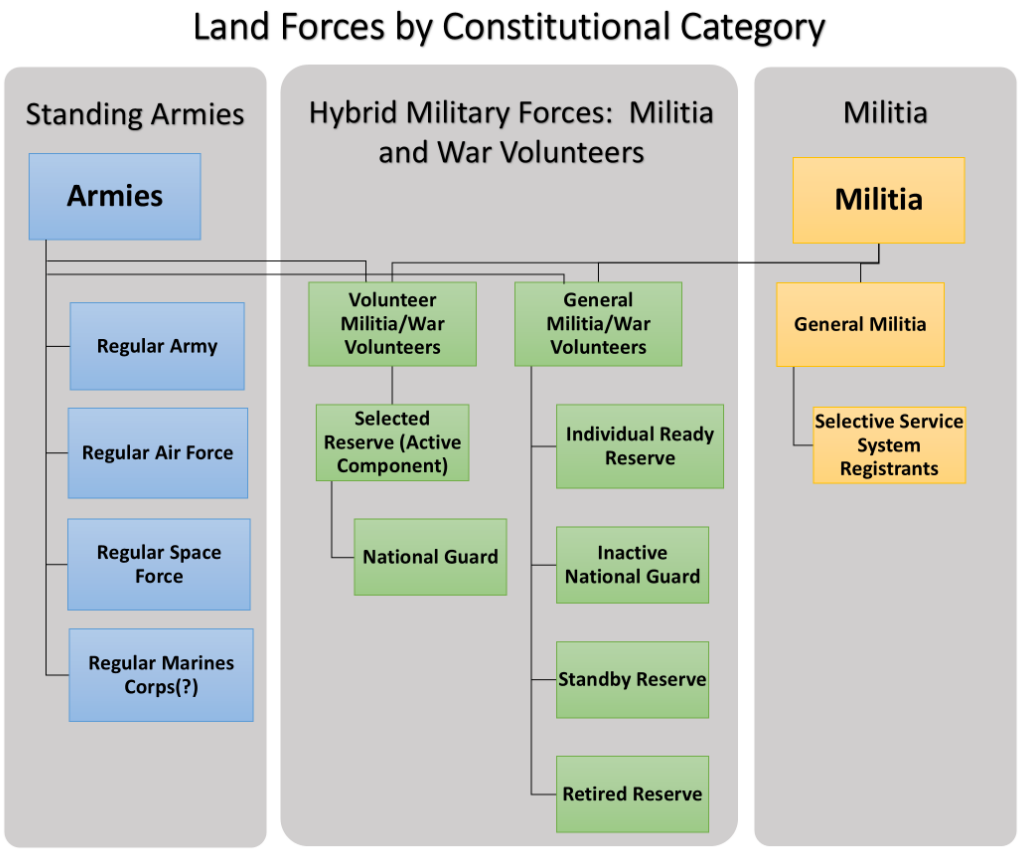
An outstanding new article provides much insight on the similarities and differences between the original organization of U.S. military forces and their present organization. Robert Leider, *Deciphering the "Armed Forces of the United States,"* 57 Wake Forest L. Rev. 1195 (2022). From the abstract, with charts from the article body:

> The Constitution provides for two kinds of military land forces — armies and militia. Commentators and judges generally differentiate armies from the militia based upon federalism. They consider the constitutional "armies" to be the federal land forces, and the constitutional "militia" to be state land forces — essentially state armies. And the general consensus is that the militia has largely disappeared as an institution because of twentieth-century reforms that brought state National Guards under the control of the federal Armed Forces.

This Article argues that the state armies view of the militia is erroneous. At the Framing, the core distinction between armies and militia was professionalism, not federalism. Armies comprised soldiers for whom military service was their principal occupation, while the militia comprised individuals who were subject to military service on a part-time or emergency basis. The armies were the regular forces, while the militia was the citizen army.

From these definitions, this article then provides a better translation of the Framing-era military system to the structure of the modern Armed Forces. Today, the constitutional "armies" consist of the regular non-naval forces (including the regular army and the regular air force). The modern "militia" includes all other persons who perform, or could be called to perform, military service on a part-time or emergency basis. These include military reservists and National Guardsmen, all of whom form the modern volunteer militia, and the registrants of the Selective Service System, who form the modern general militia.





A second article from Prof. Leider argues that the militia (nonprofessional soldiers) remains a crucial part of the U.S. military system. Robert Leider, *The Modern Militia*, 2023 Mich. St. L. Rev. 893 (2023). From the abstract:

> Twentieth-century legal reforms of the military have obscured the distinction between an "army" and a "militia." For the Framing generation, an "army" consisted of regular troops, while the "militia" comprised citizens who would perform temporary military service when needed. The twentieth-century reorganization of the military, however, brought nonprofessional soldiers within the umbrella of the U.S. Armed Forces. As a result, most now view the standing army as central to our military system and the militia as anachronistic. Further, most scholars believe that contemporary American society has jettisoned the Framers' fears of standing armies.
>
> This Article argues that the prevailing view erroneously presumes that the army/militia debates concerned whether the country should rely on federal troops or state troops for national defense. But this federalism account is profoundly mistaken. The core of the Founding-era debates involved whether to professionalize the military. The Framing generation was skeptical of professional soldiers — individuals whose primary occupation was warfare. Eighteenth-century Americans preferred a military system in which civilians performed temporary military service during emergencies but returned to normal, non-military lives in peacetime.

> Following this conceptual clarification, this Article argues that the militia remains a crucial part of the U.S. military system. Today, nonprofessional soldiers perform three principal tasks, which are similar to those that militiamen performed at the Framing. First, nonprofessional soldiers provide a means to connect the civilian community to the regular military. Second, nonprofessional soldiers provide local forces for domestic peacekeeping to aid civil authorities when necessary because Framing-era norms against use of the professional military for domestic law enforcement persist. Third, nonprofessional soldiers supplement the regular forces in hostilities.
>
> In modern times, we denote the militia with different terminology — "reservists," "Guardsmen," and "conscripts." While the labels have changed, the functions of nonprofessional soldiers have not. The militia remains a vital institution.

D. NEW FEDERAL AND STATE LAWS

7. National Law: The National Firearms Act and the Federal Firearms Act

NOTES & QUESTIONS

9. [New Note] The previous question the 1937 Pittman-Robertson Act, which imposes a 10 percent federal excise on manufacturers' sales of handguns, and 11 percent on long guns and ammunition, with the money used for wildlife conservation, public shooting ranges, and other projects to enhance the shooting sports. The California legislature in 2023 enacted an 11% excise on the gross receipts from retail sale or firearms, firearms parts, and ammunition. Revenues are to be distributed as grants from the

State government's Gun Violence Prevention and School Safety Fund. Assem. Bill 28, 2023-2024 Reg. Sess. (Cal. 2023). A lawsuit challenging the new tax argues that the tax violates Supreme Court precedent against singling out the exercise of constitutional rights for special taxation. Plaintiffs cite *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); and *Minneapolis Star & Trib. Co.*, 460 U.S. 575, 591 (1983) (discussed in Note 8, above). Complaint, *Jaymes v. Maduros*, No. 37-2024-00031147 (Cal. Superior Ct., San Diego County, July 2, 2024). Is it possible to argue that the California tax is unconstitutional whereas the Pittman-Robertson tax is not?

10. [New Note] For a post-*Bruen* analysis of the NFA Tax, see Robert T. Lass, Heller, McDonald, Bruen, *and the Unconstitutional Tax Burden of the NFA*, 7 Bus. Entrepreneurship & Tax L. Rev. 94 (2023).

E. NATIONAL FIREARMS ACT REGULATION TODAY

The regulations relating to the National Firearms Act, 26 U.S.C. §§ 5801-72, can be found in 27 CFR Parts 478-79.

2. NFA Arms

b. Combinations of Machine Gun Parts and Conversion Kits

Forced-Reset Triggers

A forced-reset trigger (FRT) is "drop-in" replacement trigger mechanism for standard semi-automatic AR platform and some semi-automatic handguns. It is designed to increase firearm's rate of fire to almost fully automatic, thereby producing a nearly "machine gun" like experience. A standard trigger requires the shooter to pull and then release the trigger so that it resets by spring action before the user can pull the trigger again to fire a second shot. The FRT forces the trigger to move forward and reset itself. The FRT thus will reset and fire continuously so long as the shooter maintains constant pressure on the trigger. Some FRTs have adjustments that can bypass the rapid-fire mechanism and fire only single shots.

A binary trigger (Ch. 15.D.3) also is designed to increase the rate of fire for certain semi-automatic rifles (such as those built on the AR platform) and handguns. It allows the shooter to fire one round by pulling the trigger and then to fire a second round when the shooter releases the trigger to return forward to reset. As with a standard trigger, the binary trigger thus requires the shooter to pull and *release* the trigger. In other words:

- *Standard trigger.* One shot when the trigger is pressed. The user then releases the trigger, and the trigger is pulled forward by a spring, and resets. To fire a second shot, the user then presses the trigger again.
- *Binary trigger.* One shot when the trigger is pressed backwards (towards the user), and another shot when the trigger is released and moves forward.
- *Forced-reset trigger.* The user never needs to release the trigger. As long as the user keeps backwards pressure on the trigger, the gun will continue to fire.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued a cease-and-desist notice in July 2021 to Rare Breed Triggers, a manufacturer of FRTs, ordering the company to stop selling its popular FRT-15 trigger. ATF asserting that the FRT-15 meets the statutory definition of "machinegun": it is a part that, when installed, converts a firearm into a machinegun. Rare Breed

refused to comply and filed a federal lawsuit against ATF. The federal district court denied Rare Breed's motion for a preliminary injunction to prevent the ATF from taking the enforcement steps outlined in its letter. *Rare Breed Triggers, LLC v. Garland,* 2021 WL 4750081 (M.D. Fla. Oct. 12, 2021). The case was dismissed without prejudice on October 28, 2021.

Separately, Rare Breed obtained a preliminary injunction for patent infringement against Wide Open Enterprises, manufacturer of the "Wide Open" trigger, and Big Daddy Enterprises, distributor of Wide Open's trigger. *Rare Breed Triggers, LLC v. Big Daddy Enterprises, Inc.,* 2021 WL 6197091 (N.D. Fla. Dec. 30, 2021). The ATF went to Big Daddy in January 2022 and confiscated its inventory of Wide Open triggers, but it did not visit Rare Breed.

Based on internal emails purportedly leaked from the ATF, Gun Owners of America (GOA) and the Firearms Policy Coalition warned in late January/early February 2022 that the ATF was about to track down and confiscate Rare Breed and Wide Open FRTs from businesses that manufacture, distribute, or sell such items.

On March 22, 2022, ATF issued an open letter to all federal firearms licensees announcing that some FRTs are "firearms" and "machineguns" as defined in the National Firearms Act (NFA) and "machineguns" as defined in the Gun Control Act (GCA). The letter differentiates some FRTs from standard and binary triggers because "FRT devices allow a firearm to automatically expel more than one shot with a single, continuous pull of the trigger." Because of this operation, the letter explains, the ATF has classified FRTs as a "machinegun" as defined by the NFA and GCA (the definition includes any parts designed to convert a firearm to a machinegun). They thus are subject to the registration, transfer, taxation, and possession restrictions of the NFA (26 USC §§ 5841, 5861) and the possession, transport, and transport of machinegun provisions of the GCA (18 USC §§ 922(o), 922(a)(4)).

In May 2022, Rare Breed filed a new lawsuit against the DOJ and ATF in federal district court in North Dakota. It is unclear how the ATF will enforce its position on FRTs against individuals after issuance of its March 22, 2022, open letter. For one view from Washington Gun Law, a gun-rights organization, see the video here.

In January 2023, a New York federal district court entered a temporary restraining order against Rare Breed Triggers. *United States v. Rare Breed Triggers*, 2023 WL 504992 (E.D.N.Y. Jan. 25, 2023). According to the court, Rare Breed's FRT-15 trigger kit was a machine gun conversion kit. The predecessor version had been so determined by ATF. Rare Breed did not seek a different ATF classification for the FRT-15. Rare Breed falsely told customers that the FRT-15 was not and could not be regulated by ATF. The TRO covers "FRT-15, the Wide Open Trigger, forced reset triggers, and other machinegun conversion devices."

On July 23, 2024, a federal district judge blocked the ATF's ban on forced reset triggers in *Nat'l Ass'n for Gun Rights v. Merrick Garland*, 2024 WL 3517504 (N.D. Tex. July 23, 2024) (summary judgement). The court held that the ATF exceeded its regulatory authority in 2021 when it classified forced reset triggers as machine guns, because a forced reset trigger fires two shots by two functions of the trigger. The decision relied in part on the Supreme Court's June 2024 decision about bump stocks in *Cargil v. Garland v. Cargill*, 602 U.S. 406 (2024), and the Fifth Circuit's similar decision in that case.

There is no similar ATF action against binary triggers (Ch. 15.D.3).

Glock Switches

The "Glock Switch" is a "relatively simple, albeit illegal, device that allows a conventional semi-automatic Glock pistol to function as a fully automatic firearm. The switch is classified as a machine gun under federal law." Bureau of Alcohol, Tobacco, Firearms and Explosives, *Internet Arms Trafficking*. Glock switches have surged in popularity among criminals the last few years. They can be 3D printed. Many come from China or Russia. While Glock, Inc. does not manufacture the switch, the City of Chicago nevertheless has sued Glock to stop the company from selling semiautomatic handguns that can be easily modified to accept the switch and achieve full automatic fire.

c. Bump Stocks

The Fifth Circuit in 2021 upheld ATF's regulation to redefine "machinegun" to include bump stocks. *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021). In June 2022, the full Fifth Circuit voted to hear the case en banc and vacated the panel decision. On the merits en banc, the Fifth Circuit ruled 13-3 against ATF's classification of bump stocks as machine gun conversion kits. *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc). In the view of the majority, the NFA defines "machinegun" as "any weapon which shoots . . ., automatically more than one shot, without manual reloading, by a single function of the trigger." With a bump stock, a single function of the trigger causes only a single shot. "But even if that conclusion were incorrect, the rule of lenity would still require us to interpret the statute against imposing criminal liability."

The Sixth Circuit came to similar conclusion in *Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 65 F.4th 895 (6th Cir. 2023). Although the court found the NFA's definition of "machinegun" to be ambiguous, it declined to apply *Chevron* deference because the subject matter was one "in which the courts are well-equipped to operate." The court declined to "abdicate [its] interpretive responsibility in such instances." It then held that the rule of lenity required it to rule in Hardin's favor.

The Supreme Court granted certiorari.

Thomas, J., delivered the opinion of the Court, in which Roberts, C.J., Alito, J., Gorsuch, J., Kavanaugh, J., and Barrett, J., joined. Alito, J., filed a concurring opinion. Sotomayor, J., filed a dissenting opinion, in which Kagan, J., and Jackson, J., joined.

Congress has long restricted access to "'machinegun[s],'" a category of firearms defined by the ability to "shoot, automatically more than one shot ... by a single function of the trigger." 26 U.S.C. § 5845(b); see also 18 U.S.C. § 922(o). Semiautomatic firearms, which require shooters to reengage the trigger for every shot, are not machineguns. This case asks whether a bump stock — an accessory for a semiautomatic rifle that allows the shooter to rapidly reengage the trigger (and therefore achieve a high rate of fire) — converts the rifle into a "machinegun." We hold that it does not and therefore affirm.

I

A

Under the National Firearms Act of 1934, a "machinegun" is "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." § 5845(b). The statutory definition also includes "any part designed and intended . . . for use in converting a weapon into a machinegun." *Ibid.* With a machinegun, a shooter can fire multiple times, or even continuously, by engaging the trigger only once. This capability distinguishes a machinegun from a semiautomatic firearm. With a semiautomatic firearm, the shooter can fire only one time by engaging the trigger. The shooter must release and reengage the trigger to fire another shot. Machineguns can ordinarily achieve higher rates of fire than semiautomatic firearms because the shooter does not need to release and reengage the trigger between shots.

Shooters have devised techniques for firing semiautomatic firearms at rates approaching those of some machineguns. One technique is called bump firing. A shooter who bump fires a rifle uses the firearm's recoil to help rapidly manipulate the trigger. The shooter allows the recoil from one shot to push the whole firearm backward. As the rifle slides back and away from the shooter's stationary trigger finger, the trigger is released and reset for the next shot. Simultaneously, the shooter uses his nontrigger hand to maintain forward pressure on the rifle's front grip. The forward pressure counteracts the recoil and causes the firearm (and thus the trigger) to move forward and "bump" into

the shooter's trigger finger. This bump reengages the trigger and causes another shot to fire, and so on.

Bump firing is a balancing act. The shooter must maintain enough forward pressure to ensure that he will bump the trigger with sufficient force to engage it. But, if the shooter applies too much forward pressure, the rifle will not slide back far enough to allow the trigger to reset. The right balance produces a reciprocating motion that permits the shooter to repeatedly engage and release the trigger in rapid succession.

Although bump firing does not require any additional equipment, there are accessories designed to make the technique easier. A "bump stock" is one such accessory. It replaces a semiautomatic rifle's stock (the back part of the rifle that rests against the shooter's shoulder) with a plastic casing that allows every other part of the rifle to slide back and forth. This casing helps manage the back-and-forth motion required for bump firing. A bump stock also has a ledge to keep the shooter's trigger finger stationary. A bump stock does not alter the basic mechanics of bump firing. As with any semiautomatic firearm, the trigger still must be released and reengaged to fire each additional shot.

B

The question in this case is whether a bump stock transforms a semiautomatic rifle into a "machinegun," as defined by § 5845(b). For many years, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) took the position that semiautomatic rifles equipped with bump stocks were not machineguns under the statute. On more than 10 separate occasions over several administrations, ATF consistently concluded that rifles equipped with bump stocks cannot "automatically" fire more than one shot "by a single function of the trigger." In April 2017, for example, ATF explained that a rifle equipped with a bump stock does not "operat[e] automatically" because "forward pressure must be applied with the support hand to the forward handguard." And, because the shooter slides the rifle forward in the stock "to fire each shot, each succeeding shot fir[es] with a single trigger function."

ATF abruptly reversed course in response to a mass shooting in Las Vegas, Nevada. In October 2017, a gunman fired on a crowd attending an outdoor music festival in Las Vegas, killing 58 people and wounding over 500 more. The gunman equipped his weapons with bump stocks, which allowed him to fire hundreds of rounds in a matter of minutes.

This tragedy created tremendous political pressure to outlaw bump stocks nationwide. Within days, Members of Congress proposed bills to ban bump stocks. . . . None of these bills became law. Similar proposals in the intervening years have also stalled.

While the first wave of bills was pending, ATF began considering whether to reinterpret § 5845(b)'s definition of "machinegun" to include bump stocks. It proposed a rule that would amend its regulations to "clarify" that bump stocks

are machineguns. . . . ATF's about-face drew criticism from some observers, including those who agreed that bump stocks should be banned. Senator Dianne Feinstein, for example, warned that ATF lacked statutory authority to prohibit bump stocks, explaining that the proposed regulation "'hinge[d] on a dubious analysis'" and that the "'gun lobby and manufacturers [would] have a field day with [ATF's] reasoning'" in court. . . . She asserted that "'legislation is the only way to ban bump stocks.'"

ATF issued its final Rule in 2018. 83 Fed. Reg. 66514. The agency's earlier regulations simply restated § 5845(b)'s statutory definition. The final Rule amended those regulations by adding the following language:

> "[T]he term 'automatically' as it modifies 'shoots, is designed to shoot, or can be readily restored to shoot,' means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and 'single function of the trigger' means a single pull of the trigger and analogous motions. The term 'machinegun' includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter."

The final Rule also repudiated ATF's previous guidance that bump stocks did not qualify as "machineguns" under § 5845(b). And, it ordered owners of bump stocks to destroy them or surrender them to ATF within 90 days. Bump-stock owners who failed to comply would be subject to criminal prosecution. . . .

C

Michael Cargill surrendered two bump stocks to ATF under protest. He then filed suit to challenge the final Rule, asserting a claim under the Administrative Procedure Act. As relevant, Cargill alleged that ATF lacked statutory authority to promulgate the final Rule because bump stocks are not "machinegun[s]" as defined in § 5845(b). After a bench trial, the District Court entered judgment for ATF. The court concluded that "a bump stock fits the statutory definition of a 'machinegun.'" *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1194 (WD Tex. 2020).

The Court of Appeals initially affirmed . . . but later reversed after rehearing en banc, 57 F.4th 447 (5th Cir. 2023). A majority agreed, at a minimum, that § 5845(b) is ambiguous as to whether a semiautomatic rifle equipped with a bump stock fits the statutory definition of a machinegun. And, the majority concluded that the rule of lenity required resolving that ambiguity in Cargill's favor. . . . An eight-judge plurality determined that the statutory definition of "machinegun" unambiguously excludes such weapons. A semiautomatic rifle equipped with a bump stock, the plurality reasoned, fires only one shot "each time the trigger 'acts,'" . . . and so does not fire "more than

one shot . . . by a single function of the trigger," § 5845(b). The plurality also concluded that a bump stock does not enable a semiautomatic rifle to fire more than one shot "automatically" because the shooter must "maintain manual, forward pressure on the barrel.". . .

We granted certiorari . . . to address a split among the Courts of Appeals regarding whether bump stocks meet § 5845(b)'s definition of "machinegun." We now affirm.

II

Section 5845(b) defines a "machinegun" as any weapon capable of firing "automatically more than one shot . . . by a single function of the trigger." We hold that a semiautomatic rifle equipped with a bump stock is not a "machinegun" because it cannot fire more than one shot "by a single function of the trigger." And, even if it could, it would not do so "automatically." ATF therefore exceeded its statutory authority by issuing a Rule that classifies bump stocks as machineguns.

A

A semiautomatic rifle equipped with a bump stock does not fire more than one shot "by a single function of the trigger." With or without a bump stock, a shooter must release and reset the trigger between every shot. And, any subsequent shot fired after the trigger has been released and reset is the result of a separate and distinct "function of the trigger." All that a bump stock does is accelerate the rate of fire by causing these distinct "function[s]" of the trigger to occur in rapid succession.

As always, we start with the statutory text, which refers to "a single function of the trigger." The "function" of an object is "the mode of action by which it fulfils its purpose." 4 Oxford English Dictionary 602 (1933); see also American Heritage Dictionary 533 (1969) ("The natural or proper action for which a ... mechanism ... is fitted or employed"). And, a "trigger" is an apparatus, such as a "movable catch or lever," that "sets some force or mechanism in action." 11 Oxford English Dictionary, at 357; see also American Heritage Dictionary, at 1371 ("The lever pressed by the finger to discharge a firearm" or "[a]ny similar device used to release or activate a mechanism"); Webster's New International Dictionary 2711 (2d ed. 1934) ("A piece, as a lever, connected with a catch or detent as a means of releasing it; specif., *Firearms*, the part of a lock moved by the finger to release the cock in firing"). The phrase "function of the trigger" thus refers to the mode of action by which the trigger activates the firing mechanism. For most firearms, including the ones at issue here, the trigger is a curved metal lever. On weapons with these standard trigger mechanisms, the phrase "function of the trigger" means the physical trigger movement required to shoot the firearm.

No one disputes that a semiautomatic rifle without a bump stock is not a machinegun because it fires only one shot per "function of the trigger." That is, engaging the trigger a single time will cause the firing mechanism to discharge only one shot. To understand why, it is helpful to consider the mechanics of the firing cycle for a semiautomatic rifle. Because the statutory definition is keyed to a "function of the trigger," only the trigger assembly is relevant for our purposes. Although trigger assemblies for semiautomatic rifles vary, the basic mechanics are generally the same. The following series of illustrations depicts how the trigger assembly on an AR-15 style semiautomatic rifle works. . . . In each illustration, the front of the rifle (*i.e.*, the barrel) would be pointing to the left.

We begin with an overview of the relevant components:

Figure 1.

The trigger is a simple lever that moves backward and forward. P. Sweeney, Gunsmithing the AR–15, p. 131 (2016). The square point at the top left edge of the trigger locks into a notch at the bottom of the hammer. P. Sweeney, Gunsmithing: Rifles 269 (1999). The hammer is a spring-loaded part that swings forward toward the barrel and strikes the firing pin, causing a shot to fire. The disconnector is the component responsible for resetting the hammer to its original position after a shot is fired.

We turn next to how these components operate:

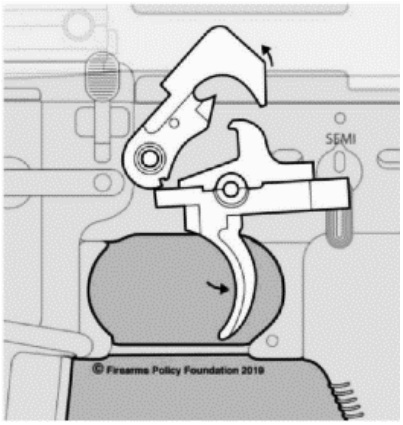


Figure 2.

When the shooter engages the trigger by moving it backward (as indicated by the arrow), the square point of the trigger pivots downward and out of the notch securing the hammer. This movement releases the spring-loaded hammer, allowing it to swing forward.

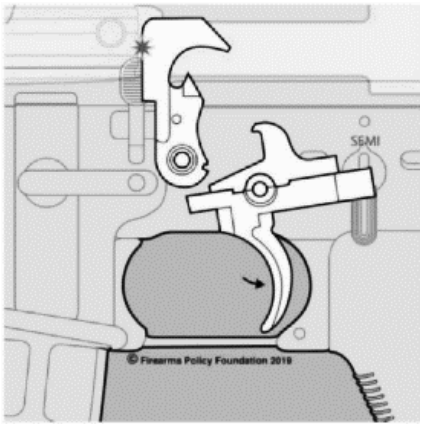


Figure 3.

At the top of the hammer's rotation, it strikes the firing pin, causing the weapon to fire a single shot.

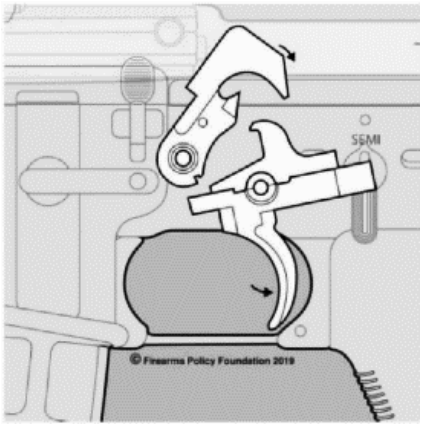


Figure 4.

The firearm then ejects the spent cartridge from the chamber and loads a new one in its place. D. Long, The Complete AR–15/M16 Sourcebook 206 (2001). The mechanism that performs this task swings the hammer backward at the same time.

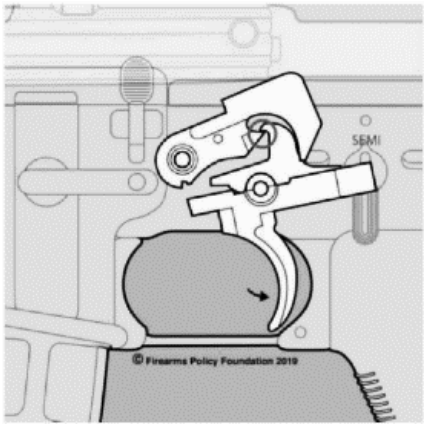


Figure 5.

As the hammer swings backward, it latches onto the disconnector. Sweeney, Gunsmithing: Rifles, at 269. This latching (circled above) prevents the hammer from swinging forward again after a new cartridge is loaded into the chamber. The disconnector will hold the hammer in that position for as long as the shooter holds the trigger back, thus preventing the firearm from firing another shot.[4]

[4] Machinegun variants of the AR-15 style rifle include an additional component known as an auto sear. The auto sear catches the hammer as it swings backwards, but will release it again once a new cartridge is loaded if the trigger is being held back. P. Sweeney, 1 The Gun Digest Book of the AR-15 38 (2005). An auto sear thus permits a shooter to fire multiple shots while engaging the trigger only once. ATF has accordingly recognized that modifying a semiautomatic rifle or handgun with an auto sear converts it into a machinegun. *See* ATF Ruling 81–4.

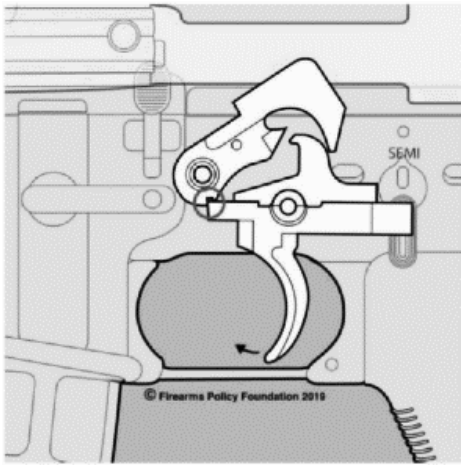


Figure 6.

Finally, when the shooter takes pressure off the trigger and allows it to move forward (as indicated by the arrow), the hammer slips off the disconnector just as the square point of the trigger rises into the notch on the hammer (circled above). The trigger mechanism is thereby reset to the original position shown in Figure 1. A semiautomatic rifle must complete this cycle for each shot fired.

ATF does not dispute that this complete process is what constitutes a "single function of the trigger." A shooter may fire the weapon again after the trigger has reset, but only by engaging the trigger a second time and thereby initiating a new firing cycle. For each shot, the shooter must engage the trigger and then release the trigger to allow it to reset. Any additional shot fired after one cycle is the result of a separate and distinct "function of the trigger."

Nothing changes when a semiautomatic rifle is equipped with a bump stock. The firing cycle remains the same. Between every shot, the shooter must release pressure from the trigger and allow it to reset before reengaging the trigger for another shot. A bump stock merely reduces the amount of time that elapses between separate "functions" of the trigger. The bump stock makes it easier for the shooter to move the firearm back toward his shoulder and thereby release pressure from the trigger and reset it. And, it helps the shooter press the trigger against his finger very quickly thereafter. A bump stock does not convert a semiautomatic rifle into a machinegun any more than a shooter with a lightning-fast trigger finger does. Even with a bump stock, a semiautomatic rifle will fire only one shot for every "function of the trigger." So, a bump stock cannot qualify as a machinegun under § 5845(b)'s definition.

Although ATF agrees on a semiautomatic rifle's mechanics, it nevertheless insists that a bump stock allows a semiautomatic rifle to fire multiple shots "by a single function of the trigger." ATF starts by interpreting the phrase "single function of the trigger" to mean "a single pull of the trigger and analogous motions." A shooter using a bump stock, it asserts, must pull the trigger only one time to initiate a bump-firing sequence of multiple shots. This

initial trigger pull sets off a sequence — fire, recoil, bump, fire — that allows the weapon to continue firing "without additional physical manipulation of the trigger by the shooter." According to ATF, all the shooter must do is keep his trigger finger stationary on the bump stock's ledge and maintain constant forward pressure on the front grip to continue firing. The dissent offers similar reasoning.

This argument rests on the mistaken premise that there is a difference between a shooter flexing his finger to pull the trigger and a shooter pushing the firearm forward to bump the trigger against his stationary finger. ATF and the dissent seek to call the shooter's initial trigger pull a "function of the trigger" while ignoring the subsequent "bumps" of the shooter's finger against the trigger before every additional shot. But, § 5845(b) does not define a machinegun based on what type of human input engages the trigger — whether it be a pull, bump, or something else. Nor does it define a machinegun based on whether the shooter has assistance engaging the trigger. The statutory definition instead hinges on how many shots discharge when the shooter engages the trigger. And, as we have explained, a semiautomatic rifle will fire only one shot each time the shooter engages the trigger — with or without a bump stock.[6]

In any event, ATF's argument cannot succeed on its own terms. The final Rule defines "function of the trigger" to include not only "a single pull of the trigger" but also any "analogous motions." ATF concedes that one such analogous motion that qualifies as a single function of the trigger is "sliding the rifle forward" to bump the trigger. Brief for Petitioners 22. But, if that is true, then every bump is a separate "function of the trigger," and semiautomatic rifles equipped with bump stocks are therefore not machineguns. ATF resists the natural implication of its reasoning, insisting that the bumping motion is a "function of the trigger" only when it initiates, but not when it continues, a firing sequence. But, Congress did not write a statutory definition of "machinegun" keyed to when a firing sequence begins and ends. Section 5845(b) asks only whether a weapon fires more than one shot "by a single function of the trigger."

Finally, the position that ATF and the dissent endorse is logically inconsistent. They reason that a semiautomatic rifle equipped with a bump stock fires more than one shot by a single function of the trigger because a shooter "need only pull the trigger and maintain forward pressure" to "activate continuous fire." If that is correct, however, then the same should be true for a

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[6] The dissent says that we "resis[t]" the "ordinary understanding of the term 'function of the trigger' with two technical arguments." But, the arguments it refers to explain why, even assuming a semiautomatic rifle equipped with a bump stock could fire more than one shot by a single function of the trigger, it could not do so "automatically." Those arguments have nothing to do with our explanation of what a "single function of the trigger" means.

semiautomatic rifle *without* a bump stock. After all, as the dissent and ATF themselves acknowledge, a shooter manually bump firing a semiautomatic rifle can achieve continuous fire by holding his trigger finger stationary and maintaining forward pressure with his nontrigger hand. Yet, they agree that a semiautomatic rifle without a bump stock "fires only one shot each time the shooter pulls the trigger." Their argument is thus at odds with itself.

We conclude that a semiautomatic rifle equipped with a bump stock is not a "machinegun" because it does not fire more than one shot "by a single function of the trigger."

B

A bump stock is not a "machinegun" for another reason: Even if a semiautomatic rifle with a bump stock could fire more than one shot "by a single function of the trigger," it would not do so "automatically." Section 5845(b) asks whether a weapon "shoots . . . automatically more than one shot . . . by a single function of the trigger." The statute thus specifies the precise action that must "automatically" cause a weapon to fire "more than one shot" — a "single function of the trigger." If something more than a "single function of the trigger" is required to fire multiple shots, the weapon does not satisfy the statutory definition. As Judge Henderson put it, the "statutory definition of 'machinegun' does not include a firearm that shoots more than one round 'automatically' by a single pull of the trigger **AND THEN SOME**." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 44 (CADC 2019) (opinion concurring in part and dissenting in part).

Firing multiple shots using a semiautomatic rifle with a bump stock requires more than a single function of the trigger. A shooter must also actively maintain just the right amount of forward pressure on the rifle's front grip with his nontrigger hand. Too much forward pressure and the rifle will not slide back far enough to release and reset the trigger, preventing the rifle from firing another shot. Too little pressure and the trigger will not bump the shooter's trigger finger with sufficient force to fire another shot. Without this ongoing manual input, a semiautomatic rifle with a bump stock will not fire multiple shots. Thus, firing multiple shots requires engaging the trigger one time — and then some.[7]

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[7] The dissent seemingly concedes this point, repeatedly recognizing that the shooter must both pull the trigger *and* maintain forward pressure on the front grip. *See*, *e.g.*, . . . ("[A] single pull of the trigger provides continuous fire as long as the shooter maintains forward pressure on the gun"); ("A bump-stock-equipped semiautomatic rifle is a machinegun because ... a shooter can . . . fire continuous shots without any human input beyond maintaining forward pressure");

ATF and the dissent counter that machineguns also require continuous manual input from a shooter: He must both engage the trigger and keep it pressed down to continue shooting. In their view, there is no meaningful difference between holding down the trigger of a traditional machinegun and maintaining forward pressure on the front grip of a semiautomatic rifle with a bump stock. This argument ignores that Congress defined a machinegun by what happens "automatically" "by a single function of the trigger." Simply pressing and holding the trigger down on a fully automatic rifle is not manual input in addition to a trigger's function — it is what causes the trigger to function in the first place. By contrast, pushing forward on the front grip of a semiautomatic rifle equipped with a bump stock is not part of functioning the trigger. After all, pushing on the front grip will not cause the weapon to fire unless the shooter also engages the trigger with his other hand. Thus, while a fully automatic rifle fires multiple rounds "automatically . . . by a single function of the trigger," a semiautomatic rifle equipped with a bump stock can achieve the same result only by a single function of the trigger and then some.

Moreover, a semiautomatic rifle with a bump stock is indistinguishable from another weapon that ATF concedes cannot fire multiple shots "automatically": the Ithaca Model 37 shotgun. The Model 37 allows the user to "slam fire" — that is, fire multiple shots by holding down the trigger while operating the shotgun's pump action. Each pump ejects the spent cartridge and loads a new one into the chamber. If the shooter is holding down the trigger, the new cartridge will fire as soon as it is loaded. According to ATF, the Model 37 fires more than one shot by a single function of the trigger, but it does not do so "automatically" because the shooter must manually operate the pump action with his nontrigger hand. That logic mandates the same result here. Maintaining the proper amount of forward pressure on the front grip of a bump-stock equipped rifle is no less additional input than is operating the pump action on the Model 37.[8]

ATF responds that a shooter is less physically involved with operating a bump-stock equipped rifle than operating the Model 37's pump action. Once the shooter pulls the rifle's trigger a single time, the bump stock "harnesses the firearm's recoil energy in a continuous back-and-forth cycle that allows the

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("[A] shooter of a bump-stock-equipped AR-15 need only pull the trigger and maintain forward pressure"); ("After a shooter pulls the trigger, if he maintains continuous forward pressure on the gun, the bump stock harnesses the recoil to move the curved lever back and forth against his finger").

[8] The dissent attempts to undermine this analogy by pointing out that a Model 37 requires manual reloading and therefore cannot qualify as a machinegun under § 5845(b). But, that is beside the point. As ATF itself agrees, the Model 37 is not a machinegun for another, independent reason: It cannot "automatically" fire more than one shot by a single function of the trigger. See Brief for Petitioners 38. And, as explained, the reasons why a Model 37 cannot do so apply with equal force to semiautomatic rifles equipped with bump stocks.

shooter to attain continuous firing." But, even if one aspect of a weapon's operation could be seen as "automatic," that would not mean the weapon "shoots . . . automatically more than one shot . . . *by a single function of the trigger*." § 5845(b) (emphasis added). After all, many weapons have some "automatic" features. For example, semiautomatic rifles eject the spent cartridge from the firearm's chamber and load a new one in its place without any input from the shooter. A semiautomatic rifle is therefore "automatic" in the general sense that it performs some operations that would otherwise need to be completed by hand. But, as all agree, a semiautomatic rifle cannot fire more than one shot "automatically ... by a single function of the trigger" because the shooter must do more than simply engage the trigger one time. The same is true of a semiautomatic rifle equipped with a bump stock.

Thus, even if a semiautomatic rifle could fire more than one shot by a single function of the trigger, it would not do so "automatically."

C

Abandoning the text, ATF and the dissent attempt to shore up their position by relying on the presumption against ineffectiveness. That presumption weighs against interpretations of a statute that would "rende[r] the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner." *The Emily*, 22 U.S. (9 Wheat.) 381 (1824). It is a modest corollary to the commonsense proposition "that Congress presumably does not enact useless laws." *United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring in part and concurring in judgment).

In ATF's view, Congress "restricted machineguns because they eliminate the manual movements that a shooter would otherwise need to make in order to fire continuously" at a high rate of fire, as bump stocks do. So, ATF reasons, concluding that bump stocks are lawful "simply because the [trigger] moves back and forth . . . would exalt artifice above reality and enable evasion of the federal machinegun ban." The dissent endorses a similar view.

The presumption against ineffectiveness cannot do the work that ATF and the dissent ask of it. A law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest. Interpreting § 5845(b) to exclude semiautomatic rifles equipped with bump stocks comes nowhere close to making it useless. Under our reading, § 5845(b) still regulates all traditional machineguns. The fact that it does not capture other weapons capable of a high rate of fire plainly does not render the law useless. Moreover, it is difficult to understand how ATF can plausibly argue otherwise, given that its consistent position for almost a decade in numerous separate decisions was that § 5845(b) does not capture semiautomatic rifles equipped with bump stocks. Curiously, the dissent relegates ATF's about-face to a footnote, instead pointing to its classification of other devices.

The dissent's additional argument for applying the presumption against ineffectiveness fails on its own terms. To argue that our interpretation makes § 5845(b) "far less effective," the dissent highlights that a shooter with a bump-stock-equipped rifle can achieve a rate of fire that rivals traditional machineguns. But, the dissent elsewhere acknowledges that a shooter can do the same with an *unmodified* semiautomatic rifle using the manual bump-firing technique. The dissent thus fails to prove that our reading makes § 5845(b) "far less effective," much less ineffective (as is required to invoke the presumption). In any event, Congress could have linked the definition of "machinegun" to a weapon's rate of fire, as the dissent would prefer. But, it instead enacted a statute that turns on whether a weapon can fire more than one shot "automatically . . . by a single function of the trigger." § 5845(b). And, "it is never our job to rewrite . . . statutory text under the banner of speculation about what Congress might have done." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).[9]

III

For the foregoing reasons, we affirm. . .

JUSTICE ALITO, concurring.

I join the opinion of the Court because there is simply no other way to read the statutory language. There can be little doubt that the Congress that enacted 26 U.S.C. §5845(b) would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock. But the statutory text is clear, and we must follow it. . . .

There is a simple remedy for the disparate treatment of bump stocks and machineguns. Congress can amend the law — and perhaps would have done so already if ATF had stuck with its earlier interpretation. Now that the situation is clear, Congress can act.

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[9] The dissent concludes by claiming that our interpretation of § 5845(b) "renders Congress's clear intent readily evadable." And, it highlights that "[e]very Member of the majority has previously emphasized that the best way to respect congressional intent is to adhere to the ordinary understanding of the terms Congress uses." But, "[w]hen Congress takes the trouble to define the terms it uses, a court must respect its definitions as virtually conclusive. . . This Court will not deviate from an express statutory definition merely because it varies from the term's ordinary meaning." *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 59 (2024) (internal quotation marks and alteration omitted).

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

On October 1, 2017, a shooter opened fire from a hotel room overlooking an outdoor concert in Las Vegas, Nevada, in what would become the deadliest mass shooting in U. S. history. Within a matter of minutes, using several hundred rounds of ammunition, the shooter killed 58 people and wounded over 500. He did so by affixing bump stocks to commonly available, semiautomatic rifles. These simple devices harness a rifle's recoil energy to slide the rifle back and forth and repeatedly "bump" the shooter's stationary trigger finger, creating rapid fire. All the shooter had to do was pull the trigger and press the gun forward. The bump stock did the rest.

Congress has sharply restricted civilian ownership of machineguns since 1934. Federal law defines a "machinegun" as a weapon that can shoot "automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). Shortly after the Las Vegas massacre, the Trump administration, with widespread bipartisan support, banned bump stocks as machineguns under the statute.

Today, the Court puts bump stocks back in civilian hands. To do so, it casts aside Congress's definition of "machinegun" and seizes upon one that is inconsistent with the ordinary meaning of the statutory text and unsupported by context or purpose. When I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck. A bump-stock-equipped semiautomatic rifle fires "automatically more than one shot, without manual reloading, by a single function of the trigger." § 5845(b). Because I, like Congress, call that a machinegun, I respectfully dissent.

I

A

Machineguns were originally developed in the 19th century as weapons of war. Smaller and lighter submachine guns were not commercially available until the 1920s. Although these weapons were originally marketed to law enforcement, they inevitably made it into the hands of gangsters. Gangsters like Al Capone used machineguns to rob banks, ambush the police, and murder rivals. . . .

Congress responded in 1934 by sharply restricting civilian ownership of machineguns. The Senate Report explaining the 1934 Act emphasized that the "gangster as a law violator must be deprived of his most dangerous weapon, the machine gun." S. Rep. No. 1444, 73d Cong., 2d Sess., 1-2. "[W]hile there is justification for permitting the citizen to keep a pistol or revolver for his own protection . . . , there is no reason why anyone except a law officer should have a machine gun."

These early machineguns allowed a shooter to fire in a variety of ways. Some would fire continuously with a single pull of the trigger or push of a button. Others, such as the famous Thompson Submachine Gun Caliber .45, or "Tommy Gun," would fire continuously only so long as the shooter maintained backward pressure on the trigger; a shooter could still fire single shots by pulling and releasing the trigger each time. The internal mechanisms of automatic-fire weapons also varied enormously, with many (such as the Tommy Gun) relying principally on the recoil energy produced by each bullet's discharge to effectuate automatic fire.

To account for these differences, Congress adopted a definition of "machinegun" that captured "any weapon which shoots, or is designed to shoot, automatically . . . more than one shot, without manual reloading, by a single function of the trigger." National Firearms Act, 48 Stat. 1236. That essential definition still governs today.

B

The archetypal modern "machinegun" is the military's standard-issue M16 assault rifle. With an M16 in automatic mode, the shooter pulls the trigger once to achieve a fire rate of 700 to 950 rounds per minute. An internal mechanism automates the M16's continuous fire, so that all the shooter has to do is keep backward pressure on the trigger. If the shooter stops putting pressure on the trigger, the gun stops firing.

Semiautomatic weapons are not "machineguns" under the statute. Take, for instance, an AR-15-style semiautomatic assault rifle. To rapidly fire an AR-15, a shooter must rapidly pull the trigger himself. It is "semi" automatic because, although the rifle automatically loads a new cartridge into the chamber after it is fired, it fires only one shot each time the shooter pulls the trigger.

To fire an M16 or AR-15 rifle, a person typically holds the "grip" next to the trigger with his firing hand. He stabilizes the weapon with his other hand on its barrel or "front grip." He then raises the weapon so that the butt, or "stock," of the gun rests against his shoulder, lines up the sights to look down the gun, and squeezes the trigger. A regular person with an AR-15 can achieve a fire rate of around 60 rounds per minute, with one pull of the trigger per second. A professional sport shooter can use the AR-15 to fire at a rate of up to 180 rounds per minute, pulling the trigger three times per second.

A shooter can also manually "bump" an AR-15 to increase the rate of fire by using a belt loop or rubber band to hold his trigger finger in place and harness the recoil from the first shot to fire the rifle continuously. To use a belt loop, he must hold the rifle low against his hip, put his finger in the trigger guard, and then loop his finger through a belt loop on his pants to lock the finger in place. With his other hand, he then pushes the rifle forward until his stationary finger engages the trigger to fire the first shot. The recoil from that

shot pushes the rifle violently backward. If the shooter keeps pressing the rifle forward against the finger in his belt loop, the repeated backward jump of the recoil combined with his forward pressure allows the rifle to fire continuously. A shooter using this method, however, cannot shoot very precisely. He has neither the advantage of the sights to line up his shot, nor his shoulder to stabilize the recoil. A shooter can also use a rubber band or zip tie to tie a finger close to the trigger. If the shooter is strong and skilled enough physically to control the distance and direction of the rifle's significant recoil, the rifle will fire continuously.

A bump stock automates and stabilizes the bump firing process. It replaces a rifle's standard stock, which is the part held against the shoulder. A bump stock, unlike a standard stock, allows the rifle's upper assembly to slide back and forth in the stock. It also typically includes a finger rest on which the shooter can place his finger while shooting, and a "receiver module" that guides and regulates the weapon's recoil. To fire a semiautomatic rifle equipped with a bump stock, the shooter either pulls the trigger . . . or slides the gun forward in the bump stock, which presses the trigger into his trigger finger. As long as the shooter keeps his trigger finger on the finger rest and maintains constant forward pressure on the rifle's barrel or front grip, the weapon will fire continuously. A rifle equipped with a bump stock can fire at a rate between 400 and 800 rounds per minute.

II

A machinegun does not fire itself. The important question under the statute is how a person can fire it. A weapon is a "machinegun" when a shooter can (1) "by a single function of the trigger," (2) shoot "automatically more than one shot, without manually reloading." 26 U.S.C. § 5845(b). The plain language of that definition refers most obviously to a rifle like an M16, where a single pull of the trigger provides continuous fire as long as the shooter maintains backward pressure on the trigger. The definition of "machinegun" also includes "any part designed and intended . . . for use in converting a weapon into a machinegun." That language naturally covers devices like bump stocks, which "conver[t]" semiautomatic rifles so that a single pull of the trigger provides continuous fire as long as the shooter maintains forward pressure on the gun.

This is not a hard case. All of the textual evidence points to the same interpretation. A bump-stock-equipped semiautomatic rifle is a machinegun because (1) with a single pull of the trigger, a shooter can (2) fire continuous shots without any human input beyond maintaining forward pressure. The majority looks to the internal mechanism that initiates fire, rather than the human act of the shooter's initial pull, to hold that a "single function of the trigger" means a reset of the trigger mechanism. Its interpretation requires six diagrams and an animation to decipher the meaning of the statutory text. Then, shifting focus from the internal mechanism of the gun to the perspective

of the shooter, the majority holds that continuous forward pressure is too much human input for bump-stock-enabled continuous fire to be "automatic."

The majority's reading flies in the face of this Court's standard tools of statutory interpretation. By casting aside the statute's ordinary meaning both at the time of its enactment and today, the majority eviscerates Congress's regulation of machineguns and enables gun users and manufacturers to circumvent federal law.

A

Start with the phrase "single function of the trigger." All the tools of statutory interpretation, including dictionary definitions, evidence of contemporaneous usage, and this Court's prior interpretation, point to that phrase meaning the initiation of the firing sequence by an act of the shooter, whether via a pull, push, or switch of the firing mechanism. The majority nevertheless interprets "function of the trigger" as "the mode of action by which the trigger activates the firing mechanism." Because in a bump-stock-equipped semiautomatic rifle, the trigger's internal mechanism must reset each time a weapon fires, the majority reads each reset as a new "function." That reading fixates on a firearm's internal mechanics while ignoring the human act on the trigger referenced by the statute.

Consider the relevant dictionary definitions. In 1934, when Congress passed the National Firearms Act, "function" meant "the mode of action by which [something] fulfils its purpose." 4 Oxford English Dictionary 602 (1933). A "trigger" meant the "movable catch or lever" that "sets some force or mechanism in action." 11 *id.* at 357. The majority agrees with those definitions. It errs, however, by maintaining a myopic focus on a trigger's mechanics rather than on how a shooter uses a trigger to initiate fire.

Nothing about those definitions suggests that "function of the trigger" means the mechanism by which the trigger resets mechanically to fire a second shot . . . as opposed to the process that a pull of the trigger on a bump-stock-equipped semiautomatic rifle sets in motion. The most important "function" of a "trigger" is what it enables a shooter to do; what "force or mechanism" it sets "in action." *Id.* A "single function of the trigger" more naturally means a single initiation of the firing sequence. Regardless of what is happening in the internal mechanics of a firearm, if a shooter must activate the trigger only a single time to initiate a firing sequence that will shoot "automatically more than one shot," that firearm is a "machinegun."

Evidence of contemporaneous usage overwhelmingly supports that interpretation. The term "'function of the trigger'" was proposed by the president of the National Rifle Association (NRA) during a hearing on the National Firearms Act before the House. He understood the "distinguishing feature of a machine gun [to be] that by a single pull of the trigger the gun continues to fire." He emphasized that a firearm "which is capable of firing

more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded . . . as a machine gun." Distinguishing a machinegun from a pistol, the NRA president emphasized that for a pistol "[y]ou must release the trigger and pull it again for the second shot to be fired." He did not say "the hammer slips off the disconnector just as the square point of the trigger rises into the notch on the hammer . . . thereby reset[ting the trigger mechanism] to the original position." He instead emphasized the action of the shooter, who must repeatedly activate the trigger for each shot. Predictably, the House and Senate Reports reflect the same understanding of the phrase.

The majority cannot disregard these statements as evidence of legislative purpose. They are, along with contemporaneous dictionary definitions, some of the best evidence of contemporaneous understanding. Indeed, at oral argument, when asked what evidence there was "that as of 1934, the ordinary understanding of the phrase 'function of the trigger' referred to the mechanics of the gun rather than . . . the shooter's motion," respondent's lawyer could not point to a single piece of evidence that supports the majority's reading. He even agreed that Congress used the word "function" to ensure that the statute covered a wide variety of trigger mechanisms, including both push and pull triggers. In short, the majority disregards the unrefuted evidence of the text's ordinary and contemporaneous meaning, substituting instead its own understanding of the internal mechanics of an AR–15 without looking at the actions of the shooter.

This Court itself has also previously read the definition of "machinegun" in this exact statute to refer to the action of the shooter rather than the firing mechanism. In *Staples v. United States*, 511 U.S. 600 (1994), the Court noted that "a weapon that fires repeatedly with a *single pull of the trigger*" is a machinegun, as opposed to "a weapon that fires only one shot with each pull of the trigger," which is (at most) a semiautomatic firearm. *Id.* at 602, n.1. (emphasis added). A "pull" of the trigger necessarily requires human input.

When a shooter initiates the firing sequence on a bump-stock-equipped semiautomatic rifle, he does so with "a single function of the trigger" under that term's ordinary meaning. Just as the shooter of an M16 need only pull the trigger and maintain backward pressure (on the trigger), a shooter of a bump-stock-equipped AR-15 need only pull the trigger and maintain forward pressure (on the gun). Both shooters pull the trigger only once to fire multiple shots. The only difference is that for an M16, the shooter's backward pressure makes the rifle fire continuously because of an internal mechanism: The curved lever of the trigger does not move. In a bump-stock-equipped AR–15, the mechanism for continuous fire is external: The shooter's forward pressure moves the curved lever back and forth against his stationary trigger finger. Both rifles require only one initial action (that is, one "single function of the

trigger") from the shooter combined with continuous pressure to activate continuous fire.

The majority resists this ordinary understanding of the term "function of the trigger" with two technical arguments.[4] First, it attempts to contrast the action required to fire an M16 from that required to fire a bump-stock-equipped AR–15. The majority argues that "holding the trigger down on a fully automatic rifle is not manual input in addition to a trigger's function — it is what causes the trigger to function in the first place" whereas "pushing on the front grip [of a bump-stock equipped semiautomatic rifle] will not cause the weapon to fire unless the shooter also engages the trigger with his other hand." The shooter of a bump-stock-equipped AR-15, however, need not "pull" the trigger to fire. Instead, he need only place a finger on the finger rest and push forward on the front grip or barrel with his other hand. Instead of pulling the trigger, the forward motion pushes the bump stock into his finger.

Second, the majority tries to cabin "single function of the trigger" to a single mechanism for activating continuous fire. A shooter can fire a bump-stock-equipped semiautomatic rifle in two ways. First, he can choose to fire single shots via distinct pulls of the trigger without exerting any additional pressure. Second, he can fire continuously via maintaining constant forward pressure on the barrel or front grip. The majority holds that the forward pressure cannot constitute a "single function of the trigger" because a shooter can also fire single shots by pulling the trigger. That logic, however, would also exclude a Tommy Gun and an M16, the paradigmatic examples of regulated machineguns in 1934 and today. Both weapons can fire either automatically or semiautomatically. A shooter using a Tommy Gun in automatic mode could choose to fire single shots with distinct pulls of the trigger, or continuous shots by maintaining constant backward pressure on the trigger. An M16 user can toggle the weapon from semiautomatic mode, which allows only one shot per pull of the trigger, to automatic mode, which enables continuous fire. In 1934 as now, there is no commonsense difference between a firearm where a shooter must hold down a trigger or flip a switch to initiate rapid fire and one where a shooter must push on the front grip or barrel to do the same.

The majority's logic simply does not overcome the overwhelming textual and contextual evidence that "single function of the trigger" means a single

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[4] The majority claims that these arguments explain only "why, even assuming a semiautomatic rifle equipped with a bump stock could fire more than one shot by a single function of the trigger, it could not do so 'automatically.'" That is correct, as far as the majority's reasoning goes. The majority defines "'single function of the trigger'" as a reset of a rifle's internal trigger mechanism. A more accurate definition is the human action required to initiate the firing sequence. The majority's argument for why "something more than a 'single function of the trigger' is required to fire multiple shots," is therefore relevant to both its discussion of "automatically" and my discussion of "single function of the trigger."

action by the shooter to initiate a firing sequence, including pulling a trigger and pushing forward on a bump-stock-equipped semiautomatic rifle.

B

Next, consider what makes a machinegun "automatic." A bump-stock-equipped semiautomatic rifle is a "machinegun" because with a "single function of the trigger" it "shoot[s], automatically more than one shot, without manual reloading." Put simply, the bump stock automates the process of firing more than one shot.

Before automatic weapons, a person who wanted to fire multiple shots from a firearm had to do two things after pulling the trigger the first time: (1) he had to reload the gun; and (2) he had to pull the trigger again. A semiautomatic weapon like an AR–15 already automates the first process. The bump stock automates the second.[5] In a fully automatic rifle like an M16, that automation is internal. After a shooter pulls the trigger, if he maintains continuous backward pressure on the trigger, the curved lever itself will not move. Instead, an internal mechanism allows continuous fire. On a bump-stock-equipped semiautomatic rifle, the automation is external. After a shooter pulls the trigger, if he maintains continuous forward pressure on the gun, the bump stock harnesses the recoil to move the curved lever back and forth against his finger. That external automated motion creates continuous fire.

When a shooter "bump" fires a semiautomatic weapon without a bump stock, he must control several things using his own strength and skill: (1) the backward recoil of each shot, including both the direction in which the rifle moves and how far it moves when recoiling; (2) the trigger finger, by maintaining a stationary position with a loose enough hold on the trigger that the rapidly moving gun will hit his finger each time; and (3) the forward motion of the rifle after it recoils backward. A bump stock automates those processes. The replacement stock controls the direction and distance of the recoil, and the finger rest obviates the need to maintain a stationary finger position. All a shooter must do is rest his finger and press forward on the front grip or barrel for the rifle to fire continuously.

The majority nevertheless concludes that a bump-stock-equipped semiautomatic rifle requires too much human input to fire "automatic[ally]" because it requires the "proper amount of forward pressure on the front grip"

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[5] The majority attempts to analogize a bump stock to the Model 37 shotgun, which allows the user to "fire multiple shots by holding down the trigger while operating the shotgun's pump action." The Model 37 automates the second process (*i.e.*, pulling the trigger for each shot), as long as the shooter maintains pressure on the trigger. Unlike a semiautomatic rifle, however, the Model 37 does not automate the first, as the shooter "must manually operate the pump action with his nontrigger hand" to "ejec[t] the spent cartridge and loa[d] a new one into the chamber."

to maintain continuous fire. "Automati[c]," however, does not mean zero human input. An M16 requires the shooter to exert the "proper amount of [backward] pressure on the" trigger to maintain continuous fire. So, too, a machinegun that requires a user to hold down a button. Makers of automatic weapons may require continuous human input for safety purposes; an accidental trigger pull that activates rapid fire is less harmful if it does not require affirmative human action to stop. Requiring continuous pressure for continuous fire, however, does not prevent a firearm from "shoot[ing], automatically more than one shot."

C

This Court has repeatedly avoided interpretations of a statute that would facilitate its ready "evasion" or "enable offenders to elude its provisions in the most easy manner." *The Emily*, 22 U.S. (9 Wheat.) 381 (1824); *see also Abramski v. United States*, 573 U.S. 169, 181-82, 185 (2014) (declining to read a gun statute in a way that would permit ready "evasion," "defeat the point" of the law, or "easily bypass the scheme"). Justice Scalia called this interpretive principle the "presumption against ineffectiveness." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012). The majority arrogates Congress's policymaking role to itself by allowing bump-stock users to circumvent Congress' ban on weapons that shoot rapidly via a single action of the shooter.

"The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered." Before machineguns, a shooter could fire a gun only as fast as his finger could pull the trigger. Congress sought to restrict the civilian use of machineguns because they eliminated the need for a person rapidly to pull the trigger himself to fire continuously. A bump stock serves that function. Even a skilled sport shooter can fire an AR-15 at a rate of only 180 rounds per minute by rapidly pulling the trigger. Anyone shooting a bump-stock-equipped AR-15 can fire at a rate between 400 and 800 rounds per minute with a single pull of the trigger.

Moreover, bump stocks are not the only devices that transform semiautomatic rifles into weapons capable of rapid fire with a single function of the trigger. Recognizing the creativity of gun owners and manufacturers, Congress wrote a statute "loaded with anticircumvention devices." Tr. of Oral Arg. 68. The definition of "machinegun" captures "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." Not "more than four, five, or six shots," not "single pull" or "single push" of the trigger. Following that definition, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has reasonably classified many transformative devices

other than bump stocks as "machinegun[s]."[6] For instance, ATF has long classified "forced reset triggers" as machineguns. See Brief for Petitioners 28. A forced reset trigger includes a device that forces the trigger back downward after the shooter's initial pull, repeatedly pushing the curved lever against the shooter's stationary trigger finger. To a shooter, a semiautomatic rifle equipped with a forced reset trigger feels much like an M16. He must pull the trigger only once and then maintain pressure to achieve continuous fire.

Gun owners themselves also have built motorized devices that will repeatedly pull a semiautomatic firearm's curved lever to enable continuous fire. ATF has classified such devices as "machinegun[s]" since 1982. In 2003, the Fifth Circuit held that such a contraption qualified as a "machinegun" under the statute. An owner of a semiautomatic rifle had placed a fishing reel inside the weapon's trigger guard. When he pulled a switch behind the original trigger, the switch supplied power to a motor connected to the fishing reel. The motor caused the reel to rotate, and that rotation manipulated the curved lever, causing it to fire in rapid succession. ATF in 2017 also classified as a "machinegun" a wearable glove that a shooter could activate to initiate a mechanized piston moving back and forth, repeatedly pulling and releasing a semiautomatic rifle's curved lever.[7]

The majority tosses aside the presumption against ineffectiveness, claiming that its interpretation only "draws a line more narrowly than one of [Congress's] conceivable statutory purposes might suggest" because the statute still regulates "all traditional machineguns" like M16s. *Ante,* at 1626. Congress's ban on M16s, however, is far less effective if a shooter can instead purchase a bump stock or construct a device that enables his AR-15 to fire at the same rate. Even bump-stock manufacturers recognize that they are exploiting a loophole, with one bragging on its website "Bumpfire Stocks are the closest you can get to full auto and still be legal." Midsouth Shooters, https://www.midsouthshooterssupply.com/b/bumpfiresystems. The majority creates a definition of the statute that bans only "traditional" machineguns, even though its definition renders Congress's clear intent readily evadable.

Every Member of the majority has previously emphasized that the best way to respect congressional intent is to adhere to the ordinary understanding

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[6] The majority emphasizes that ATF previously took the position that certain bump-stock devices were not "machinegun[s]" under the statute. ATF, however, has repeatedly classified other devices that modify semiautomatic rifles by allowing a single activation of the shooter to automate repeat fire as machineguns.

[7] Respondent does not today challenge ATF's classification of these devices as "machinegun[s]." His lawyer noted at oral argument, however, that "forced reset triggers" would be part of a category of "harder cases" where "there may be a question as to what exactly the trigger is and then how does that trigger function." That ambiguity stems from the majority's loophole for weapons that require multiple mechanical actions to fire continuously, even when a shooter initiates that fire with a single human action.

of the terms Congress uses. Today, the majority forgets that principle and substitutes its own view of what constitutes a "machinegun" for Congress's.

* * *

Congress's definition of "machinegun" encompasses bump stocks just as naturally as M16s. Just like a person can shoot "automatically more than one shot" with an M16 through a "single function of the trigger" if he maintains continuous backward pressure on the trigger, he can do the same with a bump-stock-equipped semiautomatic rifle if he maintains forward pressure on the gun. Today's decision to reject that ordinary understanding will have deadly consequences. The majority's artificially narrow definition hamstrings the Government's efforts to keep machineguns from gunmen like the Las Vegas shooter. I respectfully dissent.

NOTES & QUESTIONS

1. For commentary on *Cargill,* see Josh Blackman, *Justice Thomas Reverses President Trump's Executive Overreach in* Cargill v. Garland, Reason: Volokh Conspiracy (June 15, 2024); Duke L. Podcast, *Analysis: Supreme Court Overturns Bump Stock Ban*, Duke Ctr. Firearms L. (July 2, 2024); Stephen P. Halbrook, *Second Amendment Roundup: Bump Stocks Are Not Machineguns,* Reason: Volokh Conspiracy (June 16, 2024); Gary Lawkowski, *Garland v. Cargill: The Court's Textualists Stick to Their Guns,* Federalist Soc'y Blog (June 27, 2024); Dru Stevenson, *What Did the Cargill Opinion Really Say?,* Duke Ctr. Firearms L. (July 12, 2024); Jacob Sullum, *Supreme Court Upholds the Rule of Law by Rejecting the Trump Administration's Bump Stock Ban,* Reason (June 14, 2024); Andrew Willinger, Cargill *and the Regulatory Time Gap,* The Regul. Rev. (July 24, 2024). An excellent summary of bump-stock devices and their legal history can be found in Congressional Research Service's *The Supreme Court Invalidates the ATF's Bump-Stock Ban* (updated June 20, 2024).

2. *Cargill* does not disturb state laws banning bump stocks. Sixteen states and the District of Columbia have banned bump stocks. If Congress does not regulate or ban bump stocks in the future, more states may adopt their own bans. Following *Cargill,* the City of Philadelphia imposed a bump-stock ban. Several states have preemption laws that block municipalities from regulating firearms in most instances. See Andrew Willinger, *Bump Stocks and State Preemption Laws,* Duke Center for Firearms Law Blog (July 8, 2024).

3. Cargill made no claim that the bump stock ban violates the Second Amendment. He instead urged that the statutory language defining "machinegun" does not authorize the ATF to ban bump stocks. For the view that bump stock bans are permissible under the Second Amendment, see

Andrew Willinger, *Bump Stocks and the Second Amendment,* Duke Center for Firearms Law Blog (Mar. 1, 2024). What are the best arguments that a bump stock ban violates the Second Amendment?

4. The mass public shooting Las Vegas in 2017 appears to be the only instance where bump stocks have been used to commit crimes. The ATF's rule did not cite any other instances where bump stocks have been used in mass shootings or criminal homicides. Now that the ATF ban has been struck down, will there be more mass shootings or crimes committed with bump stocks?

5. Justice Thomas gave a tutorial — complete with diagrams — in how the firing mechanism in an AR-15 operates with and without a bump stock. How important is it for judges to understand how firearms operate when deciding cases like *Cargill* and those involving so-called "assault weapons"? How important is it for attorneys? Many judges (and their law clerks) have little or no experience with firearms. They must rely on litigators to introduce such evidence into the record. Online Chapter 20 provides detailed information about how firearms and ammunition operate.

6. The Supreme Court's most recent term does not bode well for regulatory agencies. The Court reversed *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and held in *Corner Post v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024), that actions to challenge a federal administrative rule can be initiated within six years of the date of injury to the plaintiff, rather than the date the rule is finalized. For an excellent discussion of how *Cargill* affects the ATF's regulatory power going forward, see Amy Swearer, *After* Cargill, *ATF's Legal Woes Are Likely to Continue,* The Regul. Rev. (July 24, 2024).

i. Stabilizing Braces

On January 13, 2023, the Attorney General signed ATF final rule 2021R-08F, "Factoring Criteria for Firearms with Attached 'Stabilizing Braces,'" which clarifies those factors the ATF will consider when determining whether firearms equipped with a purported "stabilizing brace" (sometimes referred to as a "pistol brace") will be considered a "rifle" or "short-barreled rifle" under the Gun Control Act of 1968, or a "rifle" or "firearm" subject to regulation under the National Firearms Act.

The final rule was published in the Federal Register on January 31, 2023. If the firearm with the "stabilizing brace" is a short-barreled rifle, the rule gave the affected person an "amnesty period" for 120 days from the date of publication to register the firearm tax-free, which expired on May 31, 2023.

Potential penalties for noncompliance are a fine of up to $10,000 and a maximum 10 years in prison.

The rule reverses the ATF's long-held position that a stabilizing or pistol brace did not convert the firearm into a rifle or short-barrel rifle, the latter which would require registration under the NFA.

The ATF explains that "[t]he rule's amended definition of 'rifle' clarifies that the term 'designed, redesigned, made or remade, and intended to be fired from the shoulder' includes a weapon that is equipped with an accessory, component, or other rearward attachment (e.g., a 'stabilizing brace') that provides surface area that allows the weapon to be fired from the shoulder, provided other factors, as listed in the definition, indicate the weapon is designed and intended to be fired from the shoulder." The ATF also says that "[t]his rule does not affect 'stabilizing braces' that are objectively designed and intended as a 'stabilizing brace' for use by individuals with disabilities, and not for shouldering the weapon as a rifle. Such stabilizing braces are designed to conform to the arm and not as a buttstock."

Several lawsuits have been filed challenging the rule, including one by 25 states. A federal district court in *Mock v. Garland,* 666 F. Supp. 3d 633 (N.D. Tex. Mar. 30, 2023), denied injunctive relief. A Fifth Circuit panel reversed and remanded. 75 F.4th 563 (5th Cir. 2023). The district court entered a preliminary injunction against enforcement of the rule against the plaintiffs or the members of plaintiff organizations. 697 F. Supp. 3d 564 (N.D. Tex. 2023). Following discovery, the preliminary injunction turned into a permanent one on summary judgement, and the ATF rule was vacated. 2024 WL 2982056 (N.D. Tex. June 13, 2024).

Another federal district court issued a preliminary injunction against the rule on May 31, 2023. *See Texas v. U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives,* 2023 WL 3763895 (S.D. Tex. May 31, 2023). This injunction applies to individuals employed directly by the State of Texas or its agencies, as well as all members of the private litigants in the case (Gun Owners of America, Gun Owners Foundation, Brady Brown).

On March 1, 2024, a federal district court in *Watterson v. ATF,* No. 4:23-cv-00080 (E.D. Tex. Mar. 1, 2024) denied plaintiffs' motion for a preliminary injunction against the pistol brace rule. The court found that the plaintiffs had not demonstrated a likelihood of success on the merits in challenging the rule, either under ATF's delegated authority or the Second Amendment.

In *NRA v. BATF,* 2024 WL 1349307 (N.D. Tex. Mar. 29, 2024), another federal district court in Texas issued a preliminary injunction against enforcement of the ATF's pistol brace rule, reasoning that the final rule was not a logical outgrowth of the proposed rule. The injunction exempts members of the NRA from the rule.

Appeals in the *Mock* cases and others are pending before the Fifth Circuit, with oral argument tentatively scheduled for September 2024.

Meanwhile, in a case brought by 25 state attorneys general, along with other plaintiffs, a 2-1 panel of the Eighth Circuit held that plaintiffs were likely to succeed on their claims that the ATF's actions to be "arbitrary and capricious," and thus void under the Administrative Procedure Act. *Firearms Regulatory Accountability Coalition v. Garland*, 2024 WL 3737366 (8th Cir. Aug. 9, 2024). For example,

> In promulgating the Final Rule, the ATF decided it was not "appropriate or necessary to specify a quantifiable metric for what constitutes surface area that allows for shouldering of the weapon." Nor did it plan on providing any "minimum surface area," which would comply with the Final Rule. Instead, the ATF explained it will "consider whether there is any surface area on the firearm that can be used to shoulder fire the weapon," and if so, proceed to step two's six-factor test. This, despite commenters asking the ATF to clarify "what amount of material is 'minimal' or 'added'" so that "the rear surface area is useful for shouldering." The ATF informs us it "reasonably chose to avoid brightline rules subject to easy circumvention" in favor of an undefined standard. The problem is the Final Rule does not explain how providing any amount of mathematical guidance, never mind bright-line mathematical rules, was likely to lead to circumvention of the law. Such guesswork fails to create an identifiable metric that members of the public can use to assess whether their weapon falls within the Final Rule's definition of a "rifle.". . .
>
> The community-use factor is even more amorphous. The ATF will consider "information demonstrating the likely use of the weapon by the general community, including both the manufacturer's stated intent when submitting its item for classification and use by members of the firearms industry, firearms writers, and in the general community." Not only are these terms vague (who comprises this "general community" and how will the ATF evaluate them?), but the community-use factor relies on circular reasoning: "the likely use of the weapon by the general community" is determined by its "use ... in the general community." That tells the reader nothing about how the ATF will evaluate community use under the Final Rule, allowing the ATF to reach any decision it wishes by only looking to specific evidence of community misuse, while ignoring any other examples of the community's compliant use. . . .
>
> Finally, because the marketing and community-use factors require analyzing third parties' intent and attributing their intent to any individual who affixes a stabilizing brace to a weapon, the Final Rule "would hold citizens criminally liable for the actions of others, who are likely unknown, unaffiliated, and uncontrollable by the person being regulated." *Mock*, 75 F.4th at 586; see also id. at 586 n.56 (The ATF "considered and explicitly rejected" an approach allowing it to systematically adjudicate stabilizing braces, instead preferring to adjudicate braces "on an entirely ad hoc basis."). On the one hand, the ATF claims a "single individual" in "isolated circumstances" is irrelevant in determining whether a braced weapon is intended to be shoulder fired. On the other hand, the ATF will consider "isolated circumstances" to be probative of intent should those isolated circumstances reveal an intent to use the braced weapon as a rifle. Which is it?

The case was remanded to the district court, which had denied the motion for a preliminary injunction. The dissent argued that because the ATF rule had

been vacated in the Texas *Mock* case, a preliminary injunction was superfluous and inappropriate.

Further reading: Lucas Bernard, *In Common Use: Stabilizing Brace Regulation and Second Amendment Jurisprudence,* 51 So. U.L. Rev. (forthcoming 2024) (explaining new ATF rule, and arguing that the rule is unconstitutional because short-barreled rifles are in common use).

3. The NFA Transfer Procedure

Purchasing a suppressor ("silencer" under the NFA) is an onerous process — completing Form 4, submitting fingerprints, purchasing the $200 tax stamp. For years ATF was notoriously slow in approving Form 4, typically taking 200 days or more. In 2024, ATF implemented numerous reforms in its Form 4 processing, allowing many applications to be approved within a few days. *See* Jordan Sillars, *How the ATF Slashed Suppressor Approval Time by 5000%*, Meateater.com, June 24, 2024.

4. Recent Growth in NFA Ownership

NOTES & QUESTIONS

2. [New Note] Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 Dickinson L. Rev. 273 (2022):

> As the NFA registry grows year after year, the federal government enjoys ever-increasing tax revenues. Consequently, registry expansion offers a lucrative and effective means of implementing gun control measures. ATF reclassification of existing non-NFA firearms and accessories as falling under the NFA can compel registrations or preclude ownership of controversial items altogether.
>
> . . . After *Heller*, the only constitutional NFA registry is a small one, reserved for the truly dangerous and unusual. By focusing on modern developments in three NFA categories — short-barreled rifles, silencers, and machine guns — this Comment contends that some NFA prohibitions are already constitutionally unsound and absent judicial intervention, Congress should remove them from the NFA altogether.

A contrary view is taken by another article, which argues that the constitutionality of the NFA could be preserved if, for the items that actually are common (suppressors, short-barreled rifle, and short-barreled shotguns) if the $200 tax were repealed and the wait times significantly improved. *See* Robert T. Lass, *Heller, McDonald, Bruen, and the Unconstitutional Tax Burden of the NFA*, 7 Business, Entrepreneurship & Tax L. Rev 94 (2023).

3. [New Note] Texas enacted a law in 2021 providing that a firearm suppressor that is manufactured in Texas and remains in Texas is not subject to federal law or regulation (e.g., the NFA). In 2022, several plaintiffs who wanted to manufacture a suppressor as well as the Attorney General of Texas filed a lawsuit seeking injunctive relief against the NFA suppressor registration and tax stamp requirements on Second Amendment grounds. The district court found that neither the plaintiffs nor Texas had standing to pursue their claims and granted summary judgment to the federal government. The Fifth Circuit affirmed in *Paxton v. Dettelbach*, 105 F.4th 708 (5th Cir. 2024).

CHAPTER 9

THE SECOND AMENDMENT AND CONTEMPORARY GUN REGULATION

B. THE SECOND AMENDMENT IN THE LATER TWENTIETH CENTURY

3. Gun Control and the Limits of Federal Power

c. Modern Applications of the Twentieth Century Precedents: Firearms Freedoms Acts and Second Amendment Sanctuaries

Second Amendment Sanctuary (SAS) legislation and policies differ from Firearms Freedom Act (FFA) legislation in important ways. State FFA legislation declared aspects of federal law invalid. Those types of declarations have been uniformly struck down.

SAS legislation and policies simply declare an intention not to enforce federal law with state or local resources. The SAS movement began in 2018, in Illinois, as a reaction by rural counties to gun legislation that urban legislators were introducing following the Parkland, FL, shooting. Movement founders candidly admit that it is based on the model of immigration sanctuaries. Sheila Simon, *On Target? Assessing Gun Sanctuary Ordinances That Conflict with State Law*, 122 W. Va. L. Rev. 817, 817-21 (2020).

Second Amendment Sanctuaries now appear at both the state and local level. State SAS policies are designed to defy federal gun laws. Local SAS polices often purport to defy either federal gun laws, state gun laws, or both.

State and local SAS policies designed to defy federal gun laws exhibit strong *de jure* validity. They rest solidly on the constitutional principle that state and local governments cannot be forced to implement federal law. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot use the states as instruments of federal governance by compelling state or local government officials to enforce federal laws); *New York v. United*

States, 505 U.S. 144 (1992) (holding that the federal government may not force states to establish regulations in furtherance of federal policy).

Enforcement by federal officials is still possible. But the federal government cannot compel state and local officials to enforce federal rules. State refusal to enforce federal law has a long pedigree. *See, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. 529 (1842) (affirming that Pennsylvania had no obligation to assist in enforcement of the Fugitive Slave Act); *see also* Horace K. Houston, *Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law*, 77 New Eng. Q. 252 (2004).

Local SAS policies that purport to defy state law present a different situation. The broad subordination of local governments to state power means that local policies designed to defy state law have weak claims to *de jure* validity. For a good summary of the issues and doctrine surrounding state powers over local governments, see Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 Col. Human Rights L. Rev. 1, 84-88 (2018). Some observers moved quickly to the conclusion that state and local sanctuary policies that purport to defy state law are merely symbolic and inconsequential. *See* Ric Su, *The Rise of Second Amendment Sanctuaries*, American Constitution Society, Issue Brief (March 2021) (Second Amendment Sanctuaries lack the power to nullify state laws and face various other legal and practical obstacles). Some commentators offer novel theories of de jure validity. *See* Shawn Fields, *Second Amendment Sanctuaries*, 115 Nw. L. Rev. 437 (2020) (challenging the view of de jure invalidity with a three-part theoretical construct grounded on home rule provisions, sub-federal anti-commandeering, and substantive constitutional resistance on matters unsettled by the judiciary); Shelia Simon, *On Target? Assessing Gun Sanctuary Ordinances that Conflict with State Law*, 122 W. V. L. Rev. 817 (2020) (presenting a normative case rooted in agency for the validity of local sanctuary policies); Stephen P. Halbrook, *Virginia's Second Amendment Sanctuaries: Do They Have Legal Effect?*, 33 Regent U.L. Rev. 277 (2021) (arguing that absent judicial resolution, local constitutional officers have an obligation not to enforce firearms laws of questionable constitutionality). Another rendition of the sort of argument presented by Halbrook appears in the Tazewell County Board of Supervisors' claim that its authority "to order the militia to the localities" per the Virginia Constitution was a justification to defy state gun control measures. Similarly, the Sheriff of Culpepper County pledged to evade state gun bans by deputizing "thousands of our law-abiding citizens." *A Virginia Sheriff has Vowed to Deputize County Residents if the new Democratic Majority in the State Legislature Passes Gun Control Measures*, Assoc. Pr. (Dec. 9, 2019).

Professor Johnson argues that while local SAS policies that defy state law might lack formal validity, they might still achieve broad practical effect

through the same sort of *discretionary non-enforcement* that has been deployed by state and local officials in opposition to marijuana restrictions, immigration laws and quality-of-life regulations that fuel mass incarceration. *See* Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion and Race*, 50 Pepperdine L. Rev. 1 (2023).

Some state legislation might exhibit both SAS and FFA characteristics. In that case, the state effort to nullify federal law is highly likely to be struck down. However, the formal or informal refusal of state or local officials to aid in the enforcement of federal law would remain valid.

NOTES & QUESTIONS

3. [Add to end of Note] Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion, and Race*, 50 Pepperdine L. Rev. 1 (2023) ("[E]ven where Second Amendment Sanctuaries have weak claims to formal validity, defiant public officials still have broad opportunities to implement Second Amendment Sanctuary policies through the exercise of enforcement discretion. The conclusion that enforcement discretion can effectuate sanctuary policies is tempered by the caution that using enforcement discretion in this way also invites the sort of racially biased implementation that has been common in the administration of firearms laws.").

4. [New Note] In 2022 the New Hampshire General Court (the state legislature) enacted HB 1178, to prohibit state or local officials from enforcing any federal statute, regulator, or executive order

> inconsistent with any law of this state regarding the regulation of firearms, ammunition, magazines or the ammunition feeding devices, firearm components, firearms supplies, or knives. Silence in the New Hampshire Revised Statutes Annotated pertaining to a matter regulated by federal law shall be construed as an inconsistency for the purposes of this chapter."

A notable word in the statute is "knives." The New Hampshire law is the first of the State's Rights arms bills to apply to nonfirearm arms.

The bill also addresses concerns raised about similar bills previously adopted in other states. First, the bill expressly allows N.H. law enforcement to assist federal arms law enforcement when the gun control law enforcement is in conjunction with another crime — ATF investigating someone for armed robberies. Additionally, state and local officials can freely comply with records requests from the federal government.

5. [New Note] *Missouri's Second Amendment Preservation Act* (SAPA). Under a statute enacted in 2021, "Any registration or tracking of firearms, firearm accessories, or ammunition" within Missouri violates the Second Amendment.

"Any act forbidding the possession, ownership, use, or transfer of a firearm, firearm accessory, or ammunition by law-abiding citizens" also violates the Second Amendment. So does "Any act ordering the confiscation of firearms, firearm accessories, or ammunition from law-abiding citizens." A "law-abiding citizen" is "a person who is not otherwise precluded under state law from possessing a firearm." All federal laws to the contrary are void in Missouri. Mo. Rev. Stat. §§ 1.410-1.485.

The Biden administration brought suit against SAPA and won in U.S. District Court. *United States v. Missouri*, 660 F. Supp. 3d 791 (W.D. Mo. 2023). The court held that SAPA violates the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI cl. 2. The National Firearms Act and the Gun Control Act create extensive systems for registering and tracking firearms. SAPA's "logical implication is that Missouri citizens need not comply with federal licensing and registration requirements." All sorts of federal laws or regulations order confiscation of firearms or accessories from law-abiding citizens. (*E.g.*, when the ATF's reclassified bump stocks and pistol braces regulation as NFA items. (Ch. 8.E.2.c; 2024 Supp. Chs. 8.E.2.c, 8.E.2.i).

"Section 1.440 imposes a duty on Missouri courts and law enforcement agencies to protect against infringements as defined under § 1.420. In creating an affirmative duty to protect against infringements, § 1.440 effectively imposes an affirmative duty to effectuate an obstacle to federal firearms enforcement within the state. . . . § 1.440 violates intergovernmental immunity." Additionally, "Section 1.470 imposes a monetary penalty through civil enforcement action against any political subdivision or law enforcement agency that employs an officer who formerly enforced the infringements identified in § 1.420 — that is, certain federal firearms regulations . . . [T]hese enforcement schemes are likely to discourage federal law enforcement recruitment efforts."

The case is presently on appeal of the Eighth Circuit, motions for stay pending appeal having been denied by the Eighth Circuit and the Supreme Court. 2023 WL 6543287 (8th Cir. Sept. 29, 2023); *Missouri v. United States*, 144 S.Ct. 7 (2023).

In a separate state court suit on the same issue, the City of St. Louis, the County of St. Louis, and Jackson County sued and asked for a declaratory judgment and an injunction. Plaintiffs alleged that SAPA violates the U.S. Constitution Supremacy Clause, and well as several provisions of the Missouri Constitution, such as the home rule powers of charter cities.

The state trial court ruled that plaintiffs did not need the requested equitable relief because they had an adequate remedy at law: if anyone brought a civil SAPA enforcement case against them, they could as defendants raise their constitutional arguments.

By 6-1, the Missouri Supreme Court disagreed. *City of St. Louis v. State*, 643 S.W.3d 295 (Mo. 2022). An intended purpose of the Declaratory Judgment

Act is to settle constitutional questions. Moreover, the possibility of raising a constitutional defense in possible future civil actions was inadequate: "a party need not face a multiplicity of lawsuits or wait for an enforcement action to be initiated before seeking a declaration of rights." "Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act." The case was remanded to the trial court for adjudication of the constitutional issues.

6. [New Note] An Oregon county's Second Amendment Sanctuary ordinance said that all gun control laws originating from outside the county are void, and county officials shall not participate in their enforcement. The county ordinance was held to violate the state firearms preemption law, O.R.S. § 166.170. The county ordinance would make the treatment of firearms different from the rest of the state. This would create the "patchwork" that preemption is intended to prevent. *Board of County Comm. of Columbia Cty. v. Rosenblum*, 324 Or. App. 221 (2023).

C. MODERN FEDERAL REGULATION OF FIREARMS: THE GUN CONTROL ACT

On June 25, 2022, President Joseph Biden signed into law S. 2938, the Bipartisan Safer Communities Act, which makes many significant changes to the Gun Control Act. The bill was privately negotiated by a bipartisan group of Senators, and immediately brought to the floors of the Senate and House, bypassing the standard process of committee hearings. Experience shows that legislation enacted with shortcuts to normal procedure and public input often contains major drafting errors and unintended consequences. The problems are particularly problematic when a bill changes the criminal law to make it more severe. Professor Leider provides an analysis of the Act.

Robert Leider*

The Bipartisan Safer Communities Act: Doctrinal and Policy Problems

(prepared for this work) (published in modified form at 49 J. Legis. 234 (2023))

Introduction

The Bipartisan Safer Communities Act injects substantial uncertainty throughout the Gun Control Act. This was the unfortunate byproduct of a rushed and aborted legislative process. This Essay examines the changes imposed by the Act, focusing on three sets of issues. First, it examines the changes to the prohibited person rules. Second, it looks at Congress's effort to further control commerce in firearms. Third, it examines how the bill supports red-flag laws without adopting any particular federal law. It presumes that the reader already has a high degree of familiarity with federal gun control laws.

The Framers designed our system of federal legislating to be slow and methodical. To become law, a bill must pass two houses of Congress.[1] Those houses represent different constituencies. Even then, the bill will not become law unless the President, whose constituency is national, signs the bill or two-thirds of Congress overrides his veto.[2]

Congressional rules and conventions generally make this procedure slower and more cumbersome. Before a bill becomes a law, Congress first assigns it to a committee. The committee holds hearings and offers amendments. The bill then goes to the floor. Members debate its provisions and offer amendments. If it passes, the bill then goes to the other house, where the process is often repeated. Then, if the two houses did not agree on the final text (and often they do not), they must reconcile their differences. Congress may appoint a conference committee.[3] The committee can agree on a final text, which then must be approved by both houses.[4] Alternatively, the first house may accede to the changes made by the second house and pass that version of the bill.[5] Only then does it go to the President.

For a many reasons, most bills never make it this far. Perhaps they do not enjoy the support of a majority of members. Or maybe the broad outlines of the

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[1] U.S. Const. art. I, § 7, cl. 2.

[2] U.S. Const. art. I, § 7, cl. 3.

[3] Elizabeth Rybicki, Cong. Rsch. Serv., 96-708, Conference Committee and Related Procedures: An Introduction 3 (2021); House Rules Committee, 117th Cong., Rules of the House of Representatives, Rule XXII 37-39 (2021); U.S. Senate Committee on Rules and Administration, 116th Cong., Standing Rules of the Senate, Rule XXVIII (2019).

[4] Elizabeth Rybicki, Cong. Rsch. Serv., R96-708, Conference Committee and Related Procedures: An Introduction 1 (2021).

[5] *Id.*

bill enjoy the support of a majority, but the majority cannot agree on the specific text. But even bills that enjoy the support of a majority of members often do not become law. Legislative time is limited and the bill may not be a priority. The bill may face a hostile committee or a hostile committee chairman. The bill may be filibustered in the Senate, requiring 60 votes to overcome it. In a close vote, individual members may try to hold the bill hostage until members agree to pass something of importance to that member. And so on.[6]

Gun control bills are among the hardest bills to pass through Congress. Gun control is divisive politically and socially.[7] Many people who favor gun rights are single issue voters, and in close elections, it does not pay candidates to alienate them.[8] Congress is also malapportioned toward smaller states, and these jurisdictions often do not support stricter gun laws.[9] And if nothing else, getting sixty votes in the Senate to overcome a filibuster on this issue is extraordinarily difficult.

Despite these challenges, political moments occur when many Members of Congress desire to pass gun control. Some members strongly believe that federal gun laws should be stronger and look for strategic moments get stricter laws passed. Others, including those who oppose gun control generally, feel extraordinary pressure to pass something, often in the wake of a mass shooting, an assassination, or another tragedy that receives national attention.

This is what happened with the Bipartisan Safer Communities Act, which was passed in the wake of two horrible mass shootings. The first occurred at a supermarket in Buffalo, New York, where a white supremacist killed ten African-Americans in May 2022.[10] Ten days later, a gunman killed nineteen children and two teachers at Robb Elementary School in Uvalde, Texas.[11] Members of Congress both faced enormous pressure to do something legislative to stem these mass shootings, but had no obvious way to overcome congressional deadlock — particularly the de facto sixty-vote threshold in the Senate.[12]

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[6] On the various reasons legislation fails to pass ("vetogates"), see William N. Eskridge, Jr., James J. Brudney & Josh Chafetz, Legislation and Statutory Interpretation 100-07 (3d ed. 2022).

[7] Pew Rsch. Ctr., Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive 10 (2021).

[8] R.J. Reinhart, *Gun Control Remains an Important Factor for U.S. Voters*, Gallup (Oct. 23, 2017).

[9] Pew Rsch. Ctr., *supra* note 7, at 10; Heather McCracken, et al., *Gun Ownership in America*, RAND (using data collected between 2007 and 2016).

[10] Jimmy Vielkind & Ginger Adams Otis, *The Buffalo Shooting: What We Know So Far, From Twitch to Replacement Theory*, Wall St. J. (May 19, 2022).

[11] *The Names: 19 Children, 2 Teachers Killed in Uvalde School*, AP News (June 3, 2022).

[12] Farnoush Amiri, *Families of Uvalde, Buffalo victims to testify in Congress*, AP News, (June 3, 2022).

To overcome the gridlock, Senators tried a different way of legislating. A small, bipartisan groups of Senators — including Republicans necessary to overcome the filibuster — met in secret and agreed on language among themselves.[13] Once the agreement was reached, the bill was jammed through Congress as quickly as possible. The usual hearings were not held.[14] No committee marked up the bill.[15] Amendments on the floor were beaten back, lest they scuttle the deal.[16]

The predictable and unfortunate result of this stunted legislative process was a law loaded with unclear policy goals, garbled language, and technical deficiencies. Ultimately, it will fall to the courts and to the administrative agencies to explain what this law actually does.

I. Changes to the Prohibited Persons Rules

From the criminal law perspective, the federal prohibitions on buying and receiving firearms are the most significant. The vast majority of criminal prosecutions under the Gun Control Act of 1968 are for the possession of a firearm by a prohibited person (usually a felon) and its aggravated sibling, unlawful possession by a person subject to the Armed Career Criminal Act.

To give a comparative perspective, consider these numbers on the quantity of federal criminal prosecutions compiled by the Transactional Records Clearinghouse, broken down by the lead charge. Between fiscal years 2008 and 2017, there were approximately 73,000 cases for which the primary crime was a violation of the Gun Control Act of 1968 or the National Firearms Act.[17] Of these, about 54,000 were federal criminal prosecutions in which unlawful possession of a firearm by a felon was the lead charge and nearly 60,000 prosecutions for possession by any prohibited person.[18]

Compare that with some unlawful trafficking offenses. During the same time period, there were about 1,500 cases brought primarily for manufacturing or selling firearms without a license.[19] Another approximately 1,300 cases were brought for making a false statement in connection with the sale of a gun or ammunition—the primary provision implicated by "straw purchase" sales.[20]

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[13] Annie Karni & Emily Cochrane, *Leaving Wish Lists at the Door, Senators Found Consensus on Guns*, N.Y. Times (June 24, 2022).
[14] *Actions Overview S.2938 — 117th Congress (2021-2022), S.2938 - Bipartisan Safer Communities Act*, Congress.gov, (last accessed Aug. 16, 2022).
[15] *Id.*
[16] *See id.*; Karni & Cochrane, *supra* note 13.
[17] TRAC, Federal Weapons Prosecutions Rise for Third Consecutive Year (2017).
[18] *Id.* at tbl.2.
[19] *Id.*
[20] *Id.*

And there were 77 cases brought for unlawfully selling firearms across state lines.[21]

As these numbers demonstrate, federal prosecutors lean heavily toward bringing prohibited person cases. It is not difficult to understand why. These cases are cheap and easy to bring.[22] Sufficient evidence (possession of the gun) is usually found on the defendant's person or in his vehicle or home. In many cases, the most significant legal issues will be whether the search was lawfully conducted and if not, whether the evidence has to be suppressed. By contrast, interstate trafficking prosecutions require much more investigation. There can also be serious burden-of-proof questions. These may include whether the seller acted with the requisite mens rea[23] and whether the seller was liquidating part of his private collection—which is generally lawful under federal law—or engaging in sales to make a profit—which is unlawful, unless the person is licensed as a dealer.[24]

The Bipartisan Safer Communities Act makes several changes to the prohibited person rules. At this time, their true legal effect is unknown and will require clarification by subsequent legislation, administrative rulemaking, or judicial decisions.

A. Modifying the Rules for Juveniles

The Gun Control Act contains two comprehensive, largely overlapping lists of prohibited persons. The first list is contained in subsection (d). That subsection makes it "unlawful for any person to sell or otherwise dispose of any firearm or ammunition knowing or having reasonable cause to believe that such person" falls into one of the prohibited categories.[25] The second list is in subsection (g), which makes it unlawful for any person who fits within one of the categories to *possess* a firearm that has ever moved in or affected interstate commerce.[26] The list of prohibited persons in each list is nearly identical, including, for example, felons, those addicted to drugs, and those unlawfully present in the United States. There are minor differences in the lists, and they make sense. For example, a person may not transfer a firearm to a person

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[21] *Id.*

[22] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 516 & n.50, 537-38, 551 (2001) (explaining how possession offenses are easier for prosecutors to prove compared with traditional crimes).

[23] *See* 18 U.S.C. § 924(a)(1)(D) (setting a default mens rea of "willfully" for violations of the Gun Control Act).

[24] *See* 18 U.S.C. § 921(21)(C), § 922(a)(1).

[25] 18 U.S.C. § 922(d).

[26] 18 U.S.C. § 922(g); *see Scarborough v. United States*, 431 U.S. 563, 575 (1977) (interpreting the Act to apply to any former transportation of the firearm in interstate commerce).

under indictment for a felony (but not yet convicted).[27] But a person merely under indictment may continue to possess owned firearms until he is convicted.[28]

Strangely, the Bipartisan Safer Communities Act made changes to subsection (d) (sale or transfer) without making the corresponding changes to subsection (g) (possession). Among these changes, it is now unlawful under subsection (d) to make a sale knowing the recipient falls into a prohibiting category for conduct that was done "including as a juvenile."[29] Subsection (g), however, does not include this "including as a juvenile" language.[30]

1. The effect this omission will have is unclear. On a strict textual reading (and courts are moving in a textualist direction[31]), it may now be possible that some individuals are prohibited from receiving firearms for conduct as a juvenile, but they are not prohibited from possessing firearms or manufacturing their own firearms. (Maybe this will fuel demand in "ghost guns" among such persons.[32]) On the other hand, maybe the courts will deem this a drafting mistake and read into subsection (g) the "including as a juvenile" language placed in subsection (d).[33] But this approach is fraught with peril because it will result in the judiciary substantively expanding the scope of a felony.[34]

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[27] 18 U.S.C. § 922(d)(1); *see also* 18 U.S.C. § 922(n) (prohibiting shipment, transportation, and receipt of a firearm in interstate or foreign commerce by a person under felony indictment).
[28] *See* 18 U.S.C. § 922(g)(1).
[29] Bipartisan Safer Communities Act, Pub. L. 117-159, § 12001(a)(1)(A)(1), 136 Stat. 1314, 1322 (2022).
[30] *See* 18 U.S.C. § 922(g)(1).
[31] *See* Diarmuid F. O'Scannlain, "*We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 St. John's L. Rev. 303, 304 (2017).
[32] "Ghost guns" are partially finished firearm components. By completing much of the manufacturing process, sellers of these products make it easy for consumers to finish manufacturing the firearm. But because they are not complete firearms yet, they have largely fallen outside the federal regulatory framework. The Department of Justice has finalized new rules designed to make more unfinished frames and receivers qualify as "firearms" under the Gun Control Act, under the theory that they can be readily restored to firing condition. *See* 18 U.S.C. § 921(a)(3); Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 27,652 (Apr. 26, 2022) (to be codified at 27 C.F.R. pts. 447-449).
[33] *Cf. King v. Burwell*, 576 U.S. 473, 492-95 (2015) (construing "an Exchange established by the State" to include federal exchanges to make the statute operate in the way Congress intended).
[34] *See United States v. Bass*, 404 US. 336, 348 (1971); *see also* Dep't of Justice, Memorandum Opinion for the Chief Counsel, Bureau of Alcohol, Tobacco, Firearms and Explosives: Nonimmigrant Aliens and Firearms Disabilities under the Gun Control Act (2011) (refusing to interpret the firearms prohibition applying to aliens admitted to the United States on a nonimmigrant visa to apply to nonimmigrant aliens who are present pursuant to the visa waiver program).

2. The confusion is compounded because Congress made the opposite error for involuntary mental health commitments. Congress added to (d)(4) that a person is prohibited if he "has been adjudicated as a mental defective or has been committed to any mental institution at 16 years of age or older."[35] The memo circulated with the bill claimed that this provision "[i]mproves current law so that mental health adjudication records for persons under 16 years old do not disqualify them from purchasing a firearm."[36] But Congress never amended subsection (g), which continues to read that it is unlawful for a person to possess a firearm if he "has been adjudicated as a mental defective or who has been committed to a mental institution."[37] This provision applies to adjudications under age 16.[38] So under a literal reading of the Gun Control Act, a person may now transfer a firearm to a person for whom it is unlawful to possess. Again, there is the question of whether courts will claim that Congress's amendment to (d)(4) was also meant to apply to (g)(4). This time, however, courts would be acting to narrow the scope of a federal criminal provision, which does not raise the same judicial power concerns that would come with *expanding* the juvenile provision to subsection (g).[39]

3. Substantively, it is unclear what this language ("including as a juvenile") is supposed to do. A memo circulated with the bill states that this provision "[c]larifies current law that a person is prohibited from purchasing a firearm if their juvenile record meets the existing criteria for a prohibited firearms purchaser under 18 U.S.[C.] 922(d)."[40] But that is already the law; it is not in need of clarification. Individuals, for example, who are convicted of felonies or involuntarily committed to a mental institution cannot plead that the conviction happened before age 18 as a defense.[41] So maybe the provision does nothing. But courts are loathe to construe a statute so that a statutory amendment has no substantive effect.

One area where there is no uniform federal standard is whether juvenile *adjudications* count as "convictions." Some states treat adjudications in

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[35] Bipartisan Safer Communities Act § 12001(a)(1)(A)(ii), 136 Stat. 1322.
[36] Bipartisan Safer Communities Act: Section-By-Section at 2 (also on file with author).
[37] 18 U.S.C. § 922(g)(4).
[38] *See, e.g.*, *United States v. Lender*, 985 F.2d 151, 156 (4th Cir. 1993) (discussing definition of "crime punishable by imprisonment for a term exceeding one year" in the context of the Armed Career Criminal Act); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 714-15 (M.D. Pa. 2016) (juvenile involuntary commitments).
[39] *See Bass*, 404 U.S. at 347-49 (discussing the rule of lenity).
[40] Bipartisan Safer Communities Act: Section-By-Section, *supra* note 36, at 2.
[41] *See Keyes*, 195 F. Supp. 3d at 714–15

juvenile court as civil matters, while others treat them as criminal ones.[42] For what qualifies as a felony, the Gun Control Act provides that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[43] Federal courts have understood this to mean that a juvenile adjudication counts as a felony conviction only when state law treats it as criminal conviction.[44] Perhaps the "including as a juvenile" language overturns this state-by-state approach and mandates a new federal standard in which all juvenile adjudications count as "convictions" notwithstanding state law. But the "including as a juvenile" amendment to subsection (d) did not change the provision that what counts as a "conviction" depends on state law.

B. Expanding the Domestic Violence Gun Ban

In 1996, the "Lautenberg Amendment" prohibited the possession of firearms by those convicted of a misdemeanor crime of domestic violence.[45] Congress defined the provision only to apply misdemeanor violent crimes "committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."[46] The theory behind the provision was that many serious cases of domestic violence were essentially felony cases that state law treated as misdemeanors or were pleaded down to misdemeanors by prosecutors.[47] Moreover, individuals are more likely to murder a spouse if they have a prior history of domestic violence.[48] But the limitation only to spouses and those similarly situated to spouses led to concerns about a "boyfriend loophole" for individuals who committed dating violence.[49]

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[42] *Compare United States v. Walters*, 359 F.3d 340, 344-46 (4th Cir. 2004) (holding that juvenile adjudications are not criminal "convictions" under Virginia law), *with United States v. Mendez*, 765 F.3d 950, 953 (9th Cir. 2014) (holding that juvenile adjudications are "convictions" under Washington state law).

[43] 18 U.S.C. § 921(20).

[44] *See supra* note 42.

[45] 1997 Consolidated Omnibus Appropriations Act, Pub. L. 104-208 § 658, 110 Stat. 3009, 3009-172 (1999).

[46] 18 U.S.C. § 921(a)(33)(ii) (2012).

[47] *See* Jessica A. Golden, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementational Flaws*, 29 Fordham Urb. L.J. 427, 453-54 (2001); Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. Rev. 365, 390 n.96 (1999) (collecting legislative history sources).

[48] *United States v. Skoien*, 614 F.3d 638, 642-44 (7th Cir. 2010) (en banc) (discussing studies).

[49] *See* Boyfriend Loophole, Wikipedia.

The Bipartisan Safer Communities Act expands the prohibition to cover some people convicted of domestic violence against dating partners. The amendment applies the domestic violence gun ban to an individual "who has a current or recent former dating relationship with the victim."[50] The term "dating relationship" is then defined as "a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature."[51] The Act does not define a serious dating relationship, but provides three factors to evaluate whether a relationship qualifies: "(i) the length of the relationship; (ii) the nature of the relationship; and (iii) the frequency and type of interaction between the individuals involved in the relationship."[52] The Act also disclaims that a "causal acquaintanceship or ordinary fraternalization in a business or social context" qualifies.[53]

The misdemeanor gun ban applies differently to dating partners than it does to family members. First, unlike for family members, the ban is not retroactive for crimes committed before its effective date.[54] The Lautenberg Amendment was retroactive and did not exempt government employees acting within the scope of their duties.[55] Before 1996, many police officers had pleaded guilty to misdemeanor crimes of domestic violence so they could avoid felony convictions and keep their jobs. These officers found themselves dismissed after the Lautenberg Amendment, which applied to convictions that predated its effective date.[56] The dating partner ban avoids this problem.

Second, the ban is only permanent for recidivists. A person with a single conviction may regain his right to bear arms after five years have elapsed unless the person commits another crime of domestic violence, a crime of violence (whether domestic violence or otherwise), or another offense that disqualifies the person from possessing a firearm under § 922(g).[57]

Despite this mitigation, the ban, as written, still has serious problems. Although all laws have a zone of ambiguity, the definition of "dating relationship" is a vague standard. The Act contains no effective guidance about where the line is between a serious relationship and a not serious relationship. A week of dating? A month? A year? Nor does it explain the relationship between physical intimacy and length of time. Does a week qualify if it includes intercourse? How about a year if there is little or no physical intimacy?

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[50] Bipartisan Safer Communities Act § 12005(a)(1)(B), 136 Stat. 1332.
[51] *Id.* § 12005(a)(2)(A).
[52] *Id.* § 12005(a)(2)(B).
[53] *Id.* § 12005(a)(1)(C).
[54] *Id.* § 12005(b).
[55] *See Fraternal Order of Police v. United States*, 173 F.3d 898, 901 (D.C. Cir. 1999).
[56] *See* Roberto Suro & Philip P. Pan, *Law's Omission Disarms Some Police*, Wash. Post (Dec. 27, 1996).
[57] Bipartisan Safer Communities Act § 12005(c)(2), 136 Stat. 1333 (codified at 18 U.S.C. § 921(a)(33)(C)).

The lack of a proper definition will cause serious problems. First, there is a good chance that the provision is unconstitutionally vague because of its indeterminacy, which makes it difficult for many to know whether they fall within the prohibition or not.[58] Second, even if it is not vague, courts may limit the provision under the rule of lenity only to those relationships that undoubtedly fall within its scope.[59]

The lack of a proper definition will also make it difficult to prosecute possession and attempted purchases. Under the current understanding of § 922(g), a person must know his status as a prohibited person.[60] A person may read this definition and believe in good faith that he or she is not prohibited. Such a belief could also scuttle a prosecution for making a false statement in connection with purchasing a firearm (i.e., lying on the ATF Form 4473 when asked about disqualifying conditions).[61]

The law is also vague about recidivists. The law provides that firearm rights are restored "in the case of a person who has not more than 1 conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship" after "5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted" of another crime of violence.[62] At that point, the National Instant Check System "shall be updated to reflect the status of the person."[63] But what happens if the person commits a misdemeanor crime of violence after six years? For example, the person has a bar fight against another (unknown) patron and is convicted of simple assault. Is he now barred for life from possessing a firearm? Or did the restoration of his firearm rights after five years return him to the status quo ante position where an offense for misdemeanor (non-domestic) violence will not disqualify him? The language is capable of either interpretation.

C. Increasing Statutory Maximum Penalties for Prohibited Possessors

One of the potentially most serious facets of the current bill is that it increases the maximum penalty for violations of § 922(d) and (g) from 10 years

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[58] *Johnson v. United States*, 576 U.S. 591, 597 (2015).

[59] *See Johnson*, 576 U.S. at 615-16 (Thomas, J., concurring) (arguing that courts should just apply vague statutes in core cases that plainly fall within their text).

[60] *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

[61] *See* 18 U.S.C. § 922(a)(6) (prohibiting knowing false statements in connection with the purchase of firearms and ammunition); *id.* § 924(a)(1)(A) (prohibiting knowing false statements of information that federal firearm licensees must collect and keep records).

[62] Bipartisan Safer Communities Act § 12005(c)(2), 136 Stat. 1333 (codified at 18 U.S.C. § 921(a)(33)(C)).

[63] *Id.*

to 15 years.[64] This is surprising. In recent years, progressives have railed against regulatory gun offenses because the crimes are not violent and minorities face disproportionate punishment. A recent report from the Sentencing Commission showed that a majority of all federal firearm convictions were against Black defendants.[65] Yet, Democrats in Congress increased the maximum penalties with no real dissent.

At this time, the impact of increasing the statutory maximum is difficult to determine. In June 2022, the Sentencing Commission issued a report looking at sentencing for all firearm offenses (not just possession by prohibited persons). Nevertheless, the report is instructive because of the ubiquity of prohibited person offenses compared with other federal gun offenses. The Sentencing Commission found that approximately half of convicted defendants received a sentence within the range of the U.S. Sentencing Guidelines.[66] On average, gun defendants were sentenced to 42 months in prison.[67] Another 23.5% received sentences of 5 to 10 years.[68] Only 3.4% received sentences greater than 10 years.[69] The Sentencing Commission found that, for gun defendants, the guidelines "ha[ve] a strong anchoring effect."[70]

Given this, the Sentencing Commission, more than Congress or individual judges, will determine the likely impact of increasing the statutory maximum for prohibited person offenses. At this time, it is not known how the Sentencing Commission will respond. Will the Commission take the cue from Congress and raise the presumptive Guideline range for all gun offenses? If it does, raising the statutory maximum will likely translate into an increase in actual sentences. But if the Commission maintains the current range, then the increase in the statutory maximum will likely have little effect, except in a narrow range of aggravated cases warranting sentences above 10 years.

D. Prohibited Transfers

The act also adds two new prohibited transfer categories under § 922(d). It is now prohibited to transfer a firearm to a person who "Intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a

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[64] Bipartisan Safer Communities Act § 12004(c), 136 Stat. 1329 (codified at 18 U.S.C. § 924(a)).
[65] Matthew J. Iaconetti et. al, U.S. Sent'g Comm'n, What Do Federal Firearms Offenses Really Look Like? 10 (2022).
[66] *Id.* at 15.
[67] *Id.* at 14.
[68] *Id.* at 15.
[69] *Id.*
[70] *Id.* at 17.

Federal crime of terrorism, or a drug trafficking offense" or who "intends to sell or otherwise dispose of the firearm or ammunition" to a prohibited person.[71]

These changes may facilitate the prosecution of accomplices to crime. Accomplice liability has a high mens rea, including either specific intent to facilitate commission of the offense or (more arguably) knowledge that a person is assisting the offense.[72] This new provision will allow prosecution where the transferor has knowledge or reasonable cause to believe a crime is intended with the weapon, a much lower mens rea.[73]

It is unclear whether a person who makes a false declaration that he does not intend to commit a crime in connection with a firearms may be punished. There may be Fifth Amendment problems with forcing someone to disclose his future criminal intent.[74] Or the courts may decide that there is no problem because no one is compelled to purchase a firearm.

II. Changes to the Prohibited Persons Rules

The Bipartisan Safer Communities Act makes several changes to the legal regime surrounding purchasing and trafficking in firearms. The substantive changes described in Part I will have profound effect on the operation of the National Instant Check System. The new Act also makes other changes to the federal legal regime, some of which may be quite significant, while others appear cosmetic.

A. Modifying the Rules for Juveniles . . . Again.

The most significant rule change for firearm sales involves sales to those between 18 and 21. To implement the new provision regarding juvenile convictions, the Act creates special provisions for young adults who purchase firearms.

Ordinarily, one who purchases a firearm from a licensed dealer is subject to a background check through the National Instant Check System.[75] The transaction may proceed once the system gives its approval or, if no approval is forthcoming, three business days have elapsed.[76]

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[71] 18 U.S.C. § 922(d)(10), (11).

[72] Joshua Dressler, Understanding Criminal Law § 30.05[B][2], at 449-50 (8th ed. 2018) (explaining that the precise mens rea for accomplice liability is doctrinally uncertain).

[73] *See* Stuntz, *supra* note 22, at 537-38 (explaining how legislatures draft criminal laws to benefit prosecutors).

[74] *Cf. Haynes v. United States*, 390 U.S. 85, 97-100 (1968).

[75] 18 U.S.C. § 922(t)(1), (3).

[76] *Id.* § 922(t)(1)(B)(ii).

For young-adult transactions in which there is "a possibly disqualifying juvenile record," the research period will now expand to 10 business days.[77] So young adults may find themselves with a two-week waiting period to purchase firearms.

Additionally, for young-adult transactions, the National Instant Check System must contact "the criminal history repository or juvenile justice information system . . . of the State in which the person resides," "the appropriate State custodian of mental health adjudication records," and "a local law enforcement agency of the jurisdiction in which the person resides."[78] It is not clear how this will work in practice. This might be done quickly through a computer check. Or young adults may find that they encounter delays at point of sale as a matter of course. It is also not clear what will happen if state authorities refuse to cooperate with the system. Finally, the mental health provision is set to sunset in 10 years.[79]

B. How Will the National Instant Check System Handle the Expanded Misdemeanor Crimes of Domestic Violence Category?

There may also be considerable administrability problems with expanding misdemeanor crimes of domestic violence to dating partners. Suppose the National Instant Check System discovers that a potential applicant has been convicted of assault or battery. What is the examiner supposed to do? A court proceeding—especially a brief plea bargain—may not have the details about whether the victim was in a relationship with the defendant. Even if it does, it may not describe that relationship in detail. How is the examiner supposed to determine whether the person is qualified to purchase the firearm or not? The result may be that anyone convicted of assault or battery may face delays in purchasing firearms.

There will also be problems even when examiners have access to all the information. The definition of serious dating relationship is vague; yet, the examiner will still have to make a legal determination whether this relationship falls within the ban. It is not clear how examiners will apply the factors and whether they will do so consistently.

Ultimately, this ambiguity will need to be resolved. Congress is unlikely to do it. Maybe the courts will as they decide cases. Or maybe these factors will receive more attention from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in rulemaking.

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[77] *Id.* § 922(t)(1)(C)(iii).
[78] 34 U.S.C. § 40901(l)(1).
[79] Bipartisan Safer Communities Act § 12001(a), 136 Stat. 1324 (setting sunset date of Sept. 30, 2032).

C. New Crimes for Straw Purchases and Trafficking in Firearms

The law adds two new sections to the Gun Control Act. Section 932 prohibits straw purchasing of firearms, while § 933 contains a new crime of trafficking in firearms.

Section 932 makes it a crime for "any person to knowingly purchase, or conspire to purchase, any firearm in or otherwise affecting interstate of foreign commerce for, on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe such other person" is prohibited from possessing a firearm, intends to commit a felony, drug trafficking offense, or a federal crime of terrorism with the firearm.[80] The maximum penalty is 15 years for ordinary offenses and 25 years if the crime involves drug trafficking or terrorism.[81] This provision will give prosecutors more tools to pursue those who illegally engage in the business of firearm sales.

It is unclear how § 932 will affect the straw purchasing rules. Currently, straw purchasers are prosecuted under the Gun Control Act for making a material false statement in connection with the sale of a firearm.[82] Usually, the false statement is answering "yes" to the question on the Form 4473 asking whether the person is the actual buyer of the firearm.[83] In *Abramski v. United States*, the Supreme Court held that, to sustain a conviction under the false statement provision, the government did not need to prove that the intended recipient of the firearm was prohibited from possessing firearms.[84]

Under one version of this offense, this new section explicitly requires that the intended recipient be prohibited from possessing firearms. Again, it is unclear how the courts will understand this section. Perhaps courts will find § 932 to be an aggravated form of straw purchasing and the false-statement provision to be essentially a lesser included offense. Under this theory, prosecutors now have two crimes they could bring for essentially the same offense. Alternatively, courts might interpret § 932 to be Congress's statement on the criminalization of straw purchases. Given that Congress explicitly required that the recipient be prohibited from receiving firearms, maybe courts will view this as an intent to narrow the offense, and thus, abrogate *Abramski*. Likely the first interpretation—that prosecutors can bring either charge—will prevail in the courts. But this is nevertheless an open question.

Section 933 now makes it a 15-year felony to ship, receive, or transport a firearm in or affecting interstate or foreign commerce if the person knows that

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[80] 18 U.S.C. § 932(b).
[81] *Id.* § 932(c).
[82] *See supra* note 61.
[83] *Abramski v. United States*, 573 U.S. 169, 173-74 (2014).
[84] *Id.* at 189.

the recipient is a felon or that receipt of the firearm would constitute a felony.[85] The provision punishes both the shipper and the receiver.[86]

There may be some confusion regarding the use of the word "felony" in both provisions. Felony is defined as "any offense under Federal or State law punishable by imprisonment for a term exceeding 1 year."[87] Again, the provision was inartfully drafted. Presumably, under § 921(20), a crime punishable by more than one year does not include state misdemeanor offenses punishable by more than two years.[88] But the definition in § 932(a)(3) does not explicitly cross-reference §921 and the language ("any offense under Federal or State law") is slightly different from § 921's "*crime* punishable by more than one year." So it is possible that courts will understand these provisions to include state misdemeanor crimes.

D. Redefining Engaged in the Business

The previous version of the Gun Control Act stated that a person was a dealer in firearms if he "devoted time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase of firearms."[89] The new bill changed "with the principal objective of livelihood and profit" and inserts in its place "to predominantly earn a profit."[90]

On the surface, this seems like Congress is playing word games. A person acts with the "principal objective" of earning a profit if he seeks "to predominantly earn a profit." The two appear synonymous.

A more charitable understanding of what Congress is trying to accomplish here is confirming that a person can unlawfully deal in firearms with mixed motives. Individuals may legitimately engage in occasional private sales for nonpecuniary reasons, such as to alter or liquidate a firearm collection.[91] Because of political pressure and because occasional sales are not inherently unlawful, ATF has been timid in prosecuting unlawful sales by those who occasionally sell firearms for profit.[92] This section may be understood to confirm what has previously been the law: individuals who resell firearms for

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[85] 18 U.S.C. § 933.
[86] *Id.* § 933(a)(1), (2).
[87] 18 U.S.C. § 932(a)(3); *id.* § 933 (a)(1) (incorporating the definition from § 932).
[88] 18 U.S.C. § 921(20).
[89] 18 U.S.C. § 921(a)(21)(C).
[90] Bipartisan Safer Communities Act § 12002, 136 Stat. 1324 (codified at 18 U.S.C. § 921(21)(C)).
[91] 18 U.S.C. § 921(C).
[92] Ali Watkins, *When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment*, N.Y. Times, (June 3, 2018); Scott Glover, *Unlicensed Dealers Provide a Flow of Weapons to Those Who Shouldn't Have Them, CNN Investigation Finds*, CNN (Mar. 25, 2019, 8:39 AM).

profit are required to obtain Federal Firearms Licenses, even if their sales are occasional. Congress may be signaling to ATF that it needs to take a stronger hand in enforcing this provision against those engaged in occasional, but still unlawful, sales.

III. Red-Flag Laws

Finally, this section will discuss the new federal provisions for so-called "red-flag laws," also called "extreme risk protection orders." These are essentially restraining orders that authorize police to seize a person's firearms and prohibit him from acquiring new firearms.[93] The status is usually temporary; most orders eventually expired unless renewed.[94] But the goal is to prevent someone in crisis, who may become suicidal or homicidal, from possessing a firearm while the crisis lasts.[95]

In principle, red-flag laws have much to commend. Unlike most gun control prohibiting factors, the status is temporary and risk-related. A person involuntarily committed to a mental institution loses his firearm rights for life, unless the rights are restored. This can be quite harsh. The mental health episodes leading to involuntary commitment may be transitory. They may not even involve a proclivity for violence. Yet, the resulting firearm ban is indefinite. Red-flag laws, in contrast, are a limited prohibition, targeted against those likely to become violent or suicidal. They last only for the emergency, at which point a person's rights are restored. So it is much better tailored than most common gun prohibiting factors.

But practice and theory do not align, and red-flag laws have serious implementation problems. The most serious problem is that no one—not even mental health professionals—can accurately predict who will become violent.[96] Those who are mentally ill are more likely to be victims of crime than to perpetrate it.[97] So judges are put in the impossible position of predicting future violent behavior, which is something that even mental-health professionals who study violence cannot accurately do. Faced with this, judges are probably more likely to err on the side of disarmament. The costs to a judge of erroneously allowing a person to retain his firearms which he then uses

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[93] *See, e.g.*, Caitlin M. Johnson, Note, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. Ill. L. Rev. 1515, 1526-28 (2021); Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 Hastings Const. L.Q. 683, 688 (2019); Extreme Risk Laws, Everytown for Gun Safety.

[94] Johnson, *supra* note 93, at 1528. A few states allow final orders to last indefinitely. *Id.*

[95] *Id.* at 1521.

[96] Jeffrey S. Janofsky et. al, *Psychiatrists' Accuracy in Predicting Violent Behavior on an Inpatient Unit*, 39 Hosp. & Cmty. Psychiatry 1090, 1091-93 (1988).

[97] Sarah L. Desmarais, et al., *Community Violence Perpetration and Victimization Among Adults with Mental Illness*, 104 Am. J. Pub. Health 2342, 2346-47 (2014).

criminally is likely to be much higher than the cost of erroneously depriving someone of his firearm rights.

Another problem is the fear that disgruntled partners will weaponize these orders.[98] They might do this to seek revenge against a current or former spouse or to gain leverage over divorce or custody proceedings. For this reason, gun groups routinely oppose these laws and push for amendments that criminalize false statements made in connection with applying for these orders.

Red-flag laws have been adopted in several states.[99] Many members of Congress wished to include a new federal red-flag law.[100] But as explained, gun groups remain opposed, and there were not sufficient votes to pass a federal law.[101]

Unable to reach agreement, Congress instead provided grants to states that have red-flag laws.[102] The law imposes many conditions to obtain the grants, including that there be adequate pre-deprivation and post-deprivation due process.[103] The provision requires that there be "at the appropriate phase" certain guarantees including "notice, the right to an in-person hearing, an unbiased adjudicator, the right to know opposing evidence, the right to present evidence, and the right to confront adverse witnesses."[104] The law requires "pre-deprivation and post-deprivation heightened evidentiary standards and proof which mean not less than the protections afforded to a similarly situated litigant in Federal court or promulgated by the State's evidentiary body."[105] Defendants must also have a right to a lawyer.[106]

These provisions reflect the division in Congress. The law lacks provisions that gun owners probably wanted. The law does not require states to furnish counsel at no cost if the defendant cannot afford counsel. The law does not set a specific heightened standard for the plaintiff's burden of persuasion. And the law does not ban temporary *ex parte* orders to seize firearms. On the other hand, the law has some provisions that are concessions to those who favor expanded gun rights. The law does not require states to have red-flag laws to get these grants. And the law explicitly requires some due process protections—which may be aimed at states which have (or which are considering) particularly broad red-flag laws.

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[98] Matt Vasilogambros, *Red Flag Laws Spur Debate Over Due Process*, Stateline, Pew Rsch. Ctr. (Sept. 4, 2019).
[99] *Id.*
[100] *Id.*; Johnson, *supra* note 93, at 1525-26 (discussing proposed legislation).
[101] Patrick Svitek, *Texas Is Unlikely to Adopt Key Provision of Bipartisan Gun Bill — A Red Flag Law to Take Guns Away from People Deemed Dangerous*, Texas Tribune (June 23, 2022).
[102] Bipartisan Safer Communities Act § 12003, 136 Stat. 1325.
[103] *Id.* § 12003(a) (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(I)).
[104] *Id.*
[105] *Id.* (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(III)).
[106] *Id.* (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(II)).

Conclusion

Since 1994, the federal gun control debate has been largely in a stalemate. The Bipartisan Safer Communities Act reflects that lack of consensus. Its provisions are modest. For the Gun Control Act more broadly, the law raises more questions than it answers.

The Bipartisan Safer Communities Act has some significant provisions. It gives powerful new enforcement tools to prosecutors, including increasing the potential maximum sentence for felons in possession and new gun trafficking crimes. It remains to be seen whether federal prosecutors utilize these provisions and whether new theoretical maximum sentences will translate to more punishment for gun violators in the average case. Parts of the Act, especially those related to young adults and the expanded misdemeanor crimes of domestic violence, may prove difficult to implement.

Finally, several provisions of the Act contain critical ambiguities. Those ambiguities will require careful attention to subsequent legislation, administrative rulemaking, and case law.

NOTES & QUESTIONS

3. [New Note] The Bipartisan Safer Communities Act of 2022 also amends the Elementary and Secondary Education of Act of 1965 (20 U.S.C. § 7906). *See* BSCA *at,* Title III, Sub-title D, Sec. 13401.

Title 20 of the U.S. Code establishes and regulates the Office of Education, along with the various grant programs that disburse federal monies to local school districts for such things as building improvements, technology assistance, and (now under BSCA) funding for safety programs. In prior years the Department of Education, through its Office of Elementary & Secondary Education, has awarded billions of dollars of federal money through various grant programs to local and regional school districts. *See* Dep't. of Educ., Off. of Elementary and Secondary Educ., Funding Status & Awards (last modified July 5, 2024).

Section 7906 of ESEA is a list of activities that would jeopardize funding to local school districts. The list includes the use of any funds that violate federal law, the distribution of obscene material, the distribution of sex-related material unless age-appropriate, etc. The BSCA of 2022 added a new prohibited activity at sub-section (7), so that no funds may be used "for the provision to any person of a dangerous weapon, as defined in section 930(g)(2) of title 18, or training in the use of a dangerous weapon."

A controversy arose over whether schools with hunter safety classes and archery programs would lose funding under this amendment to the ESEA. In response, the House by a vote of 424-1 and the Senate by unanimous consent

passed H.R. 5110; Pub. L. 118-17. The law amends 20 U.S.C. § 7906(7)) to insert:

> , except that this paragraph shall not apply to the use of funds under this Act for activities carried out under programs authorized by this Act that are otherwise permissible under such programs and that provide students with educational instruction or educational enrichment activities, such as archery, hunting, other shooting sports, or culinary arts

1. Overview of the Gun Control Act

a. Some Basic Rules

(i) Purchasing a Gun from a Commercial Dealer

NOTES & QUESTIONS

1. [New Note] *Background check delays.* Pennsylvania law requires background checks to be conducted instantaneously. 18 Pa. C.S. § 6111.1(b) ("the Pennsylvania State Police shall immediately during the licensee's call or by return call forthwith"); § 6111.1(c) ("The Pennsylvania State Police shall employ and train such personnel as are necessary to administer expeditiously the provisions of this section."); 37 Pa. Code § 33.102 ("The Pennsylvania instantaneous records check system").

In *Firearms Owners Against Crime v. Evanchick*, No. 218 M.D. 2022 (Pa. Commw., Sept. 2, 2022). Plaintiffs alleged that Pennsylvania State Police purposely understaffs its Pennsylvania Instant Check System (PICS) Operation Section. The court found that while responses for 65% of checks are completed within minutes, there have been delays of up to 34 hours, and delays of 9-10 hours are routine during peak times. Thus, the Pennsylvania Commonwealth Court judge granted a PI to "enjoin PSP from further noncompliance with section 6111.1 of the Firearms Act."

But a 3-judge appellate panel ruled that sovereign immunity forbids an affirmative injunction that defendants do something. There could be no mandamus relief for operational matters, which are discretionary, and involve budgeting. Nor could there be declaratory relief, because the court cannot add mandates to the statute. *Firearms Owners Against Crime v. Evanchick*, 291 A.3d 50 (Pa. Commw. 2023).

Pennsylvania has two intermediate appellate courts. The Superior Court handles most types of appeals. Relevant in the above case is the Commonwealth Court, which is the intermediate appellate court for matters involving state and local governments and their agencies, and is also the trial court for lawsuits against the Commonwealth. (Pennsylvania — like Virginia,

Kentucky, Massachusetts, Puerto Rico, and the Northern Mariana Islands — is formally a "commonwealth.") Cases in the Commonwealth Court are usually heard by three-judge panels, sometimes by a single judge, and sometimes en banc by all seven judges.

2. [New Note] *False denials.* If the background check results in a false denial — for example, the purchaser has the same name as a convicted felon — federal law provides for an appeal process. Unfortunately, many false denials are impossible to undo, due to many states' failure to correct records that have been proven to incorrect. Even when the FBI does recognize that a state record is false, and allows a sale to proceed, the FBI does not correct it own database; as a result, the next time the individual tries to buy a firearm, he or she will again be denied. *See* Stephen Halbrook, Written testimony 7-11, U.S. Senate, Judiciary Comm., Hearing on *Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS)* (Dec. 13, 2017).

A post-*Bruen* case involving a false denial by a state agency arose in California. There, as in some other states, private sales are outlawed. A friend may sell a gun to a friend only by routing the transaction through a FFL. The FFL must process the transfer as if the FFL were selling a firearm from its own inventory.

In California, if the initial check by the California Dept. of Justice (CalDOG) reveals an arrest or a criminal charge, the DOJ has 30 days to research the final disposition. If the DOJ fails to find a final disposition within 30 days, the DOJ must advise the FFL that the sale can proceed. Cal. Penal Code § 28220(f)(4).

Regina had been arrested in 1967 for burglary. Los Angeles County Superior Court records showed that the charge had been reduced to a misdemeanor and then dismissed. There being no conviction at all, let alone a felony, Regina was eligible to purchase a firearm.

Nevertheless, CalDOJ sent a FFL a letter falsely claiming that CalDOJ had been unable to verify Regina's eligibility. The FFL chose not to consummate the sale. *Regina v. California*, 89 Cal. App. 5th 386 (Cal. App. 2d Dist. 2023).

The California Court of Appeal held that the California statute was constitutional and was not preempted by the federal background check statute. The DOJ's "error" in its false statement to the FFL was "not of constitutional dimension." Whatever statutory remedy California law provides for the false statement by DOJ was not before the Court of Appeals.

b. The Gun Control Act Statute

The federal Law Enforcement Officer Safety Act (LEOSA) forbids states to forbid out-of-state visiting law enforcement officers, or retired officers, from carrying handguns. To be qualified for LEOSA, officers or retirees must meet certain standards. 18 U.S.C. §§ 926B & 926C. Affirming a district court opinion, the Third Circuit held that LEOSA preempts New Jersey law in two ways:

1. New Jersey may not require that visiting officers obtain a New Jersey carry permit.
2. New Jersey may not forbid such officers from carrying hollow point ammunition.

Federal Law Enforcement Officers Assoc. v. Grewal, 93 F.4th 122 (3d Cir. 2024). Previously, the D.C. Circuit Court had held LEOSA to be preemptive of District of Columbia law. *DuBerry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016).

The decision does not affect general New Jersey law restricting hollow point ammunition. Hollow point ammunition is generally considered to be superior for self-defense in most situations. *See* online Ch. 20.B.1. In New Jersey, individuals may not possess hollow-point ammunition, except on their own property, when hunting, target shooting, or traveling to and from a target range, or when the hollow cavity has a polymer filling. N.J. Stat. Ann. §§ 2C:39-3f(1), :39-3g(2), :39-6f.

2. Due Process and the GCA

b. *Mens Rea* and *Rehaif*

An empirical study of 922(g) prosecutions in the first eight months after *Rehaif* estimated that prosecutorial charging reductions had prevented "2,000 convictions for 922(g) and eliminated more than 8,000 years of prison." Matthew Mizel, Michael Serota, Jonathan Cantor & Joshua Russell-Fritch, *Does Mens Rea Matter?*, 2022 Wisc. L. Rev. 287.

In another decision issued a few days after *Bruen,* though not a gun case, the U.S. Supreme Court further clarified how the mens rea terms "knowing or intentionally" are to be applied to the "except as authorized" clause in any federal statute. Although addressing controlled substances issued as prescriptions by treating physicians, the Court clarified that once a defendant has met his or her burden to show that his or her conduct is authorized under the relevant statute, the burden shifts to the government to prove beyond a

reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Xiulu Ruan v. United States,* 142 S. Ct. 2370 (2022). This new rule may have some future application to federally licensed firearms dealers in prosecutions that allege unauthorized sale of firearms.

3. Prohibited Persons

l. [New Section] Parole and Probation

Conditions of parole, probation, or pre-trial release often include the requirement that the individual not possess a firearm. All post-*Bruen* decisions have upheld the disarmament orders. *United States v. Perez-Garcia,* 96 F.4th 1166 (9th Cir. 2024); *United States v. Wendt*, 650 F. Supp. 3d 672 (S.D. Iowa 2023); *United States v. Slye*, 2022 WL 9728732, (W.D. Pa., Oct. 6, 2022).

One commentator argues that forbidding nondangerous individuals awaiting trial from possessing a firearm violates the Second Amendment under Bruen. R. Brian Tracz, *Bruen and the Gun Rights of Pretrial Defendants*, 72 U. Penn. L. Rev. (forthcoming 2024). (deploying historical pretrial firearms regulations to argue that forbidding non-dangerous individuals awaiting trial from possessing a firearm violates the Second Amendment under Bruen).

4. Regulation of Retails Sales of Ordinary Firearms

a. Regulation of Buyers

NOTES & QUESTIONS

6. [New Note] Knowingly making false statements or using false identification to deceive an FFL with respect to any fact material to the lawfulness of the sale is a federal felony. 18 U.S.C. § 922(a)(6). This was upheld as not involving conduct protected by the plain text of the Second Amendment. *United States v. Soto*, 2023 WL 1087886 (W.D. Tex. Jan. 27, 2023). Similarly, 18 U.S.C. § 924(a)(1)(A) forbids knowingly making false statements or representations regarding firearms records. It was upheld under similar reasoning. *United States v. Porter*, 2023 WL 113739 (S.D. W.Va., Jan. 5, 2023).

b. Regulation of Sellers

NOTES & QUESTIONS

2. [New Note] Until 2022, FFLs' Firearms Transaction Records (Form 4473) were required to retain sales records for 20 years. Under a new regulation, the records must be maintained in perpetuity, and turned over the ATF for digitization when an FFL goes out of business. 87 Fed. Reg. 24652, pt. V.J (Apr. 26, 2022). The controversy over ATF digitization, and the recent expansion of firearms sales records that must be submitted to the federal government, is explored in Del Schlangen, *The Debate Over the ATF Digitizing Gun Sales Records from Out-of-Business Firearms Dealers* (Firearms Rsch. Ctr., Working Paper No. 2024-4).

5. Private Sales and Loans

5. [New Note] Under the Gun Control Act, only a person who is "engaged in the business" may receive an FFL, and no person may be "engaged in the business" without an FFL. In 2022, Congress changed the statutory definition of "engaged in the business," replacing "with the principal objective of livelihood and profit" with "to predominantly earn a profit." Bipartisan Safer Communities Act § 12002, 136 Stat. 1324 (codified at 18 U.S.C. § 921(21)(C)). In April 2024, ATF issued a new regulation that vastly expanded the scope of private transactions that are illegal without the participation of an FFL. ATF, *Definition of 'Engaged in the Business' as a Dealer in Firearms*, 89 Fed. Reg. 28968 (April 19, 2024) (to be codified at 27 C.F.R. pt. 478). According to the new rule, the single sale of a single firearm could require that the seller have an FFL if the seller made a nominal profit — such as selling for $400 a gun that was bought in 1980 for $300 dollars (even though $300 in 1980 dollars is equivalent in purchasing power to $1,200 today).

A lawsuit brought by several states and gun rights organizations resulted in a preliminary injunction against the rule. *Texas v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 2024 WL 2967340 (N.D. Tex. June 11, 2024). The injunction applies throughout the states that were plaintiffs — namely Texas, Louisiana, Mississippi, and Utah — and nationally to all members of plaintiff organizations: Gun Owners of America (GOA), Gun Owners Foundation (nonprofit of GOA), Tennessee Firearms Association, and Virginia Citizens Defense League.

The court found that ATF's "proffered interpretation is severely undercut by Section 921(a)(21)(C)'s use of (1) 'firearms,' in the plural; (2) the phrase 'regular course,' clearly contemplating a series of events; (3) 'repetitive,'

meaning more than once; and (4) the Section's exemption of 'sales, exchanges, or purchases' in the plural."

Further, according to Section (a)(22) of the BSCA:

> The term "to predominantly earn a profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: Provided, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

In the court's words, "The negative corollary is obvious: while proof of profit is not required 'for criminal purposes or terrorism,' it is required for all other cases."

Third, the new rule "arbitrarily eviscerates Section 921(a)(21)(C)'s safe harbor provision," which states:

> The term "engaged in the business" . . . shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms[.]

"Nothing in the foregoing text suggests that the term 'personal collection' does not include firearms accumulated primarily for personal protection — yet that is exactly what the Final Rule asserts."

Additionally, the rules "presumptions" "flip the statute on its head by requiring that firearm owners prove innocence rather than the government prove guilt," and they contradicted statutory text.

7. GCA Penalties

a. Statutory Penalties in § 924

In a case decided within days of *Bruen,* the U.S. Supreme Court addressed mandatory sentencing enhancements for federal crimes in which a firearm was used. In *United States v. Taylor,* 142 S. Ct. 2015 (2022), the Court held that a conviction under the Hobbs Act for attempted robbery, in which the defendant already faced up to 20 years in prison, could not be extended an additional 10 years under 18 U.S.C.S. § 924(c), because § 924(c)(3)(A) required completion of the crime. Because no element of the attempted Hobbs Act robbery required proof that the defendant used, attempted to use, or threatened to use force, the enhancement could not be applied to the circumstances of Taylor's conviction.

The controversy did not involve fundamental rights, but turned on statutory interpretation. The 7-2 decision was written by Justice Neil M. Gorsuch, with Justices Clarence Thomas and Samuel A. Alito dissenting.

Courts have held that section 924(c) creates an independent substantive offense. A defendant can be charged with a 924(c) violation even if no other offense is charged. *See*, *e.g.*, *United States v. Sudduth*, 457 F.2d 1198, 1202 (10th Cir. 1972).

Section 924(c) requires mandatory consecutive, not concurrent, sentences. Section 924(j) specifies penalties for killing someone in the course of a 924(j) crime. Must the 924(j) sentences be consecutive, or can they be concurrent? Resolving a circuit split, a unanimous Supreme Court opinion by Justice Jackson held that 924(j) sentences may be concurrent. *Lora v. United States*, 143 S. Ct. 1713 (2023).

An excellent new article provides the first in-depth survey of federal sentencing under 924(c) and related statutes. Brandon E. Beck, *The Federal War on Guns: A Story in Four-and-a-Half Acts*, 26 U. Pa. J. Const. L. 53 (2024) (detailing the sharp increase in prosecutions and penalties in the decades since the enactment of the 1968 Gun Control Act). As the author explains, the federal mandatory sentences sometimes lead to enormous terms of imprisonment, far beyond what might be imposed under state laws. From the start, and especially in the Gun Control Act of 1968 and the Firearms Owners' Protection Act of 1986, various prohibitions and sentences were enacted by Congress with little attention and no serious debate. Although the extremely harsh federal sentences were originally touted for being valuable as threats to force defendants to plead to state law offenses, since the early 1990s the U.S. Department of Justice has massively increased prosecutions. Although prosecution rates vary from one administration to another, the overall upward trend has never been reversed. The federal sentences in sections 922 and 924 are a major cause of mass incarceration in federal prisons.

Post-*Bruen* cases upholding the drug trafficking sentence enhancement in 924(c)(1)(A) include *United States v. Burgess*, 2023 WL 179886 (6th Cir. Jan. 13, 2023); *United State v. Issac*, 2023 WL 1415597 (N.D. Ala. Jan. 31, 2023); *United States v. Garrett*, 650 F. Supp. 3d 638 (N.D. Ill. 2023); *United States v. Trammell*, 2023 WL 22981 (W.D. Ky. Jan. 3, 2023); *United States v. Snead*, 647 F. Supp. 3d 475 (W.D. Va. 2022); *United States v. Ingram*, 623 F. Supp. 3d 660 (D.S.C. 2022).

b. The Sentencing Guidelines

Sentencing Guidelines § 2D1.1(b)(1) imposes an enhanced sentence if the defendant possessed a dangerous weapon at the time of a felony drug offense. A cocaine dealer possessed one firearm in his automobile when selling, and

several rifles at home while selling. The Ninth Circuit upheld the constitutionality of the particular sentencing enhancement because there is a history and tradition of restricting firearms possession during the commission of felonies that involve a risk of violence. *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023).

c. [New Section] Forfeitures

In both the federal and state systems, forfeitures of crime guns have long been standard. In America, the practice is at least as old as forfeitures of arms from persons convicted of using firearms to terrify the public. *See* Ch. 2.F.5. On the other hand, British confiscations of firearms from Americans did much to precipitate the American Revolution. *See* Ch.4.B.1-2.

The leading post-*Bruen* case on forfeitures involved a federal court challenge to arms confiscation by the Pennsylvania State Police. The son of Mr. and Mrs. Frein perpetrated crimes. As part of the investigation, the Pennsylvania State Police seized the parents' guns. The parents' guns were never used as evidence, and the parents had no involvement in the crime.

After the son's criminal case ended with a long prison sentence, the Pennsylvania State Police refused to return the parents' firearms.

The Third Circuit ordered the guns returned. "The ratifiers of both the Second Amendment and the Fourteenth Amendment (which secures the right in the states) understood that arbitrary seizures prevent citizens from keeping arms for their self-defense." *Frein v. Pennsylvania State Police*, 47 F.4th 247 (3d Cir. 2022).

The State Police had argued that the Second Amendment guarantees a right to arms, but not a particular individual firearm. So Mr. and Mrs. Frein could just buy new guns. The Third Circuit answered: "We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere. Just as those seizures and retentions can violate the First Amendment, seizing and holding on to guns can violate the Second." *Id.* at 256.

NOTES & QUESTIONS

1. [New Note] *Fake guns*. Can the use of an imitation firearm trigger GCA sentence enhancements? The Third Circuit said yes, because the Federal Sentencing Guidelines definition of "dangerous weapon" is ambiguous, and the commentary to the Guidelines suggests that an imitation firearm could suffice. *United States v. Chandler*, 104 F.4th 445 (3d Cir. 2024).

2. [New Note] *Supreme Court on the Armed Career Criminal Act.* A "serious drug offense" is predicate offenses under the Armed Career Criminal Act (ACCA). For a state drug crime to qualify, the state's definition of the "substance" much "match" the definition in the federal Controlled Substances Act (CSA). When Brown was convicted of a Pennsylvania state marijuana crime, the Pennsylvania and marijuana definitions of marijuana were identical. Later, Congress changed the federal definition. Similarly, in another case that was consolidated with *Brown*, defendant Jackson had been convicted of a Florida cocaine crime; at the time, the federal and Florida definitions of cocaine were identical, but Congress later changed the federal definition so that it did not match Florida's.

The question for the Court was whether ACCA predicates are to be based on: when the predicate crime occurred; when the final crime occurred (which resulted in the application of the ACCA); or when the defendant was to be sentenced with possible ACCA enhancement.

By 6-3, the Supreme Court adopted the first option, in an opinion by Justice Alito, joined by Justices Sotomayor, Roberts, Thomas, Kavanaugh, and Barrett. The majority held that the ACCA is a recidivism statute aimed at the dangerousness of the offender, not the dangerousness of the drug. Thus, the older convictions were valid indicators of the defendant'

Justice Jackson's dissent, joined in full by Justice Kagan and in part by Justice Gorsuch, argued that the ACCA's relationship with the CSA was dynamic, not static.

Further reading: Jacob D. Charles, *Firearms Carceralism*, 108 Minn. L. Rev. 2811 (2024) (criticizing over-imprisonment of gun law violators, including those who use firearms in a crime, and proposing proactive gun control measures as an alternative).

D. LAYERS OF REGULATION: AGENCY RULES AND AGENCY GUIDANCE

The regulations relating to the Gun Control Act, 18 U.S.C. §§ 921-31, can be found in 27 CFR Part 478. Additional regulations related to 18 U.S.C. §§ 921 and 922 can be found in 27 CFR Part 72 and 32 CFR Part 635.

1. [New Section] ***ATF's "Frame or Receiver" Rule***

Becoming effective August 24, 2022, is a 364-page ATF regulation: *Definition of "Frame or Receiver" and Identification of Firearms*, ATF Final Rule 2021R-05F, 87 Fed. Reg. 24652 (Apr. 26, 2022). Even very experienced firearms regulation attorneys are finding some of it difficult to understand.

This new rule will significantly change ATF's regulations implementing the Gun Control Act of 1968 ("GCA"), the National Firearms Act ("NFA"), and the import provisions of the Arms Export Control Act ("AECA"), and it is the first major change to the definitions of "firearm" and "frame or receiver" since ATF first promulgated regulations implementing Title I of the GCA in 1968.

Below are excerpts from two legal compliance alerts by the Washington, D.C., law firm Reeves & Dola. The Reeves & Dola *Alerts* are available on the firm's website. The first reviews the new definition of "frame or receiver." The second reviews the new definition of "Privately Made Firearm" and the related controls.

Reeves & Dola, LLP
ATF's New "Frame or Receiver" Rule What You Should Know -- Part I
(Aug. 11, 2022)

…I. An Overview of the New Definition "Frame or Receiver"

A. Structure

The Final Rule creates a new § 478.12 to house the definition of "frame or receiver". The structure of the definition is different from what ATF originally proposed in the Notice of Proposed Rulemaking (NPRM) because of the high number of comments expressing concern over the convoluted structure originally presented. The regulations implementing the National Firearms Act and the Arms Export Control Act, 27 C.F.R. Parts 479 and 447 respectively, will also be revised to cross-reference the new definition of "frame or receiver" in 27 C.F.R. § 478.12.

The definition includes several examples to illustrate the following: (1) grandfathered prior classifications; (2) which part of common firearm models is the frame or receiver; and (3) partially complete, disassembled, or nonfunctional frame or receiver that would be considered a frame or receiver because it can be readily completed, assembled, restored, or otherwise converted to a functional state.

A new term that will play an important role in firearm and frame or receiver classifications is "readily," which is added to §§ 478.11 and 479.11. "Readily" is

part of the statutory definition of "firearm," which includes a weapon that will, is designed to, or may ***readily*** be converted to expel a projectile, and also the "frame" or "receiver" of any such weapon. 18 U.S.C. 921(a)(3)(A), (B). However, ATF has never defined the term until now. ATF first introduced "readily" in the NPRM and received many comments in opposition to the definition. Nevertheless, only minor changes have been made to the term in the Final Rule. "Readily" will play a very important role in determining whether a frame or receiver has been destroyed, and in classifications of partially complete, disassembled, or nonfunctional frames or receivers.

B. Single Housing or Structural Component

One of the key changes made to the definition of "frame or receiver" was to center the definition around only <u>one</u> housing or structural component for a given type of weapon. ATF made this change in response to comments, and it is a marked improvement over the NPRM, which referenced "any housing for any fire control component."

The Final Rule also creates three distinct sub-definitions. One is for "frame," which applies to handguns and handgun variants. "Receiver" applies to rifles, shotguns, or projectile weapons other than handguns. The third sub-definition is for frame or receiver applicable to firearm mufflers and silencers.

C. Prior Classifications

To ensure that industry members and others can rely on ATF's prior classifications, the Final Rule grandfathers most prior ATF classifications, and variants thereof, into the new definition of "frame or receiver." The Final Rule also provides examples and diagrams of some of those weapons, such as the AR-15 rifle and Ruger Mark IV pistol.

CAUTION! ATF classifications of partially complete, disassembled, or nonfunctional frames or receivers as not falling within the definition of firearm "frame or receiver" prior to this rule *ARE NOT GRANDFATHERED*! Any such classifications, including parts kits, would need to be resubmitted for evaluation. The resubmission should include any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit. ATF will take this into consideration when making the classification determination.

If persons remain unclear which specific portion of a weapon or device falls within the definitions of "frame" or "receiver," then they may voluntarily submit a request to ATF Firearms Technology Industry Services Branch for a classification determination.

II. Working with the New Definition of "Frame or Receiver"

Despite the changes to the structure of "frame or receiver" in the Final Rule, the definition is dense and includes several paragraphs and subparagraphs. This style of regulatory structure can be challenging to work through, so we provide an order of review to help guide you through the new definition.

Rather than trying to swallow this definition whole (danger, choking hazard), we offer the following yes/no questions to determine which portion of the "frame or receiver" definition applies to your firearm or part. As you review these questions, we recommend having the complete new § 478.12 handy for cross-referencing purposes, especially because our approach does not follow the strict order of the definition in the hopes of creating a more digestible flow.

Question 1: Is your frame or receiver melted, crushed, shredded, or cut according to ATF-approved methods?

☐ **NO** - proceed to Question 2.

☐ **YES** - your item is "destroyed" and is *not* a controlled "frame" or "receiver" pursuant to **§ 478.12(e)**.

Notes:

- The term "destroyed" means the frame or receiver has been permanently altered such that it may not "readily" (*see* new definition in §§ 478.11 and 479.11) be completed, assembled, restored, or otherwise converted to function as a frame or receiver (defined in § 478.12(a)).
- Destruction can be accomplished by completely melting, crushing, or shredding the frame or receiver, or torch cutting according to ATF specifications.

Question 2: Is your piece a blank or a disassembled, partially complete, or nonfunctional frame or receiver?

☐ **NO** - proceed to Question 3.

☐ **YES** - refer to **§ 478.12(c)** to determine whether it is a controlled frame or receiver. If it is designed to or may "readily" be completed, assembled, restored, or otherwise converted to function as a frame or receiver, it is controlled as a frame or receiver (defined in § 478.12(a)).

Notes:

- "Readily" is a new defined term in § 478.11.
- What is *not* considered a frame or receiver: forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon, for example an unformed block of metal, liquid polymer, or other raw material.
- § 478.12(c) contains examples to show what could be considered a controlled frame or receiver compared to what may not rise to the level of control.
- ***Prior ATF classification letters concerning partially complete, disassembled, or nonfunctional frames or receivers, including parts kits:*** If you have an ATF classification letter issued prior to April 26, 2022, ruling the partially complete, disassembled, or nonfunctional frame or receiver, including a parts kit, was not, or did not include, a firearm frame or receiver (either under the old § 478.11 or old § 479.11), this letter is ***no longer valid***. If your business involves such items, whether it is importing, selling/transferring, or acquiring for use in further manufacturing and assembly operations, you should consider obtaining a new classification determination from ATF under the new rules. When issuing a classification, ATF may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, or possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit to the purchaser or recipient of the item or kit. *See* **§ 478.12(f)(2)**.

Question 3: Did ATF issue a classification determination ruling on which part of the firearm is the controlled frame or receiver *before* April 22, 2022?

☐ **NO** - proceed to Question 4.

☐ **YES** - refer to **§ 478.12(f)(1)**. Such determination is grandfathered in and *remains valid* under the new definitions. These firearms are exempt from the new definitions and the marking requirements under the Final Rule.

Notes:

- This question is *not* for partially complete, disassembled or nonfunctional frames or receivers. For these items, refer to Question 2.
- Any such part marked with an "importer's or manufacturer's serial number" (new definition added to § 478.11) is presumed to be the controlled frame or receiver of the weapon unless there is an official ATF determination or other reliable evidence showing that such part is not the frame or receiver.
- Some examples of such prior determinations include: (i) AR-15/M-16 variant firearms; (ii) Ruger Mark IV pistol; (iii) Benelli 121 M1 shotgun; and (iv) Vickers/Maxim, Browning 1919, M2 and box-type machineguns and semiautomatic "variants" (defined in § 478.12(a)(3)).

Question 4: Is it a firearm muffler or silencer? Refer to § 478.11 for the definition of "firearm muffler or silencer."

☐ **NO** - proceed to Question 5.

☐ **YES** - refer to **§ 478.12(b)**. For firearm mufflers and silencers, the frame and receiver is the part that provides housing or a structure for the primary internal component designed to reduce the sound of a projectile. The frame or receiver *does not* include a removable end cap of an outer tube or modular piece.

Notes:

- The Final Rule adds a new definition to § 478.11 for "complete muffler or silencer device" which is important for determining when and what to mark with the required identifying information. We will address this in more detail in Part 3 to our Alert.
- ATF references baffles, baffling material, expansion chamber, or equivalent as the primary internal component designed to reduce the sound of a projectile.
- For the part that provides housing or structure, ATF cites to an outer tube or modular piece.
- If the firearm muffler or silencer is modular, the frame or receiver means the principal housing attached to the weapon that expels a projectile, even if an adapter or other attachments are required to connect the part to the weapon.

Question 5: Is it a "frame" (for handguns) or a "receiver" (for rifles, shotguns, and other weapons that expel a projectile other than handguns) not captured

by Questions 1-4 above? Refer to **§ 478.12(a)** for the definitions of "frame" and "receiver".

☐ **"Frame"** as defined in **§ 478.12(a)(1)**.

☐ **"Receiver"** as defined in **§ 478.12(a)(2)**.

☐ Item is a **"multi-piece frame or receiver"** not captured under 478.12(a). Refer to **478.12(d)**.

- A "multi-piece frame or receiver" is defined as "a frame or receiver that may be disassembled into multiple modular subparts, *i.e.*, standardized units that may be replaced or exchanged." It does not include an internal frame of a pistol that is a complete removable chassis that provides housing for the energized component, unless the chassis itself may be disassembled.

☐ **None of the above.** Item is not a "frame or receiver" under the new definition. If after performing this analysis doubt remains as to the proper classification, or which specific portion of a weapon or device falls within the definitions of "frame" or "receiver," you may voluntarily submit a request to the ATF Firearms Technology Industry Services Branch for a classification determination.

Notes:

- "Variants" and "variants thereof" are defined in § 478.12(a)(3)).
- § 478.12(a)(4) lists several examples of common firearm models and "variants thereof" with illustrations showing which part is the frame or receiver under the new definition. The examples listed are: **(i)** hinged or single framed revolvers; **(ii)** hammer-fired semiautomatic pistols; **(iii)** Glock variant striker-fired semiautomatic pistols; **(iv)** Sig Sauer P250/P320 variant semiautomatic pistols (internal removable chassis; distinguished from a multi-piece frame unless the chassis can be disassembled); **(v)** bolt action rifles; **(vi)** break action, lever action, or pump action rifles and shotguns; **(vii)** AK variant firearms; **(viii)** Steyr AUG variant firearms; **(ix)** Thompson machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP40, and SIG 550 firearms, and HK machineguns and semiautomatic variants; and **(x)** Sten, Sterling, and Kel-Tec SUB-2000 firearms…

(Aug. 16, 2022)

…In this second part we will review the Final Rule's impact on firearms made by unlicensed persons, what is now termed "Privately Made Firearms" or "PMFs". This aspect of the Final Rule has received a lot of attention and is the most controversial. Multiple lawsuits have been filed in different jurisdictions against the Department of Justice and the ATF to prevent the Final Rule from going into effect. In one case brought by Gun Owners of America, seventeen states have joined as Plaintiffs.

The regulatory citations in this Alert are all in Title 27 of the Code of Federal Regulations.

I. What is a Privately Made Firearm?

A. New Defined Term

The Final Rule creates a new term, "Privately Made Firearm" to be added to § 478.11 as follows:

"***Privately made firearm (PMF).*** A firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced. The term shall not include a firearm identified and registered in the National Firearms Registration and Transfer Record pursuant to chapter 53, title 26, United States Code, or any firearm manufactured or made before October 22, 1968 (unless remanufactured after that date)."

The Final Rule also amends the definitions in Part 447 (governing permanent imports of firearms and other defense articles) to cross reference this term.

B. Why ATF Created a New Term

Citing "technological advances," ATF explains in the Final Rule that it is now easier for companies to sell firearm parts kits, standalone frame or receiver parts, and easy-to complete frames or receivers to unlicensed persons without maintaining any records or conducting a background check, even though such products enable individuals to "quickly and easily" make firearms. "Such privately made firearms ("PMFs"), when made for personal use, are not required by the GCA to have a serial number placed on the frame or receiver, making it difficult for law enforcement to determine where, by whom, or when

they were manufactured, and to whom they were sold or otherwise transferred. Because of the difficulty with tracing illegally sold or distributed PMFs, those firearms are also commonly referred to as "ghost guns."

However, the Final Rule does not prohibit individuals from making their own PMFs. Indeed, ATF acknowledges repeatedly that firearms privately made by non-prohibited persons solely for personal use generally do not come under the purview of the GCA.

> "This rule does not restrict law abiding citizens' ability to make their own firearms from parts for self-defense or other lawful purposes. Under this rule, non-prohibited persons may continue to lawfully complete, assemble, and transfer unmarked firearms without a license as long as they are not engaged in the business of manufacturing, importing, dealing in, or transacting curio or relic firearms in a manner requiring a license. Neither the GCA nor this implementing rule requires unlicensed individuals to mark (non-NFA) firearms they make for their personal use, or to transfer them to an FFL for marking. Such individuals who wish to produce, acquire, or transfer PMFs should, however, determine whether there are any applicable restrictions under State or local law." Final Rule at 24686-24687 (internal citations omitted).

The way the Final Rule imposes control over PMFs is through Federal Firearms Licensees ("FFLs" or "licensees") who accept a PMF into inventory. These licensees will be responsible for marking the PMF and entering it into their Acquisition and Disposition ("A&D") records according to the requirements set forth in the Final Rule, which we explain below.

II. PMF Marking Requirements

A. What Triggers the Marking Requirement?

Under the Final Rule, unlicensed individuals are not required to mark their own PMFs for personal use or when they occasionally acquire them for a personal collection or sell or transfer them from a personal collection to unlicensed in-state residents consistent with federal, state, and local law. Only once a PMF is transferred to a licensee for any reason, including repair, and the licensee voluntarily accepts the PMF into its inventory, is that licensee required to mark the PMF in accordance with the requirements set forth in § 478.92. Citing to the GCA, 18 U.S.C. 923(g)(1)(A), (g)(2), ATF explains, "[t]he GCA provides that all firearms received and transferred by FFLs must be traceable through licensee records maintained for the period and in such form

as prescribed by regulations. There is no exception for PMFs." Final Rule at 24687.

The Final Rule does not obligate any licensee to receive a PMF into its inventory, so a licensee can choose to refuse the PMF. In addition, licensed dealer-gunsmiths, manufacturers, and importers who do same-day adjustments or repairs to a firearm do not have to mark the firearm or enter it into their A&D records if the firearm is returned to the same person from whom it was received, and it is not kept overnight. This distinction tracks ATF's long-held policy for licensed gunsmiths performing on-the-spot repairs of commercially produced firearms (*see* ATF Rul. 77-1) and clarifies that this policy applies to licensed manufacturers and licensed importers, not just licensed dealers or gunsmiths.

National Firearms Act firearms identified and registered on the National Firearms Registration and Transfer Record pursuant to an ATF Form 1 (5320.1) Application to Make and Register a Firearm are not subject to the PMF marking requirements. Neither are firearms manufactured or made prior to October 22, 1968 (the effective date of the GCA) unless the firearm is remanufactured after that date.

B. What is the Required Format for a PMF Serial Number?

The Final Rule requires the serial numbers for PMFs be unique (not duplicate any other serial number placed by the licensee on any other firearm) and begin with the licensee's abbreviated Federal firearms license number as a prefix to a unique identification number, followed by a hyphen. The abbreviated license number is the first three and last five digits, so an example would be:

12345678-[unique identification number]

There is no requirement for the private maker to be identified in the firearm markings or in the licensee's records. As the serial number will contain the licensee's abbreviated license number, the PMF would be traced to the licensee, not the private maker.

If a PMF is already marked with a unique identification number by the unlicensed private maker, the licensee may adopt the existing number if that identifying number meets the marking requirements of § 478.92 (for example, the number cannot be readily obliterated, altered, or removed, meets the size and depth requirements, and does not duplicate any of the licensee's other firearms). However, the licensee must place their abbreviated license number as a prefix followed by a hyphen to the existing serial number, thus enabling the firearm to be traced to the licensee. This part of the rule will be codified in § 478.92(a)(4)(iii)(D).

For polymer frames or receivers, the PMF serial number can be placed on a metal plate permanently embedded into the polymer, or by another method approved in advance by ATF.

C. Who Can Mark the Firearms?

According to ATF, the intent of the Final Rule is not to require FFLs to obtain equipment to serialize PMFs. If a licensee is not capable of marking a PMF it will accept into inventory, the licensee can take the PMF to another FFL or to a non-licensed engraver for marking services. In the latter instance, the engraver would apply the markings under the licensee's direct supervision and must not accept the PMF into inventory (*i.e.,* the PMF must not be transferred to the non-licensed engraver).

The FFL may also require the unlicensed individual to serialize the PMF prior to accepting the PMF into the FFL's inventory. Unlicensed individuals can accomplish this by utilizing the marking services of licensed gunsmiths-dealers. To provide greater access to professional marking services, ATF revises the definition of "engaged in the business" as it pertains to gunsmiths to clarify that persons who engage in the business of identifying firearms for non-licensees may become licensed as dealer-gunsmiths solely to provide professional PMF marking services. They do not have to be licensed as manufacturers. As ATF explains, "allowing persons to be licensed as dealer-gunsmiths will make professional marking services more available to unlicensed individuals, and make it possible for other licensees to receive and transfer PMFs should they choose to accept them into inventory in the course of their licensed activities." Final Rule at 24689.

D. How Soon Must an FFL Mark A PMF?

For PMFs acquired by licensees before August 24, 2022 (the effective date of the Final Rule), licensees must either mark the PMFs or cause them to be marked by another licensee either within 60 days from the effective date of a final rule (October 23, 2022), or before the date of final disposition (including to a personal collection), whichever is sooner. In these instances, the licensee may outsource the marking services to a licensed manufacturer or gunsmith. This will be codified at § 478.92(a)(4)(vi).

If a PMF is acquired on or after the effective date (August 24, 2022), § 478.92(a)(2) will require markings to be applied within seven (7) days following the date of receipt, including from a personal collection, or before disposition, including to a personal collection, whichever is sooner. In these instances, licensees may must either apply the markings themselves or cause the markings to be applied under their direct supervision, as described above.

III. PMF Recordkeeping Requirements

The Final Rule amends § 478.125(i) to require licensees to record the acquisition and disposition of a PMF. These requirements apply to licensed manufacturers, licensed importers, licensed dealers, and for personal firearms collections.

If the firearm is privately made in the United States and no manufacturer name has been identified on a PMF, the licensee who accepts the PMF into inventory must record the words "privately made firearm" or the abbreviation "PMF" as the name of the manufacturer. The name of the actual private maker is *not* required to be entered into the licensee's records.

A licensee must record acquisition of a PMF into its records by close of the next business day following receipt of the PMF. However, the PMF serial number need not be immediately recorded if the firearm is being identified by the licensee or marked under the licensee's direct supervision in accordance with § 478.92(a)(2). Remember, the licensee has 7 days to mark the PMF (or prior to disposition, whichever is sooner). Consequently, if the PMF is not marked at the time of receipt, the licensee should leave the serial number portion in the acquisition record blank until the PMF is properly marked. Once marked, the licensee must update the acquisition entry to show the new serial number.

If repairs are conducted within the same day (not overnight) and returned to the same person from whom received, the FFL does not have to record the PMF into its records.

If a PMF will be transferred to another non-licensee, "privately made firearm" or "PMF" must be recorded on the Form 4473 as the name of the manufacturer. §478.124(c)(4). . .

NOTES & QUESTIONS

1. [New Note] The Supreme Court has set oral argument for October 8, 2024 in *Garland v. VanDerStok,* No. 23-582, a case challenging the ATF's final rule regulating home manufacture of firearms. The Court did not change the proposed questions presented in the cert. petition:

> 1. Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive," 27 C.F.R. 478.11, is a "firearm" regulated by the Act.
> 2. Whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," 27 C.F.R. 478.12(c), is a "frame or receiver" regulated by the Act.

The Fifth Circuit, agreeing with a district court, had ruled that ATF's regulation exceeded statutory authority. *Vanderstok v. Garland*, 86 F.4th 179 (5th Cir. 2023). By a 5-4 vote in August 2023, the Supreme Court stayed an injunction against the ATF rule. *Garland v. Vanderstok*, No. 23A82 (Aug. 8, 2023). Justices Thomas, Alito, Gorsuch, and Kavanaugh would have denied the stay.

2. [New Section] ***Export Regulations***

The export of firearms and ammunition is a complex subfield, involving reports to and licenses from the U.S. State Department, the U.S. Department of Commerce, or both. On July 18, 2022, the U.S. Department of Commerce Bureau of Industry and Security (BIS) published a final rule Adoption of Congressional Notification Requirement for Certain Semiautomatic Firearms Exports Under the Export Administration Regulations (EAR), 15 C.F.R. § 743.6, 87 Fed. Reg. 32983 (June 1, 2022) The new rule requires notification to Congress for export of four million dollars or more of certain semiautomatic firearms.

Separately, a new Interim Final Rule from the Department of Commerce substantially amends the Export Administration Regulations in the Code of Federal Regulations for arms exports. 89 Fed. Reg. 24680 (Apr. 30, 2024). There is now a presumption of denial for exports to anyone except the government in 37 nations, including in the western hemisphere Bahamas, Belize, Bolivia, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Panama, Paraguay, Peru, and Trinidad and Tobago. All current licenses for exports to those nations were revoked effective July 1, 2024.

Export licenses use Export Control Classification Numbers (ECCN). Previously, ECCN covered 0A501 for rifles, handguns and non-sporting shotguns, and number 0A502 was for sporting shotguns. There are now separate ECCNs for semi-automatics. For centerfire semi-automatic rifles, there is a separate ECCNs, if the rifle can accept a detachable magazine, has an adjustable stock, a pistol grip, or a flash suppressor. The semiautomatic shotgun ECCN covers guns that have a "folding, telescoping, or collapsible stock; magazine over five rounds; a drum magazine; a flash suppressor; Excessive Weight (greater than 10 lbs. for 12 gauge or smaller); or Excessive Bulk (greater than 3 inches in width and/or greater than 4 inches in depth)." The ECCNs are: 0A506 semi-automatic rifles; 0A507 semi-automatic pistols; 0A508 semi-automatic shotguns; 0A509 "parts," "components," devices, "accessories," and "attachments" for the aforesaid.

E. SUING THE GUN INDUSTRY AND THE LEGISLATIVE RESPONSE: THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

NOTES & QUESTIONS

8. [Add to Note] In September 2020, all of the assets of the Remington Outdoor Company (ROC) were sold at auction. The *Soto* lawsuit continued against ROC's estate, namely its insurance policies in effect at the time. In February 2022, the insurance companies settled the *Soto* case by paying the plaintiffs the full amount of the insurance coverage, $73 million in total.

9. [New Note] In a 9-judge proceeding before the Pennsylvania Superior Court, the fractured opinions produced a surprising result. The judges agreed, 5-4, that the PLCAA is constitutional; it is a valid exercise of Congress's interstate commerce power and does not infringe Pennsylvania's Tenth Amendment powers over tort law. By 7-2, the judges agreed that the plaintiff's claim was within the scope of lawsuits forbidden by PLCAA. Nevertheless, the Superior Court reversed the trial court's dismissal of the case. There were five judges who thought reversal was appropriate either on statutory grounds (PLCAA does not apply) or on constitutional grounds (PLCAA is unconstitutional). *Gustafson v. Springfield, Inc.*, 282 A.3d 739 (Pa. 2022). The Pennsylvania Supreme Court granted a petition for allowance of appeal. No. 240 WAL 2022 (Apr. 18, 2023).

10. [New Note] Armlist.com is an online broker of firearms sales. The website arranges for a purchased firearm to be delivered to a FFL near the buyer. To receive the firearm, the buyer must go to the FFL's premises and complete the same paperwork and checks as other retail customers. A lawsuit claimed that Armslist was negligently designed to encourage buyers and sellers to evade federal and state laws. In defense, Armslist argued that Section 230 of the Communications Decency Act prohibits negligence claims for websites for alleged inadequate control of users. The Seventh Circuit found answering the statutory question because plaintiffs had not adequately pleaded a negligence claim. *Webber v. Armlist*, 70 F.4th 945 (7th Cir. 2023) (also holding that public policy precluded plaintiffs' claims, Armslist did not aid and abet tortious conduct, and Armslist's mere operation was not a civil conspiracy).

11. [New Note] In 2023 Tennessee enacted a state statute similar to PLCAA. Tenn. Senate Bill 0822. In Indiana, notwithstanding PLCAA and a state statutory PLCAA analogue, the City of Gary's 1999 lawsuit against the firearms industry had managed to avoid final dismissal for a quarter century.

This year, the Indiana legislature enacted HEA 1235, which provides that only the State of Indiana may bring an action on behalf of a political subdivision of the state against firearms businesses. There are exceptions for contract or warranty claims for items purchased by a subdivision, and for enforcement of generally applicable zoning and business laws.

12. [New Note] Events in the Mexican government's lawsuits against U.S. firearms manufacturers are covered in Section 19.C.4 of this Supplement.

13. [New Note] *New State anti-PLCAA Statutes*. Recall that PLCAA has a "predicate exception" if a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including —" (I) a false entry in required recordkeeping, (II) selling or transferring a firearm to a buyer with reasonable cause to believe the buyer was a prohibited persons under 18 U.S.C. 922(g) or (n). Recall also that attempts to apply general statutes about public nuisance or torts have not been successful in invoking the predicate exception. For example, in the *City of New York v. Beretta* case excerpted in the textbook.

Several states, starting California and New York, have enacted firearms-specific statutes to attempt to utilize PLCAA's predicate exception. If the statutes created specific rules about the sales of firearms — such as forbidding sales of certain types of guns, or requiring particular procedures for firearms sales — such statutes would unquestionably be PLCAA predicate exceptions. What makes these statutes different is that they do *not* create specific rules regarding firearms commerce. Rather, the open-ended language allows for suits under a nearly infinite variety of claims that firearms commerce in compliance with all definite laws about firearms commerce can be unlawful, and hence the subject of a tort suit notwithstanding PLCAA.

The New York statute, enacted in 2022, is S. 7196. It adds a new § 898-a to Article 39-DDDD. The New York statute is as follows, in relevant part:

> § 898-a. 2. "Reasonable controls and procedures" shall mean policies that 13 include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter.
>
> § 898-b. Prohibited activities.
> 1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create,

> maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.
>
> 2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.
>
> § 898-c. Public nuisance. 1. A violation of subdivision one or two of section eight hundred ninety-eight-b of this article that results in harm to the public shall hereby be declared to be a public nuisance.
>
> 2. The existence of a public nuisance shall not depend on whether the gun industry member acted for the purpose of causing harm to the public.
>
> § 898-d. Enforcement. Whenever there shall be a violation of this article, the attorney general, in the name of the people of the state of New York, or a city corporation counsel on behalf of the locality, may bring an action in the supreme court or federal district court to enjoin and restrain such violations and to obtain restitution and damages.
>
> § 898-e. Private right of action. Any person, firm, corporation or association that has been damaged as a result of a gun industry member's acts or omissions in violation of this article shall be entitled to bring an action for recovery of damages or to enforce this article in the supreme court [in N.Y, the trial court of general jurisdiction] or federal district court.

N.Y. Gen. Bus. L. art. 39-DDDD, § 898-a

A U.S. district court in New York held that the statute was not preempted by PLCAA. *National Shooting Sports Foundation, Inc. v. James*, 604 F. Supp. 3d 48 (N.D.N.Y. 2022). A U.S. district court in New Jersey held that a similar statute was preempted by PLCAA, and granted a preliminary injunction. *Nat'l Shooting Sports Found. v. Platkin*, 2023 WL 2344635 (D.N.J. Mar. 3, 2023). However, the Third Circuit ruled that no plaintiff had standing to bring a pre-enforcement challenge. 80 F.4th 215 (3d Cir. 2023).

The Illinois version, House Bill 0218, also outlaws some speech, by forbidding a "firearms industry member" to:

> (2) "advertise, market, or promote a firearm-related product in a manner that reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity in Illinois"; or (3) "advertise, market, promote, design, or sell any firearm-related product in a manner that reasonably appears to support, recommend, or encourage persons under 18 years of age to unlawfully purchase or possess or use a firearm-related product in Illinois."

While a lawsuit has been filed against the Illinois statute, the court has not yet ruled on the motion to dismiss or the motion for a preliminary injunction.

National Shooting Sports Foundation v. *Raoul*, No. 3:23-cv-02791-SMY (S.D. Ill. 2023).

In a suit against California's, the court ruled that plaintiffs lacked standing except for one issue: the statutory provision allowing a lawsuit for sale of an "abnormally dangerous" firearm outside California, if the firearm were later misused in California. The attempt to control commerce outside California was a plain violation of the dormant commerce clause. *National Shooting Sports Foundation v. Bonta*, 2024 WL 710892 (S.D. Cal. Feb. 21, 2024).

In Hawaii, the Attorney General disavowed any intention to enforce the "abnormally dangerous" provision against any firearm that is lawful in Hawaii. Accordingly, no plaintiffs had standing for a pre-enforcement challenge. *National Shooting Sports Foundation v. Lopez*, 2024 WL 1703105 (D. Haw. Apr. 19, 2024).

Recent enactments of similar laws are: SB 168 (Colo), SB 302 (Del.), HB 947 (Maryland), and SB 5078 (Washington).

For scholarship supportive of the new statutes, see Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 Fla. L. Rev. 834 (2023); Heidi Li Feldman, *What It Takes to Write Statutes that Hold the Firearms Industry Accountable to Civil Justice*, 133 Yale L.J. Forum 717 (2024).

CHAPTER 10
THE RIGHT TO ARMS IN THE STATES

B. RECENT CHANGES TO STATE CONSTITUTIONAL RIGHT TO ARMS GUARANTEES

4. Iowa

In the November 2022 general election, the Iowa amendment passed with 65% and all but two counties voting in favor. Under the amendment, judicial review of the Iowa constitutional right to keep and bear arms is not to be based on the U.S. Second Amendment standard from *Heller* and *Bruen*. As detailed in Chapter 12.B, strict scrutiny is a methodology used in some Equal Protection and First Amendment cases. The government must prove that it has a "compelling state interest." And the government must prove that the restriction is "narrowly tailored." For example, the government must use the "least restrictive means" to accomplish the objective.

5. Oklahoma

The Oklahoma House of Representatives in March passed a resolution that would have amended the state constitutional right to arms to specify that Oklahomans have a right to possess handguns, rifles, shotguns, knives, nonlethal defensive weapons, and other arms in common use. Additionally, the amendment would specifically protect ammunition and firearm and ammunition components. The amendment also would allow the legislature to adopt time, place, and manner regulations regarding firearms only if they pass strict scrutiny. Finally, the amendment would prohibit the state or any localities from imposing registration or special taxation upon firearms, ammunition, or their components.

Although the resolution passed the state house, the state senate referred it to its rules committee and has since then taken no action on it.

6. Tennessee

The Tennessee Senate in April passed a resolution amending the state constitutional right to arms. It would remove the legislature's authority "to regulate the wearing of arms with a view to prevent crime." Instead, it would substitute the following language as the entirety of the provision: "That the citizens of this State have a right to keep, bear, and wear arms." In the words of its sponsor, this language would align the state constitutional right with the Second Amendment.

The state house has taken no action on the proposed amendment.

7. Kansas

In January, numerous members of the Kansas House of Representatives introduced a constitutional amendment to Kansas' right to arms that would expressly protect ammunition, firearm accessories, and firearm components. It would also subject any restrictions on the right to strict scrutiny.

The proposed amendment died in the chamber's Committee on Federal and State Affairs in April.

NOTES & QUESTIONS

5. Can you think of cases in which the strict scrutiny standard might yield different results from the *Heller*/*Bruen* historical test?

C. STATE FIREARMS PREEMPTION LAWS

Philadelphia's mayor issued an executive order banning licensed carry at all city-owned recreation spaces, including parks, basketball courts and pools. Office of the Mayor, Executive Order 4-22 (Sept. 7, 2022). A state trial held that the ban is preempted by the state's Uniform Firearms Act. *Gun Owners of Am. v. Philadelphia*, No. 2647 (Phil. Cty. Ct. of Common Pleas, 1st Dist. Oct. 3, 2022) (preliminary injunction); *McBride v. City of Philadelphia*, No. 2647 (Phil. Cty. Ct. of Common Pleas, 1st Dist. Aug. 13, 2024) (permanent injunction).

In contrast, Philadelphia's ban on home manufacture of guns by nonFFLs was held 4-3 not to violate the state's Uniform Firearms Act, because the parts used to manufacture firearms are not themselves firearms. The dissent pointed to state firearms law preemption precedents that had declined to read the

Uniform Firearms Act "hyper-literally." *Gun Owners of America v. Philadelphia*, 311 A.3d 72 (Pa. Commw. 2024).

A Florida statute allows civil actions and penalties against local officials who willfully violate the state firearms preemption law. Fla. Stats. § 790.33. Several elected officials argued that the statute violates common law legislative immunity and governmental function immunity. By 5-1, the Florida Supreme Court disagreed. "[T]o engage in conduct that is prohibited by statute is not a discretionary function." *Fried v. State* & *City of Weston v. State*, 355 So.3d 899 (Fla. 2023).

Lebanon, Ohio, allows licensed carry in its municipal building, such as during city council meetings, but not while court is in session. The ordinance was held not to violate Ohio's preemption law. *Donovan v. City of Lebanon*, No. 21-CV-094117 (Ohio Ct. Common Pleas, Warren Cty., Apr. 4, 2023).

Ongoing preemption litigation over gun control laws enacted by the city of Columbus, Ohio, has been complicated by the city's location in three different counties. The Columbus ordinances are presently enjoined. *Doe v. City of Columbus*, No. 23 CV H 02 0089 (Ct. Common Pleas, Del. County, May 12, 2023). The case is presently before the Ohio Supreme Court. *Doe v. City of Columbus*, No. 2024-0056 (Ohio 2024) (docket); 173 Ohio St.3d 1443 (2024) (accepting appeal). Besides the merits, the case involves the appealability of preliminary injunctions.

In 2018, the Ohio legislature strengthened the state's preemption statute, Ohio Rev. Code § 9.68, by expanding the scope of covered laws and by providing for citizen enforcement by lawsuits, which could seek damages, injunctive relief, declaratory relief, and, if successful, a mandatory award of attorneys' fees. A 2022 amendment added knives to the preemption statute. Ohio's intermediate appellate court reversed a preliminary injunction which had held 2018 and 2022 amendments to violate Ohio's Home Rule constitutional amendment. "To the extent the 2018 and 2022 amendments to the law may have altered its preemptive effects and expanded the liability of political subdivisions that act in conflict with it, the City has not proven by clear and convincing evidence that those amendments change the constitutional calculus forged by *City of Cleveland* (2010)." (Ch. 10.C). *Cincinnati v. State*, 2024-Ohio-2425 ¶61 (Ohio App. 2024).

NOTES & QUESTIONS

6. [New Note] *Preemption and Public Carry — Public Universities.* In *Bd. of Regents of Higher Educ. of Mont. v. State of Montana*, 512 P.3d 748 (June 29,

2022)[68] the Montana Supreme Court struck down Mont. Code Ann. § 45-3-111. This law was passed by the state legislature to eliminate the authority of the Montana University Board of Regents to regulate the public carry of firearms on the Montana University System (MUS) campuses. The new law merely required compliance with Montana state law in order to carry firearms on MUS campuses. The Board of Regent's Policy 1006 had effectively banned both the open and concealed carry of firearms on all MUS campuses. The decision does not specifically discuss Montana's preemption doctrine, codified at Mont. Code Ann. § 45-8-351 which reads:

> Restriction on local government regulation of firearms. (1) Except as provided in subsection (2), a county, city, town, consolidated local government, or other local government unit may not prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon, including a rifle, shotgun, handgun, or concealed handgun.
>
> (2)(a) For public safety purposes, a city or town may regulate the discharge of rifles, shotguns, and handguns. A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress the carrying of unpermitted concealed weapons or the carrying of unconcealed weapons to a publicly owned and occupied building under its jurisdiction.
>
> (b) Nothing contained in this section allows any government to prohibit the legitimate display of firearms at shows or other public occasions by collectors and others or to prohibit the legitimate transportation of firearms through any jurisdiction, whether in airports or otherwise.

The Montana high court side-stepped the firearm preemption issue by finding that Montana Board of Regents was not a "local government" subject to the legislative control of the Montana Legislature:

> Under the 1889 Montana Constitution, the Legislature possessed absolute authority over the Board, which was vested with "general control and supervision of the State University . . . [with] powers and duties [as] prescribed by law." Mont. Const. of 1889, art. XI, § 11. The 1972 Constitution removed the language subjecting the Board's powers and duties to legislative control and instead vested the Board with the "full power, responsibility, and authority to supervise, coordinate, manage and control the [MUS] and . . . supervise and coordinate other public educational institutions assigned by law." Mont. Const. art. X, § 9(2)(a). By the plain language of Mont. Const. art. X, § 9, the Board retains full independence over the MUS.

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[68] Published one week after the U.S. Supreme Court issued its opinion in *New York State Rifle & Pistol Assn., Inc. v. Bruen,* 142 S. Ct. 2111 (2022).

Bd. of Regents of Higher Educ. of Mont., 512 P.3d at 751.

Note that the Montana Supreme Court found that "Montana is not immune from the catastrophic loss that follows the use of firearms on school campuses. . . . The Board, not the Legislature, is constitutionally vested with full authority to determine the [firearm regulation] priorities of the MUS." The Court's finding was not that MUS was not immune from liability, but that the State of Montana was not immune.

The Court then concluded that the "Board is constitutionally vested with full responsibility to supervise, coordinate, manage, and control the MUS and its properties. The regulation of firearms on MUS campuses falls squarely within this authority. As applied to the Board, Sections 3 through 8 of HB 102 [Mont. Code Ann. § 45-3-111] unconstitutionally infringe[d] upon the Board's constitutionally derived authority."

The Court's rationale explicitly links exposure to liability to authority to regulate firearms. The Court's opinion then appears to concede that the State of Montana's treasury remains at risk for injuries when crimes involving firearms happen on campus. Yet the Board of Regents can turn MUS campuses into "gun-free zones" and thus override the Legislature's policy designed to mitigate that liability by allowing the law-abiding public to carry of firearms for self-defense on MUS campuses in the same manner that they do in the rest of the state.

7. [New Note] *Preemption and Public Carry – Public Land Leased to Private Entities.* In *Herndon v. City of Sandpoint,* 2023 WL 4111076 (Idaho June 22, 2023), the Idaho Supreme Court found no state constitutional or statutory barrier to a municipality leasing a public park to a private music festival, who in turn banned the public from carrying firearms on park grounds during the period of time the park was leased to the festival operators.

Idaho's preemption doctrine is codified at Idaho Code § 18-3302J:

> (1) The legislature finds that uniform laws regulating firearms are necessary to protect the individual citizen's right to bear arms guaranteed by amendment 2 of the United States Constitution and section 11, article I of the constitution of the state of Idaho. It is the legislature's intent to wholly occupy the field of firearms regulation within this state.
>
> (2) Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition. . . .

An exception to Idaho's constitutional carry policy (Ch. 10.D.6) is found at Idaho Code § 18-3302(25): "Nothing in [Idaho's constitutional carry statute] shall be construed to limit the existing rights of a private property owner, private tenant, private employer or private business entity."

The plaintiffs had argued that the government of the City of Sandpoint was fully preempted from regulating firearms in the public park — and as the city was not "a private property owner" — that it could not convey the right to regulate firearms in the public park to the music festival through the artifice of a lease.

The Idaho Supreme Court disagreed, and upheld the lease provision as a short-term conveyance of public property, that transmuted the public park to private property for the duration of the lease. This allowed the festival to take full advantage of I.C. § 18-3302(25) as if they were private property owners of the public park.

8. [New Note] Both *Board of Regents* and *Herndon* side-stepped the head-on conflict between state governments regulating the public carrying of firearms and what are arguably subordinate political entities promulgating their own, in some cases, contradictory policies.

Is this conflict or confusion exactly what a preemption doctrine is supposed to address? What other policy objectives do firearm preemption laws achieve?

a. Could a state legislature conclude that mitigation of mass shooting casualties is best achieved by allowing all law-abiding citizens to provide for their own self-defense, and that in exercising for their own self-defense the armed private citizen becomes the first line of defense against these horrific events?

b. In *DeShaney v. Winnebago County,* 489 U.S. 189 (1989) the U.S. Supreme Court found no constitutional violation when governments fail to protect someone from criminal conduct. There are exceptions to this general rule: (1) when the state takes a person into custody, thus confining the person against his or her will; (2) the "state-created danger" doctrine where the state actor creates the danger or renders a person more vulnerable to an existing danger, *Id.,* 489 U.S. at 198-201; and (3) conduct by a government actor that is arbitrary or shocks the conscience in a constitutional sense. *See Collins v. City of Harker Heights,* 503 U.S. 115 (1992); *Waddell v. Hendry County Sheriff's Office,* 329 F.3d 1300, 1305 (11th Cir. 2003).

The properties at issue in *Board of Regents* and *Herndon* are still public property (state university campus and city park). Are the government actors

(school administrators and city managers) placing anyone who would normally carry a firearm for self-defense in greater danger by forbidding him or her from exercising the right to carry on these public properties?

The case of *Peschke v. Carroll College*, 929 P.2d 874 (1996), cited in the Montana case, was brought by the estate of an employee of the MUC who had been murdered on campus. The case went to the jury on a negligence cause of action on the proposition that the college had failed to provide a safe and secure place to work. The Montana Supreme Court upheld the jury verdict in favor of the college; the jury found that the college had not breached its duty of care on a negligence claim. But what if Emma Peschke normally carried a gun for self-defense? A right since *Bruen,* recognized by the Supreme Court, even in public.

What if Emma Peschke was trained and proficient in the use a handgun and likely could have neutralized the threat against her? Would the MUC's policy of disarming everyone on campus constitute a "state-created danger"? Would this be an exception to *Deshaney*? Would the estate of Emma Peschke have had more than just a negligence work place claim to bring if the same events occurred today, post-*Bruen*? Assuming she could prove causation (normally a question for the jury) that "but for" the campus's gun-free zone policy, she would have carried a gun and neutralized the threat, should she (or her estate) be able to bring a claim against state-actors for infringing the right of self-defense?

D. MODERN STATE GUN CONTROL LAWS

7. Property Rights and Arms Rights

a. Zoning

While Massachusetts is the only state to outlaw firearms sales from a residence, many municipalities do so. After a Fargo, North Dakota, ban was upheld a against a state preemption law challenge, the North Dakota legislature amended the preemption law to include zoning. HB1340 (N.D. 2023). A state district court ruled against Fargo's challenge to the new statute. Jack Dura, *A Judge has Dismissed Fargo's Challenge to North Dakota Restrictions on Local Gun Control*, Assoc. Pr., Feb. 23, 2024.

b. Shooting Ranges

NOTES & QUESTIONS

2. [New Note] For a thorough resource on the topic of zoning and shooting ranges, see American Law of Zoning, § 18.16.50.

3. [New Note] A landowner in a residentially-zoned district of Stroudsburg, Pennsylvania, shot firearms on his 4.66 acre property, prompting noise complaints from neighbors, and a revision of the municipality's firearms discharge ordinance to prohibit such activities in residential areas. As revised, the municipality's zoning laws allow shooting ranges only in the open space and recreation districts. A range must comprise at least five acres, with a minimum lot width of 250 feet. Outdoor ranges, in addition, must be at least 150 from other occupied structures, and may only operate from dawn to dusk. Reversing a decision of the Commonwealth Court, four Justices of the Pennsylvania Supreme Court held that that plaintiff's activities were plainly protected by the Second Amendment, but, per *Bruen*, the municipality's regulations were supported by a long historical tradition of firearms discharge restrictions in municipalities. Another Justice concurred and dissented, arguing that the Second Amendment was not implicated at all. One dissenting Justice argued that the majority had been too loose in its acceptance of scattered laws about firearms discharge and shooting galleries. *Barris v. Stroud Township*, 310 A.3d 175 (Pa. 2024).

CHAPTER 11

THE SUPREME COURT AFFIRMS AN INDIVIDUAL RIGHT TO ARMS

A. THE SUPREME COURT AFFIRMS AN INDIVIDUAL RIGHT TO ARMS AGAINST FEDERAL INFRINGEMENT

Comment: Corpus Linguistics and the Meaning of Bear Arms

Some of the corpus linguistics scholars discussed above filed amicus briefs in *New York State Rifle & Pistol Association v. Bruen*. Professors David B. Kopel and E. Gregory Wallace argued that many of the historical quotes in the briefs were deceptively chopped, and the full quotes plainly treated bearing arms as a personal self-defense activity. Their article made clear that it was not questioning corpus linguistics per se, but instead was only criticizing deliberate misclassification of quotes. David Kopel & E. Gregory Wallace, *Corpus Linguistics and the Second Amendment: Support for the Right to Bear Arms for All Purposes*, Reason.com (Oct. 31, 2021 12:26 AM).

In contrast, a recent article does argue that corpus linguistics is inherently improper in constitutional adjudication. Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation*, 70 Drake L. Rev. 387 (2022). The article argues that corpus linguistic suffers several inherent defects:

> In determining the original understanding of a constitutional provision, the voice of the "common man" will, contrary to proponents of corpus linguistics, often not be heard, but rather the voices of elites. The corpora are often incomplete and do not include key texts that scholars have long relied upon to determine constitutional meaning. Corpora will often be biased in favor of newsworthy events, such as wars, and will not record important traditions. Bias may also result from historical and temporal circumstances, which may disproportionately reflect "what people are talking about at the time" rather than ordinary meaning.
>
> More fundamentally, the "frequency hypothesis," on which the entire legal corpus linguistics endeavor relies, is unsound. Just because one meaning of

> "bear arms" more frequently appears in an assortment of documents does not mean that that is the meaning in a particular instance, such as the use of "bear arms" in the Constitution. Culling a large number of irrelevant results and categorizing the remaining results according to their assumed meaning is often purely subjective, irreproducible, and far from scientific.

The authors suggest that "if the tool is to be relied upon at all, expert testimony after appropriate discovery should be required to meet the standards of admissibility under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals* and its state analogues."

C. POST-MCDONALD *SUPREME COURT CASES*

4. Dissents from Certiorari Denials

NOTES & QUESTIONS

5. [New Note] *Justice Thomas's dissents as a guide to future majority opinions*. Andrew L. Pickens, New York State Rifle & Pistol Association Inc. v. Bruen — *and the Predictive Qualities of Clarence Thomas's Post*-Heller *Dissents From Denials Of Certiorari*, 13 Wake Forest J.L. & Pol'y 1 (2023):

> [B]y examining *Bruen* and comparing it to Justice Thomas's extra-*Heller* reasoning in his dissents from denial of certiorari, this article determines that the correlation between those dissents and the result in *Bruen* is so strong as to indicate that the dissents will be useful in efforts to predict the Court's direction in future Second Amendment cases.

CHAPTER 12
STANDARDS OF REVIEW

B. THE TWO-PART TEST

On page 978, insert the following after the paragraph that begins "Some restrictions on constitutional rights are categorically void.":

Even in areas where the Supreme Court has articulated a fairly relaxed test for judging governmental actions, strong categorical rules may exist. For example, in 1990 the Supreme Court held that the First Amendment's Free Exercise Clause does not limit laws of general applicability that were enacted for neutral (not anti-religious) purposes that happen to interfere with someone's religious activities. *Employment Div. v. Smith*, 494 U.S. 872 (1990) (peyote use). However, decisions before and after *Smith* state various rights of conscience in categorical terms, seemingly placing them off-limits from governmental action. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2017) (right of clergy to choose not to officiate at a same-sex wedding); *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015) (right to teach on unpopular ideas); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (right of religious organizations to choose who will serve in ministerial roles); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("freedom to profess whatever religious doctrine one desires"); *id.* at 877-78 (right to bow in worship); *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (right to hold beliefs that a court might consider not "acceptable, logical, consistent, or comprehensible"); *id.* at 715-16 (right to identify as part of denomination even while having difference with the denomination's orthodox beliefs and practices); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976) (right of ecclesiastical authorities to adjudicate intra-church disputes); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (government may not "force or influence a person to go to or remain away from church against his will"); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) ("freedom to believe . . . is absolute"); *id.* ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."); Watson v. Jones, 80 U.S. 679, 733 (1871) (churches' right to decide "church discipline" or "the conformity of the members of the church to the standard of morals required of them").

CHAPTER 13

WHO? BANS ON PERSONS AND CLASSES

A. [New Section Title] *DOMESTIC VIOLENCE MISDEMEANANTS AND PERSONS SUBJECT TO RESTRAINING ORDERS*

The federal lifetime ban on firearms possession by anyone convicted of a misdemeanor involving domestic violence has been upheld in all post-*Bruen* cases so far. 18 U.S.C. § 922(g)(9). *See United States v. Jackson*, 622 F. Supp. 3d 1063 (W.D. Okla. 2022); *United States v. Nutter*, 624 F. Supp. 3d 636 (S.D.W. Va. 2022); *United States v. Bernard*, 2022 WL 17416681 (N.D. Iowa Dec. 5, 2022); *United States v. Anderson*, 2022 WL 10208253 (W.D. Va. Oct. 17, 2022).

The ban on possession by persons under civil domestic-violence restraining orders has faced more skepticism. *United States v. Kays*, 624 F. Supp. 3d 1262 (W.D. Okla. 2022) upheld the ban. *United States v. Combs*, 654 F. Supp. 3d 612 (E.D. Ky. Feb. 2, 2023), *app. dismissed* 2023 WL 9785711 (6th Cir. 2023), held it unconstitutional. In *United States v. Perez-Gallan*, the district court ruled against the statute, and the Fifth Circuit affirmed on the basis of the then-controlling circuit precedent in *Rahimi*. 640 F. Supp. 3d 697 (W.D. Tex. 2022), *aff'd* 2023 WL 4932111 (5th Cir. Aug. 2, 2023). The Solicitor General petitioned for certiorari. After it decided *Rahimi*, the Supreme Court granted, vacated, and remanded *Perez-Gallan*. 2024 WL 3259665 (U.S. July 2, 2024).

Most famously, the ban was held unconstitutional by the Fifth Circuit in *United States v. Rahimi*. The U.S. Supreme Court granted certiorari on June 30, 2023. The Court did not change the question presented by the Solicitor General: "Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face."

United States v. Rahimi

144 S. Ct. 1889 (June 21, 2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he "represents a credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. 18 U.S.C. § 922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment.

I

A

In December 2019, Rahimi met his girlfriend, C. M., for lunch in a parking lot. C. M. is also the mother of Rahimi's young child, A. R. During the meal, Rahimi and C. M. began arguing, and Rahimi became enraged. C. M. attempted to leave, but Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard. When he realized that a bystander was watching the altercation, Rahimi paused to retrieve a gun from under the passenger seat. C. M. took advantage of the opportunity to escape. Rahimi fired as she fled, although it is unclear whether he was aiming at C. M. or the witness. Rahimi later called C. M. and warned that he would shoot her if she reported the incident.

Undeterred by this threat, C. M. went to court to seek a restraining order. In the affidavit accompanying her application, C. M. recounted the parking lot incident as well as other assaults. She also detailed how Rahimi's conduct had endangered A. R. Although Rahimi had an opportunity to contest C. M.'s testimony, he did not do so. On February 5, 2020, a state court in Tarrant County, Texas, issued a restraining order against him. The order, entered with the consent of both parties, included a finding that Rahimi had committed "family violence." It also found that this violence was "likely to occur again" and that Rahimi posed "a credible threat" to the "physical safety" of C. M. or A. R. Based on these findings, the order prohibited Rahimi from threatening C. M. or her family for two years or contacting C. M. during that period except to discuss A. R. It also suspended Rahimi's gun license for two years. If Rahimi was imprisoned or confined when the order was set to expire, the order would instead terminate either one or two years after his release date, depending on the length of his imprisonment.

In May, however, Rahimi violated the order by approaching C. M.'s home at night. He also began contacting her through several social media accounts.

In November, Rahimi threatened a different woman with a gun, resulting in a charge for aggravated assault with a deadly weapon. And while Rahimi was under arrest for that assault, the Texas police identified him as the suspect in a spate of at least five additional shootings.

The first, which occurred in December 2020, arose from Rahimi's dealing in illegal drugs. After one of his customers "started talking trash," Rahimi drove to the man's home and shot into it. While driving the next day, Rahimi collided with another car, exited his vehicle, and proceeded to shoot at the other car. Three days later, he fired his gun in the air while driving through a residential neighborhood. A few weeks after that, Rahimi was speeding on a highway near Arlington, Texas, when a truck flashed its lights at him. Rahimi hit the brakes and cut across traffic to chase the truck. Once off the highway, he fired several times toward the truck and a nearby car before fleeing. Two weeks after that, Rahimi and a friend were dining at a roadside burger restaurant. When the restaurant declined his friend's credit card, Rahimi pulled a gun and shot into the air.

The police obtained a warrant to search Rahimi's residence. There they discovered a pistol, a rifle, ammunition — and a copy of the restraining order.

B

Rahimi was indicted on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. § 922(g)(8). . . A prosecution under Section 922(g)(8) may proceed only if three criteria are met. First, the defendant must have received actual notice and an opportunity to be heard before the order was entered. Second, the order must prohibit the defendant from either "harassing, stalking, or threatening" his "intimate partner" or his or his partner's child, or "engaging in other conduct that would place [the] partner in reasonable fear of bodily injury" to the partner or child. A defendant's "intimate partner[s]" include his spouse or any former spouse, the parent of his child, and anyone with whom he cohabitates or has cohabitated. Third . . . the order must either contain a finding that the defendant "represents a credible threat to the physical safety" of his intimate partner or his or his partner's child, § 922(g)(8)(C)(i), or "by its terms explicitly prohibit[ ] the use," attempted use, or threatened use of "physical force" against those individuals, § 922(g)(8)(C)(ii).

Rahimi's restraining order met all three criteria. First, Rahimi had received notice and an opportunity to be heard before the order was entered. Second, the order prohibited him from communicating with or threatening C. M. Third, the order met the requirements of Section 922(g)(8)(C)(i), because it included a finding that Rahimi represented "a credible threat to the physical safety" of C. M. or her family. The order also "explicitly prohibit[ed]" Rahimi from "the use, attempted use, or threatened use of physical force" against C. M., satisfying the independent basis for liability in Section 922(g)(8)(C)(ii).

Rahimi moved to dismiss the indictment, arguing that Section 922(g)(8) violated on its face the Second Amendment right to keep and bear arms. . .

II

When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may — consistent with the Second Amendment — be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.

A. . .

In *Heller*, our inquiry into the scope of the right began with "constitutional text and history." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). In *Bruen*, we directed courts to examine our "historical tradition of firearm regulation" to help delineate the contours of the right. *Id.* at 17. We explained that if a challenged regulation fits within that tradition, it is lawful under the Second Amendment. We also clarified that when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to "justify its regulation." *Id.* at 24.

Nevertheless, some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. 554 U.S. at 582. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." *Id.* By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.

As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." *Id.* at 29 & n.7. Discerning and developing the law in this way is "a commonplace task for any lawyer or judge." *Id.* at 28.

Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does

so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster." *Id.* at 30. The law must comport with the principles underlying the Second Amendment, but it need not be a "dead ringer" or a "historical twin." *Id.* (emphasis deleted).[1]

B

Bearing these principles in mind, we conclude that Section 922(g)(8) survives Rahimi's challenge.

1

Rahimi challenges Section 922(g)(8) on its face. This is the "most difficult challenge to mount successfully," because it requires a defendant to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745. That means that to prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications. And here the provision is constitutional as applied to the facts of Rahimi's own case.

Recall that Section 922(g)(8) provides two independent bases for liability. Section 922(g)(8)(C)(i) bars an individual from possessing a firearm if his restraining order includes a finding that he poses "a credible threat to the physical safety" of a protected person. Separately, Section 922(g)(8)(C)(ii) bars an individual from possessing a firearm if his restraining order "prohibits the use, attempted use, or threatened use of physical force." Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. . .

2

This Court reviewed the history of American gun laws extensively in *Heller* and *Bruen*. From the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others. . .

Through these centuries, English law had disarmed not only brigands and highwaymen but also political opponents and disfavored religious groups. By

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[1] We also recognized in *Bruen* the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." 597 U.S. at 37. We explained that under the circumstances, resolving the dispute was unnecessary to decide the case. *Id.* at 37-38. The same is true here.

the time of the founding, however, state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents on this side of the Atlantic. But regulations targeting individuals who physically threatened others persisted. Such conduct was often addressed through ordinary criminal laws and civil actions, such as prohibitions on fighting or private suits against individuals who threatened others. *See* 4 W. Blackstone, Commentaries on the Laws of England 145-46, 149-50 (10th ed. 1787) (Blackstone); 3 *id.* at 120. By the 1700s and early 1800s, however, two distinct legal regimes had developed that specifically addressed firearms violence.

The first were the surety laws. . .

. . . Under the surety laws, a magistrate could "oblig[e] those persons, [of] whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance . . . that such offence . . . shall not happen[,] by finding pledges or securities." 4 Blackstone 251. In other words, the law authorized magistrates to require individuals suspected of future misbehavior to post a bond. *Id.* If an individual failed to post a bond, he would be jailed. *See, e.g.*, Mass. Rev. Stat., ch. 134, § 6 (1836). If the individual did post a bond and then broke the peace, the bond would be forfeit. 4 Blackstone 253.

Well entrenched in the common law, the surety laws could be invoked to prevent all forms of violence, including spousal abuse. As Blackstone explained, "[w]ives [could] demand [sureties] against their husbands; or husbands, if necessary, against their wives." *Id.* at 254. These often took the form of a surety of the peace, meaning that the defendant pledged to "keep the peace." *Id.* at 252-53. Wives also demanded sureties for good behavior, whereby a husband pledged to "demean and behave himself well." 4 Blackstone 253; see Bloch 232-33, 234-35 & n.34. . .

Importantly for this case, the surety laws also targeted the misuse of firearms. In 1795, for example, Massachusetts enacted a law authorizing justices of the peace to "arrest" all who "go armed offensively [and] require of the offender to find sureties for his keeping the peace." 1795 Mass. Acts ch. 2, in Acts and Resolves of Massachusetts, 1794–1795, ch. 26, pp. 66–67 (1896). Later, Massachusetts amended its surety laws to be even more specific, authorizing the imposition of bonds from individuals "[who went] armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." Mass. Rev. Stat., ch. 134, § 16. At least nine other jurisdictions did the same.

These laws often offered the accused significant procedural protections. Before the accused could be compelled to post a bond for "go[ing] armed," a complaint had to be made to a judge or justice of the peace by "any person having reasonable cause to fear" that the accused would do him harm or breach the peace. Mass. Rev. Stat., ch. 134, §§ 1, 16. The magistrate would take evidence, and — if he determined that cause existed for the charge — summon

the accused, who could respond to the allegations. Bonds could not be required for more than six months at a time, and an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason.

While the surety laws provided a mechanism for preventing violence before it occurred, a second regime provided a mechanism for punishing those who had menaced others with firearms. These were the "going armed" laws, a particular subset of the ancient common-law prohibition on affrays.

. . . Although the prototypical affray involved fighting in public, commentators understood affrays to encompass the offense of "arm[ing]" oneself "to the Terror of the People," T. Barlow, The Justice of the Peace: A Treatise 11 (1745). . . .

Whether classified as an affray law or a distinct prohibition, the going armed laws prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[ ] the good people of the land." 4 Blackstone 149 (emphasis deleted). Such conduct disrupted the "public order" and "le[d] almost necessarily to actual violence." *State v. Huntly*, 25 N.C. 418, 421–422 (1843) (*per curiam*). Therefore, the law punished these acts with "forfeiture of the arms . . . and imprisonment." 4 Blackstone 149.

In some instances, prohibitions on going armed and affrays were incorporated into American jurisprudence through the common law. Moreover, at least four States — Massachusetts, New Hampshire, North Carolina, and Virginia — expressly codified prohibitions on going armed.

3

Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found to threaten the physical safety of another. This provision is "relevantly similar" to those founding era regimes in both why and how it burdens the Second Amendment right. Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do. Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally.

The burden Section 922(g)(8) imposes on the right to bear arms also fits within our regulatory tradition. While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of

misuse, *see Heller*, 554 U.S. at 626, we note that Section 922(g)(8) applies only once a court has found that the defendant "represents a credible threat to the physical safety" of another. That matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.

Moreover, like surety bonds of limited duration, Section 922(g)(8)'s restriction was temporary as applied to Rahimi. Section 922(g)(8) only prohibits firearm possession so long as the defendant "is" subject to a restraining order. § 922(g)(8). In Rahimi's case that is one to two years after his release from prison. . .

Finally, the penalty — another relevant aspect of the burden — also fits within the regulatory tradition. The going armed laws provided for imprisonment, 4 Blackstone 149, and 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 that Section 922(g)(8) imposes is also permissible.

Rahimi argues *Heller* requires us to affirm, because Section 922(g)(8) bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an "absolute prohibition of handguns ... in the home." 554 U.S. at 636. But *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful." 554 U.S. at 626, 627 n.26.

Our analysis of the surety laws in *Bruen* also does not help Rahimi. In *Bruen*, we explained that the surety laws were not a proper historical analogue for New York's gun licensing regime. What distinguished the regimes, we observed, was that the surety laws "presumed that individuals had a right to . . . carry," whereas New York's law effectively presumed that no citizen had such a right, absent a special need. *Id.* at 56 (emphasis deleted). Section 922(g)(8)(C)(i) does not make the same faulty presumption. To the contrary, it presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others.

While we also noted that the surety laws applied different penalties than New York's special-need regime, we did so only to emphasize just how severely the State treated the rights of its citizens. But as we have explained, our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not. 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. . .

Finally, in holding that Section 922(g)(8) is constitutional as applied to Rahimi, we reject the Government's contention that Rahimi may be disarmed simply because he is not "responsible." "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.

* * *

In *Heller*, *McDonald*, and *Bruen*, this Court did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Bruen*, 597 U.S. at 31. Nor do we do so today. Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.

The judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion. . .

Justice SOTOMAYOR, with whom Justice KAGAN joins, concurring.

Today, the Court applies its decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen* for the first time. Although I continue to believe that *Bruen* was wrongly decided, I join the Court's opinion applying that precedent to uphold 18 U.S.C. § 922(g)(8).

The Court today emphasizes that a challenged regulation "must comport with the principles underlying the Second Amendment," but need not have a precise historical match. I agree. I write separately to highlight why the Court's interpretation of *Bruen*, and not the dissent's, is the right one. In short, the Court's interpretation permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless, a too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding.

I. . .

The Court correctly concludes that "the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." That conclusion finds historical support in both the surety laws, which

"provided a mechanism for preventing violence before it occurred" by requiring an individual who posed a credible threat of violence to another to post a surety, and the "going armed" laws, which "provided a mechanism for punishing those who had menaced others with firearms" through forfeiture of the arms or imprisonment. "Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." Section 922(g)(8)'s prohibition on gun possession for individuals subject to domestic violence restraining orders is part of that "tradition of firearm regulation allow[ing] the Government to disarm individuals who present a credible threat to the physical safety of others," as are the similar restrictions that have been adopted by 48 States and Territories.

The Court's opinion also clarifies an important methodological point that bears repeating: Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should "conside[r] whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." Here, for example, the Government has not identified a founding-era or Reconstruction-era law that specifically disarmed domestic abusers, but it did not need to do so. Although § 922(g)(8) "is by no means identical" to the surety or going armed laws, it "restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws d[id]." That shared principle is sufficient.

II

The dissent reaches a different conclusion by applying the strictest possible interpretation of *Bruen*. It picks off the Government's historical sources one by one, viewing any basis for distinction as fatal. The dissent urges a close look "at the historical law's justification as articulated during the relevant time period," and a "careful parsing of regulatory burdens" to ensure that courts do not "stray too far from [history] by eliding material differences between historical and modern laws." The dissent criticizes this Court for adopting a more "piecemeal approach" that distills principles from a variety of historical evidence rather than insisting on a precise historical analogue.

If the dissent's interpretation of *Bruen* were the law, then *Bruen* really would be the "one-way ratchet" that I and the other dissenters in that case feared, "disqualify[ing] virtually any 'representative historical analogue' and mak[ing] it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security." 597 U.S. at 112 (Breyer, J., dissenting). Thankfully, the Court rejects that rigid approach to the historical inquiry. As the Court puts it today, *Bruen* was "not meant to suggest a law trapped in amber."

This case lays bare the perils of the dissent's approach. Because the dissent concludes that "§ 922(g)(8) addresses a societal problem — the risk of interpersonal violence — 'that has persisted since the 18th century,'" it insists that the means of addressing that problem cannot be "'materially different'" from the means that existed in the 18th century. That is so, it seems, even when the weapons in question have evolved dramatically. According to the dissent, the solution cannot be "materially different" even when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate. Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, it is no surprise that that generation did not have an equivalent to § 922(g)(8). Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.

III

The Court today clarifies *Bruen*'s historical inquiry and rejects the dissent's exacting historical test. I welcome that development. That being said, I remain troubled by *Bruen*'s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today. In my view, the Second Amendment allows legislators "to take account of the serious problems posed by gun violence," *Bruen*, 597 U.S. at 91 (Breyer, J., dissenting), not merely by asking what their predecessors at the time of the founding or Reconstruction thought, but by listening to their constituents and crafting new and appropriately tailored solutions. Under the means-end scrutiny that this Court rejected in *Bruen* but "regularly use[s] ... in cases involving other constitutional provisions," *id.* at 106, the constitutionality of § 922(g)(8) is even more readily apparent.

To start, the Government has a compelling interest in keeping firearms out of the hands of domestic abusers. A woman who lives in a house with a domestic abuser is five times more likely to be murdered if the abuser has access to a gun. With over 70 people shot and killed by an intimate partner each month in the United States, the seriousness of the problem can hardly be overstated. Because domestic violence is rarely confined to the intimate partner that receives the protective order, the Government's interest extends even further. In roughly a quarter of cases where an abuser killed an intimate partner, the abuser also killed someone else, such as a child, family member,

or roommate. Moreover, one study found that domestic disputes were the most dangerous type of call for responding officers, causing more officer deaths with a firearm than any other type of call.

While the Second Amendment does not yield automatically to the Government's compelling interest, § 922(g)(8) is tailored to the vital objective of keeping guns out of the hands of domestic abusers. Section 922(g)(8) should easily pass constitutional muster under any level of scrutiny.

Although I continue to think that the means-end approach to Second Amendment analysis is the right one, neither party asks the Court to reconsider *Bruen* at this time, and that question would of course involve other considerations than whether *Bruen* was rightly decided. Whether considered under *Bruen* or under means-end scrutiny, § 922(g)(8) clears the constitutional bar. I join in full the Court's opinion, which offers a more helpful model than the dissent for lower courts struggling to apply *Bruen*.

Justice GORSUCH, concurring. . .

In this case, no one questions that the law Mr. Rahimi challenges addresses individual conduct covered by the text of the Second Amendment. So, in this facial challenge, the question becomes whether that law, in at least some of its applications, is consistent with historic firearm regulations. . .

Why do we require those showings? Through them, we seek to honor the fact that the Second Amendment "codified a *pre-existing* right" belonging to the American people, one that carries the same "scope" today that it was "understood to have when the people adopted" it. *Heller*, 554 U.S. at 592, 634-35. When the people ratified the Second Amendment, they surely understood an arms-bearing citizenry posed some risks. But just as surely they believed that the right protected by the Second Amendment was itself vital to the preservation of life and liberty.

We have no authority to question that judgment. As judges charged with respecting the people's directions in the Constitution — directions that are "trapped in amber," — our only lawful role is to apply them in the cases that come before us. Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains our enduring guide. If changes are to be made to the Constitution's directions, they must be made by the American people. Nor is there anything remotely unusual about any of this. Routinely, litigants and courts alike must consult history when seeking to discern the meaning and scope of a constitutional provision. . .

Consider just one example. We have recognized that the Sixth Amendment enshrines another pre-existing right: the right of a defendant to confront his

accusers at trial. Just as here, we have recognized that, in placing this right in the Constitution, the people set its scope, "admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). And, just as here, when a party asks us to sustain some modern exception to the confrontation right, we require them to point to a close historic analogue to justify it. *Giles v. California*, 554 U.S. 353, 358-61 (2008). Just as here, too, we have expressly rejected arguments that courts should proceed differently, such as by trying to glean from historic exceptions overarching "policies," "'purposes,'" or "values" to guide them in future cases. *See id.* at 374-75 (opinion of Scalia, J.). We have rejected those paths because the Constitution enshrines the people's choice to achieve certain policies, purposes, and values "through very specific means": the right of confrontation as originally understood at the time of the founding. *Id.* at 375. As we have put it, a court may not "extrapolate" from the Constitution's text and history "the values behind [that right], and then . . . enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Id.* Proceeding that way, we have warned, risks handing judges a license to turn "the guarantee of confrontation" into "no guarantee at all." *Id.* As there, so too here: Courts must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution's text.

Proceeding with this well in mind today, the Court rightly holds that Mr. Rahimi's facial challenge to § 922(g)(8) cannot succeed. It cannot because, through surety laws and restrictions on "going armed," the people in this country have understood from the start that the government may disarm an individual temporarily after a "judicial determinatio[n]" that he "likely would threaten or ha[s] threatened another with a weapon." And, at least in some cases, the statute before us works in the same way and does so for the same reasons: It permits a court to disarm a person only if, after notice and hearing, it finds that he "represents a credible threat to the physical safety" of others. A court, too, may disarm an individual only for so long as its order is in effect. § 922(g)(8). In short, in at least some applications, the challenged law does not diminish any aspect of the right the Second Amendment was originally understood to protect.

I appreciate that one of our colleagues sees things differently. But if reasonable minds can disagree whether § 922(g)(8) is analogous to past practices originally understood to fall outside the Second Amendment's scope, we at least agree that is the only proper question a court may ask. Discerning what the original meaning of the Constitution requires in this or that case may sometimes be difficult. Asking that question, however, at least keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs. And whatever indeterminacy may

be associated with seeking to honor the Constitution's original meaning in modern disputes, that path offers surer footing than any other this Court has attempted from time to time. Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. (As we have today.) Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. (Except the judges themselves.) Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.

Just consider how lower courts approached the Second Amendment before our decision in *Bruen*. They reviewed firearm regulations under a two-step test that quickly "devolved" into an interest-balancing inquiry, where courts would weigh a law's burden on the right against the benefits the law offered. See *Rogers* v. *Grewal*, 140 S. Ct. 1865, 1867-68 & n.1 (2020) (THOMAS, J., joined by KAVANAUGH, J., dissenting from denial of certiorari). Some judges expressed concern that the prevailing two-step test had become "just window dressing for judicial policymaking." *Duncan v. Bonta*, 19 F.4th 1087, 1148 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting). To them, the inquiry worked as a "black box regime" that gave a judge broad license to support policies he "[f]avored" and discard those he disliked. *Id.* How did the government fare under that regime? In one circuit, it had an "undefeated, 50–0 record." *Id.* at 1167 n.8 (VanDyke, J., dissenting). In *Bruen*, we rejected that approach for one guided by constitutional text and history. Perhaps judges' jobs would be easier if they could simply strike the policy balance they prefer. And a principle that the government always wins surely would be simple for judges to implement. But either approach would let judges stray far from the Constitution's promise.

One more point: Our resolution of Mr. Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in "particular circumstances." *Salerno*, 481 U.S., at 751. So, for example, we do not decide today whether the government may disarm a person without a judicial finding that he poses a "credible threat" to another's physical safety. We do not resolve whether the government may disarm an individual permanently. We do not determine whether § 922(g)(8) may be constitutionally enforced against a person who uses a firearm in self-defense. Notably, the surety laws that inform today's decision allowed even an individual found to pose a threat to another to "obtain an exception if he needed his arms for self-defense." Nor do we 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.'"

We do not resolve any of those questions (and perhaps others like them) because we cannot. Article III of the Constitution vests in this Court the power to decide only the "'actual cas[e]'" before us, "'not abstractions.'" *Public Workers*

v. Mitchell, 330 U.S. 75, 89 (1947). And the case before us does not pose the question whether the challenged statute is always lawfully applied, or whether other statutes might be permissible, but only whether this one has *any* lawful scope. Nor should future litigants and courts read any more into our decision than that. As this Court has long recognized, what we say in our opinions must "be taken in connection with the case in which those expressions are used," *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821), and may not be "stretch[ed] ... beyond their context," *Brown v. Davenport*, 596 U.S. 118, 141 (2022).

Among all the opinions issued in this case, its central messages should not be lost. The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*. . .

Justice KAVANAUGH, concurring.

The Framers of the Constitution and Bill of Rights wisely sought the best of both worlds: democratic self-government and the protection of individual rights against excesses of that form of government. In justiciable cases, this Court determines whether a democratically enacted law or other government action infringes on individual rights guaranteed by the Constitution. When performing that Article III duty, the Court does not implement its own policy judgments. . .

The concurring opinions, and the briefs of the parties and *amici* in this case, raise important questions about judicial reliance on text, history, and precedent, particularly in Second Amendment cases. I add this concurring opinion to review the proper roles of text, history, and precedent in constitutional interpretation.

I

The American people established an enduring American Constitution. The first and most important rule in constitutional interpretation is to heed the text — that is, the actual words of the Constitution — and to interpret that text according to its ordinary meaning as originally understood. The text of the Constitution is the "Law of the Land." Art. VI. As a general matter, the text of the Constitution says what it means and means what it says. And unless and until it is amended, that text controls.

In many important provisions, the Constitution is a document of majestic specificity with "strikingly clean prose." A. Amar, America's Constitution xi (2005). Two Houses of Congress. A House elected every two years. Senators serve 6-year terms. Two Senators per State. A State's equal suffrage in the Senate may not be changed without the State's consent. A two-thirds House vote to expel a Member of the House. The same for the Senate. Appropriations

are made by law. Bicameralism and presentment. The Presidential veto. The Presidential pardon. The President serves a 4-year term. A maximum of two elected terms for a President. The salary of a sitting President may not be increased or decreased. A vote of a majority of the House and two-thirds of the Senate to remove a President. The President nominates and the Senate confirms principal executive officers. One Supreme Court. Tenure and salary protection for Supreme Court and other federal judges. Two-thirds of each House of Congress together with three-fourths of the States may amend the Constitution. Congress meets at noon on January 3rd unless otherwise specified by Congress. The District of Columbia votes in Presidential elections. The list goes on. . .

Of course, some provisions of the Constitution are broadly worded or vague — to put it in Madison's words, "more or less obscure and equivocal." The Federalist No. 37, p. 229 (C. Rossiter ed. 1961). As Chief Justice Rehnquist explained, the Constitution is in some parts "obviously not a specifically worded document but one couched in general phraseology." W. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 697 (1976).

That is especially true with respect to the broadly worded or vague individual-rights provisions. (I will use the terms "broadly worded" and "vague" interchangeably in this opinion.) For example, the First Amendment provides that "Congress shall make no law" "abridging the freedom of speech." And the Second Amendment, at issue here, guarantees that "the right of the people to keep and bear Arms" "shall not be infringed."

Read literally, those Amendments might seem to grant *absolute* protection, meaning that the government could never regulate speech or guns in any way. But American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions.

With respect to the First Amendment, for example, this Court's "jurisprudence over the past 216" — now 233 — "years has rejected an absolutist interpretation." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007). From 1791 to the present, "the First Amendment has permitted restrictions upon the content of speech in a few limited areas" — including obscenity, defamation, fraud, and incitement. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quotation marks omitted). So too with respect to the Second Amendment: "Like most rights, the right secured by the Second Amendment is not unlimited"; it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

II

A recurring and difficult issue for judges, therefore, is how to interpret vague constitutional text. That issue often arises (as here) in the context of determining exceptions to textually guaranteed individual rights. To what extent does the Constitution allow the government to regulate speech or guns, for example?[1]

In many cases, judicial precedent informs or controls the answer (more on that later). But absent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy.

Generally speaking, the historical approach examines the laws, practices, and understandings from before and after ratification that may help the interpreter discern the meaning of the constitutional text and the principles embodied in that text. The policy approach rests on the philosophical or policy dispositions of the individual judge.

History, not policy, is the proper guide.

For more than 200 years, this Court has relied on history when construing vague constitutional text in all manner of constitutional disputes. For good reason. History can supply evidence of the original meaning of vague text. History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.

Judges are like umpires, as THE CHIEF JUSTICE has aptly explained. And in a constitutional system that counts on an independent Judiciary, judges must act like umpires. To be an umpire, the judge "must stick close to the text and the history, and their fair implications," because there "is no principled way" for a neutral judge "to prefer any claimed human value to any other." R. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 8 (1971). History establishes a "criterion that is conceptually quite separate from the preferences of the judge himself." A. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989). When properly applied, history helps ensure that judges do not simply create constitutional meaning "out of whole

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[1] There are two ways to frame this point — either (i) determining the exceptions to a constitutional right or (ii) determining the affirmative scope or contours of that constitutional right. Either way, the analysis is the same — does the constitutional provision, as originally understood, permit the challenged law? This opinion uses the term "exceptions," which underscores that the constitutional baseline is protection of the textually enumerated right.

cloth." A. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1183 (1989).[2]

Absent precedent, therefore, history guides the interpretation of vague constitutional text. Of course, this Court has been deciding constitutional cases for about 230 years, so relevant precedent often exists. As the Court's opinions over time amply demonstrate, precedent matters a great deal in constitutional interpretation.

I now turn to explaining how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text.

A

Pre-ratification history. When interpreting vague constitutional text, the Court typically scrutinizes the stated intentions and understandings of the Framers and Ratifiers of the Constitution (or, as relevant, the Amendments). The Court also looks to the understandings of the American people from the pertinent ratification era. Those intentions and understandings do not necessarily determine meaning, but they may be strong evidence of meaning. . .

For example, some provisions of the Constitution use language that appeared in the Articles of Confederation or state constitutional provisions. And when the language that appeared in the Articles of Confederation or in state constitutions is the same as or similar to the language in the U. S. Constitution, the history of how people understood the language in the Articles or state constitutions can inform interpretation of that language in the U. S. Constitution.

Similarly, other pre-ratification national or state laws and practices may sometimes help an interpreter discern the meaning of particular constitutional provisions. Those pre-ratification American laws and practices formed part of the foundation on which the Framers constructed the Constitution and Bill of Rights. Indeed, the Constitution did not displace but largely co-exists with state constitutions and state laws, except to the extent they conflict with federal law. See Art. VI.

On the other hand, some pre-ratification history can be probative of what the Constitution does *not* mean. The Framers drafted and approved many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings.

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[2] The historical approach applies when the text is vague. But the text of the Constitution always controls. So history contrary to clear text is not to be followed. In some cases, there may be debate about whether the relevant text is sufficiently clear to override contrary historical practices. The basic principle remains: Text controls over contrary historical practices.

For example, the "defects" of the Articles of Confederation inspired some of the key decisions made by the Framers in Philadelphia and by the First Congress in drafting the Bill of Rights. The Federalist No. 37, at 224 (J. Madison).

The pre-ratification history of America's many objections to British laws and the system of oppressive British rule over the Colonies — identified most prominently in the Declaration of Independence — can likewise inform interpretation of some of the crucial provisions of the original Constitution and Bill of Rights. Compare Declaration of Independence ¶11 (under British rule, the King "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries") with U. S. Const., Art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

This Court has recognized, for example, that no "purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges v. California*, 314 U.S. 252, 265 (1941). Ratified as it was "while the memory of many oppressive English restrictions on the enumerated liberties was still fresh," the Bill of Rights "cannot reasonably be taken as approving prevalent English practices." *Id.*

The Equal Protection Clause provides another example. Ratified in 1868, that Clause sought to reject the Nation's history of racial discrimination, not to backdoor incorporate racially discriminatory and oppressive historical practices and laws into the Constitution.

In short, pre-ratification American history — that is, pre-ratification laws, practices, and understandings — can inform interpretation of vague constitutional provisions in the original Constitution and Bill of Rights. The same principle of looking to relevant pre-ratification history applies when interpreting broadly worded language in the later amendments, including the Fourteenth Amendment ratified in 1868. But in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind.

B

Post-ratification history. As the Framers made clear, and as this Court has stated time and again for more than two centuries, post-ratification history — sometimes referred to as tradition — can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights. When the text is vague and the pre-ratification history is

elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences.

After ratification, the National Government and the state governments began interpreting and applying the Constitution's text. They have continued to do so ever since. As the national and state governments over time have enacted laws and implemented practices to promote the general welfare, those laws and practices have often reflected and reinforced common understandings of the Constitution's authorizations and limitations.

Post-ratification interpretations and applications by government actors — at least when reasonably consistent and longstanding — can be probative of the meaning of vague constitutional text. The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later.

Importantly, the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text. They understood that some constitutional text may be "more or less obscure and equivocal" such that questions "daily occur in the course of practice." The Federalist No. 37, at 228-29. Madison explained that the meaning of vague text would be "liquidated and ascertained by a series of particular discussions and adjudications." *Id.* at 229. In other words, Madison articulated the Framers' expectation and intent that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text.

From early on, this Court followed Madison's lead. In 1819, in one of its most important decisions ever, the Court addressed the scope of Article I's Necessary and Proper Clause. *McCulloch v. Maryland*, 4 Wheat. 316 (1819). Writing for the Court, Chief Justice Marshall invoked post-ratification history to conclude that Congress's authority to establish a national bank could "scarcely be considered as an open question." *Id.* at 401. The constitutionality of the national bank had "been recognised by many successive legislatures," and an "exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded." *Id.* Marshall added: The "respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *Id.* . . .

For more than two centuries — from the early 1800s to this case — this Court has done just that. The Court has repeatedly employed post-ratification history to determine the meaning of vague constitutional text. Reliance on

post-ratification history "has shaped scores of Court cases spanning all domains of constitutional law, every era of the nation's history, and Justices of every stripe." S. Girgis, Living Traditionalism, 98 N. Y. U. L. Rev. 1477, 1480 (2023).

C

Precedent. With a Constitution and a Supreme Court that are both more than two centuries old, this Court and other courts are rarely interpreting a constitutional provision for the first time. Rather, a substantial body of Supreme Court precedent already exists for many provisions of the Constitution.

Precedent is fundamental to day-to-day constitutional decisionmaking in this Court and every American court. The "judicial Power" established in Article III incorporates the principle of *stare decisis*, both vertical and horizontal. As Hamilton stated, to "avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents" that will "unavoidably swell to a very considerable bulk" and "serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, at 471 (A. Hamilton).

Courts must respect precedent, while at the same time recognizing that precedent on occasion may appropriately be overturned. . .

Even then, however, text and history still matter a great deal. When determining how broadly or narrowly to read a precedent; when determining whether to extend, limit, or narrow a precedent; or in relatively infrequent cases, when determining whether to overrule a precedent, a court often will consider how the precedent squares with the Constitution's text and history. Therefore, the text, as well as pre-ratification and post-ratification history, may appropriately function as a gravitational pull on the Court's interpretation of precedent.

But the first stop in this Court's constitutional decisionmaking is the Court's precedents — the accumulated wisdom of jurists. . .

III

Some say that courts should determine exceptions to broadly worded individual rights, including the Second Amendment, by looking to policy. Uphold a law if it is a good idea; strike it down if it is not. True, the proponents of a policy-based approach to interpretation of broadly worded or vague constitutional text usually do not say so explicitly (although some do). Rather, they support a balancing approach variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny. Whatever the label of the day, that balancing approach is policy by another name. It

requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge's view, the law is sufficiently reasonable or important. . .

The balancing tests (heightened scrutiny and the like) are a relatively modern judicial innovation in constitutional decisionmaking. The "tiers of scrutiny have no basis in the text or original meaning of the Constitution." J. Alicea & J. Ohlendorf, Against the Tiers of Constitutional Scrutiny, National Affairs 72, 73 (2019). And before the late 1950s, "what we would now call strict judicial scrutiny did not exist." R. Fallon, The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny 30 (2019).

The Court "appears to have adopted" heightened-scrutiny tests "by accident" in the 1950s and 1960s in a series of Communist speech cases, "rather than as the result of a considered judgment." *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in judgment). The Court has employed balancing only in discrete areas of constitutional law — and even in those cases, history still tends to play a far larger role than overt judicial policymaking. . .

One major problem with using a balancing approach to determine exceptions to constitutional rights is that it requires highly subjective judicial evaluations of how important a law is — at least unless the balancing test itself incorporates history, in which case judges might as well just continue to rely on history directly.

The subjective balancing approach forces judges to act more like legislators who decide what the law should be, rather than judges who "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). That is because the balancing approach requires judges to weigh the benefits of a law against its burdens — a value-laden and political task that is usually reserved for the political branches. And that power in essence vests judges with "a roving commission to second-guess" legislators and administrative officers "concerning what is best for the country." W. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 698 (1976). Stated otherwise, when a court "does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation." A. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1185 (1989).

Moreover, the balancing approach is ill-defined. Some judges will apply heightened scrutiny with a presumption in favor of deference to the legislature. Other judges will apply heightened scrutiny with a presumption in favor of the individual right in question. Because it is unmoored, the balancing approach presents the real "danger" that "judges will mistake their own predilections for the law." A. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863 (1989). Under the balancing approach, to use Justice Scalia's characteristically

vivid description, if "We The Court conclude that They The People's answers to a problem" are unwise, "we are free to intervene," but if we "think the States may be on to something, we can loosen the leash." *McDonald v. Chicago*, 561 U.S. 742, 803 (2010) (concurring opinion) (quotation marks omitted).

The balancing approach can be antithetical to the principle that judges must act like umpires. It turns judges into players. Justice Black once protested that the Court should not balance away bedrock free speech protections for the perceived policy needs of the moment. He argued that "the balancing approach" "disregards all of the unique features of our Constitution" by giving "the Court, along with Congress, a greater power, that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest." H. Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865, 878-79 (1960). Like Justice Black, the Court in *Heller* cautioned that a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." 554 U.S. 570, 634.

Some respond that history can be difficult to decipher. It is true that using history to interpret vague text can require "nuanced judgments," *McDonald*, 561 U.S. at 803-04 (Scalia, J., concurring), and is "sometimes inconclusive," Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. at 864. But at a minimum, history tends to narrow the range of possible meanings that may be ascribed to vague constitutional language. A history-based methodology supplies direction and imposes a neutral and democratically infused constraint on judicial decisionmaking.

The historical approach is not perfect. But "the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world." *McDonald*, 561 U.S. at 804 (Scalia, J., concurring) (emphasis in original). And the historical approach is superior to judicial policymaking. The historical approach "depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *Id.* Moreover, the historical approach "intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people." *Id.* at 805.

IV

This Court's Second Amendment jurisprudence has carefully followed and reinforced the Court's longstanding approach to constitutional interpretation — relying on text, pre-ratification and post-ratification history, and precedent.

In *Heller*, the Court began with the baseline point that the Second Amendment textually guarantees an individual right. The Court then explained that the Second Amendment right is, of course, "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" and is subject to "important" limitations. 554 U.S. 570, 626-27.

Although *Heller* declined to "undertake an exhaustive historical analysis," it recognized a few categories of traditional exceptions to the right. *Id.*, at 626, 128 S. Ct. 2783. For example, *Heller* indicated that: (i) "prohibitions on carrying concealed weapons were lawful"; (ii) the Second Amendment attaches only to weapons "in common use" because "that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons"; and (iii) "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are presumptively constitutional. *Id.* at 626-27 (quotation marks omitted).

In *McDonald*, the Court held that the Second Amendment was incorporated against the States. In so holding, the Court reiterated the presumed constitutionality of the "longstanding regulatory measures" identified in *Heller*. 561 U.S. at 742, 786 (plurality opinion).

Then, in *Bruen*, the Court repeated that the "Nation's historical tradition of firearm regulation" guides the constitutional analysis of gun regulations and exceptions to the right to bear arms. 597 U.S. 1, 17.

This Court's approach in those three recent Second Amendment cases — and in the Court's opinion today — is entirely consistent with the Court's longstanding reliance on history and precedent to determine the meaning of vague constitutional text. *Heller* rested on "constitutional text and history," and laid the foundation for *McDonald* and then *Bruen*.

In today's case, the Court carefully builds on *Heller*, *McDonald*, and *Bruen*. The Court applies the historical test that those precedents have set forth — namely, "whether the new law is relevantly similar to laws that our tradition is understood to permit." The Court examines "our historical tradition of firearm regulation," and correctly holds that America's "tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." The law before us "fits neatly within the tradition the surety and going armed laws represent."

As the Court's decision today notes, Second Amendment jurisprudence is still in the relatively early innings, unlike the First, Fourth, and Sixth Amendments, for example. That is because the Court did not have occasion to recognize the Second Amendment's individual right until recently. Deciding constitutional cases in a still-developing area of this Court's jurisprudence can sometimes be difficult. But that is not a permission slip for a judge to let

constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs. . .

Justice BARRETT, concurring.

Despite its unqualified text, the Second Amendment is not absolute. It codified a pre-existing right, and pre-existing limits on that right are part and parcel of it. Those limits define the scope of "the right to bear arms" as it was originally understood; to identify them, courts must examine our "historical tradition of firearm regulation." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 17, 19 (2022). That evidence marks where the right stops and the State's authority to regulate begins. A regulation is constitutional only if the government affirmatively proves that it is "consistent with the Second Amendment's text and historical understanding." *Id.* at 26.

Because the Court has taken an originalist approach to the Second Amendment, it is worth pausing to identify the basic premises of originalism. The theory is built on two core principles: that the meaning of constitutional text is fixed at the time of its ratification and that the "discoverable historical meaning . . . has legal significance and is authoritative in most circumstances." K. Whittington, Originalism: A Critical Introduction, 82 Fordham L. Rev. 375, 378 (2013). Ratification is a democratic act that renders constitutional text part of our fundamental law, see Arts. V, VII, and that text "remains law until lawfully altered," S. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 782 (2022). So for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function. To be sure, postenactment history can be an important tool. For example, it can "reinforce our understanding of the Constitution's original meaning"; "liquidate ambiguous constitutional provisions"; provide persuasive evidence of the original meaning; and, if *stare decisis* applies, control the outcome. See *Vidal* v. *Elster*, 2024 WL 2964139 (U.S. 2024) (BARRETT, J., concurring in part). But generally speaking, the use of postenactment history requires some justification other than originalism simpliciter.

In *Bruen*, the Court took history beyond the founding era, considering gun regulations that spanned the 19th century. I expressed reservations about the scope of that inquiry but concluded that the timing question did not matter to *Bruen*'s holding. It bears emphasis, however, that my questions were about the time period relevant to discerning the Second Amendment's original meaning — for instance, what is the post-1791 cutoff for discerning how the Second Amendment was originally understood? My doubts were *not* about whether

"tradition," standing alone, is dispositive. As I have explained elsewhere, evidence of "tradition" unmoored from original meaning is not binding law. And scattered cases or regulations pulled from history may have little bearing on the meaning of the text.

"Original history" — *i.e.,* the generally dispositive kind — plays two roles in the Second Amendment context. It elucidates how contemporaries understood the text — for example, the meaning of the phrase "bear Arms." It also plays the more complicated role of determining the scope of the pre-existing right that the people enshrined in our fundamental law.* In Rahimi's case, the Court uses history in this latter way. Call this "original contours" history: It looks at historical gun regulations to identify the contours of the right.

Courts have struggled with this use of history in the wake of *Bruen*. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation — if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?

Many courts, including the Fifth Circuit, have understood *Bruen* to require the former, narrower approach. But *Bruen* emphasized that "analogical reasoning" is not a "regulatory straightjacket." 597 U.S. at 30. To be *consistent* with historical limits, a challenged regulation need not be an updated model of a historical counterpart. Besides, imposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us "a law trapped in amber." And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a "use it or lose it" view of legislative authority. Such assumptions are flawed, and originalism does not require them.

"Analogical reasoning" under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold. To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. Pulling principle from precedent, whether case law or history, is a

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* To my mind, this use of history walks a fine line between original meaning (which controls) and expectations about how the text would apply (which do not). *See* Whittington 383 ("Specific expectations about the consequences of a legal rule are distinct from the meaning of the rule itself "). Contemporary government actors might have been "wrong about the consequences of their own constitutional rule," or they "might not have fully and faithfully implemented the adopted constitutional rule themselves." *Id.* at 384. Thus, while early applications of a constitutional rule can help illuminate its original scope, an interpreter must exercise care in considering them. *Id.* at 385-86. In the Second Amendment context, particular gun regulations — even if from the ratification era — do not themselves have the status of constitutional law.

standard feature of legal reasoning, and reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.

Here, though, the Court settles on just the right level of generality: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Section 922(g)(8)(C)(i) fits well within that principle; therefore, Rahimi's facial challenge fails. Harder level-of-generality problems can await another day.

Justice JACKSON, concurring.

This case tests our Second Amendment jurisprudence as shaped in particular by *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022). I disagree with the methodology of that decision; I would have joined the dissent had I been a Member of the Court at that time. But *Bruen* is now binding law. Today's decision fairly applies that precedent, so I join the opinion in full.

I write separately because we now have two years' worth of post-*Bruen* cases under our belts, and the experiences of courts applying its history-and-tradition test should bear on our assessment of the workability of that legal standard. This case highlights the apparent difficulty faced by judges on the ground. Make no mistake: Today's effort to clear up "misunderst[andings]," is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them.

I. . .

When this Court adopts a new legal standard, as we did in *Bruen*, we do not do so in a vacuum. The tests we establish bind lower court judges, who then apply those legal standards to the cases before them. In my view, as this Court thinks of, and speaks about, history's relevance to the interpretation of constitutional provisions, we should be mindful that our common-law tradition of promoting clarity and consistency in the application of our precedent *also* has a lengthy pedigree. So when courts signal they are having trouble with one of our standards, we should pay attention.

The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness. It isn't just that *Bruen*'s history-and-tradition test is burdensome (though that is no small thing to courts with heavier caseloads and fewer resources than we have). The more worrisome concern is that lower courts appear to be diverging in both approach and outcome as they struggle to conduct the inquiry *Bruen* requires of them. Scholars report that lower courts applying *Bruen*'s approach have been unable to produce "consistent, principled results," and, in fact, they

"have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them." Given this, it appears indisputable that, after *Bruen*, "confusion plagu[es] the lower courts."

II

. . . By the time this Court decided *Bruen*, every court of appeals evaluating whether a firearm regulation was consistent with the Second Amendment did so using a two-step framework that incorporated means-end scrutiny.

Rejecting that "two-step approach" as having "one step too many," *Bruen*, 597 U.S. at 19 the *Bruen* majority subbed in another two-step evaluation. Courts must, first, determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 24. If it does, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

No one seems to question that "[h]istory has a role to play in Second Amendment analysis." But, per *Bruen*, courts evaluating a Second Amendment challenge must consider history *to the exclusion of all else*. This means legislators must locate and produce — and courts must sift through — troves of centuries-old documentation looking for supportive historical evidence.[2]

This very case provides a prime example of the pitfalls of *Bruen*'s approach. Having been told that a key marker of a constitutional gun regulation is "a well-established and representative historical analogue," *Bruen*, 597 U.S. at 30 (emphasis deleted), Rahimi argued below that "there is little or no historical evidence suggesting disarmament for those who committed domestic violence; and there is certainly no tradition of disarming people subject to a no-contact order related to domestic violence." The Government then proffered what it maintained were sufficient historical analogues to 18 U.S.C. § 922(g)(8), including surety and going armed laws. But the Fifth Circuit concluded that the federal statute was unconstitutional because the Government's analogues were not "'relevantly similar.'" 61 F.4th 443, 460-61 (2023).

Neither the parties nor the Fifth Circuit had the benefit of today's decision, in which we hold that the Government had in fact offered "ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." But even setting aside whether

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[2] It is not clear what qualifies policymakers or their lawyers (who do not ordinarily have the specialized education, knowledge, or training of professional historians) to engage in this kind of assessment. And dutiful legislators are not the only stakeholders who are far outside their depth: *Bruen* also conscripts parties and judges into service as amateur historians, casting about for similar historical circumstances.

the historical examples the Government found were sufficiently analogous, just canvassing the universe of historical records and gauging the sufficiency of such evidence is an exceedingly difficult task.[3] Consistent analyses and outcomes are likely to remain elusive because whether *Bruen*'s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources — neither of which we have as yet adequately clarified.

And the unresolved questions hardly end there. Who is protected by the Second Amendment, from a historical perspective? To what conduct does the Second Amendment's plain text apply? To what historical era (or eras) should courts look to divine a historical tradition of gun regulation? How many analogues add up to a tradition? Must there be evidence that those analogues were enforced or subject to judicial scrutiny? How much support can nonstatutory sources lend? . . .

III

Maybe time will resolve these and other key questions. Maybe appellate courts, including ours, will find a way to "[b]rin[g] discipline to the increasingly erratic and unprincipled body of law that is emerging after *Bruen*." J. Blocher & E. Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L. J. 99, 174 (2023). Indeed, "[m]any constitutional standards involve undoubted gray areas," and "it normally might be fair to venture the assumption that case-by-case development [will] lead to a workable standard." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 540 (1985) (internal quotation marks and alteration omitted). By underscoring that gun regulations need only "comport with the *principles* underlying the Second Amendment," today's opinion inches that ball forward.

But it is becoming increasingly obvious that there are miles to go. Meanwhile, the Rule of Law suffers. That ideal — key to our democracy — thrives on legal standards that foster stability, facilitate consistency, and promote predictability. So far, *Bruen*'s history-focused test ticks none of those boxes. . .

Justice THOMAS, dissenting.

After *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022), this Court's directive was clear: A firearm regulation that falls within the Second Amendment's plain text is unconstitutional unless it is consistent with the Nation's historical tradition of firearm regulation. Not a single historical

regulation justifies the statute at issue, 18 U.S.C. § 922(g)(8). Therefore, I respectfully dissent.

I. . .

Just as important as § 922(g)(8)'s express terms is what it leaves unsaid. Section 922(g)(8) does not require a finding that a person has ever committed a crime of domestic violence. It is not triggered by a criminal conviction or a person's criminal history, unlike other § 922(g) subsections. And, § 922(g)(8) does not distinguish contested orders from joint orders — for example, when parties voluntarily enter a no-contact agreement or when both parties seek a restraining order.

In addition, § 922(g)(8) strips an individual of his ability to possess firearms and ammunition without any due process. Rather, the ban is an automatic, uncontestable consequence of certain orders. There is no hearing or opportunity to be heard on the statute's applicability, and a court need not decide whether a person should be disarmed under § 922(g)(8). The only process § 922(g)(8) requires is that provided (or not) for the *underlying* restraining order.

Despite § 922(g)(8)'s broad scope and lack of process, it carries strong penalties. Any violation of § 922(g)(8) is a felony punishable by up to 15 years' imprisonment. And, a conviction for violating § 922(g)(8) itself triggers a permanent, life-long prohibition on possessing firearms and ammunition. . .

II

. . . As the Court recognizes, *Bruen* provides the framework for analyzing whether a regulation such as § 922(g)(8) violates the Second Amendment's mandate. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 597 U.S. at 17. To overcome this presumption, "the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation." *Id.* The presumption against restrictions on keeping and bearing firearms is a central feature of the Second Amendment. That Amendment does not merely narrow the Government's regulatory power. It is a barrier, placing the right to keep and bear arms off limits to the Government.

When considering whether a modern regulation is consistent with historical regulations and thus overcomes the presumption against firearms restrictions, our precedents "point toward at least two metrics [of comparison]: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. A historical law must satisfy both considerations to serve as a comparator. While a historical law need not be a "historical twin," it must be "well-established and representative" to serve as a historical analogue. *Id.* at 30 (emphasis deleted).

In some cases, "the inquiry [is] fairly straightforward." *Id.* at 26. For instance, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26-27.

The Court employed this "straightforward" analysis in *Heller* and *Bruen*. *Heller* considered the District of Columbia's "flat ban on the possession of handguns in the home," *Bruen*, 597 U.S. at 27, and *Bruen* considered New York's effective ban on carrying a firearm in public. The Court determined that the District of Columbia and New York had "addressed a perceived societal problem — firearm violence in densely populated communities — and [they] employed a regulation . . . that the Founders themselves could have adopted to confront that problem." *Id.* at 27. Accordingly, the Court "consider[ed] 'founding-era historical precedent'" and looked for a comparable regulation. *Id.* (quoting *Heller*, 554 U.S. at 631). In both cases, the Court found no such law and held the modern regulations unconstitutional.

Under our precedent, then, we must resolve two questions to determine if § 922(g)(8) violates the Second Amendment: (1) Does § 922(g)(8) target conduct protected by the Second Amendment's plain text; and (2) does the Government establish that § 922(g)(8) is consistent with the Nation's historical tradition of firearm regulation?

III

Section 922(g)(8) violates the Second Amendment. First, it targets conduct at the core of the Second Amendment — possessing firearms. Second, the Government failed to produce any evidence that § 922(g)(8) is consistent with the Nation's historical tradition of firearm regulation. To the contrary, the founding generation addressed the same societal problem as § 922(g)(8) through the "materially different means" of surety laws. *Id.* at 26.

A

It is undisputed that § 922(g)(8) targets conduct encompassed by the Second Amendment's plain text. After all, the statute bans a person subject to a restraining order from possessing or using virtually any firearm or ammunition. A covered individual cannot even possess a firearm in his home for self-defense, "the central component of the [Second Amendment] right itself." *Heller*, 554 U.S. at 599 (emphasis deleted). There is no doubt that § 922(g)(8) is irreconcilable with the Second Amendment's text. *Id.* at 628-29.

It is also undisputed that the Second Amendment applies to Rahimi. By its terms, the Second Amendment extends to " 'the people,'" and that "term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. The Second Amendment thus recognizes a right "guaranteed to 'all Americans.'" *Bruen*, 597 U.S. at 70 (quoting *Heller*, 554 U.S. at 581). Since Rahimi is a member of the political community, he falls within the Second Amendment's guarantee.

B

The Government fails to carry its burden of proving that § 922(g)(8) is "consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. Despite canvassing laws before, during, and after our Nation's founding, the Government does not identify even a single regulation with an analogous burden and justification.

The Government's failure is unsurprising given that § 922(g)(8) addresses a societal problem — the risk of interpersonal violence — "that has persisted since the 18th century," yet was addressed "through [the] materially different means" of surety laws. *Id.* at 26. Surety laws were, in a nutshell, a fine on certain behavior. If a person threatened someone in his community, he was given the choice to either keep the peace or forfeit a sum of money. Surety laws thus shared the same justification as § 922(g)(8), but they imposed a far less onerous burden. The Government has not shown that § 922(g)(8)'s more severe approach is consistent with our historical tradition of firearm regulation.

1

The Government does not offer a single historical regulation that is relevantly similar to § 922(g)(8). As the Court has explained, the "central considerations" when comparing modern and historical regulations are whether the regulations "impose a comparable burden" that is "comparably justified." *Id.* at 29. The Government offers only two categories of evidence that are even within the ballpark of § 922(g)(8)'s burden and justification: English laws disarming persons "dangerous" to the peace of the kingdom, and commentary discussing peaceable citizens bearing arms. Neither category ultimately does the job.

i

The Government points to various English laws from the late 1600s and early 1700s to argue that there is a tradition of restricting the rights of "dangerous" persons. For example, the Militia Act of 1662 authorized local officials to disarm individuals judged "dangerous to the Peace of the Kingdome." 14 Car. 2 c. 3, § 13. And, in the early 1700s, the Crown authorized lords and justices of the peace to "cause search to be made for arms in the

possession of any persons whom they judge dangerous, and seize such arms according to law." Calendar of State Papers Domestic: William III, 1700–1702, p. 234 (E. Bateson ed. 1937).

At first glance, these laws targeting "dangerous" persons might appear relevant. After all, if the Second Amendment right was historically understood to allow an official to disarm anyone he deemed "dangerous," it may follow that modern Congresses can do the same. Yet, historical context compels the opposite conclusion. The Second Amendment stems from English resistance *against* "dangerous" person laws.

The sweeping disarmament authority wielded by English officials during the 1600s, including the Militia Act of 1662, prompted the English to enshrine an individual right to keep and bear arms. "[T]he Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents." *Heller*, 554 U.S. at 592. Englishmen, as a result, grew "to be extremely wary of concentrated military forces run by the state and to be jealous of their arms." *Id.* at 593. Following the Glorious Revolution, they "obtained an assurance . . . in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants would never be disarmed." *Id.*

The English Bill of Rights "has long been understood to be the predecessor to our Second Amendment." *Id.* In fact, our Founders expanded on it and made the Second Amendment even more protective of individual liberty. The English Bill of Rights assured Protestants "Arms for their Defence," but only where "suitable to their Conditions and as allowed by Law." 1 Wm. & Mary, ch. 2, (1688), in 6 Statutes of the Realm 143. The Second Amendment, however, contains no such qualifiers and protects the right of "the people" generally. In short, laws targeting "dangerous" persons led to the Second Amendment. It would be passing strange to permit the Government to resurrect those selfsame "dangerous" person laws to chip away at that Amendment's guarantee.

Even on their own terms, laws targeting "dangerous" persons cannot support § 922(g)(8). Those laws were driven by a justification distinct from that of § 922(g)(8) — quashing treason and rebellion. The Stuart Kings' reign was marked by religious and political conflict, which at that time were often one and the same. The Parliament of the late 1600s "re-established an intolerant episcopalian church" through legislation targeting other sects, including "[a] fierce penal code" to keep those other sects out of local government and "to criminalize nonconformist worship." Oxford Handbook of the English Revolution 212 (M. Braddick ed. 2015. These laws were driven in large part by a desire to suppress rebellion. "Nonconformist ministers were thought to preach resistance to divinely ordained monarchs." Oxford Handbook 212; see Calendar of State Papers Domestic: Charles II, 1661–1662, p. 161 (M. Green

ed. 1861) ("[P]reachers go about from county to county, and blow the flames of rebellion"). Various nonconformist insurrections gave credibility to these fears.

It is in this turbulent context that the English kings permitted the disarming of "dangerous persons." English lords feared that nonconformists — *i.e.*, people with "'wicked and Rebellious Principles'" — had "'furnished themselves with quantities of Arms, and Ammunition'" "'to put in Execution their Trayterus designs.'" Privy Council to Lord Newport (Jan. 8, 1660), in *id.* at 156; see Calendar Charles II 541 ("The fanatics . . . are high and insolent, and threaten all loyal people; they will soon be in arms"). In response, the Crown took measures to root out suspected rebels, which included "disarm[ing] all factious and seditious spirits." *Id.* at 538 (Nov. 1, 1662). For example, following "turbulency and difficulties" arising from the Conventicles Act of 1670, which forbade religious nonconformists from assembling, the lord mayor of London pressed that "a special warrant or commission [was] necessary" empowering commissioners to "resist, fight, kill, and execute such rebels." Calendar of State Papers, Domestic Series, 1670, p. 236 (May 25, 1670) (M. Green ed. 1895) (emphasis deleted). King Charles II ordered the lord mayor "to make strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody till our further pleasure." *Id.* at 237 (May 26, 1670).

History repeated itself a few decades later. In 1701, King William III declared that "great quantities of arms, and other provisions of war" had been discovered in the hands of "papists and other disaffected persons, who disown [the] government," and that such persons had begun to assemble "in great numbers . . . in the cities of London and Westminster." Calendar William III 233. He ordered the lord mayor of London and the justices of the peace to "secur[e] the government" by disarming "any persons whom they judge[d] dangerous," including "any papist, or reputed papist." *Id.* at 233–234 (emphasis deleted). Similar disarmaments targeting "Papists and Non-jurors dangerous to the peace of the kingdom" continued into the 1700s. Privy Council to the Earl of Carlisle (July 30, 1714), in Historical Manuscripts Comm'n, Manuscripts of the Earl of Westmoreland et al. 10th Report, Appx., Pt. 4, p. 343 (1885). As before, disarmament was designed to stifle "wicked conspirac[ies]," such as "raising a Rebellion in this Kingdom in favour of a Popish Pretender." Lord Lonsdale to Deputy Lieutenants of Cumberland (May 20, 1722), in Historical Manuscripts Commission, Manuscripts of the Earl of Carlisle, 15th Report, Appx., Pt. 6, pp. 39–40 (1897).

While the English were concerned about preventing insurrection and armed rebellion, § 922(g)(8) is concerned with preventing interpersonal violence. "Dangerous" person laws thus offer the Government no support.

The Government also points to historical commentary referring to the right of "peaceable" citizens to carry arms. It principally relies on commentary surrounding two failed constitutional proposals. First, at the Massachusetts convention, Samuel Adams unsuccessfully proposed that the Bill of Rights deny Congress the power "to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000). Second, Anti-Federalists at the Pennsylvania convention unsuccessfully proposed a Bill of Rights providing a "right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game." 2 *id.* at 597-98, ¶7 (M. Jensen ed. 1976). The Anti-Federalists' Bill of Rights would also state that "no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." *Id.* at 598.

These proposals carry little interpretative weight. To begin with, it is "dubious to rely on [drafting] history to interpret a text that was widely understood to codify a pre-existing right." *Heller*, 554 U.S. at 603. Moreover, the States rejected the proposals. Samuel Adams withdrew his own proposal after it "alarmed both Federalists and Antifederalists." 6 Documentary History 1453 (internal quotation marks omitted). The Pennsylvania Anti-Federalists' proposal similarly failed to gain a majority of the state convention.

The Government never explains why or how language *excluded* from the Constitution could operate to limit the language actually ratified. The more natural inference seems to be the opposite — the unsuccessful proposals suggest that the Second Amendment preserves a more expansive right. After all, the Founders considered, and rejected, any textual limitations in favor of an unqualified directive: "[T]he right of the people to keep and bear Arms, shall not be infringed."

In addition to the proposals, the Government throws in a hodgepodge of sources from the mid-to-late 1800s that use the phrase "peaceable" in relation to firearms. Many of the sources simply make passing reference to the notion. Other sources are individual musings on firearms policy. Sources that do discuss disarmament generally describe nonpeaceable citizens as those who threaten the public or government. For example, the Government quotes a Union General's order that "all loyal and peaceable citizens in Missouri will be permitted to bear arms." Headquarters, Dept. of the Missouri, General Orders, No. 86 (Aug. 25, 1863), in The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Ser. 1, Vol. 22, Pt. 2, p. 475 (1888). Yet, the Government fails to mention that the Union General's order addresses the "[l]arge numbers of men . . . leaving the broken rebel armies . . . and returning to Missouri . . . with the purpose of following a career of plunder and murder." *Id.* at 474. The order provided that "all those who

voluntarily abandon[ed] the rebel cause" could return to Missouri, but only if they "surrender[ed] themselves and their arms," "[took] the oath of allegiance and [gave] bond for their future good conduct." *Id.* By contrast, "all loyal and peaceable citizens in Missouri w[ere] permitted to bear arms" to "protect themselves from violence" and "aid the troops." *Id.* at 475. Thus, the term "loyal and peaceable" distinguished between the former rebels residing in Missouri who were disarmed to prevent rebellion and those citizens who would help fight against them.

The Government's smorgasbord of commentary proves little of relevance, and it certainly does not establish a "historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19.

iii

The Government's remaining evidence is even further afield. The Government points to an assortment of firearm regulations, covering everything from storage practices to treason and mental illness. They are all irrelevant for purposes of § 922(g)(8). Again, the "central considerations" when comparing modern and historical regulations are whether they "impose a comparable burden" that is "comparably justified." *Id.* at 29 (emphasis deleted; internal quotation marks omitted). The Government's evidence touches on one or *none* of these considerations.

The Government's reliance on firearm storage laws is a helpful example. These laws penalized the improper storage of firearms with forfeiture of those weapons. See, *e.g.,* Act of Mar. 1, 1783, ch. 46, 1782 Mass. Acts pp. 119–120. First, these storage laws did not impose a "comparable burden" to that of § 922(g)(8). Forfeiture still allows a person to keep their other firearms or obtain additional ones. It is in no way equivalent to § 922(g)(8)'s complete prohibition on owning or possessing any firearms.

In fact, the Court already reached a similar conclusion in *Heller*. The Court was tasked with comparing laws imposing "a small fine and forfeiture of the weapon" with the District of Columbia's ban on keeping functional handguns at home for self-defense, which was punishable by a year in prison. 554 U.S. at 633-34. We explained that the forfeiture laws were "akin to modern penalties for minor public-safety infractions like speeding or jaywalking." *Id.* at 633. Such inconsequential punishment would not have "prevented a person in the founding era from using a gun to protect himself or his family." *Id.* at 634. Accordingly, we concluded that the burdens were not equivalent. That analysis applies here in full force. If a small fine and forfeiture is not equivalent to the District of Columbia's handgun ban, it certainly falls short of § 922(g)(8)'s ban on possessing any firearm.

The Government resists the conclusion that forfeiture is less burdensome than a possession ban, arguing that "[t]he burdens imposed by bans on

keeping, bearing, and obtaining arms are all comparable." But, there is surely a distinction between having *no* Second Amendment rights and having *some* Second Amendment rights. If self-defense is "the central component of the [Second Amendment] right," then common sense dictates that it matters whether you can defend yourself with a firearm anywhere, only at home, or nowhere. *Heller*, 554 U.S. at 599 (emphasis deleted). And, the Government's suggestion ignores that we have repeatedly drawn careful distinctions between various laws' burdens. *See, e.g.*, *id.* at 632 (explaining that laws that "did not clearly prohibit loaded weapons . . . do not remotely burden the right of self-defense as much as an absolute ban on handguns"); *see also Bruen*, 597 U.S. at 48.

Our careful parsing of regulatory burdens makes sense given that the Second Amendment codifies a right with a "historically fixed meaning." *Id.* at 28. Accordingly, history is our reference point and anchor. If we stray too far from it by eliding material differences between historical and modern laws, we "risk endorsing outliers that our ancestors would never have accepted." *Id.* at 30 (internal quotation marks and alteration omitted).

Second, the Government offers no "comparable justification" between laws punishing firearm storage practices and § 922(g)(8). It posits that both laws punish persons whose "conduct suggested that he would not use [firearms] responsibly." The Government, however, does not even attempt to ground that justification in historical evidence.

The Government's proposed justification is also far too general. Nearly all firearm regulations can be cast as preventing "irresponsible" or "unfit" persons from accessing firearms. In addition, to argue that a law limiting access to firearms is justified by the fact that the regulated groups should not have access to firearms is a logical merry-go-round. As the Court has made clear, such overly broad judgments cannot suffice. In *Bruen*, New York claimed it could effectively ban public carry because "the island of Manhattan [is] a 'sensitive place.'" 597 U.S. at 31. New York defined a "sensitive place" as "all places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at 30-31 (internal quotation marks omitted). The Court rejected that definition as "far too broa[d]" as it "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." *Id.* at 31. Likewise, calling a modern and historical law comparably justified

because they both prevent unfit persons from accessing firearms would render our comparable-justification inquiry toothless.[5]

In sum, the Government has not identified any historical regulation that is relevantly similar to § 922(g)(8).

2

This dearth of evidence is unsurprising because the Founders responded to the societal problem of interpersonal violence through a less burdensome regime: surety laws. Tracing back to early English history, surety laws were a preventative mechanism for ensuring an individual's future peaceable conduct. If someone received a surety demand, he was required to go to a court or judicial officer with one or more members of the community — *i.e.*, sureties — and comply with certain conditions. Specifically, the person providing sureties was required to "keep the peace: either generally . . . or . . . with regard to the person who crave[d] the security" until a set date. 4 W. Blackstone, Commentaries on the Laws of England 250 (1769). If he kept the peace, the surety obligation dissolved on that predetermined date. If, however, he breached the peace before that date, he and his sureties would owe a set sum of money. Evidence suggests that sureties were readily available. Even children, who "[we]re incapable of engaging themselves to answer any debt," could still find "security by their friends." *Id.* at 251.

There is little question that surety laws applied to the threat of future interpersonal violence. "[W]herever any private man [had] just cause to fear, that another w[ould] burn his house, or do him a corporal injury, by killing, imprisoning, or beating him . . . he [could] demand surety of the peace against such person." *Id.* at 252.

Surety demands were also expressly available to prevent domestic violence. Surety could be sought by "a wife against her husband who threatens to kill her or beat her outrageously, or, if she have notorious cause to fear he will do either." J. Backus, The Justice of the Peace 24 (1816); see 1 W. Hawkins, Pleas of the Crown 253 (6th ed. 1777) ("[I]t is certain, that a wife may demand [a surety] against her husband threatening to beat her outrageously, and that a husband also may have it against his wife"). The right to demand sureties in cases of potential domestic violence was recognized not only by treatises, but

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[5] The Government's other analogies suffer from the same flaws as the firearm storage laws. It cites laws restricting firearm sales to and public carry by various groups such as minors and intoxicated persons; laws confiscating firearms from rioters; and laws disarming insurrectionists and rebels. These laws target different groups of citizens, for different reasons, and through different, less onerous burdens than §922(g)(8). None establishes that the particular regulation at issue here would have been within the bounds of the pre-existing Second Amendment right.

also the founding-era courts. Records from before and after the Second Amendment's ratification reflect that spouses successfully demanded sureties when they feared future domestic violence.

3

Although surety laws shared a common justification with § 922(g)(8), surety laws imposed a materially different burden. Critically, a surety demand did not alter an individual's right to keep and bear arms. After providing sureties, a person kept possession of all his firearms; could purchase additional firearms; and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money. To disarm him, the Government would have to take some other action, such as imprisoning him for a crime.

By contrast, § 922(g)(8) strips an individual of his Second Amendment right. The statute's breadth cannot be overstated. For one, § 922(g) criminalizes nearly all conduct related to covered firearms and ammunition. Most fundamentally, possession is prohibited. . . See, *e.g., United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (*per curiam*) (concluding that it was "irrelevant" whether defendant "possessed the handgun for purposes of self-defense (in his home)"); *United States v. Gant*, 691 F.2d 1159, 1162 (5th Cir. 1982) (affirming conviction of a business owner under § 922(g) predecessor statute for briefly possessing a firearm to ward off suspected robbers). Courts of Appeals have understood "possession" broadly, upholding convictions where a person "picked up . . . three firearms for a few seconds to inspect" each, *United States v. Matthews*, 520 F.3d 806, 807 (7th Cir. 2008), or "made direct contact with the firearm by sitting on it," *United States v. Johnson*, 46 F.4th 1183, 1189 (10th Cir. 2022). They have also construed § 922(g) to bar "constructive possession" of a firearm, including, for example, ammunition found in a jointly occupied home. *See, e.g., United States v. Stepp*, 89 F.4th 826, 832-35 (10th Cir. 2023). . .

These sweeping prohibitions are criminally enforced. To violate the statute is a felony, punishable by up to 15 years. That felony conviction, in turn, triggers a permanent, life-long prohibition on exercising the Second Amendment right.

The combination of the Government's sweeping view of the firearms and ammunition within its regulatory reach and the broad prohibition on any conduct regarding covered firearms and ammunition makes § 922(g)(8)'s 'burden unmistakable: The statute revokes a citizen's Second Amendment right while the civil restraining order is in place. And, that revocation is absolute. It makes no difference if the covered individual agrees to a no-contact order, posts a bond, or even moves across the country from his former domestic partner — the bar on exercising the Second Amendment right remains.

That combination of burdens places § 922(g)(8) in an entirely different stratum from surety laws. Surety laws preserve the Second Amendment right, whereas § 922(g)(8) strips an individual of that right. While a breach of a surety demand was punishable by a fine, § 922(g)(8) is punishable by a felony conviction, which in turn permanently revokes an individual's Second Amendment right. At base, it is difficult to imagine how surety laws can be considered relevantly similar to a complete ban on firearm ownership, possession, and use.

This observation is nothing new; the Court has already recognized that surety laws impose a lesser relative burden on the Second Amendment right. In *Bruen*, the Court explained that surety laws merely "provide financial incentives for responsible arms carrying." 597 U.S. at 59. "[A]n accused arms-bearer 'could go on carrying without criminal penalty' so long as he 'post[ed] money that would be forfeited if he breached the peace or injured others.'" *Id.*, at 56-57 (quoting *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017); alteration in original). As a result, we held that surety laws were not analogous to New York's effective ban on public carry. 597 U.S. at 55. That conclusion is damning for § 922(g)(8), which burdens the Second Amendment right even more with respect to covered individuals.

Surety laws demonstrate that this case should have been a "straightforward" inquiry. *Id.* at 27. The Government failed to produce a single historical regulation that is relevantly similar to § 922(g)(8). Rather, § 922(g)(8) addresses a societal problem — the risk of interpersonal violence — "that has persisted since the 18th century," yet was addressed "through [the] materially different means" of surety laws. *Id.* at 26.

C

The Court has two rejoinders, surety and affray laws. Neither is a compelling historical analogue. As I have explained, surety laws did not impose a burden comparable to § 922(g)(8). And, affray laws had a dissimilar burden *and* justification. The Court does not reckon with these vital differences, asserting that the disagreement is whether surety and affray laws must be an exact copy of § 922(g)(8). But, the historical evidence shows that those laws are worlds — not degrees — apart from § 922(g)(8). For this reason, the Court's argument requires combining aspects of surety and affray laws to justify § 922(g)(8). This piecemeal approach is not what the Second Amendment or our precedents countenance.

1

Despite the foregoing evidence, the Court insists that surety laws in fact *support* § 922(g)(8). To make its case, the Court studiously avoids discussing the full extent of § 922(g)(8)'s burden as compared to surety laws. The most the

Court does is attack *Bruen*'s conclusion that surety laws were less burdensome than a public carry ban. The Court reasons that *Bruen* dealt with a "broad prohibitory regime" while § 922(g)(8) applies to only a subset of citizens. Yet, that was only one way in which *Bruen* distinguished a public carry ban from surety laws' burden. True, *Bruen* noted that, unlike the public carry ban, surety laws did not restrict the general citizenry. But, *Bruen* also plainly held that surety laws did not "constitut[e] a 'severe' restraint on public carry, let alone a restriction tantamount to a ban." 597 U.S. at 59. In fact, that conclusion is repeated throughout the opinion. *Id.* at 55-59 (surety laws "were not *bans* on public carry"; "surety laws did not *prohibit* public carry"; surety laws "were not viewed as substantial restrictions on public carry"; and "surety statutes did not directly restrict public carry"). *Bruen*'s conclusion is inescapable and correct. Because surety laws are not equivalent to an effective ban on public carry, they do not impose a burden equivalent to a complete ban on carrying *and* possessing firearms.

Next, the Court relies on affray laws prohibiting "riding or going armed, with dangerous or unusual weapons, [to] terrif[y] the good people of the land." 4 Blackstone 149 (emphasis deleted). These laws do not justify § 922(g)(8) either. As the Court concedes, why and how a historical regulation burdened the right of armed self-defense are central considerations. Affray laws are not a fit on either basis.

First, affray laws had a distinct justification from § 922(g)(8) because they regulated only certain public conduct that injured the entire community. An affray was a "common Nusanc[e]," 1 Hawkins, Pleas of the Crown, at 135, defined as "the fighting of two or more persons in some public place, to the terror of his majesty's subjects," 4 Blackstone 145. Even though an affray generally required "actual violence," certain other conduct could suffice. 1 R. Burn, The Justice of the Peace, and Parish Officer 13 (2d ed. 1756). As relevant here, an affray included arming oneself "with dangerous and unusual weapons, in such a manner as [to] naturally cause a terror to the people" — *i.e.*, "going armed." *Id.* Many postfounding going armed laws had a self-defense exception: A person could "go armed with a[n] . . . offensive and dangerous weapon" so long as he had "reasonable cause to fear an assault or other injury." Mass. Rev. Stat., ch. 134, § 16 (1836).

Affrays were defined by their public nature and effect. An affray could occur only in "some public place," and captured only conduct affecting the broader public. 4 Blackstone 145. To that end, going armed laws did not prohibit carrying firearms at home or even public carry generally. See *Bruen*, 597 U.S., at 47-50. Instead, they targeted only public carry that was "accompanied with such circumstances as are apt to terrify the people." 1 Burn, Justice of the Peace, at 13.

Affrays were intentionally distinguished from assaults and private interpersonal violence on that same basis. See *Cash v. State*, 2 Tenn. 198, 199 (1813) ("It is because the violence is committed in a public place, and to the terror of the people, that the crime is called an affray, instead of assault and battery"); *Nottingham v. State*, 227 Md.App. 592, 602, 135 A.3d 541, 547 (Md. 2016) ("[U]nlike assault and battery," affray is "not a crime against the person; rather, affray is a crime against the public" (internal quotation marks omitted)). As treatises shortly before the founding explain, "there may be an Assault which will not amount to an Affray; as where it happens in a private Place, out of the hearing or seeing of any, except the Parties concerned; in which Case it cannot be said to be to the Terror of the People." 1 Hawkins, Pleas of the Crown, at 134. Affrays thus did not cover the very conduct § 922(g)(8) seeks to prevent — interpersonal violence in the home.

Second, affray laws did not impose a burden analogous to § 922(g)(8). They regulated a niche subset of Second Amendment-protected activity. As explained, affray laws prohibited only carrying certain weapons ("dangerous and unusual") in a particular manner ("terrifying the good people of the land" without a need for self-defense) and in particular places (in public). Meanwhile, § 922(g)(8) prevents a covered person from carrying any firearm or ammunition, in any manner, in any place, at any time, and for any reason. Section 922(g)(8) thus bans *all* Second Amendment-protected activity. Indeed, this Court has already concluded that affray laws do not impose a burden "analogous to the burden created by" an effective ban on public carry. *Bruen*, 597 U.S., at 50, 142 S. Ct. 2111. Surely, then, a law that imposes a public and private ban on a covered individual cannot have an analogous burden either.

The Court counters that since affray laws "provided for imprisonment," they imposed a greater burden than § 922(g)(8)'s disarmament. But, that argument serves only to highlight another fundamental difference: Affray laws were criminal statutes that penalized past behavior, whereas § 922(g)(8) is triggered by a civil restraining order that seeks to prevent future behavior. Accordingly, an affray's burden was vastly harder to impose. To imprison a person, a State had to prove that he committed the crime of affray beyond a reasonable doubt. The Constitution provided a bevy of protections during that process — including a right to a jury trial, counsel, and protections against double jeopardy. *See* Amdts. 5, 6.

The imposition of § 922(g)(8)'s burden, however, has far fewer hurdles to clear. There is no requirement that the accused has actually committed a crime; instead, he need only be prohibited from threatening or using force, or pose a "credible threat" to an "intimate partner or child." § 922(g)(8)(C). Section 922(g)(8) thus revokes a person's Second Amendment right based on the suspicion that he *may* commit a crime in the future. In addition, the only process required before that revocation is a hearing on the underlying court

order. During that civil hearing — which is not even about § 922(g)(8) — a person has fewer constitutional protections compared to a criminal prosecution for affray. Gone are the Sixth Amendment's panoply of rights, including the rights to confront witnesses and have assistance of counsel, as well as the Fifth Amendment's protection against double jeopardy. Civil proceedings also do not require proof beyond a reasonable doubt, and some States even set aside the rules of evidence, allowing parties to rely on hearsay. The differences between criminal prosecutions and civil hearings are numerous and consequential.

Affray laws are wide of the mark. While the Second Amendment does not demand a historical twin, it requires something closer than affray laws, which expressly carve out the very conduct § 922(g)(8) was designed to prevent (interpersonal violence in the home). Nor would I conclude that affray laws — criminal laws regulating a specific type of public carry — are analogous to § 922(g)(8)'s use of a civil proceeding to bar all Second Amendment-protected activity.

2

The Court recognizes that surety and affray laws on their own are not enough. So it takes pieces from each to stitch together an analogue for § 922(g)(8). Our precedents foreclose that approach. The question before us is whether a single historical law has both a comparable burden and justification as § 922(g)(8), not whether several laws can be cobbled together to qualify. As *Bruen* explained, "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations" — the historical and modern regulations — "are 'relevantly similar.'" 597 U.S. at 28-29. In doing so, a court must consider whether that single historical regulation "impose[s] a comparable burden on the right of armed self-defense *and* whether that burden is comparably justified." *Id.* at 29 (emphasis added).

The Court's contrary approach of mixing and matching historical laws — relying on one law's burden and another law's justification — defeats the purpose of a historical inquiry altogether. Given that imprisonment (which involved disarmament) existed at the founding, the Government can always satisfy this newly minted comparable-burden requirement. That means the Government need only find a historical law with a comparable justification to validate modern disarmament regimes. As a result, historical laws fining certain behavior could justify completely disarming a person for the same behavior. That is the exact sort of "regulatory blank check" that *Bruen* warns against and the American people ratified the Second Amendment to preclude. 597 U.S. at 30. . .

IV

The Government, for its part, tries to rewrite the Second Amendment to salvage its case. It argues that the Second Amendment allows Congress to disarm anyone who is not "responsible" and "law-abiding." Not a single Member of the Court adopts the Government's theory. Indeed, the Court disposes of it in half a page — and for good reason. The Government's argument lacks any basis in our precedents and would eviscerate the Second Amendment altogether.

A

The Government's position is a bald attempt to refashion this Court's doctrine. At the outset of this case, the Government contended that the Court has already held the Second Amendment protects only "responsible, law-abiding" citizens. The plain text of the Second Amendment quashes this argument. The Amendment recognizes "the right of the *people* to keep and bear Arms." (Emphasis added.) When the Constitution refers to "the people," the term "unambiguously refers to all members of the political community." *Heller*, 554 U.S. at 580. The Government's claim that the Court already held the Second Amendment protects only "law-abiding, responsible citizens" is specious at best.[7]

At argument, the Government invented yet another position. It explained that when it used the term "responsible" in its briefs, it *really* meant "not dangerous." Thus, it posited that the Second Amendment protects only law-abiding and *non-dangerous* citizens. No matter how many adjectives the Government swaps out, the fact remains that the Court has never adopted anything akin to the Government's test. In reality, the "law-abiding, dangerous citizen" test is the Government's own creation, designed to justify every one of its existing regulations. It has no doctrinal or constitutional mooring.

The Government finally tries to cram its dangerousness test into our precedents. It argues that § 922(g)(8) and its proffered historical laws have a shared justification of disarming dangerous citizens. The Government, however, does not draw that conclusion by examining the historical justification for each law cited. Instead, the Government simply looks — from a modern vantage point — at the mix of laws and manufactures a possible connection between them all. Yet, our task is to "assess whether modern firearms regulations are consistent with the Second Amendment's text and *historical* understanding." *Bruen*, 597 U.S., at 26, 142 S. Ct. 2111 (emphasis added). To do so, we must look at the historical law's justification as articulated

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[7] The only conceivably relevant language in our precedents is the passing reference in *Heller* to laws banning felons and others from possessing firearms. *See* 554 U. S. at 626-27, and n.26. That discussion is dicta.

during the relevant time period — not at modern *post-hoc* speculations. As I have explained, a historically based study of the evidence reveals that the Government's position is untenable. . .

B

The Government's "law-abiding, dangerous citizen" theory is also antithetical to our constitutional structure. At bottom, its test stems from the idea that the Second Amendment points to general principles, not a historically grounded right. And, it asserts that one of those general principles is that Congress can disarm anyone it deems "dangerous, irresponsible, or otherwise unfit to possess arms." This approach is wrong as a matter of constitutional interpretation, and it undermines the very purpose and function of the Second Amendment.

The Second Amendment recognizes a pre-existing right and that right was "enshrined with the scope" it was "understood to have when the people adopted [the Amendment]." *Heller*, 554 U.S. at 634-35. Only a subsequent constitutional amendment can alter the Second Amendment's terms, "whether or not future legislatures or . . . even future judges think [its original] scope [is] too broad." *Id.* at 635.

Yet, the Government's "law-abiding, dangerous citizen" test — and indeed any similar, principle-based approach — would hollow out the Second Amendment of any substance. 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. In fact, the Government posits that Congress could enact a law that the Founders explicitly rejected. At base, whether a person could keep, bear, or even possess firearms would be Congress's policy choice under the Government's test.

That would be the direct inverse of the Founders' and ratifying public's intent. Instead of a substantive right guaranteed to every individual *against* Congress, we would have a right controlled *by* Congress. "A constitutional guarantee subject to future judges' [or Congresses'] assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. The Second Amendment is "the very *product* of an interest balancing by the people." *Id.* at 635. It is this policy judgment — not that of modern and future Congresses — "that demands our unqualified deference." *Bruen*, 597 U.S. at 26.

The Government's own evidence exemplifies the dangers of approaches based on generalized principles. Before the Court of Appeals, the Government pointed to colonial statutes "disarming classes of people deemed to be threats, including . . . slaves, and native Americans." It argued that since early legislatures disarmed groups considered to be "threats," a modern Congress has the same authority. *Id.* The problem with such a view should be obvious.

Far from an exemplar of Congress's authority, the discriminatory regimes the Government relied upon are cautionary tales. They warn that when majoritarian interests alone dictate who is "dangerous," and thus can be disarmed, disfavored groups become easy prey. One of many such examples was the treatment of freed blacks following the Civil War. "[M]any of the over 180,000 African-Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks." *McDonald v. Chicago*, 561 U.S. 742, 771 (2010). Some "States formally prohibited African-Americans from possessing firearms." *Id.* And, "[t]hroughout the South, armed parties . . . forcibly took firearms from newly freed slaves." *Id.* at 772. "In one town, the marshal took all arms from returned colored soldiers, and was very prompt in shooting the blacks whenever an opportunity occurred." *Id.* (alterations and internal quotation marks omitted). A constitutional amendment was ultimately "necessary to provide full protection for the rights of blacks." *Id.* at 775.

The Government peddles a modern version of the governmental authority that led to those historical evils. Its theory would allow federal majoritarian interests to determine who can and cannot exercise their constitutional rights. While Congress cannot revive disarmament laws based on race, one can easily imagine a world where political minorities or those with disfavored cultural views are deemed the next "dangers" to society. Thankfully, the Constitution prohibits such laws. The "very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 544 U.S. at 634.

The Court rightly rejects the Government's approach by concluding that any modern regulation must be justified by specific historical regulations. But, the Court should remain wary of any theory in the future that would exchange the Second Amendment's boundary line — "the right of the people to keep and bear Arms, shall not be infringed" — for vague (and dubious) principles with contours defined by whoever happens to be in power.

* * *

This case is not about whether States can disarm people who threaten others. States have a ready mechanism for disarming anyone who uses a firearm to threaten physical violence: criminal prosecution. Most States, including Texas, classify aggravated assault as a felony, punishable by up to 20 years' imprisonment. Assuming C. M.'s allegations could be proved, Texas could have convicted and imprisoned Rahimi for every one of his alleged acts. Thus, the question before us is not whether Rahimi and others like him can be disarmed consistent with the Second Amendment. Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order—even if he has never been accused or convicted of

a crime. It cannot. The Court and Government do not point to a single historical law revoking a citizen's Second Amendment right based on possible interpersonal violence. The Government has not borne its burden to prove that § 922(g)(8) is consistent with the Second Amendment's text and historical understanding.

The Framers and ratifying public understood "that the right to keep and bear arms was essential to the preservation of liberty." *McDonald*, 561 U.S., at 858 (THOMAS, J., concurring in part and concurring in judgment). Yet, in the interest of ensuring the Government can regulate one subset of society, today's decision puts at risk the Second Amendment rights of many more. I respectfully dissent.

NOTES & QUESTIONS

8. [New Note] For new scholarship on the issue, see Bonnie Carlson, *Domestic Violence, Firearms, and a Federal Registry: Equipping Victims to Enforce Lifesaving Legislation*, 24 Georgetown J. Gender & L. 73 (2022) (proposing a national gun registry to facilitate domestic violence order enforcement); and Samantha L. Fawcett, *Upholding the Domestic Violence Firearm Prohibitors Under Bruen's Second Amendment*, 18 Duke J. Const. L. & Pub. Pol'y Sidebar 405 (2023) (the bans can be upheld either because the individuals are not "law-abiding" or because there are sufficient historical precedents for disarming dangerous persons).

B. [New Section Title] *PERSONS CONVICTED OF A CRIME PUNISHABLE BY A FELONY SENTENCE OF OVER ONE YEAR OR A MISDEMEANOR SENTENCE OF OVER TWO AND PERSONS UNDER INDICTMENT FOR CRIMES PUNISHABLE BY A SENTENCE OF OVER ONE YEAR*

Post-*Bruen*, 18 U.S.C. § 922(g)(1) has been upheld in over a hundred decisions. The notable exception is *Range v. United States*, in which the en banc Third Circuit ruled 11-4 against a lifetime ban on firearms possession by a person who perpetrated $2,458 of food stamp fraud in 1995.

After deciding *Rahimi*, the Supreme Court granted the Solicitor General's cert. petition, vacated the en banc opinion, and remanded for reconsideration in light of *Rahimi*. *Garland v. Range*, 2024 WL 3259661 (U.S. July 2, 2024).

Range v. Attorney General United States

69 F.4th 96 (3d Cir. 2023) (en banc)

HARDIMAN, Circuit Judge, with whom CHAGARES, Chief Judge, and JORDAN, GREENAWAY, JR., BIBAS, PORTER, MATEY, PHIPPS, and FREEMAN, Circuit Judges, join.

Bryan Range appeals the District Court's summary judgment rejecting his claim that the federal "felon-in-possession" law — 18 U.S.C. § 922(g)(1) — violates his Second Amendment right to keep and bear arms. We agree with Range that, despite his false statement conviction, he remains among "the people" protected by the Second Amendment. And because the Government did not carry its burden of showing that our Nation's history and tradition of firearm regulation support disarming Range, we will reverse and remand.

I

A

. . . In 1995, Range pleaded guilty . . . to one count of making a false statement to obtain food stamps in violation of Pennsylvania law. In those days, Range was earning between $9.00 and $9.50 an hour as he and his wife struggled to raise three young children on $300 per week. Range's wife prepared an application for food stamps that understated Range's income, which she and Range signed. Though he did not recall reviewing the application, Range accepted full responsibility for the misrepresentation.

Range was sentenced to three years' probation, which he completed without incident. He also paid $2,458 in restitution, $288.29 in costs, and a $100 fine. Other than his 1995 conviction, Range's criminal history is limited to minor traffic and parking infractions and a summary offense for fishing without a license.

When Range pleaded guilty in 1995, his conviction was classified as a Pennsylvania misdemeanor punishable by up to five years' imprisonment. That conviction precludes Range from possessing a firearm because federal law generally makes it "unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Although state misdemeanors are excluded from that prohibition if they are "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), that safe harbor provided no refuge for Range because he faced up to five years' imprisonment.

In 1998, Range tried to buy a firearm but was rejected by Pennsylvania's instant background check system. Range's wife, thinking the rejection a mistake, gifted him a deer-hunting rifle. Years later, Range tried to buy a firearm and was rejected again. After researching the reason for the denial,

Range learned he was barred from buying a firearm because of his 1995 conviction. Range then sold his deer-hunting rifle to a firearms dealer.

B

Range sued in the United States District Court for the Eastern District of Pennsylvania, seeking a declaration that § 922(g)(1) violates the Second Amendment as applied to him. He also requested an injunction prohibiting the law's enforcement against him. . . .

The District Court granted the Government's motion [for summary judgment]. Faithfully applying our then-controlling [Two-Part Test], the Court held that Range's crime was "serious" enough to deprive him of his Second Amendment rights. . . .

While Range's appeal was pending, the Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The parties then submitted supplemental briefing on *Bruen*'s impact. A panel of this Court affirmed the District Court's summary judgment, holding that the Government had met its burden to show that § 922(g)(1) reflects the Nation's historical tradition of firearm regulation such that Range's conviction "places him outside the class of people traditionally entitled to Second Amendment rights." *Range v. Att'y Gen.*, 53 F.4th 262, 266 (3d Cir. 2022) (per curiam).

Range petitioned for rehearing en banc. We granted the petition and vacated the panel opinion. *Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2023).

III . . .

Bruen rejected the two-step approach as "one step too many." 142 S. Ct. at 2127. The Supreme Court declared: "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Id.* Instead, those cases teach "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. And "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

Applying that standard, *Bruen* held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 2122. But the "where" question decided in *Bruen* is not at issue here. Range's appeal instead requires us to examine *who* is among [the people] protected by the Second Amendment. *see Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm. . . ."). Range claims he is one of "the people" entitled to keep and bear arms and that our Nation has no historical tradition of disarming people like him. The Government responds that Range has not been

one of "the people" since 1995, when he pleaded guilty in Pennsylvania state court to making a false statement on his food stamp application, and that his disarmament is historically supported.

IV . . .

After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. If it does, the government now bears the burden of proof: it "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127 .

A

We begin with the threshold question: whether Range is one of "the people" who have Second Amendment rights. The Government contends that the Second Amendment does not apply to Range at all because "[t]he right to bear arms has historically extended to the political community of law-abiding, responsible citizens." So Range's 1995 conviction, the Government insists, removed him from "the people" protected by the Second Amendment.

The Supreme Court referred to "law-abiding citizens" in *Heller.* In response to Justice Stevens's dissent, which relied on *United States v. Miller*, 307 U.S. 174 (1939), the Court reasoned that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. In isolation, this language seems to support the Government's argument. But *Heller* said more; it explained that "the people" as used throughout the Constitution "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. So the Second Amendment right, *Heller* said, presumptively "belongs to all Americans." *Id.* at 581. Range cites these statements to argue that "law-abiding citizens" should not be read "as rejecting *Heller*'s interpretation of 'the people.'" We agree with Range for four reasons.

First, the criminal histories of the plaintiffs in *Heller, McDonald*, and *Bruen* were not at issue in those cases. So their references to "law-abiding, responsible citizens" were dicta. And while we heed that phrase, we are careful not to overread it as we and other circuits did with *Heller*'s statement that the District of Columbia firearm law would fail under any form of heightened scrutiny. Second, other Constitutional provisions reference "the people." It mentions "the people" twice with respect to voting for Congress, and "the people" are recognized as having rights to assemble peaceably, to petition the government for redress, and to be protected against unreasonable searches and seizures. Unless the meaning of the phrase "the people" varies from provision to provision—and the Supreme Court in *Heller* suggested it does not—to conclude that Range is not among "the people" for Second Amendment

purposes would exclude him from those rights as well. *See* 554 U.S. at 580. And we see no reason to adopt an inconsistent reading of "the people."

Third, as the plurality stated in *Binderup*: "That individuals with Second Amendment rights may nonetheless be denied possession of a firearm is hardly illogical." 836 F.3d at 344 (Ambro, J.). That statement tracks then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, in which she persuasively explained that "all people have the right to keep and bear arms," though the legislature may constitutionally "strip certain groups of that right." 919 F.3d 437, 452 (7th Cir. 2019). We agree with that statement in *Binderup* and then-Judge Barrett's reasoning.

Fourth, the phrase "law-abiding, responsible citizens" is as expansive as it is vague. Who are "law-abiding" citizens in this context? Does it exclude those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine? No. We are confident that the Supreme Court's references to "law-abiding, responsible citizens" do not mean that every American who gets a traffic ticket is no longer among "the people" protected by the Second Amendment. Perhaps, then, the category refers only to those who commit "real crimes" like felonies or felony-equivalents? At English common law, felonies were so serious they were punishable by estate forfeiture and even death. 4 William Blackstone, Commentaries on the Laws of England 54 (1769). But today, felonies include a wide swath of crimes, some of which seem minor.[5] And some misdemeanors seem serious.[6] As the Supreme Court noted recently: "a felon is not always more dangerous than a misdemeanant." *Lange v. California*, 141 S. Ct. 2011, 2020 (2021) (cleaned up). As for the modifier "responsible," it serves only to undermine the Government's argument because it renders the category hopelessly vague. In our Republic of over 330 million people, Americans have widely divergent ideas about what is required for one to be considered a "responsible" citizen.

At root, the Government's claim that only "law-abiding, responsible citizens" are protected by the Second Amendment devolves authority to legislators to decide whom to exclude from "the people." We reject that approach because such "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting). And that deference would contravene *Heller*'s reasoning that "the enshrinement of constitutional rights necessarily

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[5] *See, e.g.*, 18 U.S.C. § 1464 (uttering "any obscene, indecent, or profane language by means of radio communication"); Mich. Comp. Laws Ann. § 445.574a(2)(d) (returning out-of-state bottles or cans); 18 Pa. Cons. Stat. Ann. § 3929.1 (third offense of library theft of more than $150); id. § 7613 (reading another's email without permission).

[6] *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 2504 (involuntary manslaughter); id. § 2707 (propulsion of missiles into an occupied vehicle or onto a roadway); 11 Del. Code § 881 (bribery).

takes certain policy choices off the table." 554 U.S. at 636; *see also Bruen*, 142 S. Ct. at 2131 (warning against "judicial deference to legislative interest balancing").

In sum, we reject the Government's contention that only "law-abiding, responsible citizens" are counted among "the people" protected by the Second Amendment. *Heller* and its progeny lead us to conclude that Bryan Range remains among "the people" despite his 1995 false statement conviction.

Having determined that Range is one of "the people," we turn to the easy question: whether § 922(g)(1) regulates Second Amendment conduct. It does. Range's request—to possess a rifle to hunt and a shotgun to defend himself at home—tracks the constitutional right as defined by *Heller.* 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."). So "the Second Amendment's plain text covers [Range's] conduct," and "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126.

B

Because Range and his proposed conduct are protected by the Second Amendment, we now ask whether the Government can strip him of his right to keep and bear arms. To answer that question, we must determine whether the Government has justified applying § 922(g)(1) to Range "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. We hold that the Government has not carried its burden.

To preclude Range from possessing firearms, the Government must show that § 922(g)(1), as applied to him, "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. Historical tradition can be established by analogical reasoning, which "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin.*" *Id.* at 2133. To be compatible with the Second Amendment, regulations targeting longstanding problems must be "distinctly similar" to a historical analogue. *Id.* at 2131. But "modern regulations that were unimaginable at the founding" need only be "relevantly similar" to one. *Id.* at 2132. *Bruen* offers two metrics that make historical and modern firearms regulations similar enough: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133.

In attempting to carry its burden, the Government relies on the Supreme Court's statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626. . . . Section 922(g)(1) is a straightforward "prohibition[

] on the possession of firearms by felons." *Heller*, 554 U.S. at 626. And since 1961 "federal law has generally prohibited individuals convicted of crimes punishable by more than one year of imprisonment from possessing firearms." *see* An Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). But the earliest version of that statute, the Federal Firearms Act of 1938, applied only to *violent* criminals. As the First Circuit explained: "the current federal felony firearm ban differs considerably from the [original] version. . . . [T]he law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011).

Even if the 1938 Act were "longstanding" enough to warrant *Heller*'s assurance — a dubious proposition given the *Bruen* Court's emphasis on Founding-and Reconstruction-era sources, 142 S. Ct. at 2136, 2150 — Range would not have been a prohibited person under that law. Whatever timeframe the Supreme Court might establish in a future case, we are confident that a law passed in 1961 — some 170 years after the Second Amendment's ratification and nearly a century after the Fourteenth Amendment's ratification — falls well short of "longstanding" for purposes of demarcating the scope of a constitutional right. So the 1961 iteration of § 922(g)(1) does not satisfy the Government's burden.

The Government's attempt to identify older historical analogues also fails. The Government argues that "legislatures traditionally used status-based restrictions" to disarm certain groups of people. Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to Range and his individual circumstances. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today. And any such analogy would be "far too broad[ ]." *See Bruen*, 142 S. Ct. at 2134 (noting that historical restrictions on firearms in "sensitive places" do not empower legislatures to designate any place "sensitive" and then ban firearms there).

The Government also points out that "founding-era felons were exposed to far more severe consequences than disarmament." It is true that "founding-era practice" was to punish some "felony offenses with death." *Id.* at 9. For example, the First Congress made forging or counterfeiting a public security punishable by death. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 115 (1790). States in the early Republic likewise treated nonviolent crimes "such as forgery and horse theft" as capital offenses. *See Folajtar*, 980 F.3d at 904 (citations omitted). Such severe treatment

reflects the founding generation's judgment about the gravity of those offenses and the need to expose offenders to the harshest of punishments.

Yet the Government's attempts to analogize those early laws to Range's situation fall short. That Founding-era governments punished some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue — lifetime disarmament — is rooted in our Nation's history and tradition. The greater does not necessarily include the lesser: founding-era governments' execution of some individuals convicted of certain offenses does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed. As one of our dissenting colleagues notes, a felon could "repurchase arms" after successfully completing his sentence and reintegrating into society. Krause Dissent at 127-28. That aptly describes Range's situation. So the Government's attempt to disarm Range is not "relevantly similar" to earlier statutes allowing for execution and forfeiture. *See Bruen*, 142 S. Ct. at 2132.

Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally. *See, e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343-44 ("An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns"). Range's crime, however—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession. The Government has not cited a single statute or case that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime. Nor has the Government cited forfeiture cases in which the convict was prevented from regaining his possessions, including firearms (except where forfeiture preceded execution). That's true whether the object forfeited to the government was a firearm used to hunt out of season, a car used to transport cocaine, or a mobile home used as a methamphetamine lab. And of those three, only firearms are mentioned in the Bill of Rights.

Finally, the Government makes an argument from authority. It points to a decision from a sister circuit court that "look[ed] to tradition and history" in deciding that "those convicted of felonies are not among those entitled to possess arms." The Government also cites appellate decisions that "have categorically upheld felon-possession prohibitions without relying on means-end scrutiny." And it cites the more than 80 district court decisions that have addressed § 922(g)(1) and have ruled in favor of the Government.

As impressive as these authorities may seem at first blush, they fail to persuade. First, the circuit court opinions were all decided before *Bruen.* Second, the district courts are bound to follow their circuits' precedent. Third,

the Government's contention that "*Bruen* does not meaningfully affect this Court's precedent" is mistaken for the reasons we explained in Section III, *supra.*

For the reasons stated, we hold that the Government has not shown that the Nation's historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm. *See Bruen*, 142 S. Ct. at 2126.

* * *

Our decision today is a narrow one. Bryan Range challenged the constitutionality of 18 U.S.C. § 922(g)(1) only as applied to him given his violation of 62 Pa. Stat. Ann. § 481(a). Range remains one of "the people" protected by the Second Amendment, and his eligibility to lawfully purchase a rifle and a shotgun is protected by his right to keep and bear arms. Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights. We will reverse the judgment of the District Court and remand so the Court can enter a declaratory judgment in favor of Range, enjoin enforcement of § 922(g)(1) against him, and conduct any further proceedings consistent with this opinion.

PORTER, Circuit Judge, concurring.

[Judge Porter first argued that "[u]ntil well into the twentieth century, it was settled that Congress lacked the power to abridge anyone's right to keep and bear arms" not only because of the Second Amendment, but also "the combination of enumerated powers and the Ninth and Tenth Amendments, combined with a more restrictive view of the Commerce Clause. Although he found it appropriate to look to founding-era state laws for "contemporaneous clues about the people's right to keep and bear arms," he cautioned that states retained sweeping police powers and weren't initially restrained by the Bill of Rights. Some states cited on by Judge Krause's dissent, he noted, did not enumerate a Second Amendment analogue until the twentieth century, if at all. Finally, he argued that using states laws to determine the scope of the Second Amendment "seeks effectively to reverse incorporate state law into federal constitutional law," which he believes is inapplicable outside of the equal-protection context.]

AMBRO, Circuit Judge, concurring, joined by GREENAWAY, JR. and MONTGOMERY-REEVES, Circuit Judges.

[Judge Ambro clarified that, in his view, the decision is limited to its factual circumstances and "does not spell doom for § 922(g)(1)." He contended that § 922(g)(1) remains presumptively lawful based on historical analogues in both the founding and Reconstruction eras of disarming those who threatened the orderly functioning of society, but that Range successfully rebutted that presumption as the law was applied to him. He closed by noting that the Supreme Court will be forced to square the THT test with its concurrent view that felon gun restrictions are presumptively lawful, given that scholars have been unsuccessful in determining the historical support for that presumption.]

SHWARTZ, Circuit Judge, dissenting, joined by RESTREPO, Circuit Judge.

[Judge Schwartz argued that the majority downplayed the Supreme Court's admonishment that felon bans are longstanding and presumptively lawful. She also emphasized that *Bruen* used the phrase "law-abiding citizens" fourteen times and approved of certain gun regulations that include criminal background checks. Next, she criticizes the majority for looking for a historical twin, rather than a historical analogue, and rejecting the historical evidence that at the founding, the fraud-based crime of the type Range committed could be punished by death. She argued that the felon designation serves as a proxy for disloyalty and disrespect for the sovereign, which is same reason why governments disarmed groups like Native Americans, Blacks, Catholics, Quakers, and loyalists at the founding. Specifically, she notes that "Range's felony involved stealing from the government, a crime that directly undermines the sovereign." She closes by arguing that the majority opinion rejects all historical support for disarming any felon and its analytical framework will result in virtually no felony that will bar an individual from possessing a firearm.]

KRAUSE, Circuit Judge, dissenting.

[Judge Krause engaged in a lengthy historical inquiry of the validity of § 922(g)(1) by considering English history dating from the late 1600s, American colonial views up to the founding, post-ratification practices from the late eighteenth and early nineteenth centuries, and, to a lesser extent, the later nineteenth century. She argued that in during each era, governments possessed the power to disarm those who they believed could not be trusted to obey the law. Further, she noted that penalties at the founding for those who committed grave felonies — both violent and nonviolent — was death,

suggesting that the founding generation would have had no objection to imposing permanent disarmament on felons.

Next, she alleges that the majority turns the Second Amendment into a regulatory straightjacket, counter to *Bruen*, by applying a "methodology by which courts must examine each historical practice in isolation and reject it if it deviates in any respect from the contemporary regulation," which she likens to the methodology applied in *Rahimi*. *See supra* Ch. 13.A. She also took issue with the majority's rationale for what specifically exempts Range and those like him from § 922(g)(1)'s enforcement, e.g., whether it be his individual circumstances, non-violent nature, or his law-abiding life since his conviction. She claims that the majority gives no answer, which she further argues renders § 922(g)(1) so vague as to be facially unconstitutional.

She also raises what she argues are practical problems with the majority opinion, including that it makes the statute's *mens rea* impossible to establish, as the government must now prove that the defendant accused of violating § 922(g)(1) knew he was not "like Range" when he possessed firearms, as opposed to proving that he knew he was a felon. Moreover, she contends that the "majority's indeterminant and post-hoc test for which felons fall outside § 922(g)(1)" will cripple the National Instant Criminal Background Check System (NICS), to which prospective firearm purchasers must submit. For the same reason, she claims that it is no longer sufficient probable cause to stop an individual openly carrying a firearm simply be confirming a prior felony conviction in NICS. Next, she argues that it will be impossible for federal firearms licensees to know which potential customers, despite a felony conviction, are actually prohibited from possessing a firearm under § 922(g)(1). Furthermore, she argues that the decision renders the prohibition on possessing a firearm as a standard condition of bail, supervised release, probation, and parole unconstitutional as to many defendants.

Finally, Judge Krause argues that the majority could have issued a prospective declaratory judgment restoring Range's Second Amendment rights going forward. She contends that this approach is consistent with the historical tradition of requiring those disarmed to take a loyalty oath to have their right to own firearms restored and would eliminate her due process concerns discussed above. Finally, she argues that prospective relief would respect the separation of powers and federalism and avoid the debilitating effect of the majority's opinion of law enforcement, federal prosecutors, and the NICS background check system.]

ROTH, Circuit Judge, dissenting

[Judge Roth agreed with the majority that Range is among "the people" protected by the Second Amendment but concluded that he "failed to set forth the necessary interstate commerce connections to allow federal jurisdiction of his complaint." She emphasized that a conviction under § 922(g)(1) only be sustained after the government proves beyond a reasonable doubt that the firearm at issue moved through interstate commerce. Because Range did not identify the specific firearm that he has been prohibited from possessing, she argued that there was a want of federal jurisdiction.]

NOTES & QUESTIONS

5. [Add to Note] How to convict or defend someone charged with constructive possession of a firearm is described in *What Constitutes "Constructive Possession" of Unregistered or Otherwise Prohibited Weapon Under State Law*, 88 A.L.R.5th 121 (originally published 2001).

6. [New Note] On remand, how will *Rahimi* affect the reconsideration of *Range*? How would you write a new opinion coming to the same result as did the *Range* majority? How can the dissenters in *Range* make the argument that *Rahimi* compels ruling against Range?

7. [New Note] The majority in *Range* claims that the decision "is a narrow one." Judge Shwartz, however, writes "the Majority opinion is far from narrow." What do you think? Does Range open the floodgates to successful as-applied challenges to 18 U.S.C. § 922(g)(1) from an array of felons whose crimes run the gamut? Or is the decision more limited in its impact to non-violent felons who, like Range himself, committed relatively minor offenses? Consider the following offenders and whether you think the Range majority would hold the felon-in-possession ban unconstitutional as applied to them:

a. The creator of a Ponzi scheme which led to paper losses totaling $64.8 billion and drove several impacted investors to suicide. *See* Diana B. Henriques, *Bernie Madoff, Architect of Largest Ponzi Scheme in History, Is Dead at 82*, N.Y. TIMES (Apr. 14, 2021).

b. A young woman who, through text messages, encouraged her boyfriend to kill himself by carbon monoxide poisoning. He ultimately committed suicide. *See* Kate Taylor, *What We Know About the Michelle Carter Suicide Texting Case*, N.Y. TIMES (July 9, 2019).

8. [New Note] Does the history of status-based prohibitions on firearm ownership support Range's disarmament? The majority and dissents take

opposite views on this matter. Judge Krause argues that "legislatures have historically possessed the authority to disarm entire groups, like felons, whose conduct evinces disrespect for the rule of law." Judge Shwartz makes a similar argument. The majority says that these comparisons to Range's conviction are too broad, likening them to *Bruen*'s warning "that historical restrictions on firearms in 'sensitive places' do not empower legislatures to designate any place 'sensitive' and then ban firearms there."

9. [New Note] In a similar vein, consider whether there are any limits to the dissenting judges' views on who may be disarmed without offending the Second Amendment. Could a state legislature, for instance, felonize jaywalking, citing jaywalkers' disregard for the rule of law and legal norms, and rely on 18 U.S.C. § 922(g)(1) to ensure that anyone convicted of that offense is permanently disarmed? At oral argument, the U.S. Attorney expressly declined invitations from judges to agree that there is any limit to Congress's power to felonize any activity and make the felony into a lifetime prohibitor.

10. [New Note] Is 18 U.S.C. § 922(g)(1) overbroad? Recall from the majority opinion in *Range* that felonies include a wide swath of offenses, many of which seem relatively minor. *See, e.g.*, MICH. COMP. LAWS ANN. § 445.574a(2)(d) (issuing recycling refunds for 10,000 or more out-of-state bottles or cans punishable by up to five years imprisonment). Setting aside the constitutional concerns, is this solution defensible from a policy perspective? *Compare* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 Cardozo L. Rev. 1573, 1639 (2022) (attempting to make distinctions between violent felons, who could be disarmed for life, with nonviolent felons, who could not be, "would prove completely unworkable"), *with* Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post*-Heller *World*, 70 Duke L.J. 1429, 1472 (2021) (the felon-in-possession ban "is a blunt and punitive remedy" that "indiscriminately targets nonviolent offenders as well as conduct wholly unrelated to criminal activity"). *Cf.* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. Pub. Pol'y 695, 696 (2009) ("Is the public safer now that Martha Stewart is completely and permanently disarmed" for lying to the FBI about a securities transaction that was lawful?)

11. [New Note] The majority rejects the government's argument that "the People" protected by the Second Amendment includes only "law-abiding, responsible citizens." Following *Bruen*, lower courts have grappled with this issue, particularly with respect to felons. *Compare United States v. Tribble*, 2023 WL 2455978 (N.D. Ind. Mar. 10, 2023) (concluding that Second Amendment rights only extend to ordinary, law-abiding citizens and refusing to evaluate 18 U.S.C. § 922(g)(1) under *Bruen*'s text, history and tradition

standard), *with United States v. Carrero*, 635 F. Supp. 3d 1210 (D. Utah 2022) (concluding that felons fall within "the People" protected by the Second Amendment but finding 18 U.S.C. § 922(g)(1) consistent with the Nation's historical tradition of firearm regulation).

Rahimi decisively settled the issue. Rahimi was a citizen, but not a law-abiding one. The Court treated him as having Second Amendment rights, while upholding the law that allowed him to be disarmed. The Court likewise rejected the Solicitor General's argument the Second Amendment only applies to "responsible" citizens. *United States v. Rahimi*, 144 S.Ct. 1889, 1903 (2024).

12. [New Note] *Range* was the first successful as-applied challenge to 18 U.S.C. § 922(g)(1) following *Bruen*. Only one other court has held the statute unconstitutional, as applied to an individual previously convicted of aggravated assault and manslaughter. *See United States v. Bullock*, 679 F. Supp. 3d 501 (S.D. Miss. 2023). Judge Carlton Reeves excoriated the Supreme Court's Second Amendment jurisprudence as ahistorical and difficult for lower courts to apply. Nevertheless, he concluded that under *Bruen*'s framework the government had not met its burden in proving a historical tradition of disarming individuals similarly situated to Mr. Bullock. The case is on appeal to the Fifth Circuit.

A few days after *Rahimi* was decided, the Tenth Circuit held that *Rahimi* did not overrule prior Tenth Circuit precedent that as-applied challenges are never allowed for 922(g)(1). *United States v. Curry*, 2024 WL 3219693 (10th Cir. June 28, 2024). But a few days after that, the Supreme Court granted, vacated, and remanded the Tenth Circuit's most recent case forbidding as-applied challenges. *Vincent v. Garland*, 2024 WL 3259668 (U.S. July 2, 2024). Also relying on pre-*Rahimi* circuit precedent for a categorical prohibition on as-applied cases is *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024).

13. [New Note] As noted by Judge Krause, *Range* created a circuit split over whether as-applied challenges to § 922(g)(1) can ever be successful. In *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023), the Eighth Circuit expressly rejected "felony-by-felony litigation" and upheld the statute as applied to an individual twice convicted of sale of a controlled substance. The Eighth Circuit reaffirmed its reasoning in *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). After deciding *Rahimi*, however, the Supreme Court granted, vacated, and remanded *Jackson*. *Jackson v. United States*, 2024 WL 3259675 (U.S. July 2, 2024)

14. [New Note] Lesane was convicted in 2003 of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). Later, in a different case, the Fourth Circuit ruled that the North Carolina statute under which Lesane had

been convicted, and which formed the predicate for his 922(g)(1) conviction, did not qualify as a disqualifying crime under §922(g)(1). Hence, Lesane's conviction under 922(g)(1) was invalid. Lesane petitioned for a writ of *coram nobis* to vacate his 2003 federal conviction, and the U.S. attorney conceded that Lesane was actually innocent of the offense. Reversing the district court, the Fourth Circuit ordered the district court to issue a writ of *coram nobis*. *United States v. Lesane*, 40 F.4th 191 (4th Cir. 2022). A writ of *coram nobis* (Latin for "before us") vacates an erroneous criminal or civil judgement because of an error of fact in the original proceeding.

Similarly, a U.S. District Court entered a permanent injunction against applying California's felon-in-possession statute to persons whose out-state convictions for nonviolent felonies had been vacated. *Linton v. Bonta*, 2024 WL 846241 (N.D. Cal. Feb. 28, 2024).

15. [New Note] As post-*Bruen* courts grapple with history, one of the most influential scholars on disarmament has been Joseph G.S. Greenlee. His most recent article on the topic is *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1 (2024):

> Part III explores 17th-century England. Insurrections and rebellions were constant, so disarmament was, too. The authorities issuing disarmament orders and those carrying them out repeatedly stated that the purpose was to prevent danger. Even when people were disarmed based on their religion, it was because those religious groups were perceived as subversives seeking to overthrow the government. There was no codified English arms right until 1689, so disarmament laws were vulnerable to abuse. But even the despotic rulers justified their disarmament efforts by focusing on danger.
>
> Part IV addresses disarmament efforts in colonial America. Nearly every disarmament law discriminated based on race, status, or religion. And the Supreme Court has made clear that discriminatory laws cannot establish a tradition of firearm regulation. So these restrictions are irrelevant. In any event, the discriminatory laws were motivated by concerns over danger. African Americans were disarmed because slaves frequently revolted—roughly 250 times—and such revolts would have been extremely deadly had the slaves been armed. Laws preventing firearm transfers to American Indians were intended to prevent attacks against the colonists. And laws disarming Catholics during the French and Indian War—viewed throughout the colonies as a war between Catholics and Protestants—were enacted to prevent Catholics from joining Catholic France.
>
> Part V surveys disarmament orders issued during the Revolutionary War. Several counties and states disarmed people who remained or were suspected of remaining loyal to the British. Because some of these orders were broad, they inevitably disarmed some people who would not have fought for or even aided the British. But the justification for such laws was danger nevertheless—the Continental Congress, New York, Massachusetts, Delaware, New Jersey, Pennsylvania, and General George Washington all expressly stated that the loyalists were disarmed because they were dangerous. And as wartime

> measures, enacted when defeat seemed imminent, they have never been presented as respecting anyone's rights. Moreover, the Americans faced a perilous arms shortage throughout the war, so to the extent these laws swept too broadly, they served the purpose of arming soldiers who did not possess weapons.
>
> Part VI discusses the relevant proposals from the Constitution ratifying conventions. Only New Hampshire's amendment received approval from the majority of the convention. Included in its Form of Ratification, the proposed amendment provided that "Congress shall never disarm any Citizen, unless such as are or have been in actual Rebellion." At Massachusetts's convention, Samuel Adams proposed an amendment ensuring that "the said constitution be never construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Adams's amendments were not adopted at the convention, but many members who voted for ratification did so with the understanding that such amendments would later be adopted. And after the Bill of Rights was proposed, Adams's allies celebrated his amendments having been adopted. Another proposed amendment was presented by some of the members of Pennsylvania's convention who voted against ratification. This proposal provided that "no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals." Although the "crimes committed" could be read as allowing disarmament based on nonviolent activity, the reaction to the proposal both within and without the colony suggests that was not the case.
>
> This article concludes by emphasizing that danger was always the excuse for disarmament acts in 17th-century England as well as 17th- and 18th-century America. And because authorities expressly stated why they were disarming people—i.e., danger—there is no need to imagine some mysterious motivation, such as "disrespect for the law." Indeed, "disrespect for the law" was never offered as a justification, and it contradicts the overwhelming majority of disarmament acts, which did not require or even involve a violation of the law.

For additional scholarship, see Jamie G. Mcwilliam, *Refining the Dangerousness Standard in Felon Disarmament*, 108 Minn. L. Rev. Headnotes 315 (2024) ("[O]nly those who have actually created the kind of danger that the amendment was meant to protect against—i.e., who have perpetrated physical violence—should be disarmed."); Ethan Tourtellotte, *Second Chances for Second Amendment Rights: Prohibited Persons, Restoration of Rights, and Lifetime Bans in Light of New York State Rifle & Pistol Ass'n v. Bruen*, 48 Okla. City U. L. Rev. 109 (2023) (lifetime bans are unconstitutional if there is not an objective procedure for restoration of rights).

16. [New Note] The 18 U.S.C. § 922(g) prohibitions on firearm possession by certain persons are paralleled by 922(d) bans on anyone transferring a firearm to a prohibited person. The 922(d) for transfers to convicted felons was upheld on the basis that transfers are not conduct covered by the plain text of the

Second Amendment. Even if they were, there are plenty of historical analogues, including laws that generally regulated firearms sales. *United States v. Porter*, 2023 WL 113739 (S.D. W. Va. Jan. 5, 2023).

17. [New Note] A 2-1 Ninth Circuit panel held that the 922(g)(1) ban could not constitutionally be applied to a defendant with prior nonviolent convictions for vandalism, drug possession, and evading an officer. *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024). However, the Ninth Circuit has granted en banc review. 108 F.4th 786 (9th Cir. 2024). Judge VanDyke, who had been on the original panel but not authored the opinion dissented from the en banc grant:

> "What would you do if you were stuck in one place and every day was exactly the same, and nothing that you did mattered?" In the Ninth Circuit, if a panel upholds a party's Second Amendment rights, it follows automatically that the case will be taken en banc. This case bends to that law. I continue to dissent from this court's Groundhog Day approach to the Second Amendment. . . .
>
> In this circuit, you could say that roughly two-fifths of our judges are interested in faithfully applying the totality of the Supreme Court's Second Amendment precedent when analyzing new issues that have not yet been directly addressed by the Court. The other 17/29ths of our bench is doing its best to avoid the Court's guidance and subvert its approach to the Second Amendment. That is patently obvious to anyone paying attention. To say it out loud is shocking only because judges rarely say such things out loud. . . .
>
> The Ninth Circuit is going to joyride *Rahimi* and the GVRs that followed it like a stolen Trans Am until the Supreme Court eventually corrects us (again). . . .
>
> But *Rahimi* actually validates the original panel's application of the Court's prior precedents. The Supreme Court emphasized that *Rahimi* had been judicially determined to pose a credible threat to the safety of others. The government never tried to show that Duarte poses such a threat. The Court also relied on Section 922(g)(8)'s temporary nature. Section 922(g)(1)'s disarmament is permanent.

Id. at 787-89 (VanDyke, J., dissenting)

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18 U.S.C § 922(n) prohibits anyone under felony indictment from taking possession of any firearms, although it does not prohibit one from retaining firearms previously possessed. Unlike its cousin, § 922(g)(1) (Ch. 13.B) post-*Bruen* courts seem more skeptical of the law's constitutionality. Compare the following two cases, one upholding § 922(n) against a facial challenge and the other striking it down.

DAVID COUNTS, UNITED STATES DISTRICT JUDGE

This Court faces a predicament similar to Plato's allegory of the cave. There are the known knowns: a defendant was convicted of buying a gun while under indictment; after the Supreme Court's recent ruling in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, that defendant asks this Court to reconsider the constitutionality of his statute of conviction. The known unknowns: whether a statute preventing a person under indictment from receiving a firearm aligns with this Nation's historical tradition of firearm regulation. And the unknown unknowns: the constitutionality of firearm regulations in a post-*Bruen* world.

There are no illusions about this case's real-world consequences — certainly valid public policy and safety concerns exist. Yet *Bruen* framed those concerns solely as a historical analysis. This Court follows that framework.

BACKGROUND

On June 9, 2020, Jose Gomez Quiroz ("Defendant") was indicted in a Texas state court for burglary, a second-degree felony. Defendant subsequently failed to appear for a hearing on the burglary charge and was indicted almost a year later for jumping bail/failing to appear, a third-degree felony. In late 2021, while both charges were pending, Defendant attempted to buy an M1911, Semi Auto .22 caliber firearm from a local firearms dealer. To obtain the weapon, Defendant denied he was under indictment for a felony when filling out the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") Firearms Transaction Record form (Form 4473). Because the National Instant Criminal Background Check System ("NICS") returned a delayed response, Defendant waited seven days and then picked up the firearm on December 30, 2021. But less than a week later, the NICS informed ATF of Defendant's illegal firearm purchase.

Defendant was federally charged in March 2022 with two counts: (Count 1) making a false statement during the purchase of a firearm under 18 U.S.C. § 922(a)(6), and (Count 2) the illegal receipt of a firearm by a person under indictment under 18 U.S.C. § 922(n). A jury convicted him of both counts. One week after his conviction, Defendant moved to set aside the verdict pursuant to Rule 29 of the Federal Rules of Criminal Procedure and for this Court to reconsider his previous motion to dismiss because of the United States Supreme Court's recent ruling in *Bruen.*

Defendant's motion hinges on the constitutionality of § 922(n) because if the provision is unconstitutional, then Defendant's false statement during the purchase of the firearm is immaterial. . . .

DISCUSSION. . .

I. The Supreme Court in *Bruen* laid out a new standard for courts to use when analyzing firearm regulations. . . .

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

So the threshold question is whether the Second Amendment's plain text covers Defendant's conduct.

II. *Bruen*'s First Step: "receiving" a firearm under the Second Amendment's plain text.

The right to "keep and bear arms" shall not be infringed. Defendant's pivotal conviction was under 18 U.S.C. § 922(n), which makes it "unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Yet from the jump, the Government seems to misread *Bruen.* The Government first frames Defendant's conduct as "buying a gun *while under felony indictment.*" *Bruen*'s first step, however, requires only that "the Second Amendment's plain text cover the *conduct.*" And the prohibited conduct under § 922(n) is "receipt" of a firearm — nothing more. By adding "while under felony indictment" to the conduct, the Government conflates *Bruen*'s first step with its second.

To illustrate, take 18 U.S.C. § 922(g)'s proscription against felons possessing firearms. The conduct is possession — which the Government admits falls under "keep." Therefore, whether the Government can restrict that specific conduct for a specific group would fall under *Bruen*'s second step: the historical justification for that regulation. So too under § 922(n); the Second Amendment's plain text must cover "receipt" of a firearm. *Bruen*'s second step would analyze "persons under indictment." So the issue becomes whether "keep and bear arms" encompasses "receipt."

The Government next argues for a rigid, sterile reading of "keep and bear arms." Quoting *Heller*, the Government notes that to "keep arms" means to "have weapons" or "possess" and to "bear arms" means to "carry." So anything not "having," "possessing," or "carrying" weapons is excluded and thus, the Government argues, receiving a firearm falls outside the Second Amendment right to "keep and bear arms."

Yet the plain meaning of the verbs "have" or "possess" include the act of receipt. For example, "to have" means "to be in possession of . . . *something received.*" Therefore, "to have weapons" would encompass the past receipt and the current possession of those weapons.

And logically, excluding "receive" makes little sense. To receive something means "to take into . . . one's *possession.*" How can one possess (or carry) something without first receiving it? Receipt is the condition precedent to possession — the latter is impossible without the former. Taking the Government's argument at face value would also lead to an absurd result. Indeed, if receiving a firearm were illegal, but possessing or carrying one remained a constitutional right, one would first need to break the law to exercise that right. The Government is asking in effect to banish gun rights to Hotel California's purgatory: "You can check out any time you like, but you can never leave."

In that same vein, the Government doesn't dispute that there is no evidence that Defendant had a gun before buying the firearm in question. So even if § 922(n) doesn't prevent "possession," by preventing receipt it effectively prevents Defendant's constitutional possession.

Bruen's first step asks a strictly textual question: does the Second Amendment's plain text cover the conduct? Without a doubt the answer here is yes. The Second Amendment's plain text does cover "receipt" and the Constitution presumptively protects such conduct. Thus, § 922(n)'s constitutionality turns on whether prohibiting persons under indictment from receiving a firearm is consistent with the Nation's historical tradition of firearm regulation.

III. *Bruen*'s second step: the historical analysis.

Next, the Government must justify its regulation through a historical analysis. To do so, the Government's historical inquiry must show that § 922(n) is consistent with the historical understanding of the Second Amendment. If a challenged regulation addresses a "general societal problem that has persisted since the 18th century," this historical inquiry is "straightforward." But other regulations may require a "more nuanced" approach. In those cases, courts can reason by analogy. which involves finding a historical analogue that is "relatively similar" to the modern regulation. As dictated by *Bruen* the Court will initially lay out § 922(n)'s history.

A. Under indictment: the Federal Firearms Act of 1938 to present.

Section 922(n)'s history begins in 1938, when Congress passed the Federal Firearms Act ("FFA"). The FFA prohibited "individuals under indictment for, or convicted of, a crime of violence from shipping or transporting any firearms or ammunition in interstate commerce." The Act only covered those under

indictment in federal court and "crimes of violence" was commonly understood to include only those offenses "ordinarily committed with the aid of firearms."

According to legislative history, Congress implemented the FFA to combat roaming criminals crossing state lines. Without federal laws, ex-convicts would simply cross state lines to circumvent conditions of probation or parole. The FFA's main goal then was to "eliminate the guns from the crooks' hands, while interfering as little as possible with the law-a-biding citizen." In Congress's eyes, those under indictment for, or convicted of, a crime of violence had already "demonstrated their unfitness to be entrusted with such dangerous instrumentalities."

Almost 25 years later, in 1961, Congress amended the FFA to cover "all individuals under indictment, regardless of the crime they were accused of." Congress also removed the "crimes of violence" language, replacing it with "crime punishable by imprisonment for a term exceeding one year."

Congress expanded gun regulations yet again with the Gun Control Act of 1968 ("GCA"). Key amendments included defining "indictment" to mean "an indictment . . . in *any* court," thus adding persons indicted under state law. In full, the GCA criminalized receipt of a firearm or ammunition "by any person . . . who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." In 1986, Congress combined all prohibitions against persons under indictment into what is now § 922(n)'s current form.

B. Analogizing felons-in-possession.

The Government analogizes regulations prohibiting felons from possessing firearms with those prohibiting receipt of a firearm by persons under indictment. According to the Government, § 922(g)(1)'s prohibitions on the possession of firearms by felons "has exactly the same historical pedigree as § 922(n)'s restriction on felony indictees." Yet the Government fails to explain why regulations enacted less than a century years ago count as "longstanding."

With nothing further, the Government's argument can be boiled down to the following syllogism:

(1) felon-in-possession laws have the same history as § 922(n);
(2) *Heller* endorsed felon-in-possession laws as constitutional;
(3) Therefore, § 922(n) is constitutional.

The first problem with this argument is it's a logical fallacy. Sharing a history with felon-in-possession laws makes § 922(n) constitutional in the same way a dog is a cat because both have four legs.

The second problem is that *Heller*'s endorsement of felon-in-possession laws was in dicta. Anything not the "court's determination of a matter of law pivotal to its decision" is dicta. Dicta is therefore "entitled to little deference because

they are essentially ultra vires pronouncements about the law." Or, as Francis Bacon put it, dicta is only the "vapours and fumes of law."

The last, and most significant problem with the Government's argument is that it lacks historical analysis from the Second Amendment's ratification, much less anything pre-1938. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*" Consequently, the Government omitted the "critical tool of constitutional interpretation."

i. The state's power to disarm in the early colonies.

The Court therefore will conduct its own historical inquiry in the Government's absence, starting with the law preceding the Second Amendment's adoption in 1791. But this Court "must be careful when assessing evidence concerning English common-law rights" because "[t]he common law, of course, developed over time." And with this cautious inquiry, the Court finds one contextual clue: not what laws the colonies retained from their English roots, but what they excluded.

English law had a long history of disarming citizens for any reason or no reason at all. For example, Parliament granted officers of the Crown the power to disarm any person they judged "dangerous to the peace of the Kingdom." Or in 1688, Parliament disarmed Catholics because of their faith.

Yet even while still under English rule, the colonies' attitude toward disarming individuals diverged from its English roots. Indeed, when Virginia disarmed all citizens who refused to take an allegiance test, it did so only partially, allowing citizens to keep "such necessary weapons as shall be allowed him by order of the justices of the peace at their court, for the defense of his house and person." So even "traitors" unwilling to swear allegiance to the Crown retained their weapons in colonial America.

Leading up to the Second Amendment's adoption, the colonies "consistently refrained from exercising such a power over citizens." As one historian wrote, after he searched all existing printed session laws of the first fourteen states year by year from 1607 to 1815, he couldn't find "a single instance in which these jurisdictions exercised a police power to prohibit gun ownership by members of the body politic."

ii. State Conventions when ratifying the Constitution.

More evidence can be gleaned from the state conventions ratifying the Constitution. In February 1788, the Massachusetts Convention was the first to recommend amendments with its ratification. John Hancock and Samuel Adams proposed several amendments that eventually appeared in the First, Second, and Fourth Amendments. One such amendment proposed that the Constitution "be never construed to authorize Congress . . . to prevent the

people of the United States, who are peaceable citizens, from keeping their own arms."

Massachusetts wasn't the only state, as New Hampshire copied nine of Massachusetts' proposals almost verbatim, while adding three of its own. One of the three involved the right to keep and bear arms: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."

iii. The state's power to disarm leading up to 1938.

Until federalized by the FFA, prohibiting possession of a firearm, even by those convicted of violent crimes, was a rare occurrence. For instance, it wasn't until 1886 that a state court ruled on a firearm regulation that regulated "the condition of a person — rather than directly regulating his manner of carrying." There, in *Missouri v. Shelby*, the Supreme Court of Missouri upheld a ban on carrying a deadly weapon while intoxicated.

And even though other state courts eventually ruled on laws regulating the condition of a person, very few states prohibited felons — or any other type of person for that matter — from possessing a firearm. Indeed, by the mid-1920s, only six states had laws banning concealed carry by someone convicted of a crime involving a concealed weapon. And zero states banned possession of long guns based on a prior conviction.

Whether this Nation has a history of disarming felons is arguably unclear — it certainly isn't clearly "longstanding." And what's even more unclear — and still unproven — is a historical justification for disarming those indicted, but not yet convicted, of any crime.

C. Analogizing Massachusetts' surety laws to § 922(n).

In another analogy closer to § 922(n), the Government argues that Massachusetts' mid-19th century surety laws outlined in *Bruen* are a historical example of restricting gun rights for those accused but not convicted of wrongdoing. The 1795 surety laws required a person "reasonably likely to 'breach the peace,' and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm." The Government also claims that those surety statutes burdened Second Amendment rights "more directly" than § 922(n)'s prohibitions. Yet this argument ignores the rest of Justice Thomas's analysis.

Justice Thomas dismisses the contention that surety laws were a severe restraint as having "little support in the historical record." Surety laws were "not meant as any degree of punishment." And there's little evidence that such laws were regularly enforced. Indeed, the handful of cases highlighted by Justice Thomas from Massachusetts and the District of Columbia all involved "black defendants who may have been targeted for selective or pretextual enforcement."

The Government also argues that the surety laws provide an imperfect but similar analogue to § 922(n). But not only do Massachusetts' mid-19th century surety laws fail to support the Government, they actively cut against the Government's assertions. In *Bruen*, Justice Thomas highlighted the "straightforward" historical method employed in *Heller*: "If earlier generations addressed [a general societal problem that has persisted since the 18th century], but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."

Much like § 922(n), Massachusetts' surety laws addressed the societal fear that those accused — like those under indictment — would "make an unlawful use of [their firearm]." Yet surety laws addressed that fear through means "materially different" than § 922(n). Rather than completely restrict the accused's constitutional right, surety laws permitted the accused to prove a special self-defense need. And if they couldn't, the accused needed only to post a money bond for no more than six months to keep their firearms.

In contrast, § 922(n) restricts a person's right to receive a firearm indefinitely after indictment by a grand jury — which is not an adversarial proceeding. And as the Government admits, an "indictee cannot overcome § 922(n)'s restriction by posting a bond." Thus, the existence of Massachusetts' surety laws — addressing a general societal problem through materially different means — serves only as more evidence that § 922(n) departs from this Nation's historical tradition of firearm regulation.

IV. Other historical analogies.

The Court points to an important distinction here — § 922(n) varies from the challenged regulations in *Heller* and *Bruen.* Both *Bruen* and *Heller* dealt with regulations restricting "where" someone can keep and bear arms. In contrast, § 922(n) restricts "who" may keep and bear arms. Yet *Bruen* "decides nothing about *who* may lawfully possess a firearm." Indeed, *Bruen*'s first step mentions only "conduct." So as this Court reasoned above, "who" may keep and bear arms is relegated to step two.

And if relegated to step two, the Government must prove that restricting rights for a specific group (e.g., those under indictment or felons) adheres to this Nation's historical tradition. There lie Plato's unknown unknowns.

If the Government must prove a historical tradition for every regulation restricting a specific subgroup, *Bruen*'s framework creates an almost insurmountable hurdle. For one thing, one could easily imagine why historical analogies from the 18th century would be difficult to find. For example, if one lived more than a day's journey from civilization, a firearm was not only vital for self-defense — it put food on the table. Indeed, whether fending off wild animals or hunting, a firearm was a necessary survival tool. That is why

disarming someone was likely unthinkable at the time — no firearm in the wilderness meant almost certain death.

So finding similar historical analogies is an uphill battle because of how much this Nation has changed. Society, population density, and modern technologies are all examples of change that would make something unthinkable in 1791 a valid societal concern in 2022. But the only framework courts now have is *Bruen*'s two-step analysis.

That said, this Court believes there are other historical analogies that neither the Government nor Defense explore. As stated, *Bruen* and *Heller* dealt with regulations restricting where someone may keep and bear arms and unlike the challenged regulations in *Bruen* and *Heller*, § 922(n) restricts "who" may keep and bear arms. Under the Second Amendment, the "who" imbued with the right to keep and bear arms is "the people" — a term of art. Thus, the historical inquiry should be whether there is a historical tradition of excluding those under indictment from "the people."

Both *Heller* and *Bruen* note that the Second Amendment is not the only constitutional provision that reserves rights or powers to the people. For example, the First Amendment's Assembly-and-Petition Clause prevents Congress from making laws abridging "the right of the people peaceably to assemble." The Fourth Amendment protects the right of "the people ... to be free from unreasonable searches and seizures." Or § 2 of Article I, which provides that "the people" will choose members of the House.

And just like the Second Amendment, the above provisions' reservation of rights or powers for "the people" are not absolute. Indeed, there is a long history of the Government regulating those rights — including restriction on who can exercise that right. Thus, the history of excluding specific groups from rights and powers of "the people" in other constitutional contexts can provide useful analogies.

A. Restrictions on the power of "the people" to vote in Section 2, Article I.

Section 2, Article I of Constitution states, "the House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Put simply, it's the right of the people to vote. This enumerated power of "the people," however, doesn't provide an analogy to § 922(n); those under indictment can still vote. But states have excluded specific groups from "the people," for instance, those convicted of a crime.

State laws restricting voting rights for those convicted of certain crimes are not a recent vintage, states have done so since the founding. In fact, Kentucky's 1792 Constitution stated, "[l]aws shall be made to exclude from . . . suffrage those who thereafter be convicted of bribery, perjury, forgery, or other high crimes and misdemeanors." Vermont's Constitution followed one year later, authorizing the removal of voting rights from those engaged in bribery or

corruption during elections. As of 2022, only two states and the District of Columbia do not restrict felons' voting rights.

B. Regulating the rights of "the people" to assemble under the First Amendment.

The First Amendment's Assembly-and-Petition Clause also furnishes a helpful analogy. The First Amendment states, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably." But this right is not absolute — the Supreme Court has excluded groups from the people's right of assembly.

In *De Jonge v. Oregon*, the Supreme Court declared the right to peaceful assembly "equally fundamentally" with other First Amendment clauses. There, De Jonge was charged under a state criminal syndicalism statute after speaking at a Communist party meeting. Although the objectives of the Communist Party are heinous, the Supreme Court held that De Jonge "still enjoyed his personal right . . . to take part in a peaceable assembly having a lawful purpose."

Yet the Supreme Court also highlighted the right of assembly "without incitement to violence or crime." Indeed, much like the right to keep and bear arms, the First Amendment's right to assembly can be abused to incite violence or crime. Thus, legislation protecting against such abuses would be constitutional if "made only against the abuse." The rights themselves may not be curtailed.

The Supreme Court has also held that the Government may restrict the right to assembly when there's a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." Prior restraints against such dangers, however, incur a heavier burden.

In the Second Amendment context, however, restrictions against those already convicted of a crime, for example, would not be a prior restraint—they have already been found guilty in a constitutionally sufficient proceeding. Likewise, the right of the people doesn't protect violent actors or criminals. But that is not the case for those merely under indictment. Indeed, excluding those under indictment from the right of the people to keep and bear arms would operate much like prior restraints in the First Amendment concept. "[A] free society prefers to punish the few who abuse rights of [the people] after they break the law than to throttle them and all others beforehand."

In sum, this Court does not rehash all constitutional interpretations since 1791, and although not a perfect fit, the "rights of the people" in other contexts can supply useful comparisons. And as seen above, this Nation does have a

historical tradition of excluding specific groups from the rights and powers reserved to "the people" in those contexts. But unlike the historical tradition of excluding felons or violent actors from the rights of "the people," little evidence supports excluding those under indictment in any context.

V. Courts should be skeptical of § 922(n) for other reasons.

This Court is skeptical that the Government here, or in any other court, could defend § 922(n)'s constitutionality. Not only does the historical record lack the clear evidence needed to justify this regulation, § 922(n) evokes constitutional scrutiny in other ways.

A. Grand Jury Proceedings.

The nature of grand jury proceedings is one such area that casts a shadow of constitutional doubt on § 922(n). Some feel that a grand jury could indict a [burrito] if asked to do so. The freewheeling nature of such proceedings stems from the Supreme Court holding that (1) the rules of evidence don't apply, (2) evidence barred by the Fourth Amendment's exclusionary rule may be heard, and (3) the grand jury may rely on evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. Simply put, "[a] grand jury investigation is not an adversarial process."

The Fifth Amendment guarantees the right to a grand jury indictment for federal felonies. But the right to a grand jury indictment is not always applicable to state court proceedings. So because an indictment under § 922(n) means either a state or federal indictment, a defendant indicted for a state felony could lose the right to buy a firearm without the case ever reaching a grand jury.

The Government argues here that it has always been able "to impose substantial liberty restrictions on indicted defendants." To support that claim, the Government lists detentions or conditions of pretrial release as examples. Why the Government believes those examples support its argument is unclear; detention hearings have substantial procedural safeguards. For one thing, at a detention hearing, the defendant may request the presence of counsel; testify and present witnesses; proffer evidence; and cross-examine other witnesses appearing at the hearing. Grand jury proceedings have none of these safeguards. Detention hearings also occur at a different stage in the proceeding — often after indictment. And even if restricting a defendant's right to possess a firearm as a condition of pretrial release is constitutional — an issue which this Court does not consider here — that doesn't also make § 922(n)'s restrictions in the indictment stage constitutional.

In line with procedural concerns, the Court notes in passing that the expansion of gun rights by the Supreme Court in *Bruen* might also implicate procedural due process under the Fifth Amendment. Courts that have

analyzed due process and § 922(n) did so pre-*Bruen.* If the right to keep and bear arms inside and outside the home is so clear, removing that right would likely require the same constitutional procedural safeguards that the Supreme Court has bestowed on other rights. But this Court need not analyze those issues here.

B. The historical disarmament of specific groups.

Another reason that § 922(n) warrants skepticism is the historical misappropriation of law to pretextually and unlawfully disarm unfavored groups. The Supreme Court noted such historical uses against blacks in both *Bruen* and *McDonald v. City of Chicago.* After the Civil War, "systematic efforts" were made to disarm blacks from obtaining, possessing, or carrying a firearm. For example, an 1833 Florida statute authorized "white citizen patrols to seize arms found in the homes of slaves and free blacks, and provided that blacks without a proper explanation for the presence of the firearms be summarily punished, *without benefit of a judicial tribunal.*" Another example would be the aftermath of the Cincinnati race riots in 1841. The day after the riot was quelled, all blacks were disarmed. And the day after that, white rioters ransacked the now-defenseless black residential district. That pretextual disarmament wrenched away black residents' "individual right to self-defense"—"the central component" of their Second Amendment right.

The Government cites the Seventh Circuit's reasoning in *United States v. Yancy* to argue legislatures have long had the right to disarm "unvirtuous citizens." *Yancy*'s reasoning on "unvirtuous citizens" quotes an influential 1868 constitutional treatise, which stated constitutional rights did not apply to "the idiot, the lunatic, and the felon." But what's omitted is how blacks were treated the same: "Pistols old muskets, and shotguns were taken away from [freed slaves] as such weapons would be wrested from the hands of *lunatics.*"

C. Past courts interpreted § 922(n)'s constitutionality under the collective-right view the Supreme Court rejected in *Heller.*

One last issue that gives this Court pause is that the question whether the right to keep and bear arms was a collective right or an individual right wasn't answered until the Supreme Court in *Heller* held that the Second Amendment bestowed an individual right. So courts interpreting the constitutionality of what is now § 922(n) would erroneously invoke the collective-right view that *Heller* resoundingly rejected. For example, just four years after the FFA's enactment, the First Circuit in *Cases v. United States* upheld the FFA's regulation of those under indictment, or convicted of, "crimes of violence" using the collective-right view. The First Circuit, invoking neither history nor precedent, held that a person has no right under the Second Amendment unless he is "a member of a[ ]military organization" or uses his weapon "in

preparation for a military career," thus "contributing to the efficiency of the well regulated militia."

Another example that same year was the Third Circuit's decision in *United States v. Tot.* There, the court also upheld the FFA's "crimes of violence" disability, noting that the Second Amendment "was not adopted with individual rights in mind," and the FFA "[did] not infringe upon the preservation of the well regulated militia protected by the Second Amendment."

Thus, the FFA's regulations were found constitutional under the collective-right view later dismantled by *Heller.* And § 922(n)'s historical prohibitions were limited to the much-narrower "crimes of violence" disability. So if comparing the FFA's "crimes of violence" limitation to § 922(n)'s far broader coverage — which includes non-violent felonies and state indictments—it's doubtful § 922(n) would be constitutional under the individual-rights view *Heller* enumerated.

The Court notes the above concerns not to bolster its conclusion, but to highlight how *Bruen* changed the legal landscape. The *Bruen* Court made the constitutional standard "more explicit" to eliminate "asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions.'" *Bruen* did not, however, erase societal and public safety concerns—they still exist—even if *Bruen*'s new framework prevents courts from making that analysis. As stated above, the new standard creates unknown unknowns, raising many questions. This Court does not know the answers; it must only try to faithfully follow *Bruen*'s framework.

CONCLUSION

The Second Amendment is not a "second class right." No longer can courts balance away a constitutional right. After *Bruen*, the Government must prove that laws regulating conduct covered by the Second Amendment's plain text align with this Nation's historical tradition. The Government does not meet that burden.

Although not exhaustive, the Court's historical survey finds little evidence that § 922(n) — which prohibits those under felony indictment from obtaining a firearm — aligns with this Nation's historical tradition. As a result, this Court holds that § 922(n) is unconstitutional.

United States v. Rowson

652 F. Supp. 3d 436 (S.D.N.Y. 2023)

PAUL A. ENGELMAYER, District Judge:

This decision resolves two motions by defendant Iszayah Rowson. Rowson moves to suppress a firearm seized from him during a traffic stop on the grounds that the livery car in which he was a passenger was stopped, and he was thereafter frisked, in violation of the Fourth Amendment. Rowson also moves to dismiss the one-count Indictment, which charges him with receipt of a firearm in violation of 18 U.S.C. § 922(n), which makes it a crime for a person while under indictment for a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive a firearm that has travelled in interstate or foreign commerce. Drawing on *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), Rowson argues that § 922(n) is facially unconstitutional under the Second Amendment.

For the reasons that follow, the Court denies both motions.

I. Overview and Procedural History

On June 2, 2022, the Grand Jury returned the Indictment, charging Rowson with a single count of violating § 922(n), on or about March 5, 2022. The charges arose from a stop shortly after 9:45 p.m. that evening by two New York City Police Department ("NYPD") officers of an Uber livery car in the Bronx, on the ground that the backseat passenger, Rowson, was not wearing a seatbelt, as required by law. After an exchange with Rowson, and after he was asked to and did exit the vehicle, an officer patted down Rowson and found a firearm in the waistband of his pants. The gun had been stolen on February 8, 2022 in Virginia. At the time, Rowson was under indictment in New York State for criminal possession of a weapon in the second degree . . . and criminal possession of a firearm, in violation of NYSPL § 265.01-(b)(1). Both are felony offenses.

II. . . .

[After an extended review of the facts, Judge Engelmayer established that the police officers had reasonable suspicion to stop Rowson's vehicle and to frisk him. He thus denied Rowson's motion to suppress the firearm seized following the traffic stop.]

III. Rowson's Motion to Dismiss

Rowson separately moves for dismissal of the Indictment on the ground that 18 U.S.C. § 922(n), evaluated under the framework for Second Amendment analysis used by the Supreme Court in *Bruen*, is unconstitutional. . . .

B. Discussion. . .

1. Are Felony Indictees Within the Scope of "The People" Protected by the Second Amendment?

The initial *Bruen* inquiry is whether the Second Amendment's "plain text covers an individual's conduct." 142 S. Ct. at 2126. The Amendment states: "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."

Rowson argues that, as a pretrial indictee who is an American citizen, he falls within the scope of "the people" covered by the Amendment. The Government seizes on an adjective in *Bruen* to argue the contrary. There, the Court, recapping its decisions in *Heller* and *McDonald*, stated that the Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" and an "individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122. Drawing on the reference to "law-abiding citizen[s]," the Government argues that a felony indictee falls outside "the people" whom the Amendment protects, because, by definition, a showing of probable cause has been made that such a person violated a felony statute. Hence, it argues, such persons should not be viewed as "ordinary, law-abiding citizens" with rights under the Second Amendment.

The Government's argument on this aspect of the *Bruen* framework is unpersuasive. None of the post-*Bruen* decisions addressing § 922(n) — including the four finding § 922(n) unconstitutional — have so held. Several have explicitly held that a person indicted for a felony remains among "the people" whom the Second Amendment covers. Those include decisions upholding § 922(n) . . ., and decisions invaliding it . . .

Nor, apart from the adjective "law-abiding," does any other aspect of the analysis in *Bruen* support the Government's argument at this step. On the contrary, the Court's focus on the "conduct" of the person challenging the law supports Rowson's argument. No doubt because the class of persons implicated by the mandatory New York gun licensing statute included all who sought to carry firearms outside the home, the Court's focus in *Bruen* was not on potentially disqualifying status characteristics of the challengers to the statute. It was instead on whether the Amendment's text covered the "conduct" the statute proscribed. The Court recognized in *Bruen* that the conduct at issue there, possessing a firearm, was presumptively protected by the Amendment, so as to require that the challenged law be justified based on "the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2130. The same is so of the conduct to which § 922(n) is addressed — shipping, receiving, or transporting a firearm — as the courts to consider that question have uniformly held. *See, e.g.*, *United States v. Holden*, 2022 WL 17103509, at *3 ("Receiving a firearm is . . . presumptively protected by the Second Amendment."); *United States v. Quiroz*, 2022 WL 4352482, at *4 ("[D]oes the

Second Amendment's plain text cover the conduct [of receiving a firearm]? Without a doubt the answer here is yes.").

To be sure, *Bruen* did not have occasion to address whether, as the Government posits, the threshold textual inquiry into the scope of the Second Amendment's coverage may also consider whether certain persons, by category, fall outside "the people" whom the Amendment covers. It is reasonable to assume that *Bruen* leaves room for that inquiry in an appropriate case. But even if so, the Government does not offer a convincing basis to treat the broad and eclectic category of persons under any type of pending felony indictment as, *ex officio*, lacking all Second Amendment rights. Pre-*Bruen* decisions, in fact, had so inquired as to the Second Amendment rights of various persons by category. With limited exceptions, most declined to hold that the groups at issue were categorically without Second Amendment rights . . . Insofar as the scope of "the people" the Amendment covered presented an unresolved question before *Bruen*, the decision there did not address, let alone settle, that question. . . .

The case law as to convicted felons is also instructive on this point. The post-*Bruen* decisions addressing the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), although uniformly upholding that statute, have divided on the analytic basis for doing so. Although some courts have treated convicted felons as lacking Second Amendment rights, others have held otherwise, and have instead sustained § 922(g)(1) at the second step of *Bruen* analysis, based on the statute's historical antecedents . . . To the extent that convicted felons have been held to be within the scope of "the people" whom the Second Amendment covers, it follows *a priori* that felony indictees are, too.

Most fundamentally, the Government's argument disqualifying felony indictees from any Second Amendment rights is in conflict with the Supreme Court's explanation in *Heller* of the meaning of the term "the people" — reasoning foundational to its landmark holding that the Second Amendment protects individual rights. In his decision for the *Heller* majority, Justice Scalia equated that term as used in the Second Amendment to its use in other Amendments, including the First Amendment's assembly-and-petition clause and the Fourth Amendment's search-and-seizure clause. . . .

It is black letter law that even convicted felons retain rights under, *inter alia*, the First and Fourth Amendments. That the rights of such persons may be burdened based on their criminal records does not expunge these rights *in toto.* And unlike convicted felons, felony indictees do not stand to lose their political rights (for example, the right to vote) on account of a pending but as-yet-unadjudicated felony charge. The holding urged by the Government, under which felony indictees would be excluded altogether from "the people" as used in the Second Amendment, would therefore be inconsistent with both the

breadth of the term, and its symmetrical use across amendments, noted in *Heller.*

The Court, joining all others to consider the question squarely post-*Bruen*, accordingly holds that felony indictees are within the scope of "the people" who have Second Amendment rights, and that the conduct regulated by § 922(n) of shipping, receiving, or transporting firearms is also covered by the plain text of the Second Amendment. Under *Bruen*, the burden is therefore on the Government to show that § 922(n) is consistent with the Nation's historical tradition of firearm regulation.

2. Is § 922(n) Consistent with the Historical Tradition of Firearms Regulation?

Had *Bruen*'s inquiry into historical antecedents required locating an 18th-century replica of § 922(n), the statute would fail the Second Amendment. The Government has not identified any federal law, before 1938, that specifically targeted felony indictees . . . Nor has the Government or the Court located a colonial era state-law replica of § 922(n).

The Supreme Court in *Bruen*, however, disclaimed the need to find an exact historical match. The proper inquiry, the Court stated, is whether the regulation "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. Where the challenged law "addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence" but it is not dispositive, *id.* at 2131. And the search for analogues is not intended to impose a "regulatory straightjacket." *Id.* at 2133. Rather, the historical inquiry "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin.*" *Id.* (emphasis in original). In conducting this inquiry, the Court inquires whether the antecedent laws and the law at issue "are 'relevantly similar'" — that is, "how and why the regulations burden" a citizen. *Id.* at 2132-33. The Court is also to focus on laws that reflect "the scope [that constitutional rights] were understood to have *when the people adopted them*" — that is, laws temporally proximate to 1791, when the Second Amendment was adopted, and, as potentially confirmative evidence, to 1868, when the Fourteenth Amendment was adopted. *See id.* at 2136 (emphasis in original); *see also id.* at 2138 (noting scholarly debate as to whether 1791 or 1868 is the more apt date for analysis). "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous to pass constitutional muster." *Id.* at 2133.

. . .

Here, utilizing the *Bruen* methodology, the Court finds two lines of historical regulation of firearms to supply analogues sufficiently apposite to sustain § 922(n). The first entails the Nation's long line of laws of disarming

persons perceived as dangerous. The second consists of historical surety laws. The Court develops these lines below.

a. Laws Disarming Dangerous Categories of Persons Perceived as Dangerous

A long line of statutes predating — and/or present at — the founding disarmed persons deemed inherently dangerous. These included many statutes that disarmed persons on bases other than a felony (or other) conviction.

For example, in 1662, the British Parliament authorized Lieutenants to "seize all arms in the custody or possession of any person" deemed "dangerous to the Peace of the Kingdom." Opp. at 30 (citing Militia Act of 1662, 13 & 14 Car. 2, c.3, § 13 (1662)); *see also* Militia Act of 1662 ("[A]rms so seized may be restored to the owners again if the said Lieutenants or . . . their deputies or any two or more of them shall so think fit."). During the ratification period, a "highly influential," *Heller*, 554 U.S. at 604, proposal that circulated among delegates recognized that "people have a right to bear arms . . . *unless for crimes committed, or real danger of public injury*," *id.* at 658 (Stevens, J., dissenting) (emphasis added) (discussing "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents").

There is also ample evidence of colonial and revolutionary-era laws that disarmed groups of people perceived as *per se* dangerous, on the basis of their religious, racial, and political identities. *See, e.g.*, Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 115-16 & accompanying notes (2013) (citing laws barring gun sales to Native Americans, due to fears of violence; free and enslaved Black or mixed-race persons, even where completely law-abiding, out of fear of revolution against white masters; and Catholics or Loyalists). Both parties have collected examples of and/or authorities collecting such laws.

It goes without saying that, in our modern era, a law that would disarm a group based on race, nationality, or political point of view — or on the assumption that these characteristics bespoke heightened dangerousness — would be anathema, and clearly unconstitutional. But the Second Amendment's inquiry into historical analogues is not a normative one. Viewing these laws in combination, the above historical laws bespeak a "public understanding of the [Second Amendment] right" in the period leading up to 1791 as permitting the denial of access to firearms to categories of persons based on their perceived dangerousness. *Bruen* and *Heller* recognized one such longstanding classification — on gun possession by felons. *See Bruen*, 142 S. Ct. at 2137; *Heller*, 554 U.S. at 627. And courts have recognized, based on historical evidence, the common law tradition of disarming classes of

individuals based on judgments about whether they were "peaceable" or "law-abiding."

In this historical context, a law such as § 922(n) fits within the tradition of firearms regulation at the time of the nation's founding. Section 922(n) imposes a partial limit on the firearms rights of a group of persons defined by an objective characteristic that is a fair proxy for dangerousness: an indictment for a felony punishable by a year or more in prison. And the burden § 922(n) imposes is limited in scope (barring the indictee from shipping, transporting, or receiving firearms, but not from possessing them) and time (expiring upon the disposition of the indictment). This aspect of historical firearms regulations is sufficient to sustain § 922(n) against Rowson's challenge.

b. Surety Statutes

Surety laws supply another relevant set of analogues. These laws required persons deemed likely to breach the peace or otherwise transgressive to post a bond before publicly carrying a firearm. The majority of courts to have considered § 922(n) following *Bruen* have treated such statutes as the most germane historical comparators for § 922(n). . . .

Colonial and American surety laws derived from a longstanding English tradition of authorizing government agents to seize arms from persons who had acted unlawfully or in a manner that threatened the public. *See, e.g.*, Robert Gardiner, The Compleat Constable 18 (3d ed. 1708) (directing justices of the peace to "arrest such persons as ride or go offensively Arm'ed" and "seize and take away their Armour and Weapons, and have them apprized as forfeited to her majesty"). Consistent with this tradition, various colonial regulations confiscated weapons from people who were deemed dangerous or apt to disturb the peace. [Judge Engelmayer cited a 1692 Massachusetts law and a 1759 New Hampshire law as support.] These statutes authorized imprisonment "until [the perpetrator] find[s] sureties for the peace and good behavior"; they did not address the return of the confiscated weapons upon the payment of such surety. Most salient, although each statute provided that a confession or "legal proof of any such offense" could justify such confiscation, neither required a conviction as a predicate. Rather, as noted, the "view of such justice" was sufficient.

As *Bruen* recounted, other laws enacted in the years immediately before and after the Second Amendment's adoption also aimed to neutralize people who were armed in ways that could cause alarm. A 1786 Virginia statute, for example, provided that "no man . . . [shall] go nor ride armed by night nor by day, . . . in terror of the Country," Collection of All Such Acts of the General Assembly of Virginia ch. 21, p. 33 (1794) . . . Taken together, as *Bruen* synopsized, these statutes reflected the "by-now-familiar thread" of laws prohibiting "bearing firearms in a way that spreads 'fear' or 'terror' among the

people." *Bruen*, 142 S. Ct. at 2145. Like their predecessors, these laws empowered justices of the peace to apprehend those who were publicly armed and presented offensively.

The Supreme Court considered these surety laws in *Bruen* but found them inapposite to the New York "proper cause" statute at issue, which conditioned the right to a license to carry a handgun in public on a showing of a "special need" for self-protection different from that of the general community. As the Court explained:

> Contrary to respondents' position, these [and other surety laws] in no way represented the "direct precursors" to New York's proper-cause requirement. While New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry [unless they did so in a way that inspired fear or terror.] ... Thus, unlike New York's regime, a showing of special need was required only after an individual [had or] was reasonably accused of intending to injure another or breach the peace.

Bruen, 142 S. Ct. at 2148-49 (internal citation omitted) (emphasis in original).

In the different context presented here, however, the surety laws, considered collectively, are "relevantly similar" to § 922(n). *Id.* at 2132. That inquiry turns on "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133 (emphasis in original) (quoting *McDonald*, 561 U.S. at 767). As to the first question, the surety laws — like § 922(n), but unlike the New York "proper cause" law at issue in *Bruen* — presume that individuals have the right to bear arms. These laws imprisoned or otherwise restricted only those persons who had disturbed the peace or whose public possession of a firearm, as determined by a justice of the peace or other legal process, was otherwise likely to spread fear among the public. Section 922(n) similarly applies only to a subset of persons — felony indictees — as to whom probable cause has been found, by a grand jury or its prosecutorial equivalent in the context of a consented-to felony information, to have committed a serious crime. And they impose a burden with respect to the firearms that is comparable or, arguably, less. Unlike the surety laws, which deprived citizens of the right to possess firearms, § 922(n) does not disturb the indictee's right to continued possession of a firearm; instead, it limits the ability of the indictee to ship, receive, or transfer firearms during the pendency of the indictment. As to the second question, there is comparable justification: the period in which an indictment pends is "a volatile period during which the stakes and stresses of pending criminal charges often motivate defendants to do violence to themselves or to others," thereby reasonably giving rise to fear of threats or violence among the community. *United States v. Kays*, 2022 WL 3718519, at

*4 (quoting *United States v. Khatib*, No. 12 Cr. 190, 2012 WL 6086862, at *4 (E.D. Wis. Dec. 6, 2012), *report and recommendation adopted*, 2012 WL 6707199 (E.D. Wis. Dec. 26, 2012)).

The analogy to surety statutes has particular utility because the public safety threat posed by pretrial indictees was not, in the main, "a general societal problem" at the founding, *Bruen*, 142 S. Ct. at 2131. Such invites, as the Government rightly argues, a broader search for historical analogies. That is because, at the time the Second Amendment was ratified, bail was not available for many crimes that were then treated as capital offenses but which today would be treated as felonies within § 922(n)'s scope. Under English law through the time of ratification, bail generally was either unavailable for persons "clearly guilty or indicted" of certain violent crimes such as murder, or was discretionary for "thieves openly defamed and known; persons charged with other felonies . . . [or] accessories to felony under the same want of reputation." *See* Meyer, *Constitutionality of Pretrial Detention*, at 1157 (citing 4 Blackstone 298–99) . . . The circumstances — the relative scarcity of non-detained felony indictees — likely explain the absence of a colonial-era statute like § 922(n) addressed specifically to pretrial indictees. They reinforce this Court's conclusion that the surety statutes — as colonial and early American examples of statutes disarming (and imprisoning) persons charged with serious offenses, whereby their conduct threatened the public safety — are worthy comparators.

Courts invalidating § 922(n) have discounted the surety laws, reasoning that, because some such laws had exceptions for the payment of a bond or self-defense, these imposed a "qualitatively different burden[ ]" on the accused's Second Amendment right. *United States v. Stambaugh*, 2022 WL 16936043, at *5. In this Court's assessment, however, the surety laws, though an imperfect match, are informative and viable analogues. That some surety laws permitted the accused to reclaim their firearm on the posting of a bond or a showing of self-defense does not destroy the analogy to § 922(n). On the contrary, § 922(n) embeds its own mechanism for relief: resolution of the pending indictment (whether by dismissal, plea, acquittal, or conviction).

Further, to the extent that *Quiroz*, *Stambaugh*, *Holden*, and *Hicks* rely on the "self-defense exception" in some surety statutes, this exception developed materially after the founding. The first appears to have been enacted by Massachusetts in 1836. It provided that:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

Mass Rev. Stat., ch. 134, § 16. Between 1836 and 1871, another 10 states adopted similar laws. *See Bruen*, 142 S. Ct. at 2148 & n.23. But as *Bruen* teaches, the more apt comparators are those in place at the time of the Second Amendment's ratification. The surety laws then in place did not provide for the retention of weapons upon a showing of self-defense, but instead applied upon the determination by a justice of the peace or other legal proceeding that a person's conduct made their possession of the weapon a heightened danger. Such makes them fair analogues to § 922(n).

Accordingly, the Government has satisfied its burden to justify § 922(n) with reference to historical antecedents. Section 922(n), the Court holds, is consistent with the Nation's history of firearms regulation. . . .

NOTES & QUESTIONS

1. [New Note] Unlike most of its sister § 922(g) status-based firearm prohibitors, § 922(n) only prohibits *receipt* of a firearm while under felony indictment. Felony indictees may keep already possessed firearms. *Cf. United States v. Adams*, 2011 WL 1475978, at *2 (S.D. Ala. Apr. 11, 2011). A separate federal law, however, allows judges to condition pretrial the release of persons charged with federal crimes on their disarmament. *See* 18 U.S.C. § 3142(c)(1)(B)(viii).

2. [New Note] Post-*Bruen* cases rebuffing Second Amendment challenges to § 922(n) include: *United States v. Alston*, 699 F. Supp. 3d 424 (E.D.N.C. 2023); *United States v. Everson*, 2023 WL 3947828 (D. Mont. June 12, 2023); *United States v. Adger*, 2023 WL 3627840 (S.D. Ga. May 24, 2023); *United States v. Posada*, 670 F. Supp. 3d 402 (W.D. Tex. 2023); *United States v. Jackson*, 661 F. Supp. 3d 392 (D. Md. 2023); *United States v. Stennerson*, 2023 WL 2214351 (D. Mont. Feb. 24, 2023); *United States v. Bartucci*, 658 F. Supp. 3d 794 (E.D. Cal. 2023); *United States v. Simien*, 655 F. Supp. 3d 540 (W.D. Tex. 2023); *United States v. Rowson*, 652 F. Supp. 3d 436 (S.D.N.Y. 2023); *United States v. Kelly*, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022).

Cases striking 922(n) are: *United States v. Quiroz*, 629 F.Supp.3d 511 (W.D. Tex. 2022); *United States v. Hicks*, 649 F. Supp. 3d 357 (W.D. Tex. 2023); *United States v. Stambaugh*, 641 F. Supp. 3d 1185 (W.D. Okla. 2022); and *United States v. Holden*, 638 F. Supp. 3d 931 (N.D. Ind. 2022), *rev'd on other grounds*, 70 F.4th 1015 (7th Cir. 2023).

C. PERSONS UNDER 21

The following case addresses a Minnesota statute that requires applicants for public-carry licenses to be at least 21 years old. In August 2024, the Eighth Circuit denied en banc review (with no dissents) making the decision final unless it is appealed to the Supreme Court.

Worth v. Jacobson

108 F.4th 677 (8th Cir. 2024)

BENTON, Circuit Judge.

Minnesota's permit-to-carry statute, among its objective criteria, requires applicants to be at least 21 years old. . . The district court granted summary judgment to the Plaintiffs, finding the Second Amendment's plain text covered their conduct and that the Government did not meet its burden to demonstrate that restricting 18 to 20-year-olds' right to bear handguns in public was consistent with this Nation's historical tradition of firearm regulation. . . [T]his court affirms.

I. . .

The individual plaintiffs wish to carry handguns in public. The district court found: "Except for failing to meet the age requirement," they were "otherwise eligible to receive a permit to carry a pistol in Minnesota.". . .

Specifically, the Plaintiffs asked for the following relief:

a) Declare that [Minnesota's permit-to-carry statute], their derivative regulations, and all related laws, policies, practices, and customs violate—facially, as applied to otherwise qualified 18–20-year-olds, or as applied to otherwise qualified 18–20-year-old women—the right of Plaintiffs and Plaintiffs' similarly situated members to keep and bear arms as guaranteed by the Second Amendment and Fourteenth Amendments to the United States Constitution; [and]

b) Enjoin Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with him from enforcing, against Plaintiffs and Plaintiffs' similarly situated members [Minnesota's permit-to-carry statute], their derivative regulations, and all related laws, policies, practices, and customs that would impede or criminalize Plaintiffs and Plaintiffs' similarly situated members' exercise of their right to keep and bear arms. . .

. . . As this is a facial challenge, the "individual circumstances" are not important as the Carry Ban must be "unconstitutional in *all* its applications"

to 18 to 20-year-olds. *United States v. Veasley*, 98 F.4th 906, 909 (8th Cir. 2024). . .

III.

The Second Amendment reads: "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." The Supreme Court, in *Heller*, recognized that the Second Amendment's right to keep and bear arms "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes. . . ." *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (Ch. 11.A).

"[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right," "the natural right" to "resistance," "self-preservation and defence," not merely a common law right. *Id.* at 593-94.

The Supreme Court has applied that right against the states through the Fourteenth Amendment (with a plurality incorporating it through the Due Process Clause and Justice Thomas recognizing it as within the Privileges or Immunities Clause). Thus, courts apply against the states, through the Fourteenth Amendment, the right to bear arms—the natural right of resistance, self-preservation, and defense.

"[C]onsistent with *Heller* and *McDonald*," *Bruen* held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 10 (2022). The *Heller* opinion demands "a test rooted in the Second Amendment's text, as informed by history." *Id.* at 19.

Before *Bruen*, many circuits—but not this court—had "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Id.* at 17. The Supreme Court, in *Bruen*, rejected the two-step test as "one step too many." *Id.* at 19. The Court provided a new test to evaluate the text consistent with *Heller*'s reasoning:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id.

The test has two parts: text, then history. (1) *If* a "focused" application of "the 'normal and ordinary' meaning of the Second Amendment's language" "covers an individual's conduct," *then* (2) "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 17, 19-20.

First, this court conducts a textual analysis, determining if the Amendment's plain text covers the Plaintiffs—are they part of 'the people' with a right to keep and bear arms? If so, then that conduct is presumptively protected.

Second, the burden shifts to the government to demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation. "[W]hen the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" *Rahimi*, 144 S. Ct. 1889, 1897 (2024) (*supra* Section A). This court analyzes the government's identified historical analogues, whether "the government identif[ies] a well-established and representative historical *analogue*, not a historical *twin*." *Bruen*, 597 U.S. at 30. If the regulation is consistent with the Nation's historical tradition of firearm regulation, it does not infringe the right of the people. If not, then the regulation improperly infringes the individual right to keep and bear arms.

A.

"*Bruen* does not command us to consider only 'conduct' in isolation and simply assume that a regulated person is part of 'the people.'" *United States v. Sitladeen*, 64 F.4th 978, 987 (8th Cir. 2023). Instead, we must begin by asking whether the Carry Ban "governs conduct that falls within the plain text of the Second Amendment." *Id.* at 985. That is, *Bruen* tells us to begin with a threshold question using the plain text, are the Plaintiffs part of the people? . . .

Minnesota argues that 18 to 20-year-olds are not members of "the people" because at common law, individuals did not have rights until they turned 21 years old.

Ordinary, law-abiding, adult citizens that are 18 to 20-year-olds are members of the people because: (1) they are members of the political community under *Heller*'s "political community" definition; (2) the people has a fixed definition, though not fixed contents; (3) they are adults; and (4) the Second Amendment does not have a freestanding, extratextual dangerousness catchall.

First, the right to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed. . . ." *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (Ch. 7.C); *Heller*, 554

U.S. at 592. The people codified that right, and that political tradition, in the Constitution. *Heller* recognizes the universal applicability of that right to "all Americans." *Id.* at 581.

Heller and *Bruen* command focus on the "normal and ordinary" meaning of the text of the Second Amendment. *Bruen*, 597 U.S. at 20. The 1773 edition of Samuel Johnson's dictionary definition of people reaffirms the definition used in *Heller*: "A nation; these who compose a community." 1 Dictionary of the English Language (4th ed.) (reprinted 1978).

Minnesota must overcome the "strong presumption" that the right applies to "all Americans." *Heller*, 554 U.S. at 581. Further, "the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580.

Eighteen to 20-year-olds are included in the "political community." *See Cruikshank*, 92 U.S. at 549; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 (1990) (holding that "the people" covers even some non-citizens who are members of the "national community").[5]

Second, Minnesota asserts that because 18 to 20-year-olds did not possess all their "civil and political rights" as minors at the founding, they cannot today be considered members of the people. *See* 1 John Bouvier, Institutes of American Law 148 (Robert Peterson, ed., 1851). Minnesota emphasizes that the "political community at the time of the founding" was restricted not only to those over the age of 21, but also to "eligible voters, namely white, male, yeomen farmers." It concludes that because those 18 to 20-year-olds were not legally autonomous members of the political community at the founding, they are not part of the people in the plain text of the Second Amendment.

Arguments of this type, focusing on the original contents of a right instead of the original definition—i.e., that only those people considered to be in the political community in 1791 "are protected by the Second Amendment," instead of those meeting the original definition of being within the political community—are "bordering on the frivolous." *Heller*, 554 U.S. at 582, 128 S. Ct. 2783. "We do not interpret constitutional rights this way." *Id. Heller* rejected the idea that the Second Amendment protected only the original contents of the defined term "arms" and, instead, applied that original definition "to all instruments that constitute bearable arms, even those that

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[5] The parties dispute whether this court should use the "political community" definition of the people from *Heller* and *Bruen,* or the "national community" definition from *Verdugo-Urquidez*. *See* Note, *The Meaning(s) of 'The People' in the Constitution*, 126 Harv. L. Rev. 1078, 1079-86 (2013) (arguing *Verdugo-Urquidez*'s "national community" definition is more expansive than *Heller*'s "political community" definition). Any difference between these definitions does not affect this case. This court relies on the definition from *Heller* and *Bruen*, "political community."

were not in existence at the time of the founding." *Id.* at 582. *Cf. Bruen*, 597 U.S. at 47 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today."). "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 28.

Similarly, *Heller* defines "the people" as "all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580 & 582. "[T]he Second Amendment extends, prima facie," to all members of the political community, "even those that were not [included] at the time of the founding." *Id.* Contrary to Minnesota's assertion, the political community is not confined to those with political rights (eligible voters) at the founding.

Even if Minnesota were correct in its assertions about the political community's definition, the contents of that defined term have changed. Since the founding, the guarantee of political rights has constitutionally expanded, especially in the right to vote. *See* U.S. Const. amend. XV (proscribing the abridgment of voting rights based on race); U.S. Const. amend. XIX (proscribing the abridgment of voting rights based on sex); U.S. Const. amend. XXIV (proscribing the poll tax); U.S. Const. amend. XXVI (proscribing the abridgment of voting rights based on age for those over 18). Reading the Second Amendment in the context of the Twenty-Sixth Amendment unambiguously places 18 to 20-year-olds within the national political community. . . .

Third, it is not disputed that plaintiffs are "ordinary," "law-abiding," or "citizens," only whether they are "adult" citizens. . . . For political rights, the Twenty-Sixth Amendment sets the age of majority at age 18.

Fourth, Minnesota states that from the founding, states have had the power to regulate guns in the hands of irresponsible or dangerous groups, such as 18 to 20-year-olds. At the step one "plain text" analysis, a claim that a group is "irresponsible" or "dangerous" does not remove them from the definition of the people.

Neither felons nor the mentally ill are categorically excluded from our national community[, the people]. That does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all.

Importantly, the Second Amendment's plain text does not have an age limit.

Ordinary, law-abiding 18 to 20-year-old Minnesotans are unambiguously members of the people. Because the plain text of the Second Amendment covers the plaintiffs and their conduct, it is presumptively constitutionally protected and requires Minnesota to proffer an adequate historical analogue consistent with the Nation's historical tradition of firearm regulation.

B.

The historical analysis presumes that the individuals' conduct is protected and requires Minnesota to "identify a well-established and representative historical analogue." *Bruen*, 597 U.S. at 30. "[W]hether modern and historical regulations impose a *comparable burden* on the right of armed self-defense and whether that burden is *comparably justified* are 'central' considerations when engaging in an analogical inquiry"—the "how and why," respectively, must be analogous. *Id.* at 29 (emphasis added). . . .

While the Second Amendment is not a "regulatory straightjacket" and Minnesota does not need to provide this court with a "dead ringer," a regulation that "remotely resembles" the Carry Ban will not suffice. *Id.* at 30. "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit[.]" *Rahimi*, 144 S. Ct. at 1898. Minnesota must prove that it "is consistent with this Nation's historical tradition of firearm regulation" for the state to ban, on account of their age, the public carrying of handguns by ordinary, law-abiding, adult citizens. *See Bruen*, 597 U.S. at 34. For each proffered analogue, this court considers (1) the "how" (comparable burden) and (2) the "why" (comparably justified). *Id.* at 29.

The "how" of the Carry Ban—the burden to be compared—is a ban on the bearing of arms in an otherwise constitutional manner.

Minnesota states the "why" of the Carry Ban is that 18 to 20-year-olds are not competent to make responsible decisions with guns and pose a risk of dangerousness to themselves and to others as a result.

Minnesota proffers three reasons that the Carry Ban survives *Bruen*'s historical tradition test: (1) a freestanding catchall for groups the state deems dangerous; (2) founding-era and common law analogues; and (3) Reconstruction-era analogues.

1.

Minnesota contends that status-based restrictions from the founding-era created a freestanding dangerousness catchall analogue: if the state deems a group of people to pose a risk of danger, it may ban the group's gun ownership.

Assuming that historical regulation of firearm possession can be viewed as an effort to address a risk of dangerousness, this risk does not justify the Carry Ban. Minnesota claims that 18 to 20-year-olds present a danger to the public, but it has failed to support its claim with enough evidence. *See Rahimi*, 144 S. Ct. at 1901 (upholding a carry ban,[69] the Court repeatedly emphasized that the law at issue "applies only once a court has found that the defendant

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[69] [*Rahimi* actually upheld a total possession ban. *See supra* Section A.—EDS.]

'represents a credible threat to the physical safety' of another."). Although we take no position on how high the risk must be or what the evidentiary record needs to show, the answer is surely more than what Minnesota's general crime statistics say. According to the report, "the murder arrest rate for 18 to 20-year-olds is almost 33 percent higher than the murder arrest rate for the next most homicidal age group." And they are the "most likely" of any age group "to use firearms to commit homicides and other violent crimes."

Even if we have no reason to doubt the accuracy of these statistics, they do not support the Carry Ban. For one thing, the Minnesota legislature could not have relied on them. The expert report, which was prepared solely for this case, uses data from 2015 through 2019—more than 10 years *after* it enacted the Carry Ban. And the record is devoid of statistics that Minnesota could have used to justify a conclusion that 18 to 20-year-olds present an unacceptable risk of danger if armed. After all, even using these recent statistics, it would be a stretch to say that an 18-year-old "poses a clear threat of physical violence to another." *Id.*

For another, Minnesota has not attempted to explain why its other statutory restrictions, none of which the Plaintiffs have challenged, do not reduce the risk of danger already. First, permit applicants must complete "training in the safe use of a pistol" and not be "listed in the criminal gang investigative data system." Certain state and federal statutes might already render an applicant ineligible, including those who have been convicted of "a crime of violence" or a recent controlled-substance offense. What the record lacks, in other words, is any support for the claim that 18 to 20-year-olds, who are otherwise eligible for a public-carry permit, "pose [such] a credible threat to the physical safety of others" that their "Second Amendment right may . . . be burdened." *Rahimi*, 144 S. Ct. at 1902.

A legislature's ability to deem a category of people dangerous based only on belief would subjugate the right to bear arms "in public for self-defense" to "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70; *see also Rahimi*, 144 S. Ct. at 1903 ("[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."). While "our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others[,]" Minnesota has failed to show that 18 to 20-year olds pose such a threat. *Id.* at 1902. Accordingly, absent more, the Carry Ban cannot be justified on a dangerousness rationale.

2.

Minnesota proffers three founding-era sources: (1) the common law, (2) college gun rules, and (3) municipal regulations.

First, Minnesota reiterates that, at common law, 18 to 20-year-olds' Second Amendment rights were restricted because they were minors. The common law "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19. Minnesota cites common law evidence that (as minors) 18 to 20-year-olds did not have full rights. Minnesota, however, does not put forward common law analogues restricting the right to bear arms. Instead, Minnesota points to statutory law, such as the Militia Act of 1792 that required 18 to 20-year-olds to acquire firearms, as evidence the common law was the inverse. A mandate to acquire a firearm is hardly "evidence" that one was previously prohibited from owning one.

Inverse evidence of the common law is not a sufficient analogue to meet the state's burden. In fact, Minnesota contends elsewhere that statutes passed after the ratification of the Bills of Rights often codified the common law. Minnesota does not provide convincing evidence why the Militia Act of 1792 is inverse evidence of the common law, rather than evidence of its codification. Further, if the state is correct that the Militia Act is inverse evidence of the common law, then the Militia Act may demonstrate that the Second Amendment and the common law diverge.

Second, Minnesota cites college rules restricting students from possessing guns on campus.

These rules are very different in their "how." These school procedural rules are not laws subject to constitutional limitations. Minnesota acknowledges that universities had guardianship authority *in loco parentis*. Universities had many practices that if compelled by the government, would have violated students' constitutional rights. Thus, founding-era college rules are not persuasive sources to discern the constitutional rights of its students.

Further, a restriction on the possession of firearms in a school (a sensitive place) is much different in scope than a blanket ban on public carry. The Supreme Court has distinguished between "sensitive places" and the public. *Id.* at 31 ("Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."). A sensitive place restriction is not analogous to a no-guns-in-public restriction.

Third, Minnesota cites three municipal ordinances.

The first two ordinances, New York and Columbia, fine anyone who discharges a weapon within the city, increasing the fines (or allowing seizure of weapon in Columbia) for minors. The third ordinance prohibited the sale of gunpowder (but not firearms) to minors in Louisville and is also not a founding-era source (enacted more than 60 years after 1791). All three are distinct from the "how" of the Carry Ban, a blanket ban on carrying a weapon in public. The "how" is also different in the New York and Columbia ordinances, which prohibit conduct regardless of age.

Minnesota's proffered founding-era analogues do not meet its burden to demonstrate that the Nation's historical tradition of firearm regulation supports the Carry Ban.

3.

Minnesota makes four arguments why the Reconstruction era evinces a historical tradition of firearm regulation sufficient to support the 18 to 20-year-old Carry Ban: (1) unprecedented social concerns in the second half of the 19th Century (the increased prevalence of handguns) require this court to take a more nuanced approach; (2) Reconstruction-era and late 19th Century statutes; (3) 19th Century state court cases; and (4) that, as a longstanding prohibition, the Carry Ban should be considered presumptively constitutional.

[I]t is questionable whether the Reconstruction-era sources have much weight. *See Bruen*, 597 U.S. at 37 ("that the scope of the protection applicable to the Federal Government and States [under the Bill of Rights] is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."). Certainly, postenactment history of the Fourteenth Amendment is not given weight. Assuming it has any weight, this court will address Minnesota's arguments.

First, Minnesota argues that because the market revolution between the founding era and the Reconstruction era made pistols more accessible, this court must take a more "nuanced approach." *See id.* at 27 ("cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach").

Minnesota contends that because handguns were not "in common use" at the founding, founding-era regulations are insufficient to properly regulate them. This contention contradicts *Bruen* and *Heller*'s "in common use" doctrine: "the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Id.* at 47. "Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.'" *Id.*

Second, Minnesota proffers 20 state laws from the Reconstruction-era and late 19th Century that in some way limit the Second Amendment rights of those under 21 years old. Minnesota believes this represents a historical tradition of restricting the gun rights of those under 21 years old. As we have already discussed, however, these laws carry less weight than Founding-era evidence.

Besides, these laws have "serious flaws even beyond their temporal distance from the founding." *Id.* at 66. For starters, several prohibited only *concealed* carry. Others prohibited only the kinds of weapons that could be

easily concealed, like bowie knives and pistols. And as *Bruen* clarifies, these "concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry."

Many, including some already mentioned, criminalized the *sale* or *furnishing* of weapons to minors, meaning they could publicly bear arms subject to generally applicable concealed-carry rules. Several included exceptions for parental permission or self-defense. And others prohibited the sale of only easily concealable weapons. The point is "[n]one of these historical limitations on the right to bear arms approach" the burden of Minnesota's Carry Ban. *Bruen*, 597 U.S. at 60.

Third, Minnesota argues that, because no historic cases found age restrictions to be unconstitutional, the Carry Ban is consistent with the historical tradition of firearms regulation. It cites four state supreme court cases involving laws restricting access to firearms by 18 to 20-year-olds. Three of these cases do not analyze or discuss the constitutionality of the laws, rendering them irrelevant analogues.

Only one case addresses the constitutionality of a state law prohibiting carry by a minor. *State v. Callicutt*, 69 Tenn. 714, 714-15 (1878). *Callicut*, a postenactment case interpreting a state statute that applies only to concealed carry by minors, is not analogous in its "how" (solely a conceal ban) or its "why" (only affecting minors).

Fourth, Minnesota argues the Carry Ban is a "presumptively lawful" "longstanding prohibition." *See Heller*, 554 U.S. at 626-27 & n.26. *Heller* offered a list, which does not purport to be exhaustive, of longstanding prohibitions that were presumptively lawful. Age restrictions are not on that list. The Carry Ban here was enacted in 2003. Minnesota claims this court should look to Alabama's 1856 statute for the principle that all age restrictions are in the class of "longstanding prohibitions." Alabama's statute, a status-based law, targets only minors, a status not held by 18 to 20-year-olds in Minnesota. Further, Minnesota tries to link the Carry Ban to several 20th Century laws banning the carry of arms by the mentally ill or those with unsound minds. Those laws, still in effect, prevent the mentally ill from acquiring firearms. Minnesota may not claim all 18 to 20-year-olds are comparable to the mentally ill. This court declines to read a new category into the list of presumptively lawful statutes.

Minnesota did not proffer an analogue that meets the "how" and "why" of the Carry Ban for 18 to 20-year-old Minnesotans. The only proffered evidence that was both not *entirely* based on one's status as a minor and not *entirely* removed from burdening carry—Indiana's 1875 statute—is not sufficient to demonstrate that the Carry Ban is within this nation's historical tradition of firearm regulation. *See Bruen*, 597 U.S. at 65, 142 S. Ct. 2111 (a "single" "postbellum" "state statute" is insufficient weight to meet the state's burden).

Minnesota has not met its burden to proffer sufficient evidence to rebut the presumption that 18 to 20-year-olds seeking to carry handguns in public for self-defense are protected by the right to keep and bear arms. The Carry Ban, § 624.714 subd. 2(b)(2), violates the Second Amendment as applied to Minnesota through the Fourteenth Amendment, and, thus, is unconstitutional.

NOTES & QUESTIONS

8. [New Note] Reaching the opposite result of the 2012 Fifth Circuit case in the textbook, the Fourth Circuit held that the federal statute forbidding persons aged 18 to 20 from buying handguns from retail firearm dealers violated the Second Amendment. *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407 (4th Cir. 2021). After the opinion was announced, but before the mandate was issued, the plaintiff turned 21. The case now being moot, the Fourth Circuit vacated its opinion, and the opinion of the district court. 14 F.4th 322 (4th Cir. 2021).

9. [New Note] Post-*Bruen*, there have been many challenges to statutes restricting Second Amendment rights of young adults, and some of the challenges have succeeded. The federal ban on FFL handgun sales to persons ages 18 to 20 — 18 U.S.C. § 922(b)(1) & (c)(1) — was held unconstitutional in *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 672 F. Supp. 3d 118 (E.D. Va. 2023). But the ban was upheld in *Reese v. Bureau of Alcohol Tobacco Firearms & Explosives*, 647 F. Supp. 3d 508 (W.D. La. 2022).

After two years of litigation, which began before *Bruen*, the State of Tennessee conceded that its law against issuing handgun carry permits of persons 18-20 is unconstitutional. The court approved a joint motion to approve a settlement, by which Tennessee would begin issuing permits. *Beeler v. Long*, No. 3:21-cv-152 (E.D. Tenn.).

Firearms Policy Coal. v. McCraw, 623 F. Supp. 3d 740 (N.D. Tex. Aug. 25, 2022), held unconstitutional a Texas statute that prohibits defensive carry outside the home by law-abiding 18-to-20-year-olds. Texas filed a notice of appeal to the 5th Circuit, but later withdrew it. *Andrews v. McCraw*, 2022 WL 19730492 (5th Cir. Dec. 21, 2022). The Texas Department of Public Safety announced that it will stop enforcing the ban. The announcement cautioned that some local law enforcement officials might still enforce it.

Commenting on *McCraw*, Professor George A. Mocsary argued that "[t]o be a full citizen is to be allowed to bear arms; to be denied the right to bear arms is to be denied inclusion in the polity." By striking the Texas statute, the court treated young adults — who can be executed, drafted, and even compelled by Texas law enforcement under the state's posse comitatus laws to pursue a violent criminal or suppress a riot, but not carry a firearm (even for self-defense

from a violent criminal or during a riot — like full citizens. George A. Mocsary, *Treating Young Adults as Citizens*, 27 Tex. Rev. L. & Pol. 607 (2023).

The Eleventh Circuit, examining Florida's 2017 statute banning young adults from all long gun purchases, whether at stores or from private persons, held that because the Second Amendment was made enforceable against the States by the Fourteenth Amendment in 1868, that year is the proper date for considering American legal history tradition. *National Rifle Association v. Bondi*, 61 F.4th 1317 (11th Cir. 2023). As of 1868, three States restricted handgun access by minors, and in the following decades, others followed. The panel considered it irrelevant that 18-to-20-year-olds are not considered minors today. Although no state restricted minors' access to long guns before 1900, the handgun restrictions were a good enough analogy for long gun restrictions today. In July 2023, the Eleventh Circuit granted a petition for rehearing en banc. 72 F.4th 1346 (11th Cir. 2023)

Lara v. Commissioner Pennsylvania State Police, 91 F.4th 122 (3d Cir. 2024), held that a combination of Pennsylvania statutes banning 18-to-20-year-olds from carrying firearms outside their homes during a state of emergency was unconstitutional, rejecting the Commissioner's argument that 18-to-20-year-olds were not among "the people" protected by the Second Amendment, stating that "The words "the people" in the Second Amendment presumptively encompass all adult Americans, including 18-to-20-year-olds, and we are aware of no founding-era law that supports disarming people in that age group. Accordingly, we will reverse and remand." By a vote of 7-6, the Third Circuit denied a petition for rehearing on banc, and Judge Krause wrote a lengthy dissent arguing in favor of the prohibition. 97 F.4th 156 (3d Cir. 2024). A cert. petition has been filed.

McRorey v. Garland, 99 F.4th 831 (5th Cir. 2024), upheld the Bipartisan Safer Communities Act's (2024 Supp. Ch. 9.C), provision expanding background checks for 18-to-20-year-olds to up to 10 days. It held that the restriction on purchase was presumptively lawful because so *Heller* designated "'conditions and qualifications on the commercial sale of arms,'" and "on its face 'keep and bear' does not include purchase—let alone without background check," although "the Court prohibits shoehorning restrictions on purchase into functional prohibitions." *Id.* at 836-39.

A preliminary injunction was entered against a new Colorado statute forbidding persons 18-to-20 years old from purchasing long guns in gun stores. The Gun Control Act of 1968 already forbade them from purchasing handguns, and Colorado's "background check" law makes it impossible to purchase any firearm without routing the transaction through a gun store. The court stated, "Colonial laws that disarmed persons who presented a risk of danger to the state or to the country are not analogous to a categorical ban on a segment of society that has not professed hostility to the state or to the nation." *Rocky*

Mountain Gun Owners v. Polis, 685 F. Supp. 3d 1033, 1057 (D. Colo. 2023). "[B]ecause the Governor fails to point to any evidence during the founding era that a total prohibition on the sale of firearms to minors was consistent with the right to bear arms, the Court gives little weight to evidence from the time of the Fourteenth Amendment's ratification to limit the scope of the right to keep and bear arms" *Id.* at 1060. The Tenth Circuit denied an emergency motion for a stay pending appeal on August 29, 2023.

10. [New Note]. A new Hawaii law, SB 2845, forbids persons under 21 from possessing or purchasing ammunition in most circumstances. There is an exception if the individual "Is actively engaged in hunting or target shooting or going to or from the place of hunting or target shooting."

Further reading: ThiGerald L. Neuman, *Discrimination on the Basis of Chronological Age: November 2022 Workshop Proceedings and Working Papers* (April 25, 2023) (symposium examining age discrimination in many contexts); Ryder Gaenz, *You'll Grow Into It: How Federal and State Courts Have Erred in Excluding Persons Under Twenty-One from 'the people' Protected by the Second Amendment*, 17 FIU L. Rev. 197 (2023):

> "[D]uring the colonial and founding eras, persons as young as sixteen often were required to bear arms not only for militia purposes, but generally and irrespective of military service or purpose. Additionally, the Court's long-standing First Amendment, Fourth Amendment, and privacy-abortion jurisprudence is clear: Constitutional rights do not vest only when a person attains a particular age. Instead, individual, constitutional rights protect persons of all ages, although the rights of minors under eighteen — while meaningful — are often less robust than their adult counterparts. In light of this history and jurisprudence, courts should begin recognizing that persons eighteen and older enjoy full Second Amendment rights, while minors under eighteen maintain truncated — albeit meaningful — Second Amendment rights."

D. UNLAWFUL ALIENS

NOTES & QUESTIONS

4. [New Note] *United States v. Jimenez-Shilon*, 34 F.4th 1042 (11th Cir. 2022). Applying the Eleventh Circuit's (now-invalid, per *Bruen*), Two-Step Test, a panel upheld 18 U.S.C. § 922(g)(5)(A), which bans firearms and ammunition possession and use by any "alien" who is "illegally or unlawfully in the United

States." The decision followed every other Court of Appeals that had addressed the issue.

Judge Kevin Newsom, author of the panel opinion, also wrote a concurring opinion that used a text and history approach. This was prescient because a month later *Bruen* instructed lower courts to use a similar methodology. Relying on Founding Era sources, the concurrence argued that "the people" in the Second Amendment do not include aliens who have not taken affirmative steps (e.g., applying for and being granted permanent residency) to affiliate with the American republic. The decision is analyzed in Elizabeth McDaniel, *Ready. Aim. Fire! The Eleventh Circuit Takes its Shot at the Second Amendment's Application to Illegal Aliens*, 74 Mercer L. Rev. 1581 (2023).

5. [New Note] Following *Bruen*, unlawful aliens raising constitutional challenges of 18 U.S.C. § 922(g)(5) have fared no better than previously. *See United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023) ("unlawful aliens are not part of 'the people' to whom the protections of the Second Amendment extend"; the Canadian fugitives and drug traffickers had 67 guns and many prior convictions); *United States v. Escobar-Temal*, 2023 WL 4112762 (M.D. Tenn. June 21, 2023); *United States v. Vizcaíno-Peguero*, 671 F. Supp. 3d 124 (D.P.R. 2023); *United States v. Trinidad-Nova*, 671 F. Supp. 3d 118 (D.P.R. 2023); *United States v. Pierret-Mercedes*, 2023 WL 2957728 (D.P.R. Apr. 14, 2023); *United States v. Leveille*, 659 F. Supp. 3d 1279 (D.N.M. 2023); *United States v. Carbajal-Flores*, 2022 WL 17752395 (N.D. Ill. Dec. 19, 2022); *United States v. DaSilva*, 2022 WL 17242870 (M.D. Pa. Nov. 23, 2022).

6. [New Note] Pratheepan Gulasekaram, *The Second Amendment's 'People' Problem*, 76 Vanderbilt L. Rev. 1437 (2023):

> This Article is the first to examine the relationship between "the people," immigration status, and the right to keep and bear arms, in the wake of both *Heller* and *Bruen*. . . . This Article concludes that a more coherent theory of second amendment rightsholders would necessarily include most noncitizens, at least when the right is grounded in self-defense from interpersonal violence. This conclusion casts doubt on current federal law that categorically criminalizes possession by certain groups of noncitizens, as well as deportation rules that banish all noncitizens for firearms violations. More capacious interpretations of the second amendment's "the people" in turn, helps ensure noncitizens' inclusion under other core constitutional protections.

Further reading: Abby Vorhees, *The Constitutionality of Barring Undocumented Immigrants from Second Amendment Protections*, 73 Am. U. L. Rev. 929 (2024) (unlawful aliens are part of "the people," and there is not a historical tradition against them possessing arms); John Cicchitti, *The Second*

Amendment and Citizenship: Why "The People" Does Not Include Noncitizens, 30 Geo. Mason L. Rev. 525 (2023) ("Supreme Court precedent and a traditional respect for the legislative and executive branches' power over alienage mean that only citizens have the Second Amendment right to keep and bear arms.").

E. THE FORMERLY MENTALLY ILL

6. [New Note] *Post-Bruen cases.* California's ban on arms possession within five years after release from a mental health facility was upheld in *Clifton v. United States Dep't of Justice*, 615 F. Supp. 3d 1185 (E.D. Cal. 2022). A plaintiff's due process challenge to past psychiatric certification was rejected in *Pervez v. Becerra*, 2022 WL 2306962 (E.D. Cal. June 27, 2022).

Preliminary injunction was entered against the Honolulu rule that if gun registration applicants disclose on the written application that they have been diagnosed with a "behavioral, emotional, or mental" disorder, they must provide a written certification of mental health from a doctor. The plaintiff's possession of firearms was compliant with state law, so Honolulu could not add an extra condition. Honolulu later agreed to a permanent injunction. *Santucci v. City and County of Honolulu*, 2022 WL 17176902 (D. Haw. Nov. 23, 2022).

Further reading: Eric Ruben, *Scientific Context, Suicide Prevention, and the Second Amendment After Bruen*, 108 Minn. L. Rev. 3121 (2024): "[E]arly generations of Americans fundamentally misunderstood mental illness and suicide, and that misunderstanding influenced societal approaches to suicide prevention. . . . The state of mental health science at the Founding renders comparisons of past and present suicide-prevention measures pursuant to *Bruen*'s doctrinal mandate fraught from the get-go." Courts should thus evaluate analogies related to mental illness at a high level of generality.

Raygen L. Lee, *A Sane Proposal for the Mentally Ill: Are Their Second Amendment Rights Dead?*, 2022 37 W. Mich. U. T.M. Cooley L. Rev. 35: The presumption in § 922 (g)(4) that persons who have been involuntarily committed are dangerous to others is false and stigmatizing. Persons who were formerly committed ought to be able to bring a case in district court asking for relief from the lifetime firearms prohibition.

G. PERSONS SUSPECTED OF BEING DANGEROUS

1. Red Flag Laws

Before 2022, facial challenges to state red flag laws had not succeeded. But two recent cases have held New York's red flag law facially void. Both cases came from New York's "Supreme Court," which is the trial course of general jurisdiction. In most other states, that court would be called a "district court."

In one case, an ex-boyfriend had filed a red flag petition against his ex-girlfriend. Pursuant to New York's red flag law, a Supreme Court judge issued an ex parte temporary order against the girlfriend, and so her pistol permit was revoked. After the girlfriend retained a lawyer who appeared at the later hearing for long-term gun ban, the court found the red flag law unconstitutional, because:

- The law allows the confiscation of other people's guns if the respondent has constructive possession (*e.g.*, group living situation).
- The N.Y. red flag law does not provide the due process protections that exist in the N.Y. Mental Hygiene Law. For example, the latter requires "a *physician's* determination" that the person is likely to harm herself.
- "While some may advocate that 'the ends justify the means' in support of § 63-a, where those means violate a fundamental right under our Bill of Rights to achieve their ends, then the law, on its face, cannot stand."

"Therefore, the 'Temporary Extreme Risk Protection Order' (TERPO) and 'Extreme Risk Protection Order' (ERPO) are deemed to be unconstitutional by this Court as [it] is presently drafted. It can not be stated clearly enough that the Second Amendment is not a second class right, nor should it ever be treated as such." *G.W. v. C.N.*, 78 Misc. 3d 289 (N.Y. Sup. Ct., Monroe County, Dec. 22, 2022). Another case followed similar analysis to the same result. *R.M. v. C.M.,* 79 Misc. 3d 250 (N.Y. Sup. Ct., Orange Cty. 2023). However, the Chief Judge of the N.Y. Supreme Court directed other judges not to treat these rulings

Two important empirical studies of Red Flag laws have been published recently. The first is K. Alexander Adams, *The Impact of Extreme Risk Protection Orders on Homicide and Suicide: Are there Any Red Flags?* U. Wyo. Firearms Res. Ctr. (Mar. 14, 2023). This paper reviews prior research on Red Flag laws, and then presents its own research.

> This paper contributes to the existing literature in multiple ways. First, it uses a new form of synthetic control model, the Generalized Synthetic Control Model (GSCM), which improves both upon the synthetic control models used in past papers but also avoids the pitfalls of difference-in-difference models used by other researchers. Second, the dataset for this paper ranges between

> 1980-2018, making it one of the largest datasets used to test the effect of red flag laws to date. And third, this paper directly tests whether or not the substitution effect is at play regarding the impact of ERPOs on suicide rates.

The paper finds no statistically significant effects in reduction of total homicide, total suicide, firearms homicide, or firearms suicide. As the author points out, the study does not examine crime other than homicide, nor does it examine mass shootings in particular — the latter being such a small percentage of firearms homicides that any changes would be unlikely to have a statistically discernable effect on overall firearms homicide figures.

The second new study is Royce Barondes, *Red Flag Laws, Civilian Firearms Ownership and Measures of Freedom*, 35 Regent U. L. Rev. 339 (2023). Examining Maryland's law, the article suggests that "adoption of these statutes causes blameless persons to be subject to being killed by the government at a rate comparable to or in excess of the murder rate."

The article also argues that 2022 federal legislation offering funding to states to adopt Red Flag laws "will require courts to consider more favorably firearms rights reinstatement petitions filed by criminals with old convictions. That is because congressional adoption of this legislation is inconsistent with the strongest premise on which courts have heretofore rejected those claims — that courts are not competent to assess whether individuals have a heightened propensity to commit firearms crimes."

A comprehensive critique of Red Flag laws, mainly from a due process perspective, is available in Edward Andrew Paltzik, *Red Flag Laws: The Retrograde "Justice" of America's 21st Century Salem Witch Trials*, SSRN.com (draft, May 14, 2024).

The U.S. Department of Justice has established a National Extreme Risk Protection Order Resource Center, which is run by the Johns Hopkins Center for Gun Violence Solutions. The Center provides information about obtaining red flag orders and best practices.

3. The Intoxicated

See this 2024 Supplement Chapter 17.E.2, which cover marijuana and other intoxicants.

H. BUSINESSES

Several cases have upheld 18 U.S.C. § 922(a)(1)(A), which prohibits dealing in firearms without an FFL. All of the criminal defendants were plainly engaged in dealing as defined by federal law (repetitive transactions for profit).

The courts not only upheld the statute, they opined that firearms dealers and business have no Second Amendment rights. *See United States v. King*, 646 F. Supp. 3d 603 (E.D. Pa. 2022) ("the Second Amendment does not protect the commercial dealing of firearms"); *United States v. Tilotta*, 2022 WL 3924282 (S.D. Cal. Aug. 30, 2022 (The Second Amendment does not apply to the "buying, selling, storing, shipping, or otherwise engaging in the business of firearms."); *United States v. Flores*, 652 F. Supp. 3d 796 (S.D. Tex. 2023) (agreeing with Ninth Circuit's en banc *Texiera* decision that firearms stores have no Second Amendment rights).

In a less extreme approach, another U.S. district court pointed out that defendant's series of crimes were not conduct covered by the plain text of the Second Amendment: "[T]he violations involve false statements to acquire firearms, the repeated transfer of firearms without a license, and proceeds derived from those activities. These types of regulations do not in any way limit Mr. Gonzales' ability to defensively arm himself." *United States v. Gonzalez*, 2022 WL 17583769 (D. Utah Dec. 12, 2022).

In a civil case where some firearms businesses proactively objected to certain gun control laws, a court held that the Second Amendment does not apply to corporations. *Gazzola v. Hochul*, 645 F. Supp. 3d 37 (N.D.N.Y. 2022). The Second Circuit held that the firearms retailers had derivative standing to assert the Second Amendment rights of their customers, just as bookstores can assert the First Amendment rights of customers. However, a preliminary injunction was not appropriate:

> Appellants claim that New York law will put them and other FFLs out of business by requiring them to secure firearms "in a locked fireproof safe or vault" outside of business hours; install security alarm systems at each point of exit, entrance, and sale; provide State Police-developed training to their employees; perform monthly inventory checks; provide State Police with full access to their premises during periodic onsite inspections; prohibit minors from entering their stores without a parent or guardian; and hire employees who are at least twenty-one years old. But, besides Appellants' say-so, there is no evidence that those regulations will impose such burdensome requirements on firearms dealers that they restrict protections conferred by the Second Amendment.

88 F.4th 186, 197 (2d Cir. 2023).

According to a new article, "purpose analysis, which entails judicial examination of the purpose behind particular constitutional provisions to determine their boundaries, dictates that corporations should have Second Amendment rights. Indeed, corporations' interests in these rights are rooted in and further the key purposes of the Second Amendment: self-defense, protection of third parties, and defense of property." Robert E. Wagner, *The Corporate Right to Bear Arms*, 15 Wm. & Mary Bus. L. Rev. 369 (2024).

CHAPTER 14
WHERE? RIGHT TO CARRY

A. CARRYING HANDGUNS FOR SELF-DEFENSE IN PUBLIC PLACES

NOTES & QUESTIONS

3. [Add to existing Note in text] Subsequently a civil jury was convened for the purpose of removing the sheriff from office on bribery allegations. She resigned while the trial was in progress, allowing her to keep her pension. Three days after her resignation, the civil jury returned its verdict. It found that Sheriff Laurie Smith had committed six acts of corruption and willful misconduct in a pay-to-play scheme, where she doled out concealed carry permits to campaign donors and members of her inner circle, as well is failing to report gifts in exchange for the permits. Robert Salonga, *Court Formally Expels ex-Santa Clara County Sheriff Laurie Smith*, The Mercury News (Nov. 30, 2022).

Sheriff Smith appealed her civil "conviction" which only resulted in her removal from office. She had been the sheriff of Santa Clara County for 24 years and served in law enforcement for nearly 50 years. *Id.*

In a pre-*Bruen* world where permits to carry a firearm in public could be a highly controversial decision in certain jurisdictions, is the granting of permits under a may-issue system only to close friends and inner-circle associates necessarily evidence of corruption? Could it be that the permit issuer was simply employing a vetting process in which she had personal knowledge of the character of the people to whom she was issuing permits? Is it possible the Sheriff Smith was making the best of a system that made exercise of a fundamental right a discretionary (may-issue subjective) act — rather than a ministerial (shall-issue to all qualified applicants) act?

Quickly on the heels of the Supreme Court striking down the good cause requirement for granting licenses to carry concealed firearms in *Bruen*, New York State passed new legislation governing the granting of carry permits. That law, the Concealed Carry Improvement Act, (CCIA) was challenged by a variety of plaintiffs. Litigation over similar legislation is ongoing in other jurisdictions. New Jersey, Maryland, and Hawaii, have passed near clones of

the New York law.

Procedural jockeying for preliminary relief in the New York litigation ultimately reached the United States Supreme Court, which upheld a Second Circuit stay of preliminary relief pending appeal. The decision excerpted below is the Second Circuit's resolution on the merits. It is the first application by a federal court of appeals of Bruen's text, history and tradition test to public carry regulations.

Antonyuk v. Chiumento

89 F.4th 271 (2d Cir. 2023)

Dennis Jacobs, Gerard E. Lynch, and Eunice C. Lee, Circuit Judges:

In these four cases, [*Antonyuk v. Chiumento*, *Hardaway v. Chiumento*, *Brown v. Chiumento*, and *Spencer v. Chiumento*,] heard and now decided in tandem, Plaintiffs raise First and Second Amendment challenges to many provisions of New York's laws regulating the public carriage of firearms. . . .. We stayed the various injunctions pending appeal. . .

We now AFFIRM the injunctions in part, VACATE in part, and REMAND for proceedings consistent with this opinion. In summary, we uphold the district court's injunctions with respect to . . . (social media disclosure); N.Y. Penal L. § 265.01-d (restricted locations as applied to private property held open to the general public; and as applied to Pastor Spencer, the Tabernacle Family Church, its members, or their agents and licensees. We vacate the injunctions in all other respects. . .

BACKGROUND

Plaintiffs are several individuals, one church, and two advocacy groups. They raise numerous challenges to provisions of New York's Concealed Carry Improvement Act ("CCIA"), primarily on Second Amendment grounds. We begin with a description of that statute and then outline the Plaintiffs' challenges in the district court and the issues on appeal. Because the Second Amendment dominates this appeal, we conclude this background section with a discussion of the Supreme Court's three 21st-century precedents addressing that Amendment.

I. Regulatory Background

New York adopted the CCIA in the wake of the Supreme Court's decision in *Bruen*, which struck down New York's former "proper cause" requirement for carrying a concealed firearm. . . Proper cause was defined as "a special need for self-protection distinguishable from that of the general community or of

persons engaged in the same profession." *In re Klenosky*, 75 A.D.2d 793, 793 (1980), *aff'd*, 421 N.E.2d 503 (1981). No such proper cause was required to possess a firearm at one's home. An applicant for an in-home license needed only to show good moral character and to satisfy certain other statutory requirements, such as being at least 21 years old and having no felony convictions.

Addressing only New York's proper-cause requirement, the Supreme Court in *Bruen* held that that requirement violated the Second Amendment because there was no 18th-or 19th-century tradition of conditioning the right to carry a firearm in public on a state official's assessment of special need or justification. . .

Following the decision in *Bruen*, New York Governor Kathy Hochul convened an Extraordinary Legislative Session, . . . during which the New York legislature passed the CCIA. . . . These appeals concern the CCIA's Penal Law amendments related to "licensing," "sensitive locations," and "restricted locations."

A. Licensing

Under the CCIA, applicants for both in-home and concealed-carry licenses must have "good moral character" to obtain a license. The CCIA defines "good moral character" as "the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others." *Id.* . . .

The CCIA added other relevant requirements that are particular to the issuance of concealed-carry licenses. An applicant for a concealed-carry license must attend an in-person meeting with a licensing officer and disclose to the officer: (1) the "names and contact information for the applicant's current spouse, or domestic partner, any other adults residing in the applicant's home, including any adult children of the applicant, and whether or not there are minors residing, full time or part time, in the applicant's home"; (2) the "names and contact information of . . . four character references who can attest to the applicant's good moral character"; (3) a list of all former and current social media accounts from the preceding three years; and (4) such other information as the licensing officer may require "that is reasonably necessary and related to the review of the licensing application." *Id.* § 400.00(1)(o)(i)-(ii), (iv)-(v).

The applicant must also provide the licensing officer with a certificate verifying that he has completed certain required training. To obtain a concealed-carry license, the applicant must "complete an in-person live firearms safety course conducted by a duly authorized instructor with curriculum approved by the division of criminal justice services and the superintendent of state police." *Id.* § 400.00(19). Among other things, the course must provide "a minimum of sixteen hours of in-person live curriculum"

addressing various specified topics, like general firearm safety, safe-storage requirements, situational awareness, conflict de-escalation and management, the use of deadly force, and suicide prevention. *Id.* § 400.00(19)(a)(i)-(ii), (iv)-(v), (viii)-(x). The course must also provide "a minimum of two hours of a live-fire range training." *Id.* § 400.00(19)(b). To obtain a certificate of completion, the applicant must pass a written test and show proficiency in live-fire range training.

B. Sensitive Locations

The CCIA makes it a crime to carry a firearm in a number of "sensitive locations," even for individuals with concealed-carry licenses. The CCIA designates twenty categories of places as sensitive locations. For example, firearms are prohibited in "any place owned or under the control of federal, state or local government, for the purpose of government administration, including courts,"; in nursery schools, preschools, public schools, and certain licensed private schools; and "any location being used as a polling place". More relevant to these appeals, an individual may not carry a firearm in "any location providing health, behavioral health, or chemical depend[e]nce care or services," any place of worship, ;zoos and public parks; any place holding a license for on-premise alcohol consumption; "any place used for . . . performance, art[,] entertainment, gaming, or sporting events such as theaters, . . . conference centers, [and] banquet halls"; and "any gathering of individuals to collectively express their constitutional rights to protest or assemble."[3]

C. Restricted Locations

In addition to prohibiting the carriage of firearms in any designated sensitive location, the CCIA makes it a crime to possess firearms in a "restricted location":

> A person is guilty of criminal possession of a weapon in a restricted location when such person possesses a firearm, rifle, or shotgun and enters into or remains on or in private property where such person knows or reasonably should know that the owner or lessee of such property has not permitted such possession by clear and conspicuous signage indicating that the carrying of firearms, rifles, or shotguns on their property is permitted or has otherwise given express consent.

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[3] The CCIA was amended on May 3, 2023, during the pendency of these appeals, to narrow its provisions applicable to places of worship and public parks. In particular, persons "responsible for security" at places of worship are now exempt from the place-of-worship prohibition, and the term "public parks" has been defined to exclude specially-defined forest preserves and privately-owned land within public parks. . .

N.Y. Penal L. § 265.01-d(1) (2023). It is undisputed that the restricted-locations provision effectively prohibits entrance with a firearm onto another person's private property — whether that property is generally open to the public, like a gas station or grocery store, or is generally closed to the public, like a personal residence — unless the owner or lessee of the property provides affirmative, express consent to armed entry. *Id.* . . .

E. Summary [of procedural history]

Altogether, the district courts enjoined the CCIA's:

(1) licensing requirements that
  (a) an applicant have good moral character and
  (b) disclose to a licensing officer
    (i) a list of the applicant's current spouse and all adult cohabitants,
    (ii) a list of all former and current social media accounts from the preceding three years, and
    (iii) such other information as the officer may require;
(2) sensitive-locations provisions concerning
  (a) locations providing behavioral health or chemical dependence care or services;
  (b) places of worship;
  (c) public parks and zoos;
  (d) buses and airports;
  (e) places that are licensed for on-premise alcohol consumption;
  (f) theaters, conference centers, and banquet halls; and
  (g) gatherings of individuals to collectively express their constitutional rights to protest or assemble; and
(3) restricted-locations provision.

The State timely appealed and moved this Court for stays pending appeal in *Antonyuk, Hardaway*, and *Christian*, which were granted. The State challenges each aspect of the injunctions except for the *Antonyuk* court's injunction against the CCIA's application to buses and airports. No Plaintiff cross-appeals or otherwise challenges any aspect of the district courts' decisions adverse to them.

III. Legal Standards Governing the Right to Keep and Bear Arms. . .

D. *Bruen*

Fourteen years after *Heller* and twelve years after *McDonald*, the Supreme Court decided *Bruen*, abrogating our circuit precedent, both the specific

holding of *Kachalsky* and the general approach we took to Second Amendment claims.

Bruen rejected step two of "the predominant framework" described above and set out a new "test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. Thus, a court must now consider whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129-30. If so, "the Constitution presumptively protects that conduct." *Id.* at 2130. To overcome that presumption, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Stated differently, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. Like the Fifth, Eighth, and Eleventh Circuits, we read *Bruen* as setting out a two-step framework, with the first step based on text and the second step based on history.

Applying that two-step framework, the Supreme Court struck down New York's proper-cause requirement. . . .

The Court, however, made clear that "nothing in [its] analysis should be interpreted to suggest the unconstitutionality of the . . . 'shall-issue' licensing regimes" applicable in 43 States. . . .

The Court also made clear that New York's proper-cause requirement did not resemble the "[t]hree States — Connecticut, Delaware, and Rhode Island — [that] have discretionary criteria but appear to operate like 'shall issue' jurisdictions.". . .

The Supreme Court's simultaneous endorsement of Connecticut and Rhode Island's suitability regimes and criticism of state laws that give licensing officials "discretion to deny licenses based on a perceived lack of need or suitability," *id.* at 2123, suggests that States cannot grant or deny licenses based on suitable need or purpose but may do so based on the applicant having a suitable character or temperament to handle a weapon.[8]

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[8] Justice Kavanaugh, joined by Chief Justice Roberts, emphasized that "[t]he Court's decision addresses only the unusual discretionary licensing regimes, known as 'may-issue' regimes, that are employed by 6 States including New York," under which a licensing official has "open-ended discretion" to deny concealed-carry licenses and may deny a license for a failure to "show some special need apart from self-defense." *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, *J.*, concurring). "Those features," Justice Kavanaugh wrote, "in effect deny the right to carry handguns for self-defense to many ordinary, law-abiding citizens." *Id.* (internal quotation marks omitted). Accordingly, the Court did not address "objective shall-issue licensing regimes," under which the State "may require a license applicant to undergo fingerprinting, a background check, a mental

E. History and Tradition

Bruen requires courts to engage in two analytical steps when assessing Second Amendment challenges: first, by interpreting the plain text of the Amendment as historically understood; and second, by determining whether the challenged law is consistent with this Nation's historical tradition of firearms regulation, as "that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. We focus here on the history-and-tradition prong.

As we understand it, history and tradition give content to the indeterminate and underdetermined text of the Second Amendment: "the right of the people to keep and bear Arms.". . .

That conclusion carries several implications. First, when used to interpret text, "not all history is created equal." *Id.* at 2136. While ancient practices and post-enactment history remain "critical tool[s] of constitutional interpretation," *Heller*, 554 U.S. at 605, they must be examined with some care because while history and tradition shed light on the meaning of the right to keep and bear arms — they do not create it. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634-35). Thus, historical practices that long predate or postdate codification of the relevant constitutional provision may not have much bearing on the provision's scope if the practices were obsolete or anomalous. For example, a one-off and short-lived territorial law, military decree, or local law, while no doubt relevant, will not carry the day if it contradicts the overwhelming weight of other evidence.

Second, in examining history and tradition, a court must identify the "societal problem" that the challenged regulation seeks to address and then ask whether past generations experienced that same problem and, if so, whether those generations addressed it in similar or different ways. *Bruen*, 142 S. Ct. at 2131. . .

Third, the absence of a distinctly similar historical regulation in the presented record, though undoubtedly relevant, can only prove so much. Legislatures past and present have not generally legislated to their constitutional limits. . . . That is so even if the problems faced by past

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health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements." *Id.* at 2162. "Unlike New York's may-issue regime, those shall-issue regimes do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense." *Id.* Shall-issue regimes are constitutional, Justice Kavanaugh explained, so long as they "operate in [an objective] manner in practice." *Id.*

generations could be described, at a high level of generality, as similar to the problems we face today.

Fourth, courts must be particularly attuned to the reality that the issues we face today are different than those faced in medieval England, the Founding Era, the Antebellum Era, and Reconstruction. . . . Thus, the lack of a distinctly similar historical regulation, though (again) no doubt relevant, may not be reliably dispositive in Second Amendment challenges to laws addressing modern concerns. . . . The Supreme Court emphasized in *Bruen* that such a "more nuanced approach" is necessary in cases concerning "new circumstances" or "modern regulations that were unimaginable at the founding," such as regulations addressing "unprecedented societal concerns or dramatic technological changes."

Fifth, under the more nuanced approach, the "historical inquiry that courts must conduct will often involve reasoning by analogy." When reasoning by analogy, a court should ask whether the challenged regulation and the proposed historical analogue are "relevantly similar." In making that determination, a court must identify an appropriate metric by which to compare the two laws. . . . *Bruen* identified "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." Thus, under the more nuanced approach, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." *Id.* at 2133.

Bruen emphasized that "analogical reasoning . . . is neither a regulatory straightjacket nor a regulatory blank check." *Id.* A court should not uphold modern laws simply because they remotely resemble historical outliers. *Id.* Conversely, a court should not search in vain for a "historical *twin*". . . *Id.*

Sixth, just as the existence *vel non* of a *distinctly similar* historical regulation is not dispositive, it is likewise not dispositive whether *comparable* historical regulations exist in significant numbers. The *Bruen* court's rejection of certain historical analogues due to the "miniscule territorial populations who would have lived under them" occurred in the exceptional context of a regulation that "'contradic[ted] the overwhelming weight' of other, more contemporaneous historical evidence." *Id.* at 2154-55 (quoting *Heller*, 554 U.S. at 632). In less exceptional contexts lacking such countervailing historical evidence, the absence in other jurisdictions of positive legislation distinctly similar to a proffered historical analogue does not command the inference that legislators there deemed such a regulation inconsistent with the right to bear arms. . . .

Seventh, as we noted above, the right to keep and bear arms is applicable to the States through the Fourteenth Amendment, which was adopted in 1868. Acknowledging as much, however, *Bruen* expressly declined to decide "whether

courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope." 142 S. Ct. at 2138.

Because the CCIA is a state law, the prevailing understanding of the right to bear arms in 1868 and 1791 are both focal points of our analysis.

We therefore agree with the decisions of our sister circuits — emphasizing "the understanding that prevailed when the States adopted the Fourteenth Amendment" — is, along with the understanding of that right held by the founders in 1791, a relevant consideration.

LICENSING REGIME

"New York maintains a general prohibition on the possession of 'firearms' absent a license." . . .

Before us are facial Second Amendment challenges to four components of New York's firearm licensing regime:

- N.Y. Penal L. § 400.00(1)(b) — To receive a firearm license, the applicant must be "of good moral character." Following the enactment of the CCIA, "good moral character" means "having the essential character, temperament and judgment necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others." We refer to this provision as the "character requirement" or "character provision." "Good moral character" appears to be a prerequisite for all types of firearm licenses, but since both the district court and the Plaintiffs discuss the character requirement only with respect to concealed carry licenses, and since the sole Plaintiff claiming he is injured by the licensing regime asserts a desire to obtain only a concealed carry license, we confine our discussion to that context.
- N.Y. Penal L. § 400.00(1)(o)(i) — An applicant for a concealed carry license must "submit to the licensing officer . . . names and contact information for the applicant's current spouse, [] domestic partner, [and] any other adults residing in the applicant's home, including any adult children of the applicant." The applicant must further disclose "whether or not there are minors residing, full time or part time, in the applicant's home." We refer to this provision as the "cohabitants requirement."
- N.Y. Penal L. § 400.00(1)(o)(iv) — An applicant for a concealed carry license must "submit . . . a list of former and current social media accounts of the applicant from the past three years to confirm the information regarding the applicant[']s character and conduct." We refer to this provision as the "social media requirement."

- N.Y. Penal L. § 400.00(1)(o)(v) — An applicant for a concealed carry license must "submit . . . such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application." We refer to this provision as the "catch-all" requirement.

Plaintiffs argue that these requirements interfere with their right to carry a gun publicly and violate the Second Amendment because they lack a sufficient basis in the "Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. The district court agreed and enjoined defendants from enforcing these four requirements.[14]

First, we conclude that at least one Plaintiff has presented a justiciable challenge to the licensing regime. The cohabitants, social media, and "catch-all" requirements have deterred Plaintiff Lawrence Sloane from obtaining a concealed carry license, a cognizable injury traceable to the enforcement of those provisions and redressable by an injunction. And given the close relationship between the disclosure requirements and the character requirement, Sloane's injury is attributable to the character provision itself and redressable by an injunction against enforcement. . . .

Second, on the merits, we affirm the district court's injunction in part and vacate it in part. We reject Sloane's challenges to the character, catch-all, and cohabitants requirements. The character requirement, we conclude, is not *facially* unconstitutional. A reasoned denial of a carry license to a person who, if armed, would pose a danger to themselves, others, or to the public is consistent with the well-recognized historical tradition of preventing dangerous individuals from possessing weapons. We do not foreclose as-applied challenges to particular character-based denials, but the provision is not invalid in all of its applications.

Nor does the bounded discretion afforded to licensing officers by the character provision render it invalid. On the contrary, *Bruen* explains that several licensing regimes with arguably discretionary criteria identical to New York's are *consistent* with its analysis. Similarly, although it is possible that a licensing officer *could* make an unconstitutional demand for information pursuant to the catch-all, we cannot conclude that there are *no* questions a

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[14] Plaintiffs challenged other aspects of the licensing regime in the district court, including provisions that require concealed carry applicants to attend an in-person interview with the licensing officer, submit a list of four character references, and complete 18 hours of in-person firearms training. The district court concluded that Plaintiffs had not demonstrated substantial likelihood of success on these claims and accordingly denied preliminary relief with respect to those provisions. Plaintiffs have not cross-appealed from or otherwise challenged those rulings here, so we express no view on them.

licensing officer might constitutionally ask an applicant under that provision. Since the catch-all has a "plainly legitimate sweep," we cannot strike it down on its face. Finally, the cohabitants requirement is consonant with the long tradition of considering an applicant's character and reputation when deciding whether to issue a firearm license.

But we affirm the preliminary injunction against enforcement of the social media requirement: although the *review* of public social media posts by a licensing officer poses no constitutional difficulties, requiring applicants to disclose even pseudonymous names under which they post online imposes an impermissible infringement on Second Amendment rights that is unsupported by analogues in the historical record and moreover presents serious First Amendment concerns.

I. Standing

[The court concludes that Plaintiff, Sloane is deterred from seeking—and thereby prevented from obtaining — a concealed carry license]

II. Merits. . .

A. The Character Requirement

To recapitulate, the character requirement states that "[n]o license shall be issued or renewed except for an applicant . . . of good moral character." N.Y. Penal L. § 400.00(1)(b). . . .

Between them, Sloane and the district court put forward three reasons why the character requirement is unconstitutional. First, Sloane contends that the character requirement is, despite its century-long history, facially inconsistent with the history and tradition of firearm regulation. Second, the district court concluded that the discretion baked into the character provision is unsupported by history and tradition, and is therefore impermissible. Finally, Sloane argues that statements in *Bruen* categorically forbid states from conferring any discretion on licensing officers.

We reject all three arguments and vacate the district court's injunction against enforcement of the character requirement. First, the requirement is not facially invalid because it is not unconstitutional in *all* its applications. The CCIA's definition of "character" is a proxy for dangerousness: whether the applicant, if licensed to carry a firearm, is likely to pose a danger to himself, others, or public safety. And there is widespread consensus (notwithstanding some disputes at the margins) that restrictions which prevent dangerous individuals from wielding lethal weapons are part of the nation's tradition of firearm regulation. . . .

Next, we disagree with the district court's conclusion that affording licensing officers a modicum of discretion to grant or deny a concealed carry

permit is inconsistent with the nation's tradition of firearm regulation. For as long as licensing has been used to regulate privately-owned firearms, issuance has been based on discretionary judgments by local officials. Licensing that includes discretion that is bounded by defined standards, we conclude, is part of this nation's history and tradition of firearm regulation and therefore in compliance with the Second Amendment.

Finally, *Bruen* does not forbid discretion in licensing regimes—on the contrary, the *Bruen* Court specifically stated that its decision did not imperil the validity of more than a dozen licensing schemes that confer discretion materially identical to the CCIA. At most, the Court indicated that the practical operation of a licensing scheme is relevant to whether it is impermissibly discretionary. It was therefore error to strike down New York's scheme on a facial challenge.

1. Facial Second Amendment Challenge

At the outset, the State argues that the character requirement does not actually implicate the Second Amendment and therefore may be upheld without reference to historical analysis. . . . The State contends that, because the character requirement requires only that licensees can be entrusted to wield a gun responsibly, it does not infringe the rights of "law-abiding, responsible citizens" and so need not be assessed for consistency with history and tradition.

This potentially dispositive argument bears upon the scope of the Second Amendment right. The State reasons that the character provision impairs the ability to bear arms only of those individuals who *do not have Second Amendment rights* in the first place: the irresponsible. That is a controversial supposition. Though the Supreme Court has suggested that "law-abiding," "responsible," and/or "ordinary" individuals are protected by the Second Amendment, it is far from clear whether these adjectives describe individuals who stand *outside* the Second Amendment or instead those who may be disarmed *consistent with* that Amendment. . . .

But we may resolve this appeal without opining on a tricky question with wide-ranging implications. The character requirement has not been enforced against a Plaintiff, nor has any Plaintiff alleged that he would be denied a license on character grounds—Sloane therefore brings only a facial challenge to the character provision. . . .

There are applications of the character provision that would be constitutional. The Second Amendment does not preclude states from denying a concealed-carry license based on a reasoned determination that the applicant, if permitted to wield a lethal weapon, would pose a danger to himself, others, or to public safety. There is widespread agreement among both courts of appeals and scholars that restrictions forbidding dangerous

individuals from carrying guns comport with "this Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2126. . . .

Such dangerousness is the core of New York's character requirement, as clarified in the CCIA. . . .

We recognize that "good moral character" is a spongy concept susceptible to abuse, but such abuses, should they become manifest, can still be vindicated in court as they arise. A licensing officer who denies an application on character (or any other) grounds must provide "a written notice to the applicant setting forth the reasons for such denial," N.Y. Penal L. § 400.00(4-a). A notice that does not articulate the evidence underlying the character determination or that fails to connect that evidence to the applicant's untrustworthiness to responsibly carry a gun may well be deemed arbitrary and thus subject to vacatur. . .

Likewise, a licensing decision that uses "good moral character" as a smokescreen to deny licenses for impermissible reasons untethered to dangerousness, such as the applicant's lifestyle or political preferences, would violate the Constitution by relying on a ground for disarmament for which there is no historical basis. And we further agree with Sloane (and the district court) that it would violate the Second Amendment to deny a license because the applicant is willing to use a weapon in lawful self-defense (and thereby be said to "endanger . . . others"). But this observation is insufficient to enjoin the law. . . .

Plaintiffs assume that licensing officers will act in bad faith, but facial challenges require the opposite assumption. Permissible outcomes are possible (and we think likely) under the statute. . . .

2. Historical Challenge to Licensing Officer Discretion

The district court deemed the character requirement facially invalid for a further reason: that the statutorily bounded discretion baked into the provision is inconsistent with the history of firearm regulation in the United States and thus violates the Second Amendment. We disagree as a matter of historical fact. For as long as American jurisdictions have issued concealed-carry-licenses, they have permitted certain individualized, discretionary determinations by decisionmakers.

It is important at the outset to be clear about the possible meanings of the term "discretion." Professor Ronald Dworkin long ago distinguished between strong and weak senses of the term. He emphasized that discretion "does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask 'Discretion under which standards?'" Ronald Dworkin, *Taking Rights Seriously* 31 (1977). A statutory scheme that gave officials discretion in the strong sense, such that they could grant or deny licenses as they saw fit, would plainly not pass

muster. But almost any regime that describes standards that must be applied to a wide variety of individual cases creates a certain bounded area of discretion, in a weaker sense, in determining whether those standards are met. . . .

The State has identified firearm licensing schemes from the years immediately following ratification of the Fourteenth Amendment that authorized a local official to issue permits in his limited discretion without the kind of objective criteria the district court deemed necessary. There are a lot of them. Many schemes omit criteria altogether, requiring only "written permission from the mayor," or a "special written permit from the Superior Court." . . .

Other schemes placed limits on eligibility that embedded a certain amount of discretion. For instance, an influential scheme in California authorized "[t]he Police Commissioners [to] grant written permission to [certain] peaceable person[s] . . . to carry concealed deadly weapons for [their] own protection." . . .

The State draws special attention to the history of discretionary licensing regimes in New York. Decades before the state-wide Sullivan Act in 1911, localities from around New York were enacting permitting schemes that depended on individualized assessments by local officials. . . .

These regimes were among the earliest concealed-carry-licensing schemes enacted in the nation. For as long as licenses to carry concealed weapons have been issued in this country, the officials administering those systems have been tasked with making individualized assessments of each applicant. . . . Indeed, the record thus suggests that the kind of purely "objective" licensing scheme which the district court deemed *required* by history and tradition is in fact a historical outlier.

The geographical breadth of licensing schemes that confer a measure of discretion likewise demonstrates their place in "our whole experience as a Nation," . . . Cities from across the country, from San Francisco and Eureka to New York and Elmira, adopted similar discretionary permitting schemes. That widespread adoption by diverse and distant localities under varying circumstances suggests that these policies enjoyed broad popular support and were understood at the time to be consistent with the Second and Fourteenth Amendments. . . .

Strikingly, moreover, these laws and ordinances did not merely exist — they appear to have existed without constitutional qualms or challenges. . . .

It is unnecessary to consider whether licensing was a uniform practice in this period, nor whether officials' limited discretion was unanimously allowed. *Bruen* instructs us to determine whether a given modern law is *part* of the nation's tradition of firearm regulation, not the sum of it. That tradition is multiplicitous, consisting of many different attempts to balance individual

freedom with public safety. . . . Given the frequency of such regulations, and the absence of successful constitutional challenges to them, we find it impossible to read out of our historical tradition the longstanding and established restriction of concealed carry licenses by those who present a danger to themselves or others, or who otherwise cannot be characterized as "law abiding, responsible citizens" simply because such regulations require some individualized application of a clearly delineated standard.

The district court discounted the evidence discussed above based on categorical rules it derived from *Bruen*. For instance, the district court relied on the "rule" that city ordinances are of lesser weight than state laws, and that the relevant laws are those that governed a certain percentage of the nation's population, *id.* at 301. But *Bruen* merely warns against allowing "the bare existence of . . . localized restrictions" to "overcome the overwhelming evidence of an otherwise enduring American tradition." 142 S. Ct. at 2154. It does not suggest that local laws are not persuasive in illuminating part of the nation's tradition of firearm regulation. Similarly, the number of people subject to a given law is only one clue to whether said law may have been an outlier unable to refute a contrary tradition.

The district court also seemed to draw strong and specific inferences from historical silence, reasoning that, if the submitted record lacks legislation from a particular place, it must be because the legislators there deemed such a regulation inconsistent with the right to bear arms. That inference is not commanded by *Bruen*, nor is it sound. . . .

With that perspective, we are not troubled that many licensing schemes originated in the cities of the post-Civil War period. Licensing was the result of changes in American society in the nineteenth century, including urbanization and concomitant shifts in norms of governance. The post-Civil War world was transformed by rapid urbanization. And city people have long had a different relationship with guns than their rural neighbors, a relationship generally marked by greater concern about interpersonal violence. . . .

Accompanying the nineteenth-century explosive growth of cities was the development of governance institutions that were more tightly organized, specialized, and bureaucratic than those required by the towns of the late eighteenth and early nineteenth centuries. "The transformation of the state is one of the most prominent themes of nineteenth-century American history," and "[f]or the most part, it is a story of the expansion and increasing complexity of government and of the professionalization and decreasing popular character of politics." Allen Steinberg, The Transformation of Criminal Justice: Philadelphia 1800-1880, at 2 (1989). It is no coincidence that true police forces come into being in this period, first in London, and then in Boston, New York, and Philadelphia in the 1830s.

These new institutions and ideas shaped the response to increasingly-lethal guns in increasingly-populous cities and naturally led to a greater resort to legislation and regulation. Police-administered licensing schemes evinced a degree of administrative sophistication typical of the late-nineteenth century cities but unusual in the Founding Era. . . .

In context, it makes sense that licensing regimes were instituted by cities rather than states, and that such schemes were not enacted until after the Civil War. We therefore see nothing in either the timing or urban origins of limited discretionary licensing regimes to justify discounting this tradition of American firearm regulation, which can be documented in the aftermath of the ratification of the Fourteenth Amendment.

For the reasons above, we disagree with the district court's conclusion that licensing regimes that afford a modicum of discretion to issuing officers are not part of the nation's tradition of firearm regulation and that the character provision thus violates the Second Amendment. . . .

3. *Bruen*-Based Challenge to Licensing-Officer Discretion

Plaintiffs also attack the discretionary aspect of the character requirement on a different basis. They assert that *Bruen* announced a freestanding rule of constitutional law that requires states to determine eligibility for a gun license using only a checklist that wholly precludes individualized judgments. This claim is based on an overreading of one footnote in *Bruen* . . .

Plaintiffs' rule precluding all discretion cannot be squared with *Bruen*'s discussion of "shall-issue" regimes, even if one thought that the Court would announce a sweeping prohibition of discretion in a single sentence of a footnote designed to clarify the *limited* scope of its decision. Of the forty-three licensing regimes that *Bruen* described as consistent with its analysis, more than a dozen confer some measure of discretion on licensing officers, with many using terms that are nearly identical to New York's character provision. . . .

Furthermore, without specific discussion, *Bruen* categorized as "shall-issue" jurisdictions at least twelve other licensing schemes that call for discretionary judgments, such as whether the applicant "causes justifiable concern for public safety". . . .

The same modicum of discretion as New York's character requirement is embedded in the licensing schemes discussed above. . . . Yet *Bruen expressly* denominated those states (not to mention the dozen others that call for discretionary judgments) as "shall-issue jurisdictions." It therefore cannot be that *Bruen* even "suggest[s]" — let alone holds — that a licensing regime which confers some limited degree of discretion is facially invalid. . . .

For the foregoing reasons, we **VACATE** the district court's preliminary injunction: licensing officers across New York may consider whether an applicant for a firearm license can be trusted to use that gun in a responsible,

safe way. Licensing officers nevertheless have a statutory duty to make "character" determinations only with respect to an applicant's potential dangerousness, and a denial on that ground requires a written, reasoned notice of denial supported by evidence. Where necessary, both state and federal courts are empowered to enforce those statutory requirements and consider as-applied constitutional challenges, thereby ensuring that individuals are not prevented from carrying a gun on the basis of flimsy imputations, unsupported subjective intuitions, or hunches about the applicant's character. But there is currently no reason to doubt that licensing officers across New York will approach their task with diligence and a respect for the relevant constitutional interests.

B. The Catch-All

We vacate the district court's injunction against the catch-all disclosure provision for the same reason: it is not *facially* unconstitutional. Though we (along with Plaintiffs and the district court) can think of situations in which the catch-all could be abused, there are plenty of possible applications that would be permissible.

Section 400.00(1)(o)(v) provides that "the applicant . . . shall, in addition to any other information or forms required by the license application[,] submit . . . such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application." . . .

. . . [A]s the district court recognized in a previous opinion in this litigation, it surely does not violate the Constitution for a licensing officer to request "only very minor follow-up information from an applicant (such as identifying information)." . . .

As-applied challenges to particular requests made pursuant to the catch-all provision remain viable. There surely exist some possible requests which would unconstitutionally burden the right to bear arms: the reader can no doubt conceive of apt hypotheticals. . . .

But no such request for supplementary information is before us: Sloane chose to challenge the law on its face. And for the reasons stated above, a challenge so framed fails.

C. The Cohabitant Requirement

N.Y. Penal Law § 400.00(1)(o)(i) requires that an applicant (i) identify and provide contact information for their current spouse or domestic partner and any adult cohabitants, and (ii) disclose whether minors reside in the applicant's home. This provision is intended to "facilitate inquiries to the applicant's close associates for information relevant to the good-moral-character evaluation and assist in identifying red flags that may cast doubt on the applicant's ability to use firearms safely." Plaintiffs argue — and the district court held — that this

requirement is unconstitutional on its face. We disagree and vacate the district court's injunction as to that provision.

The district court itself recognized the existence of a "sufficiently established and representative . . . tradition of firearm regulation based on reputation (for example, by a reasonable number of character references)." *Antonyuk*, 639 F. Supp. 3d at 306. It accordingly upheld New York's requirement that applicants provide "four character references who can attest to the applicant's good moral character . . . ." Plaintiffs do not challenge either conclusion here. In our view, disclosure of one's cohabitants (in part for the purpose of identifying references regarding the applicant's trustworthiness) is tantamount to the character-reference provision upheld by the district court. If the character-reference requirement is consistent with a historical tradition of firearm regulation, how can the cohabitant provision's requirement of a limited number of *additional* character references be *in*consistent with that tradition?

More generally, we have already explained that it is constitutional for a state to make licensing decisions by reference to an applicant's "good moral character," at least where that "character" is defined in terms of dangerousness. It must therefore be constitutional for the licensing authority to investigate the applicant's character, and no one argues that a licensing officer may not inquire into the applicant's trustworthiness beyond the challenged disclosures. It follows that the State can also require modest disclosures of information that are relevant to that investigation and that will make the (permissible) assessment of dangerousness more efficient and more accurate.

This provision serves that end. In addition to providing an alternate means by which the licensing officer can learn of potential character references, the cohabitants themselves can inform the dangerousness inquiry. An assessment of an applicant's "good moral character" requires an evaluation of the whole individual. The identity and characteristics of an applicant's cohabitants are obviously relevant to the dangerousness of the applicant *in situ*. For instance, if an applicant living with multiple young children was unwilling or unable to secure firearms from meddling, surely a licensing officer could conclude that the applicant cannot "be entrusted with a weapon and to use it only in a manner that does not endanger [him]self or others," N.Y. Penal L. § 400.00(1)(b).

Of course, conditioning a firearm license on disclosures that are burdensome and historically unprecedented can still violate the Second Amendment — we strike down one such disclosure obligation in the next section — but we conclude that the cohabitant requirement is not within that category. . . .

. . . The district court reasoned that the disclosure is a burden "imposed solely for the licensing officers' convenience" because the requested information is theoretically already in the state's possession in the form of "marriage licenses, children's birth certificates, guardianship forms, school forms, adoption paperwork, applications for driver's license or passport, and U.S. census forms." *Antonyuk*, 639 F. Supp. 3d at 307. At the outset, we have our doubts that the relevant agencies would willingly hand over adoption records, census forms, or school paperwork to licensing officers without objection. That aside, we draw the opposite conclusion from the fact that the State will usually already possess the requested information due to the disclosure requirements of its various other agencies: that there is only a minimal privacy interest in the identity of one's cohabitants. Disclosing that information again in another context is that much less burdensome. Unlike the social media provision discussed *infra*, the cohabitants requirement does not demand information with constitutional implications or in which the applicant has any special interest in concealing.

Moreover, the "convenience" of licensing officers, properly understood, is a legitimate consideration that, at least in this context, furthers the relevant constitutional values. . . . Background investigations should be quick and efficient, and should not require licensing officers to engage in burdensome cross-checks with other government records to learn relevant information that would result in unnecessary delays and backlogs in processing applications, especially where that information is routinely disclosed to the government in other contexts and is readily available to the applicant.

For these reasons, we conclude that Plaintiffs are not likely to succeed in their challenge to the cohabitants requirements and **VACATE** the district court's preliminary injunction against enforcing that provision.

D. The Social Media Requirement

Under N.Y. Penal L. § 400.00(1)(o)(iv), an applicant for a concealed carry license must "submit . . . a list of former and current social media accounts of the applicant from the past three years to confirm the information regarding the applicant[']s character and conduct." The district court rejected the State's proffered analogues, found "the burdensomeness of this modern regulation to be unreasonably disproportionate to the burdensomeness of any historical analogues," and preliminarily enjoined enforcement of the provision. *Antonyuk*, 639 F. Supp. 3d at 310. We generally agree. Disclosing one's social media accounts — including ones that are maintained pseudonymously — forfeits anonymity in that realm. Conditioning a concealed carry license on such a disclosure imposes a burden on the right to bear arms that is without sufficient analogue in our nation's history or tradition of firearms regulation.

At the outset, it is important to be clear about what the social media provision does and does not require. . . . It does *not* compel applicants to provide a password to their accounts, make their posts accessible to the public, or give a licensing officer permission to view non-public posts . . .

On the other hand, compelled disclosure of *pseudonymous* social media handles to a licensing officer is no small burden. . . . Anyone familiar with most social media platforms knows that nearly all handles are pseudonymous, at least to the extent that the poster's identity is not immediately apparent. Requiring disclosure of handles is thus to demand that applicants effectively forfeit their right to pseudonymous speech on social media (where so much speech now takes place).

That significant burden on the right to bear arms is not one for which we see persuasive historical analogues. . . . [N]either the Founders nor successive generations required forfeiture of a speaker's anonymity in order to facilitate an inquiry into character or dangerousness. This constitutes "relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131.

The State argues more generally that review of social media is consistent with a tradition of licensing officers "looking to past conduct, associates, and reputation to assess whether an applicant is law-abiding and responsible." That is true, so far as it goes. . . . But *review* of these posts is not the burden imposed by § 400.00(1)(o)(iv). The burden is the disclosure of pseudonyms under which applicants have a constitutional right to post their views. . . .

The State also asks for flexibility in our historical inquiry because "[t]he development of social media is a quintessential dramatic technological change" which requires "a nuanced analogical approach." Social media is of course revolutionary because of the ease with which individuals can disseminate their thoughts to a large audience without the traditional barriers to publishing. . . . But the CCIA's social media requirement does not bear upon the aspects of social media that are new. While social media writ large may have no historical analogue, social media *handles* do. The frequency, formality, and barriers to dissemination of one's views may be different, but the election of a pseudonym to hide one's true identity is not. . . .

In sum, we agree with the district court that Plaintiffs are likely to succeed on the merits of their constitutional challenge to this provision, and we **AFFIRM** the district court's preliminary injunction as it applies to the social media requirement.

SENSITIVE LOCATIONS

We now consider the Plaintiffs' challenges to assorted subsections of N.Y. Penal L. § 265.01-e banning the carriage of firearms in "sensitive locations." . . .

I. Treatment Centers. . .

1. District Court Decision

The district court found that the plain text of the Second Amendment covered the conduct proscribed by § 265.01-e(2)(b) — *i.e.*, licensed carriage of a concealed firearm for self-defense in a location providing behavioral health, or chemical dependence care or services — and accordingly placed the burden on the State to demonstrate the statute's consistency with this Nation's tradition of firearm regulation. The State, in turn, offered two categories of historical analogues. First, the State pointed to an 1837 Massachusetts militia law, an 1837 Maine militia law, and an 1843 Rhode Island militia law that each excluded people with intellectual disabilities, mental illnesses, and alcohol addictions from militia service. Second, the State generally referenced the tradition of restricting firearms in locations frequented by vulnerable populations such as children and provided, as examples, state statutes prohibiting firearms in school rooms. . . .

2. The State's Historical Analogues

a. Well-Established and Representative

Because the district court only assumed, without deciding, that the State's proposed analogues were representative and established, we begin there. "[A]nalogical reasoning requires only that the government identify a well-established and representative historical analogue." *Bruen*, 142 S. Ct. at 2133 (emphasis removed). Representativeness and establishment ensure against "endorsing outliers that our ancestors would never have accepted." *Id.* (internal quotation marks omitted). On the other hand, as *Bruen* cautioned, these requirements cannot be stretched to require the historical twin or "dead ringer." *Id.* . . .

Lacking any evidence that the laws from Maine, Massachusetts, and Rhode Island were historical anomalies, we find them sufficiently established and representative to stand as analogues. . . .

b. Consistency with Tradition

Both sets of the State's proffered analogues place § 265.01-e(2)(b) within this Nation's tradition of firearm regulation in locations where vulnerable populations are present. We begin by comparing how and why § 265.01-e(2)(b) and each set of the proffered historical analogues burdens Second Amendment rights. Section 265.01-e(2)(b) aims to protect "vulnerable or impaired people who either cannot defend themselves or cannot be trusted to have firearms around them safely." It does so by prohibiting carriage of firearms in centers providing behavioral health or substance dependence services. As to the 19th-

century state militia laws, the State argues that the statutes of Maine, Massachusetts, and Rhode Island, which prohibited those with mental illness, intellectual disabilities, and alcohol addiction from serving in militias, were aimed at protecting vulnerable populations from either misusing arms or having arms used against them. These statutes operated by preventing such individuals from serving in the militia.–Similarly, the State claims that the tradition of regulating firearms in locations frequented by children, as exemplified by historical regulations prohibiting guns in schools, is motivated by the need to protect a vulnerable population. . . .

The three militia laws and the tradition of prohibiting firearms in schools are each "relevantly similar" to § 265.01-e(2)(b). The relevantly similar features of those statutes prohibiting firearms in schools are the *burden* they place on Second Amendment rights and the *reason*: prohibiting firearm carriage for the protection of vulnerable populations. The relevantly similar feature of the state militia laws is *who* has historically been considered to make up a vulnerable population justifying firearm regulation on their behalf, *i.e.*, the mentally ill or those with substance use disorders.

In this case, both analogues surely suffice to validate our finding of the likely constitutionality of § 265.01-e(2)(b). Had the State pointed only to those laws prohibiting firearms in schools, the State would have had to demonstrate that individuals with behavioral and substance abuse disorders are sufficiently analogous to children protected by school carriage prohibitions, as the State cannot justify a sensitive location prohibition merely by designating a population as "vulnerable" and enacting a law purporting to protect them. *See Bruen*, 142 S. Ct. at 2133 (emphasizing that "analogical reasoning under the Second Amendment" is not a "blank check"). However, the evidence from the state militia laws that individuals with behavioral or substance dependence disorders have historically been viewed as a vulnerable population justifying firearm regulation makes such analogical reasoning unnecessary to our holding. Likewise, had the State pointed only to the militia law analogues, which disarmed the members of the vulnerable population itself rather than others in proximity, it would have borne the burden of demonstrating that §265.01-e(2)(b) — which disarms everyone in spaces where a vulnerable population is present — is consistent with or distinctly similar to a historical tradition.

In sum, the State's evidence establishes a tradition of prohibiting firearms in locations congregated by vulnerable populations and a concomitant tradition of considering those with behavioral and substance dependence disorders to constitute a vulnerable population justifying firearm regulation. Section 265.01-e(2)(b) is consistent with these traditions.

3. Proper Analysis of Proffered Analogues

In rejecting the State's evidence as to the tradition of regulating firearms in places frequented by vulnerable populations such as children, the district court misidentified the relevantly similar features of the State's proffered analogues The district court found that the State failed to show that today's treatment centers contain more children than similar locales in the 18th-and 19th-centuries; but the relevantly similar feature of these analogues is the *how* and the *why*: firearm prohibition (how) in places frequented by and for the protection of vulnerable populations (why). The New York legislature need not have attempted to protect the exact same subset of vulnerable persons for its regulation to be relevantly similar to these historical analogues. Similarly, the district court discounted the state militia laws on the ground that they impose a lesser burden on Second Amendment rights than § 265.01-e(2)(b); but the relevantly similar feature of the state militia laws is that the intellectually disabled, mentally ill, or those with substance use disorders have historically been considered a vulnerable population justifying firearm regulation. . . .

Furthermore, contrary to the district court's conclusion, the State was not required to show that firearms were traditionally banned "in places such as 'almshouses,' hospitals, or physician's offices." *Antonyuk*, 639 F. Supp. 3d at 318. For one, this requirement by the district court was a product of its erroneous conclusion that the State's evidence was insufficiently analogous. Properly construed, that evidence establishes a historical tradition of firearm regulation embracing § 265.01-e(2)(b) — the opposite of historical silence. Yet, even putting that foundational error aside, the district court made too much of *Bruen*'s observation that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131.

For the above stated reasons, the preliminary injunction is **VACATED** insofar as the State was enjoined from enforcing § 265.01-e(2)(b) in behavioral health and substance dependence care and service centers.

II. Places of Worship

Section 265.01-e(2)(c) of the CCIA criminalizes possession of a firearm in "any place of worship, except for those persons responsible for security at such place of worship." N.Y. Penal L. § 265.01-e(2)(c). A suite of challenges to this provision is before us on appeal. . . . In *Antonyuk v. Chiumento*, plaintiff Joseph Mann avers that, as pastor, he frequently carries a concealed firearm in his church. . . . The district court held that the place of worship provision intruded on Mann's Second Amendment right to carry firearms. . . .

The State now appeals from the grant of preliminary injunctions in each case. It does not dispute any Plaintiff's standing to challenge the place of worship provision, and we see no impediment to standing.

A. *Antonyuk* and *Hardaway*

1. Standing and Mootness

The New York legislature amended the place of worship provision after the district courts enjoined it. Previously, the provision criminalized possession of a firearm in "any place of worship or religious observation." 2023 N.Y. Laws, Ch. 55, pt. F, § 4. Effective May 3, 2023, however, places of "religious observation" are no longer covered, and the provision has an exception for "those persons responsible for security at such place of worship." *Id.* We must consider whether the statutory amendment has mooted any of the Plaintiffs' claims.

With respect to *Hardaway* and *Antonyuk*, it has. Put simply, the amended statute prohibits none of the Plaintiffs in these cases from doing what they seek to do. . . .

The natural-person plaintiffs in *Hardaway*, Jimmie Hardaway, Jr. and Larry Boyd, state directly in their complaint that they would grant themselves permission to carry firearms in order to protect their churches if they could. . . . Now, under the amended statute, they are perfectly capable of doing so. . . .

B. *Spencer*

. . .[T]he claims of the *Spencer* Plaintiffs are not limited to their own carriage of weapons, but extend to a "desire to allow others to carry concealed firearms . . . on the Church's New York campuses" because of a belief "that such concealed carry will protect [Spencer] and other worshippers from the kind of violence that other houses of worship across the country have suffered, and because such concealed carry effectuates our religious beliefs . . . that we must protect the physical safety of the flock."

The district court accepted both First Amendment arguments. It held that the CCIA's explicit targeting of places of worship facially discriminates against religious activity, and that the law was not neutral to religion because "[c]areful drafting ensured that carrying of concealed weapons for religious reasons at place[s] of worship is prohibited, while the same carrying in numerous other circumstances remains permissible." *Spencer*, 648 F. Supp. 3d at 462. It determined that the law was not generally applicable because the CCIA permits several different types of private businesses to allow weapons on their property while prohibiting religious organizations from doing the same. *Id.* at 463. Further, it concluded that the CCIA violates the Establishment Clause because it interferes in internal matters of the church

by "dictat[ing] that protection of the Church may only be provided by . . . individuals fitting into a statutory exemption," instead of members of the congregation writ large. *Id.* at 465.

Separately, the district court concluded that the place of worship provision lacked historical analogues sufficient to show that it imposed a constitutional burden on the exercise of Spencer's Second Amendment right to carry a firearm. It therefore enjoined the statute under both the First and Second Amendments, as incorporated by the Fourteenth Amendment.

We affirm the preliminary injunction under the Free Exercise Clause, and express no view as to the other arguments raised by the Plaintiffs.

We consider first whether Plaintiffs have demonstrated a likelihood of success on the merits. . . .

1. Burden on Religious Practice. . .

The central argument advanced by the *Spencer* Plaintiffs is that the CCIA impedes their religious duty to protect the congregation by carrying firearms in their church and inviting congregants to do the same. . . .

Although the burden on the Plaintiffs' religious practice has been reduced by the intervening amendment, a remediable injury to the Plaintiffs' religious practice subsists. . . .

The New York legislature's decision to authorize the *Spencer* Plaintiffs and other church leaders to appoint "persons responsible for security" who may carry firearms in the church therefore gives the Plaintiffs only partial relief. While they may now arm themselves and their security volunteers, they still cannot give general license to their congregants to bring firearms into the church unless they are willing to designate every congregant as "responsible for security." The need to make this designation is not an obstacle faced by secular establishments that wish to authorize the carriage of firearms. . . .

The State argues that the place of worship provision does not meaningfully burden the Plaintiffs' religious practice. . . .

The State does not dispute, however, that Spencer used to carry a firearm in the church because of a personal religious belief and encouraged his congregants to do the same. Nor does it dispute that Spencer no longer did so after the CCIA was passed. This is all that is required. . .

To the extent the State disputes the sincerity of Spencer's beliefs, we decline to consider vacatur on these grounds. . . .

2. Neutrality & General Applicability

However, even if a law burdens a religious practice, it is not constitutionally suspect if it is "neutral" and "generally applicable." *Kennedy*, 142 S. Ct. at 2422. . . .

. . . the CCIA is not neutral because it allows the owners of many forms of private property, including many types of retail businesses open to the public, to decide for themselves whether to allow firearms on the premises while denying the same autonomy to places of worship. By adopting a law that applies differently as to places of worship (alongside the other enumerated sensitive places) than to most other privately owned businesses and properties, the CCIA is, on its face, neither neutral nor generally applicable. . . .

3. Strict Scrutiny

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. . . .

The State asserts that categorically prohibiting weapons in places of worship "is the least restrictive means of reducing gun violence within this sensitive location" because "many clerical leaders have no desire to jeopardize their safety and undermine their relationships with congregants by attempting to eject persons carrying firearms." . . .

The State provides no explanation for why leaders of religious groups in general, and the Plaintiffs specifically, are less able to "eject persons carrying firearms" than any other property owner who is permitted to make a free choice whether to allow firearms on their premises. . . .

And if New York has elected to "permit[] other activities to proceed" with less stringent regulation of firearms, "it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, 141 S. Ct. at 1297. At this stage, the State has not demonstrated that allowing church leaders to regulate their congregants' firearms is more dangerous than allowing other property owners to do the same. . . .

For these reasons, Plaintiffs have shown a likelihood of success in demonstrating that the place of worship provision is not the most narrowly tailored means to address the State's compelling interest.

4. Irreparable Harm & Balance of Equities

We now turn to the remaining preliminary injunction factors. Plaintiffs have shown that they will suffer irreparable harm if the place of worship provision is enforced against them. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As for the balance of equities, because the State has not demonstrated that public safety would be harmed by allowing the *Spencer* Plaintiffs to permit congregants to carry firearms within the church, "it has not been shown that

granting the [injunction] will harm the public." *Roman Cath. Diocese*, 141 S. Ct. at 68.

For the reasons set forth above, we **VACATE** the district courts' preliminary injunctions in *Antonyuk* and *Hardaway* against enforcement of § 265.01-e(2)(c) but **AFFIRM** the preliminary injunction issued by the district court in *Spencer*. . . .

III. Parks and Zoos

New York also criminalizes possession of a gun in "public parks[] and zoos." Plaintiffs challenge the constitutionality of this prohibition. . . .

1. District Court Decision

Having determined that the conduct proscribed by § 265.01-e(2)(d), *i.e.*, carriage in public parks and zoos, was within the plain text of the Second Amendment, the district court placed the burden on the State to establish the regulation's consistency with the Nation's history and tradition. The district court considered the following analogues: (1) an 1870 Texas law prohibiting firearms in "place[s] where persons are assembled for educational, literary or scientific purposes,"; (2) an 1883 Missouri Law prohibiting carriage in places where people assembled for "educational, literary or social purposes" and "any other public assemblage of persons met for any lawful purpose," J.A. 611 (1883 Mo. Sess. Laws 76); (3) an 1889 Arizona law and 1890 Oklahoma law prohibiting carriage in any "place where persons are assembled for amusement or for educational or scientific purposes," *see also* (4) ordinances in New York City, Philadelphia, St. Paul, Detroit, Chicago, Salt Lake City, St. Louis, and Pittsburgh adopted between 1861 and 1897 prohibiting carriage in public parks;[69] and (5) the tradition of prohibiting firearms in schools.

Before proceeding to the individual history and analogue test for public parks and zoos,[70] the district court noted that it would afford little weight to

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[69] *See* Fourth Annual Report Of The Board Of Commissioners Of The Central Park (Jan. 1861); First Annual Report Of The Commissioners Of Fairmount Park (Philadelphia), Supplement § 21(II) (1869); Rules And Regulations Of The Public Parks And Grounds Of The City Of Saint Paul (1888); 1895 Mich. Pub. Acts 596; Chicago Muni. Code art. 43 (1881); Salt Lake City, Revised Ordinances ch. 27 (1888), Tower Grove Park Bd. of Comm'rs, Rules and Regulations, *in* David H. Macadam, Tower Grove Park Of The City Of St. Louis (1883); Pittsburgh Gen. Ordinances, *Bureau of Parks*, p. 496 (2d ed. 1897).

[70] The district court determined that § 265.01-e's prohibition on carriage in playgrounds was consistent with history and tradition and did not issue an injunction as to that aspect of the regulation. That determination is not on review in this appeal. No Plaintiff has appealed from that ruling, so it is not before us for review.

territorial laws and city ordinances that did not correspond to sufficiently similar state laws. Likewise, it discounted laws from the last decade of the 19th century because of their distance from the Founding and Reconstruction. Given these parameters, the district court considered: the 1870 Texas law, 1883 Missouri law, and "to a lesser extent" the New York, Philadelphia, Chicago, St. Louis, and St. Paul ordinances. . . .

2. Analysis of the Historical Analogues — Public Parks

On appeal, the State offers three arguments for why its analogues show a history and tradition consistent with § 265.01-e. First, it argues that the regulation aims to protect the spaces where individuals often gather to express "their constitutional rights to protest or assemble". Thus, according to the state, the well-established tradition of regulating firearms in quintessential public forums, such as fairs and markets, justifies regulating firearms in public parks, which today often serve as public forums. As examples of this tradition, the State reaches as far back as a 1328 British statute forbidding going or riding "armed by night []or by day, in fairs, markets." Statute of Northampton 1328, 2 Edw. 3 c.3 (Eng.). The State adduces evidence that at least two Founding-era states and several Reconstruction-era states replicated this type of law, . . . and that, where challenged, these laws and subsequent amendments were upheld as constitutional by state courts. And, as it did below, the State offers the same eight city ordinances prohibiting firearms in city parks and notes that these ordinances were passed shortly after the time that parks emerged as municipal institutions.

Second, the State relies on the same state laws establishing a tradition of firearm regulation in public forums to argue that § 265.01-e(2)(d) is within the tradition of regulating firearms in "quintessentially" crowded places such as fairs and markets.

Third, and finally, the State explains that § 265.01-e(2)(d) endeavors to protect children who often frequent public parks from firearms and is thus consistent with the tradition of regulating firearms in areas frequented by children.

We agree with the State that § 265.01-e is within the Nation's history of regulating firearms in quintessentially crowded areas and public forums, at least insofar as the regulation prohibits firearms in *urban* parks, though not necessarily as to *rural* parks. Considering, then, that the law has a plainly legitimate sweep as to urban parks, the facial challenge fails notwithstanding doubt that there is historical support for the regulation of firearms in wilderness parks, forests, and reserves.

a. Well-Established and Representative

Contrary to the district court's conclusion, the State has made a robust showing of a well-established and representative tradition of regulating firearms in public forums and quintessentially crowded places, enduring from medieval England to Reconstruction America and beyond. . . .

Though "[s]ometimes, in interpreting our own Constitution, it is better not to go too far back into antiquity," that is distinctly *not* the case where "evidence shows that medieval law survived to become our Founders' law." *Bruen*, 142 S. Ct. at 2136 (internal quotation marks omitted). Here, the State has shown that at least two states — Virginia and North Carolina — passed statutes at the Founding that replicated the medieval English law prohibiting firearms in fairs and markets, *i.e.*, the traditional, crowded public forum. . . .

The tradition of regulating firearms in quintessentially crowded places was continued throughout the history of our Nation. In Reconstruction, three states (Texas, Missouri, and Tennessee) passed laws prohibiting weapons in public forums and crowded places such as assemblies for "educational, literary or scientific purposes, or into a ball room, social party or other social gathering." . . .

This "long, unbroken line," *Bruen*, 142 S. Ct. as 2136, beginning from medieval England and extending beyond Reconstruction, indicates that the tradition of regulating firearms in often-crowded public forums is "part of the 'immemorial' custom" of this nation. . . .

Of particular note, the state courts of all three states that had such laws upheld this type of statute as constitutional. . . .

The number of states and territories with such statutes makes clear that this tradition has also been consistently representative of the Nation as a whole. At the time in which they were passed in 1791, Virginia's and North Carolina's statutes prohibiting firearms in fairs and markets applied to over a quarter of the Nation's population. By 1891, an additional three states and two territories had passed similar laws, meaning that such statutes applied to nearly 10 million Americans, a figure equivalent to about 15.3 percent of the Nation's population at that time. . . .

In addition to showing that there existed a well-established and representative state tradition of such regulation, the State points to eight examples (Chicago, Detroit, New York City, Philadelphia, Pittsburgh, Salt Lake City, St. Paul, St. Louis) establishing a municipal tradition of regulating firearms in urban public parks specifically. The proliferation of these urban public park regulations between 1861 and 1897 coincides with the rise of public parks as municipal institutions over the latter half of the 19th century. . . .

The district court mistakenly discounted these city laws because they were not accompanied by state laws, relying on the *Bruen* majority's statement that "the bare existence of these localized restrictions cannot overcome the

overwhelming evidence of an otherwise enduring American tradition." We think this is an overreading of Bruen. *Bruen*'s pronouncement addressed an isolated set of territorial laws, whose transient and temporary character does not correlate to the enduring municipal governments whose enactments are before us now. *Bruen*, 142 S. Ct. at 2154. And while *Bruen* also relied on the "miniscule" populations who were governed by the territorial statutes at issue, by 1897, fully eight percent of the entire population lived in one of the urban areas governed by the state's analogues here. . . . Moreover, the appropriate figure in this instance is not the percentage of the nation's *total* population that was affected by city park firearms restrictions, but rather the percentage of the *urban* population that was governed by city park restrictions. By 1890, four of the five most populous cities prohibited firearms in their urban parks, and Brooklyn's incorporation into New York City in 1896 would result in all five of the most populous cities having such prohibitions. Those cities alone numbered over 4.9 million people, at a time when only 14 million Americans lived in a city with more than 25,000 inhabitants, resulting in at least 37.7% of the urban population living in cities where firearms were prohibited in their parks.

The upshot of the State's wealth of evidence is a well-established, representative, and longstanding tradition of regulating firearms in places that serve as public forums and, as a result, tend to be crowded. This tradition comes down to us from medieval England; it was enshrined in the law books of the largest (Virginia) and third largest (North Carolina) Founding-era states, and built on throughout and beyond Reconstruction. With the rise of urban America, cities continued this tradition and began regulating firearms in a newly emerging public forum: the urban park. . . .

b. Consistency with Tradition

It is not enough for the State to point to well-established and representative analogues; the contemporary regulation it seeks to defend must also be "consistent" with the tradition established by those analogues. *Bruen*, 142 S. Ct. at 2135. We now turn to this aspect of the inquiry.

Whether § 265.01-e's prohibition on firearms in urban parks is consistent with this Nation's tradition is a straightforward inquiry. It is obvious that § 265.01-e burdens Second Amendment rights in a distinctly similar way (*i.e.*, by prohibiting carriage) and for a distinctly similar reason (*i.e.*, maintaining order in often-crowded public squares) as do the plethora of regulations provided by the State, many of which specifically applied to urban public parks. This demonstrates § 265.01-e's consistency with the Second Amendment. . . .

The State's justification for § 265.01-e appears to be the same for rural as for urban parks, even though rural parks much more resemble the commons of yore than to the historical and often-crowded public squares, *i.e.*, fairs,

markets, and urban public parks, regulated under the State's historical analogues. Rural parks do not as neatly resemble quintessential public squares in that they are not primarily designed for peaceable assembly.

As opposed to fairs, markets, or the new, urban parks of the mid-19th century, *i.e.*, quintessential and often-crowded public spaces, the more proper analogue for rural parks based on the record before us appears to be "commons" and "wilderness areas." New York describes its Adirondack Park, which encompasses "one-third of the total land area of New York State," as containing "vast forests, rolling farmlands, towns and villages, mountains and valleys, lakes, ponds and free-flowing rivers, private lands and public forest." . . . This description echoes that of the "New England commons . . . spaces held by the community for shared utilitarian purposes," much more than it does the "communal spaces" and "quintessential public space[s]" embodied by urban parks.

But we need not resolve this line-drawing issue on a facial challenge. Although we doubt that the evidence presently in the record could set forth a well-established tradition of prohibiting firearm carriage in rural parks, we are mindful that this litigation is still in its early stages and that the State did not distinguish between rural and urban parks in its arguments to this Court or below. . . .

As § 265.01-e(2)(d) applies to urban parks, the State has carried its burden by placing the regulation within a National tradition of regulating firearms in often-crowded public squares, including, specifically, city parks. Accordingly, we **VACATE** the district court's preliminary injunction as to § 265.01-e(2)(d).

3. Analysis of the Historical Analogues — Zoos

To defend § 265.01-e's regulation of firearms in zoos, the State relies on two of the same analogical categories as for public parks: prohibiting firearms in crowded places and in places where children congregate. The State also points out that, contrary to the district court's assertion, nearly 70 percent of visitors to zoos are parties with children.

a. Well-Established and Representative

For the reasons laid out in our discussion of public parks, the State's evidence demonstrates a well-established and representative tradition of regulating firearms in densely trafficked public forums. We rely on *Bruen* for the proposition that the tradition of regulating firearms in spaces frequented by children is also well-established and representative.

b. Consistent with Tradition

Section 265.01-e's firearm ban in zoos is consistent with the State's analogues that establish a history of regulating firearms in crowded places and

locations frequented by children. Although zoos are relatively modern institutions, the *Bruen* analysis remains valid and useful, subject to the more "nuanced approach" announced in *Bruen*. 142 S. Ct. at 2132. . . .

[W]e **VACATE** the district court's preliminary injunction enjoining enforcement of § 265.01-e(2)(d) as applied to zoos and public parks.

IV. Premises Licensed for Alcohol Consumption. . .

B. The State's Historical Analogues

On appeal, the State relies largely on the same analogues as it did below to argue that § 265.01-e(2)(o) is in harmony with the tradition of regulating firearms in locations frequented by "concentrations of vulnerable or impaired people," here intoxicated individuals, "who either cannot defend themselves or cannot be trusted to have firearms around them safely." The State also argues that the tradition of regulating firearms in "quintessentially crowded places," which they argue liquor-licensed establishments generally are, supports § 265.01-e(2)(o).

As a preliminary matter, we address the district court's erroneous decision to afford little weight to the Arizona and Oklahoma statutes because they were territorial laws, and to the 1889 Wisconsin statute because of its distance from Reconstruction and the Founding.

As we have already explained, the district court's repeated and automatic rejection of any territorial laws and statutes from the latter half of the nineteenth century is not compelled by *Bruen*. True, *Bruen* counseled that evidence "that long predates either date *may* not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years," and that "[s]imilarly, we must also guard against giving post enactment history more weight than it can rightly bear." 142 S. Ct. at 2136 (emphasis added). That observation, however, does not require courts to reflexively discount evidence from the latter half of the 19th century absent indications that such evidence is inconsistent with the National tradition. Likewise, the district court made too much of the fact that *Bruen* gave "little weight" to territorial laws. *Id.* at 2155. Not only did New York offer only one state law in support of its proper-cause requirement in *Bruen*, the territorial laws on which it relied in *Bruen* were "short lived" and some "were held unconstitutional shortly after

passage,"[91] while another "did not survive a Territory's admission to the Union as a State." *Id.*

The circumstances leading to the Court's cautions in *Bruen* are not present here and did not require the district court to discount the territorial laws of Arizona and Oklahoma nor the 1889 Wisconsin law. Unlike in *Bruen*, there is no evidence in the record before us that the territorial laws were short-lived, did not survive admission to the Union, or were later held unconstitutional. Nor were these territorial laws aberrant to the National tradition. As discussed below, these territorial laws were consistent with five state laws already on the books when the territorial laws were enacted. Similarly, Wisconsin's 1889 law was not a late-term aberration from the National tradition, but an addition consistent with the older state laws from Kansas, Missouri, and Mississippi. All three statutes should have been considered by the district court.

1. Well-Established and Representative

We now hold what the district court assumed, that the State's historical analogues establish a consistent and representative tradition of regulating access to firearms by people with impaired self-control or judgment, specifically those who are intoxicated. Three of the State's analogues — the 1867 Kansas law, 1889 Wisconsin law, and 1883 Missouri law — prohibited intoxicated persons from carrying firearms. . . . The State's three other analogues included a law that prohibited selling firearms to intoxicated persons, *id.* at 633 (1878 Miss. Laws 175); a law that required the keepers of "drinking saloon[s] to keep posted up in a conspicuous place in his bar room . . . a plain notice to travelers to divest themselves of their weapons," *id.* at 617 (1889 Ariz. Sess. Laws 17); and a law that prohibited carriage in "any place where intoxicating liquors are sold," *id.* at 621 (1890 Okla. Terr. Stats., Art. 47, § 7). These six analogues, which applied to nine-and-a-half percent of Americans by 1889, establish a consistent and representative National tradition of regulating firearms due to the dangers posed by armed intoxicated individuals. This tradition was carried

[91] The *only* case cited in *Bruen* for the proposition that "some" territorial laws were held unconstitutional is *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902). That one-paragraph opinion invalidated a statute that apparently prohibited the carriage of deadly weapons within the limits of a city, town, or village (the statute is only paraphrased, not quoted, in the brief decision). Far from suggesting the unconstitutionality even of New York's Sullivan law, let alone laws addressing sensitive places, the Idaho Supreme Court merely noted that the state legislature had the power to *regulate* arms-bearing, but not totally to prohibit it, specifically stating that "[a] statute prohibiting the carriage of *concealed* deadly weapons [which the court characterized as 'a pernicious practice'] would be a proper exercise of the police power of the state." 70 P. at 609 (emphasis added).

out in various forms: either by disarming intoxicated persons (as in Kansas, Wisconsin, and Missouri), prohibiting the sale of firearms to intoxicated persons (as in Mississippi), or prohibiting firearms in liquor-serving or-selling establishments (as in Arizona and Oklahoma).

In addition to these statutory analogues, the State points to the Missouri Supreme Court's holding in *State v. Shelby*, S.W. 468, 469 (1886), that the state's prohibition of firearm carriage by intoxicated persons was in "perfect harmony with the constitution" given the "mischief to be apprehended from an intoxicated person going abroad with fire-arms." . . .

2. Consistency with Tradition

We now turn to whether § 265.01-e(2)(o) is consistent with the well-established and representative tradition established by the State's analogues. We hold that it is consistent with both analogical categories established by the State, as liquor-licensed establishments are both typically crowded milieus and are frequented by intoxicated individuals who cannot necessarily be trusted with firearms and who may also, due to their intoxication, be unable to defend themselves effectively.

Both categories of analogues burdened Second Amendment rights in a similar manner and for similar reasons as § 265.01-e(2)(o). Contemporaneous state case law reveals that historical regulations prohibiting firearms at social gatherings, parties, and ball rooms were justified by the "duties and proprieties of social life." *Andrews*, 50 Tenn. at 181-82; . . .

And, though the State does not explicitly refer to historical statutes regulating firearms in other crowded spaces such as fairs and markets, those too provide support for regulating firearms in crowded places and keeping such spaces peaceful, as we have already discussed, *see supra* Sensitive Locations § III.B. As to means, both § 265.01-e(2)(o) and its historical "crowded space" analogues achieve their purpose by prohibiting carriage in heavily-trafficked spaces. Likewise, contemporaneous state case law reveals that intoxicated-persons statutes were motivated by the need to disarm intoxicated individuals who could not be trusted with weapons. *See Shelby*, 2 S.W. at 469-70 (holding that the "mischief" posed by intoxicated persons carrying weapons justified a statute prohibiting as much). As we have noted, these statutes achieved their objective in various ways. Some did so by disarming intoxicated individuals themselves, others by prohibiting sale to intoxicated persons, and yet others by prohibiting firearms in liquor-serving or-selling establishments altogether. Section 265.01-e(2)(o), which operates by prohibiting firearms in liquor-serving establishments, is directly parallel to the latter historical statutes.

When paired with the crowded space analogues, even absent the historical statutes prohibiting carriage in liquor-serving establishments, the analogues prohibiting intoxicated persons from carrying or purchasing firearms justify §

265.01-e(2)(o). . . . Together, these statutes justify regulating firearms in crowded spaces in which intoxicated persons are likely present. . . .

For the aforementioned reasons we **VACATE** the district court's preliminary injunction enjoining enforcement of § 265.01-e(2)(o).

V. Theaters, Conference Centers, and Banquet Halls

N.Y. Penal L. § 265.01-e(2)(p) is a wide-ranging ban on gun carriage in "any place used for the performance, art entertainment [sic], gaming, or sporting events" that provides a long list of examples of such locations. The district court enjoined enforcement of § 265.01-e(2)(p) with respect to three of those locations: "theaters," "conference centers," and "banquet halls." We vacate that injunction, concluding (1) that no plaintiff presented a justiciable challenge to the conference center and banquet hall provisions (and thus that the district court's injunction was entered without subject-matter jurisdiction), and (2) that Plaintiffs have not shown a likelihood that the ban on carrying guns in theaters violates the Second Amendment. . . .

2. The State's Historical Analogues

On appeal, the State argues that § 265.01-e(2)(p) is consistent with the Nation's tradition of regulating firearms in quintessentially crowded social places. . . .

As we have already laid out, . . . the State points to [five] the following analogues to establish a tradition of crowded-place regulations: (1) a 1382 British statute forbidding going or riding "armed by night []or by day, in fairs, markets," Statute of Northampton 1328; (2) a 1792 North Carolina statute replicating the 1328 British statute and prohibiting firearms in fairs or markets; (3) a 1786 Virginia law prohibiting "go[ing] []or rid[ing] armed by night []or by day, in fairs or markets, or in other places, in terror of the county"; (4) laws from 1869 Tennessee, 1870 Texas, 1883 Missouri, 1889 Arizona, and 1890 Oklahoma prohibiting firearms in crowded places such as assemblies for "educational, literary or scientific purposes, or into a ball room, social party or social gathering"; and (5) Missouri, Tennessee, and Texas state court opinions upholding those states' regulations as constitutional.

We have already held that the above analogues set forth both a well-established and representative tradition of regulating firearms in quintessentially crowded places, *supra* Sensitive Locations § III.B.2.a. The question to which we turn, therefore, is whether § 265.01-e(2)(p) is consistent with that tradition, *supra* Sensitive Locations § III.B.2.b. We hold that it is and, accordingly, vacate the preliminary injunction. . . .

[T]he order of the district court preliminarily enjoining the State from enforcing § 265.01-e(2)(p) is **VACATED**.

VI. First Amendment Gatherings

Section 265.01-e(2)(s) makes it a crime to possess a gun at "any gathering of individuals to collectively express their constitutional rights to protest or assemble." . . . [W]e conclude that neither Terrille nor Mann has presented justiciable constitutional challenges to paragraph (2)(s).

A. Mann

The district court concluded that Mann has standing because paragraph (2)(s) applies to Sunday worship at Mann's church — "expressive religious assemblies," in the district court's words. . . . However, as a matter of statutory interpretation, neither a worship service nor other "expressive religious assemblies" are even arguably covered by paragraph (2)(s).

The inquiry depends on the provision's purpose: guns are banned only when people gather "to collectively express their constitutional rights to protest or assemble." It is unreasonable to interpret this text to include every gathering or even every "expressive gathering." . . .

Paragraph (2)(s)'s placement within § 265.01-e confirms that it was aimed at protests and other demonstrations rather than at an undifferentiated category of gatherings that would include worship services. . . .

Moreover, it is easy to infer what the legislature had in mind. Peaceful demonstrations petitioning the government to take or desist from particular actions are a vital part of democratic discourse; demonstrations by armed mobs are something else. Similarly, counter-demonstrations often lead to dangerous confrontations; how much more so if a peaceful protest is met by counter-demonstrators who are armed. It is thus reasonable to assume that the legislature was concerned that carrying firearms in connection with such protests conveys intimidation rather than free expression, a concern that would not extend to ordinary religious or social gatherings at which people exercise their rights to gather and speak with each other.

Accordingly, we conclude that worship services at Mann's church are not arguably "gathering[s] of individuals to collectively express their constitutional rights to protest or assemble" and that he has thus not alleged injury-in-fact with respect to § 265.01-e(2)(s).

B. Terrille

The district court found that Alfred Terrille had standing to challenge the constitutionality of paragraph (2)(s) based on his intention to attend the Polish Community Center Gun Show on October 8-9, 2022. But for the reasons explained above with respect to conference centers and banquet halls, Terrille's failure to demonstrate that he attended the gun show while armed, was

dissuaded by law from doing so, or intends to attend another gun show in the future means that Terrille's challenge to paragraph (2)(s) is now moot.

Moreover, a gun show is not arguably a "gathering of individuals to collectively express their constitutional rights to protest or assemble" under paragraph (2)(s). Though Terrille states that "one of [his] main reasons for attending [the Polish Community Center Gun Show], and a huge part of any gun show, is the conversations with fellow gun owners, which invariably includes discussion of New York State's tyrannical gun laws," that does not on its own bring a gun show within paragraph (2)(s). A gun show is a commercial exhibition: that attendees might *also* engage in speech, including on politically-charged topics, does not make it a gathering for the purpose of expressing participants' "constitutional right to protest or assemble." As discussed, the challenged law does not cover every gathering where expression might occur. A book fair is not a qualifying gathering even if attendees anticipate conversations about censorship. So, even if Terrille's claim was not moot, it still would not be justiciable.

Since neither Mann nor Terrille present justiciable challenges § 265.01-e(2)(s), the district court was without jurisdiction to enjoin its enforcement. . . .

RESTRICTED LOCATIONS

Under § 265.01-d of the CCIA, a "person is guilty of criminal possession of a weapon in a restricted location when such person possesses a firearm, rifle, or shotgun and enters into or remains on or in private property where such person knows or reasonably should know that the owner or lessee of such property has not permitted such possession by clear and conspicuous signage indicating that the carrying of firearms, rifles, or shotguns on their property is permitted or by otherwise giving express consent." The effect of this "restricted location" provision is to create a default presumption that carriage on any private property is unlawful — whether property is open or closed to the public — unless the property owner has indicated by "clear and conspicuous signage" or express verbal consent that carriage is allowed. . . .

1. *Christian*

a. Scope of Second Amendment

We agree with the district court that, to the extent the restricted location provision applies to private property open to the public, the regulated conduct falls within the Second Amendment right to carry firearms in self-defense outside the home. Otherwise, as the district court observed, because over 91 percent of land in New York state is privately held, the restricted location provision would turn much of the state of New York into a default no-carriage

zone. We need not and do not decide, however, whether the Second Amendment includes a right to carry on private property *not* open to the public. . . .

Because the conduct at issue in this appeal regulated by § 265.01-d is within the plain text of the Second Amendment, the district court properly placed the burden on the State to demonstrate § 265.01-d's consistency with a well-established and representative National tradition. We now turn to this analysis.

b. The State's Analogues on Appeal

The State relies on the same analogues here as it did in the district court: (1) the 1715 Maryland law barring people "convicted of [certain crimes] . . . or . . . of evil fame, or any vagrant, or dissolute liver," from "shoot[ing], kill[ing], or hunt[ing], or . . . carry[ing] a gun, upon any person's land, whereon there shall be a seated plantation, without the owner's leave,"; (2) the 1721 Pennsylvania law and 1722 New Jersey law prohibiting carriage or hunting "on the improved or inclosed lands of any plantation other than his own, unless have license or permission"; *see also* (3) the 1763 New York law prohibiting "carry[ing], shoot[ing] or discharg[ing]" any firearm in any "Orchard, Garden, Corn-Field, or other inclosed Land . . . without License" from the proprietor; (4) the 1865 Louisiana law and 1866 Texas law prohibiting carriage on the "premises plantations of any citizen, without the consent of the owner or proprietor,"; and (5) the 1893 Oregon law prohibiting anyone "other than an officer on lawful business, [from] being armed . . . or trespass[ing] upon any enclosed premises or lands without the consent of the owner," The State urges that the restricted locations regulation is consistent with these historical statutes. We disagree.

We assume without deciding that the State's analogues demonstrate a well-established and representative tradition of creating a presumption against carriage on enclosed private lands, *i.e.*, private land closed to the public. But we do not agree that these laws support the broader tradition the State urges. These analogues are inconsistent with the restricted location provision's default presumption against carriage on private property *open* to the public.

The State fails to place § 265.01-d within a National tradition because at least three of its proffered analogues burdened law-abiding citizens' rights for different reasons than § 265.01-d, and all of its analogues burden Second Amendment rights to a significantly lesser extent than § 265.01-d. . . . We address each issue in turn.

At least three of the State's proffered analogues were explicitly motivated by a substantially different reason (deterring unlicensed hunting) than the restricted location regulation (preventing gun violence). . . . No matter how expansively we analogize, we do not see how a tradition of prohibiting illegal

hunting on private lands supports prohibiting the lawful carriage of firearms for self-defense on private property open the public.

What is more, *none* of the State's proffered analogues burdened Second Amendment rights in the same way as § 265.01-d. All of the State's analogues appear to, by their own terms, have created a default presumption against carriage only on private lands *not open to the public*. . . . Given that most spaces in a community that are not private homes will be composed of private property open to the public to which § 265.01-d applies, the restricted location provision functionally creates a universal default presumption against carrying firearms in public places, seriously burdening lawful gun owners' Second Amendment rights. That burden is entirely out of step with that imposed by the proffered analogues, which appear to have created a presumption against carriage only on private property not open to the public. . . .

Because the State has failed to situate § 265.01-d's prohibition on carriage on private property open to the public, we affirm the district court's injunction.

2. *Antonyuk*

[Here the district court issued a broader injunction that enjoined enforcement of § 265.01-d as applied to *both* private property open to the public and private property not open to the public]

. . . For their facial challenge to support the blanket injunction that was issued, the *Antonyuk* Plaintiffs were required to show that § 265.01-d was unconstitutional in all of its applications. . . .Yet, per the district court's own analysis, the Plaintiffs secured a blanket injunction without making this necessary showing below.

The district court accepted the State's argument that § 265.01-d could, consistent with the Second Amendment, be applied to restrict carriage on private property closed to the public. . . . Having accepted the State's argument that there was at least one set of circumstances in which the statute could be valid under the Second Amendment, it was error for the district court to subsequently enjoin § 265.01-d in all its applications.

CONCLUSION

For the reasons stated above, we **AFFIRM** the injunctions in part, **VACATE** in part, and **REMAND** for proceedings consistent with this opinion. In summary, we uphold the district court's injunctions with respect to N.Y. Penal L. § 400.00(1)(o)(iv) (social media disclosure); N.Y. Penal L. § 265.01-d (restricted locations) as applied to private property held open to the general public; and N.Y. Penal L. § 265.01-e(2)(c) as applied to Pastor Spencer, the Tabernacle Family Church, its members, or their agents and licensees. We vacate the injunctions in all other respects, having concluded either that the district court lacked jurisdiction because no plaintiff had Article III standing

to challenge the laws or that the challenged laws do not violate the Constitution on their face.

Koons v. Platkin

673 F. Supp. 3d 515 (D.N.J. 2023)

Another very thorough decision comes from the U.S. District Court for the District of New Jersey, with a 230-page opinion involving its near-clone of New York's law. The opinion involved two consolidated cases, *Koons v. Platkin* and *Siegel v. Platkin*, 2023 WL 3478604, (D.N.J. May 16, 2023).

The case was appealed to the Third Circuit, which heard oral arguments in October 2023. A decision is still pending.

The opinion noted the New Jersey Attorney General's implicit contempt for its duty to justify infringements on civil rights:

> Remarkably, despite numerous opportunities afforded by this Court to hold evidentiary hearings involving the presentation of evidence, the State called no witnesses. And despite assurances by the State that it would present sufficient historical evidence as required by *Bruen* to support each aspect of the new legislation, the State failed to do so. . . .
>
> The legislative record reveals the Legislature paid little to no mind to *Bruen* and the law-abiding New Jerseyans' right to bear arms in public for self-defense. . . . When Assemblymen Brian Bergen asked the law's primary sponsor, Assemblymen Joseph Danielsen, if he had read *Bruen*, Danielsen responded "me reading the Court's decision is not part of the bill." . . . And when pressed by Bergen on whether the Founding Founders limited the Second Amendment to "town squares," "taverns," "public parks," and "beaches," Danielsen refused to answer the question, telling Bergen to "stay on the bill." . . . Throughout his questioning with Bergen, Danielsen evaded questions on the historical support for the new law. At another hearing, when Assemblywomen Victoria Flynn simply asked Danielsen where law-abiding citizens could conceal carry, Danielsen's response included such statements as: "reasonable persons exercising common sense would have an expectation that guns are not being brought in except by law enforcement . . . you are not going to mindlessly put a loaded firearm on your person and just leave the house." . . .
>
> This has left the Court to do what the Legislature had said it had done, but clearly did not. The Court has conducted its own exhaustive research into this Nation's history and tradition of regulating firearms that *Bruen* mandates. . . .
>
> [W]hat the State and the Legislature-Intervenors ignore, and what their empirical evidence fails to address, is that this legislation is aimed primarily — not at those who unlawfully possess firearms — but at law-abiding, responsible citizens who satisfy detailed background and training requirements and whom the State seeks to prevent from carrying a firearm in public for self-defense.
>
> Simply owning a firearm in New Jersey requires a lengthy and intensive background check. To acquire a firearm, an individual must have been issued

> a Firearms Identification Card, which requires a fingerprint background check and safety training. On top of that, every single handgun acquisition requires a separate permit to purchase. Permits are issued by local police departments. A FID card is valid until revoked, whereas a carry permit lasts only two years.

Here are the specific issues on which the court ruled, and its reasoning:

Carry license requirements.

Rejection of applicants who pass the background check. An applicant may be denied if the issuing officer finds that the applicant "would pose a danger to self or others." The determination is subject to judicial review. The discretion was upheld based on the long historical tradition of disarming dangerous people. The court was skeptical of the notion that the Second Amendment applies only to persons whom the legislature deems to be "virtuous citizens," but even setting that ahistorical notion aside, the historical statutory precedents were more than sufficient to uphold the new statute. A vagueness challenge was also rejected.

Four endorsers. Carry permits and permits to purchase handguns must have four endorsers. Although the State failed to provide any precedents for the endorser requirement in general, the Court conducted its own research and found sufficient precedents in some historic laws requiring endorsements for arms possession by certain disfavored groups — namely slaves, religious minorities (occasionally), and disloyal persons in wartime.

In-person interview for endorsers. For carry permits, the applicants and the endorsers must be interviewed in person. The latter requirement was held to be unduly burdensome.

"Such other information." Under the new law, an applicant must provide "such other information" that the licensing officer requests. Plaintiffs alleged that the ominbus information requirements chills their free speech, but they failed to provide any specific examples, so the First Amendment request for a PI was denied.

The "such other information" requirement raises serious privacy concerns, such as if the issuing officer required urinalysis or medical records. Thus, the "such other information" is judicially limited "to only those objective facts bearing on the applicant's dangerousness or risk of harm to the public." As such, the requirement is consistent with *Bruen*'s affirmation of the legality of background checks for "Shall Issue" carry permits.

Fees. Before the state legislature enacted clone of New York's law in 2022, the fees were $5 for a FID, $2 for a handgun purchase permit, and $50 for a carry permit. These were raised to $50, $25, and $200. The court was skeptical that these fees were "exorbitant" (which *Bruen* forbids), and noted that the Second Circuit had previously upheld New York City's $340 fee for handgun possession license applicants, based on proof that the amount actually did

reflect the City's costs in processing and investigating applications. The court was annoyed that New Jersey had failed to present any evidence about the costs justifying the fees, but the court declined to enjoin the provision.

Insurance mandate. Carry applicants must prove that they have a $300,000 policy "insuring against loss resulting from liability imposed by law for bodily injury, death, and property damage sustained by any person arising out of the ownership, maintenance, operation or use of a firearm carried in public."

This law has no historical precedent. Nineteenth century surety of the peace statutes are inapposite. They merely required the posting of a bond for six months or a year if a person had been judicially found to be threatening to breach the peace.

Likewise inapposite are 19th century tort laws imposing strict liability on firearms users for injuries. These laws are not analogous to a blanket mandate for everyone who bears arms.

Bans on carry at particular places.

Heller stated that some laws are "presumptively constitutional," including bans on carrying arms in "sensitive places such as schools and government buildings." The rule cannot be extended to cover all property owned by a government.

Public gatherings. The statute forbids carry "within 100 feet of a place for a public gathering, demonstration or event is held for which a government permit is required." Yet many colonial period laws *required* bringing arms to some or all public gatherings.

Some late nineteenth-century state or territorial laws did forbid arms carrying at a few or most public gatherings. Some of these laws were upheld by state courts based on an (incorrect) militia-centric understanding of the Second Amendment. There are not enough of them to create a national tradition.

Traditionally, "sensitive places" are locations where certain core government functions take place, such as legislative chambers, courthouses, or polling places, and those places were traditionally protected by armed security provided by the government. Thus, the public gatherings ban is overbroad.

Zoos. Although a few zoos in the nineteenth century banned arms carry, many did not. The fact that children visit zoos does not turn zoos into sensitive places. The State's purported fear of poaching is "strained."

Parks, Beaches, Recreational Facilities, and Playgrounds. There is zero historical support for a ban at beaches. The playground ban was upheld as analogous to bans at schools. The history of carry bans in parks comes almost entirely from the late nineteenth century, and the one state law plus 25 municipal laws only covered 10% of the U.S. population and did not establish a representative tradition, especially considering their lateness.

Youth Sports Events. Upheld as analogous to schools.

Public Libraries and Museums. Void. The few late nineteenth-century laws did not establish a representative tradition.

Bars and Restaurants Where Alcohol is Served. A late nineteenth century Oklahoma law against firearms anyplace that liquor is sold, plus an 1859 Connecticut law against selling alcohol near a military encampment do not establish a representative tradition. Laws against selling guns to intoxicated persons are not analogous. Of course, private restaurant or tavern owners are free to ban carry if they choose.

Entertainment Facilities. Late nineteenth-century Tennessee, Texas, and Missouri laws plus the New Orleans law against firearms at public ballrooms do not establish a tradition.

Casinos. Gambling facilities are older than the United States. There is no historical precedent for a ban. [But all New Jersey casinos, presumably seeking to avoid trouble for their highly regulated industry, implemented carry bans.]

Airports. At oral argument, New Jersey said that people could carry handguns when dropping off or picking up passengers, as long as they do not enter the airport building. The court enjoined enforcement against passengers checking firearms in baggage pursuant to TSA rules, as long as the firearm is in a TSA-compliant locked case before it enters the airport, and the passengers do not linger with the case before checking it in. Absent evidentiary hearing, the court declined to go further at this stage.

Transportation Hubs. In briefing, the State contended that a "transportation hub" is only something that is multi-modal, such as Newark Penn Station, where subway and train lines meet. A "hub" does not include a mere stop at a train-only station. Awaiting further factual development, the court declined to issue an injunction.

Health Care Facilities. Plaintiffs had demonstrated standing only for medical offices and ambulatory care facilities. There being no precedents to justify a ban, the ban was enjoined for these locations.

Public Film Locations. Analogized to entertainment facilities and, as such, enjoined for lack of historical precedent.

Vehicles. A carry permit holder may not have a functional firearm in her own automobile. Instead, the handgun must be unloaded and stored in a locked case or in the trunk. This is a huge infringement on the right to bear arms for self-defense and is contrary to colonial tradition of protecting arms carry while traveling. The 1876 Iowa law against shooting at trains is hardly analogous. Two 1871 municipal laws against carrying gunpowder in vehicles were fire safety measures addressing the volatile blackpowder of the time. There are not such risks for modern metal-cased ammunition.

Fish and Game Restrictions. No plaintiffs had standing for the carry ban at a "state game refuge," because no plaintiffs have declared an intent to visit

such a place. One plaintiff wanted to carry a handgun for personal protection while hunting with a shotgun. The ban was upheld based on historic fish and game laws. The ban on having a functional firearm in the vehicle while driving to or from hunting is void for the same reason as the general ban in vehicles.

Vampire rule for all private property. This is by far the most important restriction. It forbids licensed carriers from entering any private property unless the owner affirmatively grants permission for carrying. The term "vampire rule" arises from the myth that a vampire can only enter a home if it is invited in by its residents. As applied to private property that is not held open to the public, the court held that this presumption does not implicate the Second Amendment or any other part of the Constitution.

Some private property, however, is traditionally open to the public without special conditions, absent express signage to the contrary. This includes retail establishments. "Here, the State, not private landowners, burdens carriers' lawful entry onto the property of another with a 'no-carry' default. The Default Rule is thus state action insofar as the State is construing the sound of silence."

The vampire rule is not supported by historic laws against hunting or trapping on someone else's enclosed land without permission. Three broader Reconstruction-era laws from Texas, Louisiana, and Oregon are insufficient to establish a tradition under *Bruen.*

Other issues.

Equal protection. Exempting judges and prosecutors from the location restrictions does not violate Equal Protection, because they are at higher risk of criminal attack and are more thoroughly vetted than ordinary citizens.

Unjustified display. The ban on unjustified display is saved by the State's concessions that a *mens rea* of "knowing" is required and that the ban does not apply to drawing a handgun for self-defense.

"All guns are bad." This was the basic public interest argument of the legislative intervenors against a preliminary injunction. However, "the Intervenors' argument ignores the fundamental right of self-defense. Although the Intervenors cite to statistics involving gun violence, they do not cite to statistics involving law-abiding citizens with carry permits who used their firearms to save lives." Indeed, "despite ample opportunity for an evidentiary hearing, the State has failed to offer any evidence that law-abiding responsible citizens who carry firearms in public for self-defense are responsible for an increase in gun violence."

In sum, the New Jersey statute "went too far, becoming the kind of law that Founding Father Thomas Jefferson would have warned against since it 'disarm[s] only those who are not inclined or determined to commit crimes

[and] worsen[s] the plight of the assaulted, but improve[s] those of the assailants.'"

The New Jersey Attorney General asked the Third Circuit for a stay of the preliminary injunction pending appeal. The court granted the stay for most of the sensitive places, but not for the vampire rule, the public film location ban, and the automobile carry ban.

Several other states adopted near clones of New York's CCIA. Each has been challenged in court and met with varying degrees of success:

- Not included in the expedited appeal that led to *Antonyuk* were: *Frey v. Nigrelli*, 2023 WL 2473375 (NSR) (S.D.N.Y. Mar.13, 2023) (denying PI for New York's longstanding ban on open carry, regulation that New York State residents who live outside of New York City obtain a separate license from the NYPD costing $340 to carry in the City, ban on carry on public transportation, and ban on carry in and near Times Square; New York's law referred to "Times Square," which New York City defined as the few blocks traditionally thought of as Times Square and many streets around it); *Goldstein v. Hochul*, 2023 WL 4236164 (S.D.N.Y. June 28, 2023) (Jewish congregants unlikely to succeed on merits in challenge to house of worship ban).
- Maryland's post-*Bruen* public carry law contains the vampire rule and bans on carrying firearms in three categories of statutorily defined locations: (1) areas for children and vulnerable individuals; (2) government of public infrastructure areas, and (3) "special purpose" areas. Locations falling into these three categories include schools, healthcare facilities, government buildings, public demonstrations, stadiums, museums, amusement parks, racetracks, casinos, and locations serving alcohol. Apart from the post-*Bruen* law, Maryland also bans "concealed weapons" on public transportation. In *Kipke v. Moore*, 695 F. Supp. 3d 638 (D. Md. 2023), the district court granted a preliminary injunction against these regulations only with respect to the vampire rule, public demonstrations, and locations serving alcohol. The court denied an injunction as to healthcare facilities, state parks and forests, mass transit facilities, school grounds, government buildings, and places of entertainment. After the district court entered summary judgment without changing the results from its PI, the state appealed to the Fourth Circuit. *Kipke v. Moore*, 2024 WL 3638025 (D. Md. Aug. 2, 2024), *appeal docketed*, No. 24-1799 (4th Cir. Aug. 22, 2024).

- Montgomery County, Maryland, which is the state's most populated county and borders Washington, D.C., to the south, imposed its on restrictions on possessing firearms at several locations. Under the county's code, firearms are banned within 100 yards of all public and private parks, places of worship, schools, library, recreational facilities, hospitals, community health centers, nursing homes, multipurpose exhibition facilities like fairgrounds, childcare facilities, government buildings, polling places, courthouses, and protests. Relying almost entirely on late nineteenth-century laws and municipal ordinances, the district court denied plaintiff's motion for a preliminary injunction against enforcement of the code with respect to private schools, childcare facilities, places of worship, public parks, recreational facilities/multipurpose exhibition facilities, public libraries and the 100-yard buffer zones to all these locations. *Md. Shall Issue v. Montgomery County*, 680 F. Supp. 3d 567 (D. Md. 2023). This decision has not been appealed. As plaintiffs note, the effect of the 100-yard buffer zones is to render large swaths of the county off limits to firearms.
- Both California and Hawaii enacted near identical lists of sensitive locations from which firearms are prohibited. District courts in each state granted motions for preliminary injunctions against several of these locations. In California, a district court granted a PI as to carry bans in hospitals and medical service facilities, public transportation, locations that serve alcohol, public gatherings and special events, playgrounds and youth centers, parks and athletic facilities, casinos, stadiums and arenas, public libraries, amusement parks, zoos and museums, places of worship, and financial institutions. The court also enjoined the vampire rule and parking areas appurtenant to all statutorily defined sensitive locations. *May v. Bonta*, 2023 WL 8946212 (C.D. Cal. Dec. 20, 2023). A three-judge motions panel on the Ninth Circuit initially granted an administrative stay of the district court's ruling. One week later, however, the three-judge merits panel dissolved the administrative stay. A district court in Hawaii granted a PI with respect to the following sensitive locations: parking areas adjacent to government buildings, locations serving alcohol, beaches, parks, and banks, as well as the vampire rule. *Wolford v. Lopez*, 686 F. Supp. 3d 1034 (D. Haw. 2023). Both *May* and *Wolford* were consolidated on appeal before the Ninth Circuit, and oral argument was held in April.

NOTES & QUESTIONS

1. The text history and tradition test articulated in *Bruen* was a response to lower court decisions that that weakened the right to arms through the loose

application of means-ends scrutiny. The instructions provided in *Bruen* give lower courts a much more explicit framework. But it remains to be seen just how strictly the Supreme Court will police lower court applications of *Bruen*. *Antonyuk* presents several opportunities to consider this question. Does the Second Circuit's analysis adhere to the instructions in *Bruen*? If it is at odds with *Bruen*, how significant is the tension? Does the Second Circuit defy *Bruen* to an extent that you would expect the Supreme Court to reverse?

2. The CCIA authorizes gatekeepers to grant or deny applicants for concealed carry licenses based on whether they exhibit good moral character. In New York City, this includes consideration of whether the applicant has ever been arrested (no conviction required), has a poor driving history, has ever been fired from a job, or failed to pay debts. Is this aspect of the CCIA consistent with *Bruen*'s statement that licensing regimes contain "narrow, objective and definite standards guiding licensing officials. Consider that a judge once upheld the NYPD's denial of an application for a license to keep a handgun *at home* on the grounds that the applicant failed to disclose a sealed arrest from nineteen years prior in which he was found not guilty. *Bruen* also rejected licensing regimes that require "appraisal of facts, the exercise of judgement and the formation of an opinion." Is the good moral character requirement consistent with *Bruen*?

3. Some states require that an applicant for a concealed carry permit must achieve a certain score on a live shooting test. One scholar, observing that such requirements have no basis in the American historical tradition of firearms regulation, argues they are unconstitutional. Daniel F. Mummolo, *Bruen's Ricochet: Why Scored Live-Fire Requirements Violate the Second Amendment*, 136 Harv. L. Rev. 1412 (2023).

4. *Permitless carry.* When *Bruen* was decided, 25 states allowed permitless concealed carry of handguns by adults who are not prohibited from owning firearms. In 2023, Florida and Alabama, having previously been shall-issue states, adopted permitless carry, bringing the state total to 27. In all permitless carry states except Vermont, carry permits are still available for willing applicants. A carry permit may be useful for a person who wants to carry when visiting another state, pursuant to state reciprocity agreements to honor each other's permits. In some states, licensed carry is allowed in certain areas that permitless carry is not. Reflecting on the trend, one writer urges that states should adopt "bifurcated statutory systems in which unlicensed and licensed carry coexist." In "constitutional-carry" states,

> concealed-carry permits should remain available, and citizens should have to

> undergo extensive training and background checks to obtain them. But data shows that permit numbers drop precipitously when states enact constitutional carry. Therefore, to incentivize armed citizens to voluntarily undergo thorough training and vetting, states should exempt permit holders from most location-based restrictions on firearms. By banning unlicensed and open carry in many public spaces — but authorizing licensed concealed carry — states can limit the number of firearms in public (especially those in untrained hands) while still complying with *Bruen*. This Article presents a comprehensive framework for how states should do so.

Tyler Smotherman, *More Rights, More Responsibilities: A Post-Bruen Proposal for Concealed-Carry Compromise*, 2024 Wisc. L. Rev. 343.

5. *D.C. 20-round limit*. A District of Columbia regulation said that a concealed handgun licensee could carry at most two ten-round magazines. DCMR § 24-2343.1. After *Bruen*, Dick Heller brought a case against the carry limit, and asked for a preliminary injunction. In response, the District repealed the ammunition carry limit. Metropolitan Police Department, Emergency Rulemaking, Repealing 24 DCMR § 2343.1 (Sept. 14, 2022). The parties then entered into a settlement agreement, which included voluntary dismissal of the case with prejudice. *Heller v. District of Columbia*, No. 22-cv-1894 (D.D.C. 2022) ("Heller IV").

6. *Pre-Bruen offenses.* In New York, a defendants can still be prosecuted for possession of unlicensed firearms if they did not apply for a carry permit pre-*Bruen*, even though the application is expensive and would have been futile. *People v. Williams*, 76 Misc. 3d 925 (N.Y. Sup. Ct. 2002); *People v. Rodriguez*, 76 Misc. 3d 494 (N.Y. Sup. Ct. 2022). But one court implied that New York's may-issue law did not make it impossible for ordinary citizens without particular self-defense needs to get carry permits. *See Williams*, 76 Misc. 3d at 930. In New York, the "Supreme Court" is the trial court of general jurisdiction.

7. *Drug & Alcohol Testing for Concealed Carry Permit?* A New York Supreme Court Judge granted in part and denied in part an injunction sought by a Nassau County man seeking a pistol permit in which one of the requirements imposed by the licensing authority was urinalysis test. The court found that requiring waiver of Fourth Amendment rights could not be a pre-condition to exercise a Second Amendment right. *In re Kamenschik,* 2024 NYLJ LEXIS 594, *9. (Feb. 20, 2024)

8. The New York Police Department has published regulations for applications for handgun carry permits by persons who neither reside in New York State nor work in New York City. The new rule also maintains a previous restriction

preventing New York City residents from acquiring more than one handgun or long gun in a 90-day period. The social media disclosure requirement, which was held unconstitutional in *Antonyuk*, was eliminated. *2024 RG 058 amendment of handgun licensing rule*, New York City Record, Aug. 12, 2024.

9. A Pennsylvania statute forbidding carrying loaded firearms in vehicle, except with a concealed carry permit, was bereft of historical support, and so held unconstitutional. Likewise unconstitutional was a ban on unlicensed carry during declared states of emergency. *Suarez v. Paris*, 2024 WL 3521517 (M.D. Pa. July 24, 2024)

Further reading: Leo Bernabei, Antonyuk, Bruen, *and the Second Circuit* (Firearms Rsch. Ctr., Working Paper No. 2024-3) ("Although the [Second Circuit] correctly struck down onerous provisions of New York's law that had no historical pedigree, it upheld many regulations that also lacked a clear basis in the nation's history and tradition of firearm regulation."); Leo Bernabei, *Taking Aim At New York's Concealed Carry Improvement Act*, 92 Fordham L. Rev. 103 (2023) (arguing for the unconstitutionality of the good moral character provision, many of the "sensitive places," and the "vampire rule" banning entry onto business property open to the public); Michal E. Folczyk, *Good Intentions With Bad Consequences: Post-Bruen Gun Legislation In New York*, 32 J.L. & Pol'y 77 (2023) (critiquing training requirements and sensitive places, including the "detrimental impacts" on racial minorities and low-income communities).

B. LOCATION RESTRICTIONS

NOTES & QUESTIONS

6. [New Note] Here are some of the post-*Bruen* cases on various types of sensitive places:

- *D.C. government transit system*. The District bans licensed carry throughout the government's subway and bus mass transit system. D.C. Code § 7-2509.07(a)(6). Plaintiffs have no standing for a preenforcement challenge; although enforcement against plaintiffs is "credible," it is not "imminent." *Angelo v. District of Columbia*, 2024 WL 3751401 (D.D.C. Aug. 9, 2024).
- *National Institutes of Health*. Carry is banned by 45 C.F.R. § 3.42(g). The ban was upheld in *United States v. Marique*, 647 F.Supp.3d 382 (D.

Md. 2022) (handgun found in glove compartment of government contractor); *United States v. Power*, 2023 WL 131050 (D. Md. Jan. 9, 2023); *United States v. Robertson*, 2023 WL 131051 (D. Md. Jan. 9, 2023); *United States v. Tallion*, 2022 WL 17619254 (D. Md. Dec. 13, 2022).

- *Minnesota State Fair*. In 2021, the State Agricultural Society adopted Rule 1.24, to ban licensed carry at State Fair. People who had already bought fair tickets for that year sued for a writ of mandamus. Defendant's motion to dismiss was granted. The ban passes strict scrutiny, and the fair is a sensitive place. *Christopher v. Ramsey County*, 621 F. Supp. 3d 972 (D. Minn. 2022).
- *Almost all municipal property*. Glendale, California, banned guns on all city property, including parking lots, but not on public rights-of-way, such as streets and sidewalks. A facial challenge failed because plaintiffs conceded that at least some of the places may be prohibited. The as-applied challenge failed for lack of specificity about where plaintiffs want to carry. *California Rifle & Pistol Ass'n, Inc. v. City of Glendale*, 644 F.Supp.3d 610 (C.D. Cal. 2022).
- *Parks and recreation.* A 2021 Winchester, Virginia, ordinance banned guns in public parks, permitted events, and recreation centers. Winchester City Code § 16-34. A preliminary injunction was issued against the ban in public parks and at permitted events. The ruling was based on the Virginia Constitution right to arms, as informed by *Bruen*. A PI was denied for the ban in recreation centers, because they are "government buildings," per *Heller*. *Stickley v. City of Winchester*, No. CL210206 (Cir. Ct. Winchester Sept. 27, 2022).
- *Public housing projects.* Lease prohibitions on tenant arms possession have been held unconstitutional ever since *Heller*. *See*, *e.g.*, *Winbigler v. Warren County Housing Authority*, 2013 WL 1866908 (C.D. Ill., May 1, 2013); *Doe v. East St. Louis Housing Authority*, no. 3:18-CV-545-JPG-MAB (S.D. Ill., Apr. 11, 2019).

  So a government-subsidized housing landlord cannot evict tenants for on possessing firearms in their own apartments. *Columbia Hous. & Redevelopment Corp. v. Braden*, 2022 WL 727567 (Tenn. Ct. App. Oct. 13, 2022).
- *Day care and foster homes*. Illinois requires a license to operate a day care or be a foster parent. By regulation, day care licensees and foster parent licensees may not have handguns in the home. Long guns must be disassembled and locked in a container. 89 Ill. Admin. Code §§ 406.8(a)(17)-(18). Pre-*Bruen*, the ban was upheld under intermediate scrutiny. *Miller v. Smith*, 2022 WL 782735 (C.D. Ill. Mar. 14, 2022). The

Seventh Circuit remanded for reconsideration in light of *Bruen. Miller v. Smith*, 2023 WL 334788 (7th Cir. Jan. 20, 2023).

- *Post offices*. Applying intermediate scrutiny, the 10th Circuit's *Bonidy v. United States Postal Service* upheld the national ban on firearms in post offices and parking lots for post office. 790 F.3d 1121 (10th Cir. 2015) (Ch. 14.B.1). Post-*Bruen*, a district court dismissed an indictment against a postal truck driver who had a Florida carry permit and kept his gun concealed in a fanny pack. Post offices being older than the United States, there were no restrictions on postal employees or customers being armed until the late twentieth century. The historic restrictions on carry, such as in some state legislatures or in polling places, were to protect government deliberations, which do not occur in post offices. The "dicta" in *Heller* about "government buildings" should not be read as establishing a conclusive rule, since it had nothing to do with the *ratio decendi.* The "government as proprietor" theory should not taken so far as to allow a government to criminalize firearms carrying or exercise of other rights in every government building. In briefing, the government had failed to make any argument for its powers as an employer. *United States v. Ayala*, 2024 WL 13262 (M.D. Fla. Jan. 12, 2024)

7. [New note] Under Texas law, private businesses can exclude licensed handgun carriers by posting a sign with specified language and format. Carrying in violation of the sign is a criminal trespass. Alternatively, a business can orally tell a handgun carrier to leave, and if that carrier does not leave, he is guilty of trespass. Tex. Penal Code §§ 30.06-07. A church and coffee shop wanted to exclude licensed carry with a sign, but using their own words, rather than the statutory language. Plaintiffs had no standing, because the Texas statutes did not require them to do anything, nor was there any possibility that the statutes would be enforced against them; further, private citizens have no judicially cognizable interest in whether someone is criminally prosecuted. *Bay Area Unitarian Universalist Church v. Paxton*, 2023 WL 2563998 (S.D. Tex. Mar. 16, 2023).

8. [New Note] *When is a Police Station a School?* Shortly before Louisiana's permitless carry law took effect, the New Orleans Police Department designated one of its police stations as a "vocational-technical school," since some police training takes place there. In conjunction with state law forbidding unlicensed carry within a thousand feet of a school, the designation put much of the French Quarter off limits for permitless carry. (Existing state law bans handgun carrying in bars.) The plan was abandoned after Louisiana Attorney General Liz Murrill met with the police Superintendent. Lee Williams,

Louisiana Attorney General quashes New Orleans illegal gun-free zone, Second Amendment Found., July 17, 2024; *How to Keep Guns off Bourbon Street? Designate a Police Station as a School*, Assoc. Pr., July 1, 2024.

9. [New Note] Further reading: Joseph Blocher & Reva Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 NYU L. Rev. (2023) (historic restrictions carrying in sites of governance can be analogized to create new sensitive places of commerce and transportation); Darrell A. H. Miller, Alexandra Filindra, & Noah J Kaplan, *Technology, Tradition, and "The Terror Of The People"*, 99 Notre Dame L. Rev. 1373 (2024) (survey showing that some people feel less safe about particular locations when informed that firearms carrying is allowed there); Joseph Blocher, Jacob Charles, & Darrel Miller, *"A Map Is Not the Territory": The Theory and Future Of Sensitive Places Doctrine*, 98 N.Y.U.L. Rev. 438 (2023) (Doctrinal development of the sensitive places doctrine should not solely look at historical rules about particular places. Rather, there should consider be consideration of the values that have underlain the doctrine, such as "safeguarding the exercise of other constitutional rights, protecting the vulnerability of specific populations, [or] recognizing the inhibited judgment or discretion of those gathered").

C. SCHOOLS

Interpreting the separation of powers in the Montana Constitution, the Montana Supreme Court held that the Montana legislature did not have the power to enact House Bill 102, which limited the power of state university regents to forbid bearing arms on university campuses. *Board of Regents v. State*, 512 P.3d 748 (Mont. 2022).

NOTES & QUESTIONS

2. [New Note] After the Supreme Court decision in *Lopez v. United States* (Ch. 9.B.3.b), Congress re-enacted the federal Gun-Free School Zones Act, this time with a nominal jurisdictional predicate about interstate commerce, phrased broadly enough so as to cover every firearm. The Act bans gun carrying within a thousand feet of a school, which is to say, virtually everywhere in most towns or cities. The act exempts licensed carry pursuant to a state license *issued by the state where the school is located.* This does not include persons who are carrying pursuant to interstate reciprocity — such as when two states agree to recognize each other's permits, so that a visitor from state A can carry in state B. Law enforcement officers and retired officers have national carry rights

pursuant to the federal Law Enforcement Officer Safety Act (LEOSA). 18 U.S.C. §§ 926B & 926C. LEOSA, however, does not over-ride the ban on carry in thousand-foot school zones. A recent article suggests that Congress should amend the Act "to establish a more reasonable tie to interstate commerce and to exempt the lawful carry and defensive use of firearms by off-duty police officers and private citizens." Tyler R. Smotherman, *Troubleshooting the Gun-Free School Zones Act: A Call for Amendment in the Age of Constitutional Carry*, 55 Tex. Tech L. Rev. 359 (2023).

3. [New Note] A challenge to the University of Michigan's gun ban was remanded for reconsideration in light of *Bruen*. *Wade v. University of Michigan*, 981 N.W.2d 56 (Mich. 2022). Concurring, Justice Viviano detailed some things to be investigated on remand:

- "[I]t is not at all apparent that *Heller*'s brief discussion of sensitive places was intended to establish a rule that all entities historically known as 'schools' could permissibly ban firearms, meaning the only question that would remain for future cases is whether the entity at issue was considered a 'school.' Nor is it even clear that the Court meant to include universities and coroser
- lleges in its reference to 'schools,' let alone to say that such locations can completely ban firearms."
- Historical prohibitions on campus carry were more limited. *E.g.*, only for students, or only for concealed carry.
- "[A]re large modern campuses like the University of Michigan's so dispersed and multifaceted that a total campus ban would now cover areas that historically would not have had any restrictions?"
- "Many areas on campus, such as roadways, open areas, shopping districts, or restaurants, might not fit the 'sensitive place' model suggested by *Heller*. . ."
- "[B]ecause the campus is so entwined with the surrounding community, the ban might also burden carrying rights on locations outside campus, as many individuals will regularly go from campus to off-campus environments, even in a single trip; because they cannot bring a gun on campus, they will not feasibly be able to bring the gun to the off-campus locations either."

On remand, the Michigan Court of Appeals upheld the University's ban. *Wade v. Univ. of Michigan*, 2023 WL 4670440 (Mich. App. July 20, 2023).

> . . . Plaintiff also relies heavily on Justice VIVIANO's concurrence, but the question posed by Justice VIVIANO is not the correct inquiry and his

> suggested analysis is inconsistent with *Bruen*. *Bruen* expressly stated that the inapplicability of the Second Amendment to sensitive places is settled. Finally, Justice VIVIANO's concurrence rests on the incorrect premise that colleges and universities are inherently larger and more complex institutions than K-12 schools. All sensitive places abut other property and that proximity alone cannot render a firearm prohibition invalid. . . .
> . . . Samuel Johnson's dictionary from 1773 defines "school," in part, as: "A house of discipline and instruction[,]" and "[a] place of literary education; an university. It defines "university" as "[a] school, where all the arts and faculties are taught and studied." Thus, considering either time period [1791 or 1868], the term "school" included universities.
>
> Notably, the reference to "schools" being sensitive places was first made by Justice SCALIA in *Heller*. In discussing the "longstanding" tradition of laws forbidding firearms in sensitive places such as "schools and government buildings," Justice SCALIA did not define the term "school," nor did he cite or rely on any authority. *Heller*, 554 US at 626. Given that the term "school" is not found in the Second Amendment, but was first used by Justice SCALIA, it is not clear that either 1791 or 1868 are the correct time periods to determine the meaning of that term as used in *Heller*. Nonetheless, the plain meaning of "school" when Justice SCALIA used the term in 2008 similarly includes universities. Merriam-Webster's Collegiate Dictionary (2003) defines "school," in part, as "an organization that provides instruction," such as a "college, university." Significantly, in the law review article cited in *Bruen* by Justice THOMAS, the authors presume that Heller's reference to "schools" included universities. *See The "Sensitive Places" Doctrine*, 13 Charleston L Rev. 205, 251-52 (2018). Thus, at all potentially relevant time periods, the term "school" includes universities, and thus, the University is a "sensitive place." . . .
>
> Finally, GOA [Gun Owners of America], as amicus in support of plaintiff, argues that the "sensitive places" doctrine is a mere presumption, which can be rebutted absent a historical analogue. In *Heller*, 554 US at 627 n 26, the Court stated in a footnote following its reference to "sensitive places" the following: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." Thus, it is true that the Court in *Heller* referred to such regulations as only *presumptively* lawful. However, in *Bruen*, the Court clearly and unequivocally pronounced that it could assume that it was "settled that these locations were 'sensitive places' where arms carrying *could be prohibited* consistent with the Second Amendment." *Bruen*, 142 S Ct at 2133 (emphasis added). Accordingly, there is no support for the assertion that the finding of a "sensitive place" results in a mere presumption that may be rebutted.

4. [New Note] A new Tennessee statute, Senate Bill 135, give schools the option to allow trained teachers and staff to carry firearms. Each individual must be approved by the school district director, the school principal, and head of the local law enforcement agency. Besides having a concealed carry permit, the teacher or staff member must complete "a minimum of forty (40) hours of training specific to school policing that has been approved by the peace officer

standards and training (POST) commission each year to retain the authorization."

In Iowa, the newly-enacted House File 2586 authorizes school teachers and staff — at all levels of education — who have regular carry permits to be issued special permits for carry at school. If a school chooses to authorize employees, the individual must receive one-time in-person legal training, and participate in annual and quarterly live-fire school-focused training programs to be created by the Iowa Department of Public Safety.

D. STOP-AND-FRISK

6. [New Note] At a high-crime apartment complex in Des Moines, Iowa, the security guard called the police at 4:40 a.m. because he saw an automobile moving around to places where parking is illegal, and a passenger in the automobile was swinging a gun. When the police arrived the vehicle attempted to leave, the police conducted a *Terry* stop. The man with the gun was a convicted felon, and he was prosecuted federally as a felon-in-possession. The district court suppressed the gun, because permitless carry is legal in Iowa, so the police did not have reasonable suspicion. "The Iowa Legislature did not exclude 'high-crime neighborhoods' from the new gun laws or restrict open-carry rights to particular times of day." The Eighth Circuit reversed:

> McMillion argues that this was merely the behavior of an individual exercising his right to openly carry a gun in a dangerous neighborhood. Perhaps. But while the mere presence of a firearm in an open carry jurisdiction does not itself create reasonable suspicion of criminal activity, the presence of a firearm taken together with the "high-crime area," the "time of ... night," the report that Oakridge security had "previously observed a pistol in [McMillion's] hand," the "location of the suspect parties," and their "behavior when they [became] aware of the officer[s'] presence" may be indicative of criminal activity such as trespass, assault, or burglary.

United States v. McMillion, 101 F.4th 573, 577 (8th Cir. 2024).

In Aurora, Colorado, the police received a telephone tip about a sport utility vehicle putting guns in and out of their pockets. The SUV drove away at a normal speed but was stopped by police after it ran a red light. One man had been left behind by the SUV, and officers detained him. A convicted felon, the man was prosecuted for a stolen gun found in the SUV, which had his DNA. The Tenth Circuit held the search illegal and ordered the suppression of the gun as evidence. The man had been detained without "any hint of any kind of illegality whatsoever." As the concurrence detailed, although the 911 call

involved suspicious activity, the man who was detained did not match the man who was described by the caller. *United States v. Daniels*, 101 F.4th 770 (10th Cir. 2024)

7. [New Note] *The Open Fields Doctrine*. During the alcohol prohibition era, a two-paragraph Supreme Court opinion created the open fields doctrine. *Hester v. United States*, 265 U.S. 57 (1924). According to Justice Holmes, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl.Comm. 223, 225, 226." The Blackstone pages cited by Justice Holmes were about the law of burglary, which distinguished home invasions from trespass into outbuilding such as sheds. Under the open fields doctrine, police trespasses into most private land do not need a warrant, except for the curtilage of a home. Joshua Windham & David Warren, *Good Fences? Good Luck: The open-fields doctrine gives government vast powers to invade nearly 96 percent of all US private land*, Regulation 10 (Spring 2024).

The Tennessee Court of Appeals, relying on the state constitution, held that state wildlife officials cannot secretly enter private land without permission to scout for hunting law violations. Such warrantless searches bear a "marked resemblance" to British government's misconduct that led to the American Revolution. *Rainwaters v. Tennessee Wildlife Resources Agency*, 2024 WL 2078231 (Tenn. App. May 9, 2024).

8. [New Note] In Connecticut "in the course of a routine traffic stop," a police officer "unlawfully and violently handcuffed and detained" the driver "in the back of a police vehicle for over half an hour and conducted a warrantless search" of the automobile after the driver "presented a facially valid firearms permit and disclosed that he possessed a firearm pursuant to the permit." The Second Circuit affirmed the district court's denial of the officer's attempt to raise a qualified immunity defense. *Soukaneh v. Andrzejewski*, 2024 WL 3747703 (2d Cir. Aug. 12, 2024).

CHAPTER 15
WHAT? LAWS ON TYPES OF ARMS

A. "ASSAULT WEAPON" AND MAGAZINE BANS

Bruen's rejection of the "tiers of scrutiny" or "means-end" analysis in Second Amendment cases and its reaffirmation of the Text, History, and Tradition test means that "assault weapon" and magazine bans will receive greater judicial scrutiny.

The constitutionality of such bans already is being litigated or re-litigated under the *Bruen* test. After deciding *Bruen,* the Supreme Court granted certiorari, vacated the judgment, and remanded (GVR'd) *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), *vacated* 142 S. Ct. 2898 (Mem.) (June 30, 2022), a case challenging Maryland's ban on "assault weapons." Prior to *Bruen,* the Fourth Circuit upheld the ban per its en banc decision in *Kolbe v. Hogan*, 848 F.3d 114 (4th Cir. 2017) (en banc) (rejecting 2-1 panel decision that the ban should be reviewed under strict scrutiny). For a critique, see E. Gregory Wallace, *Why the Fourth Circuit's Test for Banned Arms is Contrary to* Heller, Wyoming College of Law Firearms Research Center Forum (Apr. 15, 2024).

After *Bianchi v. Frosh* was vacated and remanded, the Fourth Circuit heard oral arguments in December 2022. In January 2024, however, the Fourth Circuit withdrew the case from the panel and granted a rehearing en banc, despite no party requesting such action. *Bianchi v. Brown,* 2024 WL 163085 (4th Cir. Jan. 12, 2024). The plaintiffs in *Bianchi* filed a petition for certiorari with the Supreme Court, seeking review without a Fourth Circuit judgment. That petition was denied. *Bianchi v. Brown,* 2024WL2262406 (May 20, 2024). The case was argued to the en banc court on March 20, 2024. The Fourth Circuit issued its en banc decision on August 6, 2024. That decision is excerpted below.

Several other post-*Bruen* challenges have been filed against state and local "assault weapon" bans. The Seventh Circuit in *Bevis v. City of Naperville,* 85 F.4th 1175 (7th Cir. 2023), issued an opinion affirming several federal district court denials of preliminary injunctions against Illinois "assault weapon" ban and reversing one lower court decision enjoining the ban. The court of appeals

held that the parties challenging the ban had not shown a likelihood of success on the merits. Those parties filed petitions seeking Supreme Court review, but their petitions were denied. The Seventh Circuit decision is criticized in E. Gregory Wallace, *The Seventh Circuit's Misguided Quest to Transform AR-15s into Machine Guns,* Wyoming College of Law Firearms Research Center Forum (Nov. 15, 2023). Following *Bevis,* a federal district court in Illinois in *Viramontes v. County of Cook*, 2024WL897455 (N.D. Ill. Mar. 1, 2024), *on appeal* No. 24-1437 (7th Cir.), granted summary judgment upholding Cook County's ban.

The Ninth Circuit in *Rupp v. Bonta,* 2022 WL 2382319 (9th Cir., June 28, 2022), and *Miller v. Bonta,* 2022 WL 3095986 (9th Cir., Aug. 1, 2022), vacated federal district court decisions upholding and invalidating, respectively, California's "assault weapons" ban and remanded those cases for consideration under *Bruen.* The district court in *Miller v. Bonta,* 699 F. Supp. 3d 956 (S.D. Cal. 2023), granted a permanent injunction against the ban. The Ninth Circuit heard oral arguments in January 2024, but thereafter issued an order holding the appeal in abeyance until the court decides the appeal in *Duncan v. Bonta,* No. 23-55805, from an order by the same district judge striking down California's magazine ban. 695 F.Supp.3d 1206 (S.D. Cal. 2023), In a separate case, on March 15, 2024, a district court issued a decision upholding the ban in *Rupp v. Bonta,* 2024WL1142061 (C.D. Cal., Mar. 15, 2024). That decision is now on appeal to the Ninth Circuit.

The Third Circuit affirmed lower court denials of preliminary injunctions against Delaware's "assault weapon" and magazine bans in three consolidated cases in *Delaware State Sportsmen's Ass'n v. Delaware Dep't of Safety & Homeland Security,* 108 F. 4th 194 (3rd Cir. 2024). The court held that the plaintiffs failed to demonstrate irreparable harm in the absence of a preliminary injunction.

The First Circuit will hear oral arguments in October 2024 in an appeal from a district court order in *Capen v. Campbell,* 2023WL8851005 (D. Mass., Dec. 23, 2023), denying a preliminary injunction against Massachusetts' "assault weapons" ban.

The Second Circuit also will hear oral arguments in October 2024 in *National Association for Gun Rights v. Lamont.* The lower court, 685 F. Supp. 3d 63 (D. Conn. 2023), declined to issue a preliminary injunction against Connecticut's "assault weapons" ban.

On July 30, 2024, a federal district court issued a decision in *Association of New Jersey Rifle & Pistol Clubs v. Platkin,* 2024WL3585580 (D.N.J., July 30, 2024), holding that the provision banning the Colt AR-15 in New Jersey's "assault weapons" statute is unconstitutional. The court limited its summary judgment decision to the Colt AR-15 rifle.

Another case challenging state "assault weapon" bans is pending in Washington. *Hartford v. Ferguson*, No. 23-cv-05364 (W.D. Wash.). Two federal district judges in Colorado temporarily restrained enforcement of municipal ordinances banning "assault weapons." *See Rocky Mountain Gun Owners v. Board of County Comm'rs of Boulder County*, 2022WL4098998 (D. Colo., Aug. 30, 2022); *Rocky Mountain Gun Owners v. Town of* Superior, No. 1:22-cv-01685 (D. Colo., July 22, 2022). The latter case was dismissed on October 12, 2022. A new case, *Rocky Mountain Gun Owners v. Town of Superior*, No. 1:22-cv-02680 (D. Colo.) was filed the same day, with cross motions for summary judgment filed on October 20, 2023. The most recent ruling was on motions to exclude. *See* 2024 WL 3496824 (D. Colo. July 22, 2024).

Two federal district judges in Colorado temporarily restrained enforcement of municipal ordinances banning "assault weapons." *See* 2022 WL 4098998 (D. Colo. Aug. 30, 2022). The latter case was closed on October 12, 2022, with a new case filed the same day. *See* No. 22-cv-02680-NW.

Plaintiffs challenging "assault weapon" bans in the post-*Bruen* cases typically emphasize *Heller's* "common use" test for determining whether possession and use of a particular arm is protected by the Second Amendment. They argue that "assault weapons" such as the widely popular civilian AR-15 semiautomatic rifle are commonly possessed by ordinary, law-abiding citizens for the lawful purposes, including self-defense. If such firearms are "in common use," they may be dangerous (as are all firearms), but they are not "unusual," and thus are not within our historical tradition recognized in *Heller* of prohibiting "dangerous and unusual" weapons. Once it is determined that a firearm is commonly used for lawful purposes, the analysis ends and no historical inquiry is necessary, some plaintiffs argue.

Government defendants typically make four arguments in favor of upholding bans on "assault weapons" like the AR-15:

(1) Such firearms are not protected under the Second Amendment because they are "like" M16s, which *Heller* says can be banned as being "most useful in military service; this is the argument from the 4th Circuit's pre-*Bruen* case *Kolbe*, noted below, which was adopted by the Seventh Circuit's post-*Bruen* decision in *Bevis*, noted above.

(2) Such firearms are not protected because they are too dangerous for civilians to possess. Defendants assert that the AR-15 is exceptionally dangerous firearm in its rate of fire, wounding power, usefulness in high-fatality mass shootings, and danger to law enforcement and the public. Some plaintiffs have contested these claims, while others, relying exclusively on the "common use" test, have dismissed them as irrelevant.

(3) Such firearms are not protected because they are not well-adapted to or in common use for self-defense.

(4) Even if such firearms are protected under the Second Amendment, such firearms can be banned consistent with our nation's history and tradition banning certain dangerous weapons. The latter argument typically requires reading *Heller*'s "in common use" test as simply creating the *presumption* that possessing such weapons is constitutionally protected, but that presumption can be overcome by contrary historical analogues.

In regard to point 4, government defendants point to historical examples of regulations on Bowie knives, billy clubs, slungshots, trap guns, and, much later, automatic weapons under the NFA, state, and local laws. Pre-1900, regulations of controversial arms mainly involved bans on concealed carry, restrictions on sales to minors, and extra punishment for use in a crime. Complete bans on carry, possession, or sales were rare. *See* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legisl. 223 (2024).Some courts have found them sufficiently analogous to uphold possession bans, as did the Fourth Circuit in the decision discussed next.

The most important circuit court decision to date on "assault weapon" bans is the Fourth Circuit's en banc *Bianchi v. Brown,* — F.4th — (4th Cir. Aug. 6, 2024) (en banc) (2024WL3666180). The Supreme Court GVR'd *Bianchi* after its decision in *Bruen.* The Fourth Circuit majority re-affirmed its pre-*Bruen* decision in *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017) (en banc). The majority and dissent excerpted below are the most extensive pro/con judicial commentary on *Bruen,* arms in "common use," "dangerous and unusual" arms, and historical tradition involving gun bans.

Bianchi v. Brown

2024 WL 3666180 (4th Cir. Aug. 6, 2024) (en banc)

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Diaz, Judge King, Judge Wynn, Judge Thacker, Judge Harris, Judge Heytens, Judge Benjamin, and Judge Berner joined. Chief Judge Diaz wrote a concurring opinion, in which Judge King, Judge Wynn, Judge Thacker, Judge Benjamin, and Judge Berner joined. Judge Gregory wrote an opinion concurring in the judgment. Judge Richardson wrote a dissenting opinion, in which Judge Niemeyer, Judge Agee, Judge Quattlebaum, and Judge Rushing joined. . . .

WILKINSON, Circuit Judge:

The elected representatives of the people of Maryland enacted the Firearms Safety Act of 2013 in the wake of mass shootings across the country and a plague of gun violence in the state. This case is about whether the Act's general

prohibition on the sale and possession of certain military-style "assault weapons," including the AR-15, the AK-47, and the Barrett .50 caliber sniper rifle, is unconstitutional under the Second Amendment.

We considered this issue as an en banc court in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc) (Ch. 15.A.3), where we held that Maryland's regulation of these assault weapons is cons istent with the Second Amendment. However, in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Supreme Court clarified how courts are to resolve Second Amendment challenges and rejected part of our approach in *Kolbe.*

With the respectful consideration and benefit of *Bruen*, we now uphold the judgment below. The assault weapons at issue fall outside the ambit of protection offered by the Second Amendment because, in essence, they are military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense. Moreover, the Maryland law fits comfortably within our nation's tradition of firearms regulation. It is but another example of a state regulating excessively dangerous weapons once their incompatibility with a lawful and safe society becomes apparent, while nonetheless preserving avenues for armed self-defense.

For these reasons, we decline to wield the Constitution to declare that military-style armaments which have become primary instruments of mass killing and terrorist attacks in the United States are beyond the reach of our nation's democratic processes. In so holding, we offer no view on how a state should regulate firearms. Nor do we do anything to impose Maryland's regulations upon other states. We do hold, however, that Maryland was well within its constitutional prerogative to legislate as it did. We therefore reject the challenges of appellants and affirm the judgment of the district court.

Our friends in dissent would rule the Maryland statute unconstitutional. They would go so far as to uphold a facial challenge to the enactment, meaning that there is no conceivable weapon, no matter how dangerous, to which the Act's proscriptions can validly be applied. In so doing, they reject the centuries of common law that infused accommodation in the rights our founding generation recognized. And in creating a near absolute Second Amendment right in a near vacuum, the dissent strikes a profound blow to the basic obligation of government to ensure the safety of the governed. Arms upon arms would be permitted in what can only be described as a stampede toward the disablement of our democracy in these most dangerous of times. All this we shall explain.

The Supreme Court remanded this case for reconsideration in light of *Bruen*, a task which we shall, with great respect, perform. We conclude that *Bruen* did not mandate an abandonment of our faith in self-governance, nor

did it leave the balance struck throughout our history of firearms regulation behind.

I.

Maryland law prohibits any person in the state from selling, purchasing, receiving, transporting, transferring, or possessing an "assault weapon," subject to limited exceptions. A violator of this statute faces up to three years' imprisonment. Maryland law enforcement officers are authorized to seize and dispose of weapons sold, purchased, received, transported, transferred, or possessed in violation of the law.

The statute defines "assault weapon" as "(1) an assault long gun; (2) an assault pistol; or (3) a copycat weapon." The term "assault long gun," in turn, encompasses more than forty-five enumerated long guns "or their copies, regardless of which company produced and manufactured" the firearm. These proscribed guns include an assortment of military-style rifles and shotguns capable of semiautomatic fire, such as the AK-47, almost all models of the AR-15, the SPAS-12, and the Barrett .50 caliber sniper rifle. The term "assault pistol" encompasses more than fifteen enumerated firearms and their copies. These include the TEC-9 and semiautomatic variants of the MAC-10, MP5K, UZI, and other military-style submachine guns.

"Copycat weapon" is defined as a firearm that is not an assault long gun or assault pistol yet is covered by at least one of the following six categories:

(i) a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:
    1. a folding stock;
    2. a grenade launcher or flare launcher; or
    3. a flash suppressor;
(ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;
(iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches;
(iv) a semiautomatic pistol with a fixed magazine that can accept more than 10 rounds;
(v) a semiautomatic shotgun that has a folding stock; or
(vi) a shotgun with a revolving cylinder. . . .

II.

The Second Amendment instructs, "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." This single sentence provides us with a lofty command, but little concrete guidance. In the past two decades, the Supreme

Court has stepped in to provide this guidance, offering a methodological framework by which to structure our inquiry.

The development of this framework began with *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A). In *Heller*, the Supreme Court held that the Second Amendment safeguards the right to possess a firearm within one's home for self-defense. To reach that conclusion, the Court distilled the Second Amendment into its constituent parts, engaged in linguistic and historical analysis to interpret the original meaning of each, and determined that the Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court recognized that the Amendment "codified a *pre-existing* right" to keep and bear arms, *id.*, which, at the time of the nation's founding, was understood by Americans to be a "right of self-preservation," *id.* at 595 (quoting 2 *Blackstone's Commentaries: With Notes of Reference* 145 n.42 (St. George Tucker ed. 1803) [hereinafter Tucker's Blackstone]). The Court therefore found that "self-defense" is "the *central component* of the right." *Id.* at 599.

In rejecting the "argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment," the Court in *Heller* stated that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. The Court clarified this statement later in the opinion, where it emphasized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626.

There, the Court explained that the Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Indeed, the Court found it would be "startling" to read the Second Amendment such that "the National Firearms Act's restrictions on machineguns . . . might be unconstitutional." *Id.* at 624. Thus, the Court acknowledged that it was not in serious dispute that "weapons that are most useful in military service — M-16 rifles and the like — may be banned." *Id.* at 627.

The Court recognized an additional limitation on the types of arms that the Second Amendment protects. It interpreted the holding of a previous Second Amendment decision, *United States v. Miller*, 307 U.S. 174 (1939) (Ch. 8.D.7), to stand for the proposition "that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Heller*, 554 U.S. at 625. In other words, "dangerous and unusual weapons" that are not "in common use" can be prohibited. *Id.* at 627.

In the wake of *Heller*'s recognition of the individual right to keep and bear arms and its limitations, circuit courts across the nation—including ours—interpreted *Heller* to permit a means-end approach for assessing the

constitutionality of firearms regulations. In evaluating such regulations against Second Amendment challenges, a court would first inquire "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Kolbe*, 849 F.3d at 133. If the challenged law did so, the court would then apply either intermediate or strict scrutiny, "depend[ing] on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.*

As this approach percolated in the lower courts, the Supreme Court's subsequent Second Amendment opinions did little to alter the status quo. In *McDonald v. City of Chicago*, the Court held that "the Second Amendment right is fully applicable to the States," but otherwise endorsed *Heller* as is. 561 U.S. 742, 791 (2010) (Ch. 11.B). And in *Caetano v. Massachusetts*, a per curiam Court reaffirmed two aspects of *Heller*: that "the Second Amendment extends . . . to . . . arms . . . that were not in existence at the time of the founding"; and that the Second Amendment may protect arms beyond "weapons useful in warfare." 577 U.S. 411, 412 (2016) (Ch. 11.C.2) (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 582).

Then came *Bruen.* Rejecting the means-end approach of the lower courts, the *Bruen* Court set out a two-step methodology oriented towards text, history, and tradition. Under this approach, a court first looks to the text of the Second Amendment to see if it encompasses the desired conduct at issue. If the text does not extend to the desired conduct, that conduct falls outside the ambit of the Second Amendment, and the government may regulate it. But if a court finds that the text *does* encapsulate the desired conduct, the analysis moves to the second step, where the burden shifts to the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Only if such consistency is shown can a court conclude that the regulation is constitutionally permissible.

The Court in *Bruen* found that the New York regulation at issue, which required an individual to "demonstrate a special need for self-protection distinguishable from that of the general community" before he could carry a handgun outside of his home, did not satisfy this history-and-tradition test. *Id.* at 70. The Court first determined that the plaintiffs' "proposed course of conduct — carrying handguns publicly for self-defense" readily fell within the plain text of the Second Amendment. *Id.* at 32. Thus, the burden shifted to New York to show that its regulation was "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 33–34.

After examining multiple historical regulations on the public carry of weapons, the *Bruen* Court determined that none of them was sufficiently analogous to the regulation at issue. Specifically, the Court held that the New York regulation was unconstitutional because, "[a]part from a few late-19th-century outlier jurisdictions, American governments simply have not broadly

prohibited the public carry of commonly used firearms for personal defense," nor have these governments "required law-abiding, responsible citizens to demonstrate a special need . . . in order to carry arms in public." *Id.* at 70 (internal quotation marks omitted).

In so holding, the *Bruen* Court was clear that it was "apply[ing]" the "test that [it] set forth in *Heller*." *Id.* at 26. It reiterated that "the right secured by the Second Amendment is not unlimited," and, as such, it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 21 (quoting *Heller*, 554 U.S. at 626). Justice Alito further elaborated on this point in his concurrence, explaining that the majority's "holding decides nothing . . . about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns." *Id.* at 72 (Alito, J., concurring).

III.

With this background in mind, we proceed to our analysis of the assault weapons regulations at issue. We hold that the covered firearms are not within the scope of the constitutional right to keep and bear arms for self-defense, and thus Maryland's regulation of them can peaceably coexist with the Second Amendment. Moreover, even if the text of the Second Amendment were read to encompass the covered firearms, the statutory provisions at issue would nonetheless be constitutional. Our nation has a strong tradition of regulating excessively dangerous weapons once it becomes clear that they are exacting an inordinate toll on public safety and societal wellbeing. . . .

A.

Pursuant to *Bruen*, we begin by asking whether the "plain text" of the Second Amendment guarantees the individual right to possess the assault weapons covered by the Maryland statute. 597 U.S. at 24. At first blush, it may appear that these assault weapons fit comfortably within the term "arms" as used in the Second Amendment.

We know, however, that text cannot be read in a vacuum. *Heller* and *Bruen* confirmed the importance of reading the Amendment in context by repeatedly emphasizing that "it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right." *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 592). In other words, the Second Amendment codified "the right to keep and bear arms": a specific entitlement with a particular meaning in the ratifying public's consciousness, with baked-in prerogatives and qualifications alike. *See Bruen*, 597 U.S. at 21 ("[L]ike most rights, the right secured by the Second Amendment is not unlimited." (quoting *Heller*, 554 U.S. at 626)).

This understanding of the text of the Second Amendment is consistent with the way we read other constitutional provisions. . . .

The upshot is that the text of the Second Amendment, like the text of other constitutional provisions, must be interpreted against its historical and legal backdrop. *See Bruen*, 597 U.S. at 25 (endorsing "reliance on history to inform the meaning of constitutional text — especially text meant to codify a *pre-existing* right"). What we must do under *Bruen*, then, is assess the historical scope of the right to keep and bear arms to determine whether the text of the Second Amendment encompasses the right to possess the assault weapons at issue.

B.

This was the question we earlier faced as an en banc court in *Kolbe*. Our primary holding in that case was that the assault weapons regulated by the statute were not within the scope of the Second Amendment. 849 F.3d at 136. Specifically, we resolved the case by finding that the covered weapons were "'like' 'M-16 rifles', i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment." *Id.* (quoting *Heller*, 554 U.S. at 627). It was only after "we affirm[ed] the district court's award of summary judgment in favor of the State" on those grounds that we turned to finding, "[i]n the alternative," that the assault weapons regulations survived intermediate scrutiny. *Id.* at 137–38.

It is true that *Kolbe* was decided before *Bruen*. But contrary to appellants' claims, *Bruen* did not abrogate *Kolbe*'s entire holding. While the Court in *Bruen* held that the means-end balancing we conducted in our secondary, alternative analysis was "one step too many," it did not disturb our principal holding that the covered assault weapons were outside the ambit of the individual right to keep and bear arms. *Bruen*, 597 U.S. at 19. The Court was careful to note that only "the Courts of Appeals' second step" was "inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny." *Id.* at 24. On the other hand, when it came to our primary approach, the *Bruen* Court did not reject this type of analysis, finding that it was "broadly consistent with *Heller*." *Id.* at 19. We therefore respectfully reaffirm the conclusion we reached in *Kolbe* that the covered weapons "are not constitutionally protected arms." 849 F.3d at 130 (emphasis omitted).

C.

The validity of this conclusion becomes clear when viewed in light of the purpose of the individual right to keep and bear arms. *Heller* established that "the *central component*" of the individual right codified by the Second Amendment was "self-defense." 554 U.S. at 599; *see also Bruen*, 597 U.S. at 32; *McDonald*, 561 U.S. at 767. The common-law right to self-defense, in turn,

was understood by the founding generation to mean the right of "a citizen to 'repel force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 595 (quoting 2 Tucker's Blackstone 145) (internal alteration omitted). The pre-existing right codified by the Second Amendment is thus about amplifying the power of individual citizens to project force greater than they can muster with their own bodies so that they may protect themselves when government cannot.

Limitations on this right to self-defense have been recognized in common law since before our nation's founding. . . . [the court offers several examples].

The above limitations and qualifications do not undermine the importance of self- defense when one's person is imperiled. And the exact scope of the self-defense right has ebbed and flowed over time and across jurisdictions. . . .

As these limitations on the right to self-defense demonstrate, there are societal interests that can prevail over the right to protect oneself with force. The imminence requirement, for example, ensures that the justice system, not the individual, is the preferred user of force to restrain unlawful action when that system has the time and capacity to act. And restrictions on how much force may be employed, and against whom force may be used, clarify that it is not just the rights to life and liberty of the defender that matter, but also those of other members of society. Else, how could we have any society at all?

These limitations inform the historical backdrop of the right ultimately enshrined in our Constitution: to keep and bear arms for the purpose of self-defense. Just as the right to self-defense had limitations at the time of the founding, so too did the right to keep and bear arms that enabled it. As the Supreme Court recognized in *Heller*, the Second Amendment "is the very *product* of an interest balancing by the people." 554 U.S. at 635. In crafting the Amendment, the Framers aimed to safeguard the right to individual self-preservation while recognizing appropriate limitations — including those already inherent in the common-law right to self-defense — that permitted the maintenance of an amicable and orderly society. Thus, courts are "not [to] read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* at 595 . . . . [the court discusses *Heller*'s limitations on the right to arms for possession of firearms by felons and the mentally ill and the carrying of firearms in sensitive places] . . . . These limitations, ultimately, reflect a careful balancing of interests between individual self-defense and public protection from excessive danger that existed within the meaning of the phrase "the right to keep and bear arms" when the Second Amendment was ratified.

For our purposes, the most relevant limitation that emerged from this consideration of individual and societal interests is upon *what* arms may be kept and carried. As recognized in *Heller*, "the Second Amendment right . . . extends only to certain types of weapons"; it is "not a right to keep and carry

any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 623, 626. Arms typically used by average citizens for self-defense are generally within the ambit of the Second Amendment, presumably because these arms had proven over time to effectively amplify an individual's power to protect himself without empowering him to singlehandedly reign terror upon a community. But other weapons — variously referred to as "dangerous or unusual," *e.g.*, 4 Blackstone 148, or "dangerous and unusual," *e.g.*, *Heller*, 554 U.S. at 627 — could be banned without infringing upon the right to bear arms. Such excessively dangerous arms were not reasonably related or proportional to the end of self-defense — but rather were better suited for offensive criminal or military purposes — and were thus understood to fall outside the reach of the right.

This dichotomy between these two types of arms is reflected in the concrete examples of exempted arms that the Supreme Court offered us in *Heller*. A corollary to "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" 554 U.S. at 627, is that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," *id.* at 625. Further, the Court recognized that "weapons that are most useful in military service," such as "M-16 rifles and the like," can be "banned." *Id.* at 627. The *Heller* Court placed such weapons of crime and war in explicit contradistinction to the handgun, "the quintessential self-defense weapon," which it emphasized was squarely within the ambit of the Second Amendment. *Id.* at 629.

What brings all the weapons beyond the scope of the Second Amendment together, and what separates them from the handgun, is their ability to inflict damage on a scale or in a manner disproportionate to the end of personal protection. As such, they are weapons most suitable for criminal or military use. For instance, Congress began regulating sawed-off shotguns and short-barreled rifles after they became infamously associated with "notorious Prohibition-era gangsters like Bonnie Parker and Clyde Barrow." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 47 (1st Cir. 2024). These firearms "are more easily concealable than long-barreled rifles but have more destructive power than traditional handguns," making them particularly desirable to malefactors and crooks. U.S. Dep't of Just., *Justice Department Announces New Rule to Address Stabilizing Braces, Accessories Used to Convert Pistols into Short-Barreled Rifles* (Jan. 13, 2023). And the M16 was adopted by the U.S. Army as the standard-issue infantry rifle "due to its phenomenal lethality and reliability, as well as its increased ability to penetrate helmets and body armor." *Lamont*, 685 F. Supp. 3d at 101 (internal quotation marks omitted).

We also recognize that the Supreme Court, in the handful of Second Amendment cases that it has decided, has not yet had the opportunity to clarify

the full array of weaponry that falls outside the ambit of the Second Amendment. . . . [S]ome bearable arms deliver force so excessive for self-defense that no reasonable person could posit that the Constitution guarantees civilian access to them. *See, e.g.*, *Bevis v. City of Naperville*, 85 F.4th 1175, 1198 (7th Cir. 2023) ("Everyone can also agree, we hope, that a nuclear weapon such as the . . . 51-pound W54 warhead, can be reserved for the military, even though it is light enough for one person to carry."), *cert. denied sub nom. Harrel v. Raoul*, No. 23-1010, 2024 WL 3259606 (U.S. July 2, 2024); *see also Heller*, 554 U.S. at 627.

As should be clear, these are not the modern equivalents of weapons that were commonly possessed and employed for self-preservation by your shopkeeper, or your butcher, or your blacksmith up the road in colonial America — the disarmament of whom the Second Amendment was ratified to prevent. The Second Amendment, with its "central component" of "individual self-defense," is not concerned with ensuring citizens have access to military-grade or gangster-style weapons. *Bruen*, 597 U.S. at 29 (emphasis omitted). In short, then, while the Second Amendment jealously safeguards the right to possess weapons that are most appropriate and typically used for self-defense, it emphatically does not stretch to encompass excessively dangerous weapons ill-suited and disproportionate to such a purpose.

Our friends in dissent argue that there is not simply a right to individual self-defense but to "collective" self-defense. This view has several problems. One, it contradicts both the purpose and language of *Heller* and *Bruen* quoted in the preceding paragraph. The second problem is one of self-contradiction. The dissent announces a right to "communal self-defense" and then proceeds directly to disregard the community's judgment as expressed in the Maryland statute as to how communal self- defense can be most effectively safeguarded. The third problem is the dissent's conversion of a right of self-defense to a right to possess arms whose uses on offense are all too prominent and apparent. Either alone or in combination these hurdles underscore the danger of expanding appellants' right far beyond the careful exposition of the Second Amendment that *Heller* and *Bruen* articulated.

D.

Having elucidated our understanding of the Second Amendment's text in its historical context, we turn to the Maryland regulations under challenge in the present case. Our analysis confirms that the covered weapons are not within the ambit of the "right to keep and bear arms" as codified within the plain text of the Second Amendment.

As an initial matter, we note that appellants have brought a facial challenge to the assault weapons regulations. . . . "To succeed in a typical facial attack, [appellants] would have to establish 'that no set of circumstances exists

under which [the statute at issue] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010). . . .

Appellants have not met this high bar. Many of the firearms regulated by the Maryland statute are "dangerous and unusual weapons" that are not "in common use today for self-defense." *Bruen*, 597 U.S. at 21, 32 (internal quotation marks omitted). Rather, they are weapons "most useful in military service" with firepower far exceeding the needs of the typical self-defense situation. *Heller*, 554 U.S. at 627. These weapons therefore do not fit within the Second Amendment's ambit and thus "may be banned." *Id.*

Consider, for example, the Barrett .50 caliber semiautomatic sniper rifle, one of the forty-five covered long guns. This rifle fires bullets powerful enough to "to disable or destroy military targets such as armored personnel carriers, radar dishes, communications vehicles, missiles, aircraft, bulk fuel and ammunition storage sites." Am. Bar Ass'n, Bar Ass'n of S.F. Special Comm. on Gun Violence, *Restriction of Sale of .50 Caliber Sniper Weapons* (Aug. 7, 2005). Heralded as "[t]he most powerful sniper rifle in the U.S. military," the Barrett .50 cal. "is capable of long range destruction of military targets at distances exceeding a mile . . . with the power of a rocket or mortar but with the precision of a sniper rifle." *Id.* This extraordinary combination of power and precision has helped Mexican cartels outgun police, with the Barrett rifle becoming "a very symbolic weapon in the narco world" that "shows you're on the top of the game." Diego Oré and Drazen Jorgic, *'Weapon of War': The U.S. Rifle Loved by Drug Cartels and Feared by Mexican Police*, Reuters (Aug. 6, 2021).

Appellants made no effort to present evidence that this sniper rifle is "in common use today for self-defense" and not a "dangerous and unusual" weapon outside of the Second Amendment's ambit. *Bruen*, 597 U.S. at 21, 32. How could they? Common sense dictates that restricting the possession of this type of weapon is consistent with the original meaning of the Second Amendment as elucidated in *Heller* and *Bruen*. With its very limited ability to serve the defensive needs of the average citizen yet its extraordinary capability to advance the offensive purposes of criminals, terrorists, and soldiers, the Barrett .50 caliber sniper rifle is exactly the type of firearm that is "most useful in military service" and "may be banned" consistent with the Second Amendment. *Heller*, 554 U.S. at 627. . . . [the court also discusses the Striker-12 and other street sweeper shotguns] . . . . Perhaps recognizing the steep uphill climb that such an argument would face, appellants did not devote even a page of their complaint or briefing to posit how these specific prohibitions are unconstitutional.

In short, appellants have failed to show that each firearm regulated by the Maryland statute is within the ambit of the Second Amendment. And so the broad relief their facial challenge seeks is not ours to grant.

E.

We do recognize, however, that the parties thoroughly briefed the issue of whether the Second Amendment protects a citizen's ability to purchase and possess an AR-15, which appellants refer to as the "paradigmatic semiautomatic rifle targeted by 'assault weapons' laws." This is also the question we primarily considered at our en banc oral argument. Because it has been fully briefed and considered after a remand from the Supreme Court, we find the question of whether the AR-15 is within the ambit of the Second Amendment appropriate to address here. Not to address it would be to bypass the very heart of the dispute in this proceeding.

1.

The intertwined origins of the AR-15 and its military version, the M16, show that these weapons were intended for offensive combat applications rather than individual self- defense. *See Lamont*, 685 F. Supp. 3d at 101. In the late 1950s, the U.S. Army was seeking an improved infantry weapon. General Willard G. Wyman called upon firearms manufacturers to develop a lightweight yet lethal combat rifle that would penetrate a steel helmet at 500 yards. Armalite Corporation responded by developing the AR-15, which originally was a selective-fire rifle with both semiautomatic and automatic firing capability.

The AR-15 quickly gained popularity with the U.S. military, which, by the end of 1963, had purchased over 100,000 AR-15s and had begun to combat test them in Vietnam. Early testing "discovered that a 7- or even 5-man squad armed with AR-15s could do as well or better in hit-and-kill potential . . . than the traditional 11-man squad armed with M14 rifles," the U.S. military's standard-issue rifle during the late 1950s. *See Kolbe*, 849 F.3d at 124. Further testing by the military and CIA concluded that the AR-15 was "superior in virtually all respects to the – a. M-1 rifle, b. M-1 and M-2 Carbines, c. Thompson Sub- machine gun and d. Browning Automatic rifle." Advanced Rsch. Projects Agency, *Field Test Rep., AR-15 Armalite Rifle* (Aug. 20, 1962). The AR-15 also became popular in Vietnam, where the military found that it was a "more desirable weapon" than any of the alternative military rifles, carbines, or submachineguns. Advanced Rsch. Projects Agency, *Rep. of Task No. 13A, Test of Armalite Rifle, AR-15*, at 4 (July 31, 1962). The military designated the AR-15 rifle the "M16" and adopted it as the standard-issue infantry rifle in the late 1960s.

During this same period, Colt, which had obtained the trademark and patents for the AR-15 from Armalite, created a semiautomatic version of the rifle for the civilian market. In 1977, the patents to the AR-15 expired, and a

number of manufacturers started selling semiautomatic rifles built on the AR-15 platform.

The civilian versions of the AR-15 have not strayed far from the rifle's military origin. The AR-15 continues to use the same internal piston firing system and the same ammunition as the M16. Its bullets leave the muzzle at a similar velocity of around 3000 feet per second, have a similar effective area target range of up to 875 yards, and deliver a similar amount of kinetic energy upon impact. Contemporary versions of the AR-15 and M16 have both incorporated additional combat-functional features. These include a flash suppressor that conceals the shooter's position and facilitates night combat operations, and a pistol grip that enables fast reloading and accuracy during sustained firing. Most versions of the AR-15, like the M16, use detachable 20-round or 30- round magazines that increase the weapon's effective rate of fire and are most useful in prolonged firefights with enemy combatants. Both weapons are also compatible with up to 100-round magazines. Other combat-functional features that the AR-15 and M16 share include a threaded barrel for the affixing of a flash suppressor, recoil compensator, or silencer; a barrel shroud to protect the shooter's hands from excessive heat during sustained firing; and a rail integration system for the mounting of sights, scopes, slings, flashlights, lasers, foregrips, bipods, bayonets, and under-barrel grenade launchers or shotguns.

The firepower of the AR-15 and M16 is a key component of their "phenomenal lethality." *Lamont*, 685 F. Supp. 3d at 101. Built to generate "maximum wound effect" and to pierce helmets and body armor, *id.* at 100, AR-15 bullets discharge at around "three times the velocity of a typical handgun," *Rupp*, 2024 WL 1142061, at *11. These higher velocity rounds "hit fast and penetrate deep into the body," creating severe damage. *Bevis v. City of Naperville*, 657 F. Supp. 3d 1052, 1073 (N.D. Ill. 2023). When a bullet fired from an AR-15 impacts human tissue, it typically "yaws" or turns sideways. *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.*, 664 F. Supp. 3d 584, 599 (D. Del. 2023). As it passes through the body, the rotated bullet creates a large, "temporary cavity" or "blast wave" that can be "up to 11-12.5 times larger than the bullet itself," *id.* (internal quotation marks omitted)—an effect known as "cavitation," *Capen v. Campbell*, 2023 WL 8851005, at *15 (D. Mass. Dec. 21, 2023). So, while a "typical 9mm [bullet] wound to the liver" from a commonly used handgun like the Glock 19 "will produce a pathway of tissue destruction in the order of one inch to two inches," an AR-15 wound "will literally pulverize the liver, perhaps best described as dropping a watermelon onto concrete." *Id.* (internal alterations omitted). The "catastrophic" damage caused by AR-15 rounds means that the injuries they leave in their wake—such as "multiple organs shattered," bones "exploded," and "soft tissue absolutely destroyed"—"often cannot be repaired" by trauma

surgeons. *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 599–600 (internal quotation marks omitted).

Another key aspect of the destructiveness of the AR-15 and M16 is their pairing of high muzzle velocity with a comparative lack of recoil. AR-15s can fire rounds "in rapid succession on a precise target, even while standing or moving, because a shooter's position is relatively unaffected by the recoil of each shot." *Capen*, 2023 WL 8851005, at *15. This lower recoil makes the AR-15 "uniquely dangerous" compared to other high-powered rifles, which tend to have greater recoil that "necessarily disrupts follow-on shots." *Id.*

The primary difference between the M16 and AR-15 — the M16's capacity for automatic fire, burst fire, or both, depending on the model — pales in significance compared to the plethora of combat-functional features that makes the two weapons so similar. The U.S. Army Field Manual instructs that semiautomatic fire is "[t]he most important firing technique during fast-moving, modern combat" because it "is the most accurate technique of placing a large volume of fire on . . . multiple, or moving targets." U.S. Army FM 3-22.9, at 7-8 (Aug. 12, 2008). Indeed, a decorated former U.S. Navy SEAL stated that he "[n]ever once fired full auto in combat" during a decade of special operations combat deployments, including the 2011 Osama Bin Laden raid. @mchooyah, Twitter (Oct. 3, 2017, 5:04 PM), https://perma.cc/7JXA-YK97. Moreover, the AR-15's rate of fire can "be easily converted to . . . mimic military-grade machine guns" with devices like bump stocks, trigger cranks, and binary triggers. *Bevis*, 657 F. Supp. 3d at 1074. In *Garland v. Cargill*, the Court recently emphasized that "[s]hooters have devised techniques for firing semiautomatic firearms at rates approaching those of some machine guns." 602 U.S. 406, 411 (2024); *see also id.* at 429 (Alito, J., concurring) ("[A] semiautomatic rifle with a bump stock can have the same lethal effect as a machinegun."). Additionally, nothing in *Cargill* evinced any affirmative endorsement of bump stocks. The case rested on a close reading of statutory text and regulatory deviation from it, which is not before us here.

Between its firepower, accuracy, and modifiability, the "net effect" of the AR-15's "military combat features is a capability for lethality." *Kolbe*, 849 F.3d at 144. All this is a far cry from any notion of civilian self-defense.

2.

Illicit uses of the AR-15 have demonstrated just how much destruction the weapon can cause in the wrong hands. When used for criminal purposes, the AR-15 and other assault rifles "result in more numerous wounds, more serious wounds, and more victims." *Id.* at 140 (quoting *Cuomo*, 804 F.3d at 262). AR-15s are disproportionately used in mass shootings: one recent examination found that although AR-platform rifles constituted about 5% of the firearms in the United States, they were used in 25% of mass shootings. Moreover, in a

grim testament to the gun's deadliness, mass shootings are over 60% more deadly when an AR-15 or similar assault rifle is used. *See id.* ("[O]ver the past ten years, there have been 12.9 fatalities per shooting when an assault rifle is used in a mass shooting, as opposed to 7.8 fatalities per shooting where an assault rifle is not used."). Four of every five "mass shootings that resulted in more than 24 deaths involved the use of assault rifles," *id.*, as did every single mass shooting involving more than 40 deaths, *see* The Violence Project, *Mass Shooter Database* (database updated Jan. 2024). In short, the AR-15 and other assault rifles are the preferred weapons for those bent on wreaking death and destruction upon innocent civilians.

Their utility for mass killing has made the AR-15 and similar assault rifles the most popular arms for terrorist attacks in the United States. The perpetrator of the Pulse nightclub shooting — which was "the deadliest terrorist attack in the United States since September 11, 2001" — used an assault rifle similar to the AR-15 that is covered by the "copycat weapon" provision of Maryland's assault weapons regulation. *See* Frank Straub et al., *Rescue, Response, and Resilience*, U.S. Dep't of Just. Cmty. Oriented Policing Servs., at 1, 7 (2017). With his rifle in hand, the ISIS-aligned perpetrator walked into the Orlando nightclub and fired approximately 200 rounds in five minutes. Despite a police detective being on scene who called in the shooting as soon as it began, and despite the SWAT team arriving six minutes later, the terrorist was able to shoot 102 innocent people, killing 49 of them. Police found so many people lying shot and bleeding on the dance floor that one officer — in a desperate attempt to triage casualties and save lives — shouted, "if you're alive, raise your hand." *Id.* at 22. Another responding officer who had served three combat tours in the U.S. military described his experience in the nightclub: "I was a platoon sergeant again. I stepped out of being a cop and back into being a platoon sergeant. We were in a war zone." *Id.* at 21.

Indeed, AR-15 or AK-47 type assault rifles covered by the Maryland regulations have been used in every major terrorist attack on U.S. soil in the past decade: the 2015 San Bernardino office attack (14 victims killed, 24 injured), the 2016 Pulse nightclub shooting (49 victims killed, 58 injured), the 2018 Pittsburgh synagogue shooting (11 victims killed, 6 injured), the 2019 El Paso Walmart shooting (23 victims killed, 22 injured), and the 2022 Buffalo supermarket shooting (10 victims killed, 3 injured). As modern information technologies have increasingly shifted the terrorism threat towards "lone offenders" who are often driven to extremism "by a mix of conspiracy theories; personalized grievances; and enduring racial, ethnic, religious, and anti-government ideologies," AR-15s will likely remain a crucial instrument of terrorism in the United States so long as they are widely available. U.S. Dep't of Homeland Sec., *Homeland Threat Assessment 2024* at v, 3 (Sept. 14, 2023).

In addition to being the weapons of choice for mass killing and terrorism, AR-15s and similar assault rifles are "uniquely dangerous to law enforcement." *Capen*, 2023 WL 8851005, at *13. These firearms place law enforcement officers "at particular risk" because "their high firepower" causes their bullets to readily penetrate police body armor. *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011). AR-15s also "allow criminals to effectively engage law enforcement officers from great distances," giving them a "military-style advantage." *Kolbe*, 849 F.3d at 127.

The impact of these dangers is starkly displayed in the statistics of slain law enforcement officers. Despite the relative rarity of assault weapons, studies have estimated that they have been used to gun down between 13% to 20% of those officers killed in the line of duty. Moreover, assault rifles have been used in the deadliest recent attacks on law enforcement officers, such as the 2016 killing of five Dallas police officers and the 2024 murder of four officers, including three U.S. Marshals task force members, in Charlotte.

As criminals and terrorists have increasingly turned to AR-15s and similar assault rifles, there have been "multiple incidents in which [they] outgun police." *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 600. One of these instances was again the Pulse nightclub terrorist attack. The detective who was on scene when the shooting began "recognized that his Sig Sauer P226 9mm handgun . . . was no match for the .223 caliber rifle being fired inside the club and moved to a position that afforded him more cover in the parking lot." *See* Frank Straub et al., *Rescue, Response, and Resilience*, at 16. The first police officers on scene at the Uvalde, Texas elementary school shooting that left 19 students and two teachers dead similarly "concluded they were outgunned[, a]nd that they could die" after identifying the shooter's gun as an "AR," and thus "opted to wait for the arrival of a Border Patrol SWAT team . . . based more than 60 miles away." Zach Despart, *"He Has a Battle Rifle": Police Feared Uvalde Gunman's AR-15*, Tex. Tribune (Mar. 20, 2023). Time after time, the sheer power of AR-15 style rifles has contributed to hesitation by police in confronting mass shooters, exacerbating the bloodshed and trauma that result.

3.

We have described the AR-15's capacities in abundant detail to demonstrate just how far outside the animating purposes of the Second Amendment this weapon lies. While we know that the AR-15 thrives in combat, mass murder, and overpowering police, appellants have failed to demonstrate that the weapon is suitable for self-defense. This is likely because such a showing would be difficult to make. Indeed, many of the weapon's combat-functional features make it ill-suited for the vast majority of self-defense situations in which civilians find themselves.

To wit: the heightened firepower of AR-15s "pose[s] a serious risk of 'over-penetration' — that is, [bullets] passing through their intended target and impacting a point beyond it." *Capen*, 2023 WL 8851005, at *15. For example, AR-15 rounds "can pass through most construction materials, even at ranges of 350 yards," thereby threatening the lives of "bystanders, family members, or other innocent persons well outside the intended target area." *Id.* Overpenetration poses a grave risk in the home — "where the need for defense of self, family, and property is most acute," *Heller*, 554 U.S. at 628 — because firing an AR-15 in close quarters will often put the safety of cohabitants and neighbors in jeopardy.

The large magazines that are integral to the AR-15's effectiveness in combat and mass murder are also ill-suited for typical self-defense scenarios. As the First Circuit has noted, "civilian self-defense rarely — if ever — calls for the rapid and uninterrupted discharge of many shots." *Ocean State Tactical*, 95 F.4th at 45. Indeed, "most homeowners only use two to three rounds of ammunition in self-defense," *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 121 n.25 (3d Cir. 2018), with one study finding that when citizens fire shots in self-defense, they fire an average of two shots and, 97% of the time, fire five shots or fewer.

The AR-15 also does not have any of the advantages that the Supreme Court identified in *Heller* as establishing the handgun as the "quintessential self-defense weapon . . . for home defense." 554 U.S. at 629. Compared to a handgun, the AR-15 is heavier, longer, harder to maneuver in tight quarters, less readily accessible in an emergency, and more difficult to operate with one hand.

Outside the home, the AR-15 has even less utility for self-defense. It is significantly less concealable than a handgun and much more difficult to carry while conducting daily activities. When shot in cities, towns, or other densely populated areas where armed confrontations most often occur, the AR-15 presents at least as great a risk as it does in the home of harming innocent bystanders due to overpenetration. Moreover, public carry of an AR-15 in modern-day America may well "spread[] 'fear' or 'terror' among the people" due to its frequent and devastating use in mass shootings of innocent civilians—an effect that our common-law tradition has long regarded as incompatible with lawful carry for self-defense. *Bruen*, 597 U.S. at 50.

In sum, the AR-15 — with its military origination, combat-functional features, and extraordinary lethality — has "the same basic characteristics, functionality, capabilities, and potential for injury as the" M16. *Capen*, 2023 WL 8851005, at *14. And its all too frequent use in terrorism, mass killing, and police murder shows that the AR-15 offers firepower ill- suited and disproportionate to fulfilling the Second Amendment's purpose of armed self-

defense. Therefore, just like the M16, the AR-15 is "most useful in military service" and "may be banned" consistent with the Second Amendment. *Id.*

F.

Appellants take umbrage with our method of analysis, contending that "arms that are 'in common use today' are constitutionally protected and cannot be banned." According to their reading of *Heller* and *Bruen*, the covered assault rifles are "unquestionably arms within the meaning of the Second Amendment" because they are "'instruments that constitute bearable arms.'" Therefore, say appellants, the possession of the covered rifles cannot be prohibited because they are "in common use," with "millions of law-abiding citizens choos[ing] to possess" them, and thus "by definition *will not* fit into" the "historical tradition of prohibiting the carrying of dangerous and unusual weapons" acknowledged in *Heller* and *Bruen*. Under this view, so long as enough law-abiding citizens own a type of firearm, that type of firearm cannot be prohibited.

As an initial matter, this argument misreads *Heller* and *Bruen*. In those cases the Supreme Court did not posit that a weapon's common use is conclusive evidence that it cannot be banned. Rather, the Court instructed that "the Second Amendment protects *only* the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627) (emphasis added). In other words, weapons that are *not* in common use can safely be said to be *outside* the ambit of the Second Amendment. But the logic does not work in reverse. Just because a weapon happens to be in common use does not guarantee that it falls within the scope of the right to keep and bear arms.

Appellants' argument also does not resolve the difficulties in determining which weapons would pass its ill-conceived popularity test. Appellants posit that a weapon need only be in common use today for lawful purposes, but *Bruen* implies that a weapon must be "in common use today for self-defense" to be within the ambit of the Second Amendment. 597 U.S. at 32 (internal quotation marks omitted). Appellants contend that mere possession of a firearm by a requisite quantity of Americans is sufficient, but the Court's choice of the phrase common *use* instead of common *possession* suggests that only instances of "active employment" of the weapon should count, and perhaps only active employment in self-defense. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 143-45 (1995). Appellants further contend that all semiautomatic rifles should be categorized as the same type of firearm when conducting a common use inquiry, and thereby disregard the exponential differences in firepower between a small-bore rimfire rifle and a .50 caliber

sniper rifle. What is more, appellants do not provide a clear threshold for the number of firearms they believe must be possessed to be in common use.

Most importantly, appellants' proposed common use inquiry leads to absurd consequences because it totally detaches the Second Amendment's right to keep and bear arms from its purpose of individual self-defense. We have noted that certain bearable arms — such as the M16, the short-barreled shotgun, the ricin pellet-firing umbrella gun, and the W54 nuclear warhead — are not protected by the Second Amendment. But under appellants' common use inquiry, any one of these or similarly dangerous weapons could gain constitutional protection merely because it becomes popular before the government can sufficiently regulate it. Appellants admitted as much when they conceded at oral argument that the government could not prohibit possession of a "machine gun," a "bazooka," or "any firearm" so long as the weapon was "in common use."

Such a trivial counting exercise makes a mockery of the careful interest balancing between individual self-defense and societal order that our legal tradition has carved into the heart of the right to keep and bear arms. It also ignores the reality that weapons may well proliferate before lawmakers comprehend that they are ill-suited or disproportionate to self-defense. Indeed, dangerousness and unusualness need not be static concepts. That would foreclose the ability of legislators to assess these characteristics and to enhance their knowledge through observation and experience. We cannot reasonably expect our representatives to be fortune tellers, anticipating the score of dangers posed by advances in weapons technology. This is particularly true as the pace of weapons manufacturing and distribution has continued to accelerate in recent years. We decline to hold that arms manufacturers can secure constitutional immunity for their products so long as they distribute a sufficient quantity before legislatures can react. A constitutional right with a "meaning . . . fixed according to the understandings of those who ratified it" cannot be read to expand or contract based on nothing more than contemporary market trends. *Bruen*, 597 U.S. at 28.

Bruen's admonition that the right to keep and bear arms extends only to those weapons "'in common use' today for self-defense" reflects the fact that the Second Amendment protects only those weapons that are typically possessed by average Americans for the purpose of self-preservation and are not ill-suited and disproportionate to achieving that end. As demonstrated above, the AR-15 is a combat rifle that is both ill-suited and disproportionate to self-defense. It thereby lies outside the scope of the Second Amendment.

IV.

In *Bruen*, the Supreme Court emphasized the importance of using history and tradition in determining whether a firearms regulation is permissible

under the Second Amendment. Out of respect for the Supreme Court's order remanding this case after *Bruen*, we think it appropriate to reckon with the tradition of weapons regulation in this country and assess whether the Maryland statute is harmonious with it. In light of that analysis, we find that the Maryland regulation is readily "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 34.

The statute is one of many in a storied tradition of legislatures perceiving threats posed by excessively dangerous weapons and regulating commensurately. Indeed, the arc of weapons regulation in our nation has mimicked a call and response composition, in which society laments the harm certain excessively dangerous weapons are wreaking, and the state, pursuant to its police power, legislates in kind. The Maryland statute is but another example of this constructive, indeed indispensable, dialogue.

A.

Under *Bruen*, we must engage in "reasoning by analogy" to "determin[e] whether a historical regulation is a proper analogue for a distinctly modern firearm regulation." 597 U.S. at 28-29. To do so, we consider "whether [the] modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 29. The analogue need not be "a historical *twin*," but must be "a well-established and representative historical *analogue*." *Id.* at 30. Thus, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

Second Amendment analysis is heavily historical, and to bypass an inquiry into history here would be an inexplicable omission. The Court in *United States v. Rahimi* reaffirmed *Bruen*'s approach to history. As Chief Justice Roberts wrote for the *Rahimi* majority, "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 30).

The use of history is thus important not just to remain consistent with the drafters' understanding but also to acquaint Americans with the glories and flaws of our own history and founding generation. It is vital to appreciate that while history may fix the date on which certain events occur, the understanding of history is not frozen in time. *See id.* at 1897 (majority opinion) (explaining that *Heller* and *Bruen* "were not meant to suggest a law trapped in amber"). This understanding deepens as new sources become available and new insights are advanced. Such ongoing learning compels consultation with the historical record, without at the same time using history as a set of minute instructions or a "straightjacket." *Bruen*, 597 U.S. at 30. This is what we think Justice Barrett meant when she recently wrote that

"[h]istorical regulations reveal a principle, not a mold." *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring). We take it as such here. This use of history does not update the Constitution, but rather enriches our view of the Framers' understanding of it.

Bruen further instructs that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." 597 U.S. at 26. But if a case "implicat[es] unprecedented societal concerns or dramatic technological changes," courts may need to take "a more nuanced approach." *Id.* at 27.

B.

This case calls for such a nuanced approach. The ripples of fear reverberating throughout our nation in the wake of the horrific mass shootings in, for example, Las Vegas, Orlando, Blacksburg, Sandy Hook, Sutherland Springs, El Paso, Uvalde, Lewiston, Parkland, San Bernardino, Binghamton, Fort Hood, Thousand Oaks, Virginia Beach, Washington, D.C., Aurora, Monterey Park, Pittsburgh, Geneva County, Boulder, Buffalo, Covina, Dayton, Red Lake, Roseburg, San Jose, Santa Fe, Allen, Charleston, Indianapolis, Manchester, Omaha, and Plano — each of which occurred in the 21st century and resulted in at least nine fatalities — stem from a crisis unheard of and likely unimaginable at the founding.

Certainly it would have been shocking to the Framers to witness the mass shootings of our day, to see children's bodies "stacked up . . . like cordwood" on the floor of a church in Sutherland Springs, Texas; to hear a Parkland, Florida high school student describe her classroom as a "war zone" with "blood everywhere"; to be at a movie in Aurora, Colorado when suddenly gunfire erupted, leaving "bodies" strewn and "blood on seats, blood on the wall, blood on the emergency exit door"; to run past "shoes scattered, blood in the street, bodies in the street" while bullets blazed through the sky in Dayton, Ohio; to watch law enforcement officers encounter "a pile of dead children" in Sandy Hook, Connecticut; to stand next to one of those officers as he tried to count the dead children, but "kept getting confused," as his "mind would not count beyond the low teens." Silvia Foster-Frau et al., *Terror on Repeat: A Rare Look at the Devastation Caused by AR-15 Shootings*, Wash. Post (Nov. 16, 2023).

What did our forebears have by way of comparison, when they were drafting the Second and Fourteenth Amendments? Nothing even close. "[T]here is no known occurrence of a mass shooting resulting in double-digit fatalities from the Nation's founding in 1776 until 1949." *Oregon Firearms Fed'n, Inc. v. Brown*, 644 F. Supp. 3d 782, 803 (D. Ore. 2022). Yet, in modern mass shootings involving assault weapons, the death toll is often in the dozens.

Rapid advancements in gun technology are a central cause of this mass carnage. "[W]hile mass murder has been a fact of life in the United States since the mid-nineteenth century, it was a group activity through the nineteenth century because of the limits of existing technologies." *Lamont*, 685 F. Supp. 3d at 105 (internal quotation marks omitted). Back then, "[t]he only way to kill a large number of people was to rally like-minded neighbors and go on a rampage" using the firearms and melee weapons available at the time. *Id.* These weapons were "certainly lethal but did not provide individuals or small groups of people the means to inflict mass casualties on their own." *Id.*

In sharp contrast, AR-15s and the like are designed to empower an individual soldier to kill as many people in as little time as possible, as we demonstrated above. It took only 32 seconds for a lone shooter to murder nine people and shoot 17 others in Dayton, Ohio. It took about two minutes for a single shooter to kill ten people and injure three at a supermarket in Buffalo, New York. It took less than three minutes for a married couple to murder 14 people and injure 24 at an office in San Bernardino, California.

These are not our forebears' arms, and these are not our forebears' calamities. We thus take the instruction of *Bruen* to engage in a "more nuanced approach" to address these "unprecedented societal concerns." 597 U.S. at 27.

C.

Upon canvassing the historical record of arms regulations, and relying with gratitude on the careful work of professional historians, what we deduce is this: legislatures, since the time of our founding, have responded to the most urgent and visible threats posed by excessively harmful arms with responsive and proportional legislation. They have devised well-tailored solutions to the most salient issues plaguing their communities, while nonetheless protecting the core right of their citizens to defend themselves with arms in pressing circumstances. When a weapon's potential for widespread criminal abuse or unreasonable capacity to inflict casualties became apparent to lawmakers, they did not hesitate to regulate in response. We hold that the Maryland statute fits comfortably within this venerable tradition.

On the cusp of the Revolutionary War, firearms were a common fixture in the American home, but they were not used often in homicides. And this small slice of homicides committed with firearms was cut from a relatively small pie, as interpersonal violence among colonists and early Americans rarely resulted in death.

The reason firearms were so infrequently used in homicides in the 18th century was because they had limited utility for such a purpose. Many early Americans owned a musket or a fowling piece, but these weapons were prone to misfiring and needed to be reloaded after each shot, a time-consuming process that required acumen and experience. Keeping firearms preemptively

loaded was difficult, as the gunpowder of the day readily absorbed moisture and could corrode the gun's metal barrel and firing mechanism. Early Americans instead engaged in impromptu fights with their hands and feet, or used melee weapons such as "whips, sticks, hoes, shovels, axes, [or] knives." Roth, *Why Guns Are and Aren't the Problem*, at 117. Pre-Revolution, then, there was little regulation of firearms in America, as they were seldom used in "homicides that grew out of the tensions of daily life." *Id.*

One exception to this early lack of regulation was the restriction on gunpowder. Aggregation of gunpowder concerned colonists as large amounts of the substance "could kill many people at once if ignited." *Ocean State Tactical*, 95 F.4th at 49. In response to this danger — which resulted from the accumulation of firepower disproportionate to the lawful purpose of individual self-defense — a handful of American cities and states restricted the quantity of gunpowder that an individual could possess.

During the 19th century, the nation saw a surge in interpersonal violence. Starting in the South and then sprawling northward, eastward, and westward, homicide rates swelled.

Improvements in weapons technology contributed to this rise in interpersonal violence. In the mid-19th century, gunmakers like Samuel Colt greatly improved the designs of percussion-cap repeating pistols, and "breech-loading revolvers, shotguns, and rifles" became widely available to consumers. Roth, *Why Guns Are and Aren't the Problem*, at 121. Repeating pistols and most breech-loading guns could fire multiple rounds without reloading. Roth, Breech-loading guns could also be kept loaded with minimal risk of corrosion and were more accurate than their flintlock and percussion-lock predecessors. "Americans scrambled to buy" these weapons, which were "ideal for killing in the heat of the moment." Roth, *Why Guns Are and Aren't the Problem*, at 121. Once people got their hands on these guns, "they kept them everywhere: in their homes, in their wagons, in saddle bags, purses, and pockets." *Id.* As a result, civilians had easy access to more portable and precise firearms than ever before.

Knives, too, advanced in lethality. Designed for the express purpose of fighting, dirks and Bowie knives generally had longer blades than ordinary knives, crossguards to protect users' hands, and clip points that made it easier to stab an opponent. Bowie knives "were widely used in fights and duels, especially at a time when single-shot pistols were often unreliable and inaccurate." Spitzer, *Understanding Gun Law History*, 51 Fordham Urb. L.J. at 89. As the Supreme Court of Texas explained, "The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least," but "[t]he bowie-knife differs from these in its device and design; it is the instrument of almost certain death." *Cockrum v. State*, 24 Tex. 394, 402 (1859).

The country set out to do something about the surge in homicides that had been driven, in part, by the development of these more effective arms. Citizens and lawmakers alike recognized that deadly yet concealable weapons — especially pistols, revolvers, and fighting knives — were the primary culprits in a large proportion of the homicides and assaults of the day. In 1834, for instance, the grand jurors of Jasper County, Georgia, denounced the lack of restrictions on concealable weapons. They told their lawmakers that it was "common" practice among the more violently inclined to "arm themselves with Pistols, dirks knives sticks & spears under the specious pretence of protecting themselves," which resulted in the "stabbing shooting & murdering so many of our citizens." *Id.*

When confronted with these "public safety concerns over the increase in gun violence and the proliferation of concealable weapons," legislatures responded in kind. They passed restrictions on carry, and, in some cases, outright bans on the possession of certain more dangerous weapons. *See* DeLay, *The Myth of Continuity*, at 41, 52. Indeed, over the course of the 19th century and into the early 20th century, nearly every single state would either regulate the carry of certain firearms or place severe restrictions on their possession.

In addition to regulating firearms, legislatures targeted excessively dangerous weapons such as Bowie knives, dirks, sword canes, metal knuckles, slungshots, and sand clubs. These weapons were particularly suitable for fighting and "popular[] with street criminals." David B. Kopel & Joseph G. S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 345 (2024). Those who carried clubs, for instance, were called "devils and lurking highwaymen." Spitzer, *Understanding Gun Law History*, 51 Fordham Urb. L.J. at 96. Slungshots, too, "were a regular part of criminal weaponry," and "gangsters could be merciless in their use." *Id.* at 97. Laws addressing these weapons ranged from outright bans on their manufacture, sale, and possession; to enhanced criminal penalties for those who used the weapons to commit crimes; to prohibitions on both open and concealed carry. . . . At least three-quarters of states also enacted brandishing laws, which generally barred "exhibit[ing]" these dangerous weapons "in a rude, angry or threatening manner." A number of these regulations did, however, make exceptions for those who could demonstrate they had carried or brandished the weapon in reasonable anticipation of being attacked.

A handful of state supreme courts found these statutory regulations on especially dangerous weapons to be consistent with the right to keep and bear arms. In *Aymette v. State*, the Supreme Court of Tennessee sustained the conviction of a man who illegally concealed a Bowie knife under his clothes, emphasizing that "[t]he Legislature . . . ha[s] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens." 21 Tenn. 154, 159 (1840). The state law was justified, in the court's view, as it existed

"to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms." *Id.*

In sum, then, 18th and 19th century legislatures "passed laws in a number of states that restricted the use or ownership of certain types of weapons," once it "became obvious that those weapons . . . were being used in crime by people who carried them concealed on their persons and were thus contributing to rising crime rates." These legislatures — in balancing individual rights and public peacekeeping — permitted individuals to defend themselves with firearms, while ridding the public sphere of excessively dangerous and easily concealable weapons that were primarily to blame for an increase in violent deaths.

At the end of the 19th century, a different type of homicide began to emerge: mass murder spurred by the commercial availability of weaponry that empowered individuals to kill many people quickly. Dynamite, invented in 1866, was one such example. Because it was rather cheap yet very destructive, it was favored by violent activists and anarchists and was employed in a number of infamous bombings between 1919 and 1920, including "the murder of 38 people and the wounding of 143 in an attack on Wall Street, 36 dynamite bombs mailed to justice officials, newspaper editors, and businessmen (including John D. Rockefeller), and a failed attempt to kill Attorney General A. Mitchell Palmer and his family."

Another weapon that surfaced during the turn of the century was the semiautomatic firearm, which became available to consumers in the 1890s. Colt began marketing increasingly effective semiautomatic pistols, culminating in the release of the M1911. Fully automatic weapons quickly followed, with the Thompson submachine gun being patented in 1920. While the "Tommy gun" was initially created for use in World War I as "'purely a military weapon,'" it arrived on the battlefield too late to gain any real traction during that conflict. Spitzer, *Understanding Gun Law History*, 51 Fordham Urb. L.J. at 61 (quoting William J. Helmer, *The Gun That Made the Twenties Roar* 75 (1st ed. 1969)). The Tommy gun was marketed to civilians and police forces with little success, in part due to its expense and lack of controllability. It instead became popular during the interwar period "with criminals, especially bootleggers." Kopel & Greenlee, *The History of Bans*, at 287 n.490. Other military firearms that had been developed for World War I, such as the Browning Automatic Rifle, similarly "found favor among criminals and gangsters in the 1920s and early 1930s." Spitzer, *Understanding Gun Law History*, 51 Fordham Urb. L.J. at 63.

The upshot was that early 20th-century criminals gained access to weapons with firepower not seen before in civilian life. Some models of the Tommy gun could "go through a 100-round drum magazine in four seconds." *Id.* at 61. The

Browning Automatic Rifle was a heavy machine gun that could fire up to ten rounds per second.

Moreover, these firearms' detachable magazines "empowered individual shooters to inflict far more damage on more people than had been possible with earlier technologies." DeLay, *The Myth of Continuity*, at 52. When the guns were used, "they exacted a devastating toll and garnered extensive national attention," becoming inextricably linked to notorious crimes including the St. Valentine's Day Massacre (seven gang members and associates killed) and the Kansas City Massacre (four law enforcement officers and one prisoner killed). These national tragedies put pressure on government to do something about machine guns.

Once again, legislatures responded. And though they enacted regulations in a later century than the ratification of the Second and Fourteenth Amendments, the tide of legislative responses to technological advances in weaponry has persisted throughout our history. So, while we acknowledge that "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text," we see these 20th-century enactments as steps trod along a well-worn path. *Bruen*, 597 U.S. at 36. These later-in-time regulations remain relevant in tracing the broader and consistent story of our nation's regulation of excessively dangerous weaponry.

The Federal Explosives Act of 1917 regulated possession of dynamite and a wide array of other explosives — regulations that were later expanded by the Organized Crime Control Act of 1970. As for semiautomatic and automatic weapons, a great number of jurisdictions took action. At least 29 states enacted anti-machine-gun laws between 1925 and 1934, and ten states restricted semiautomatic weapons between 1927 and 1934. At the federal level, Congress banned possession in the District of Columbia of "any firearm which shoots automatically or semiautomatically more than twelve shots without reloading." Pub. L. No. 72-275, 47 Stat. 650 (1932). The National Rifle Association endorsed the ban, announcing its "desire [that] this legislation be enacted for the District of Columbia, in which case it can then be used as a guide throughout the States of the Union." S. Rep. No. 72-575, at 4-6 (1932). Two years later, Congress enacted the National Firearms Act of 1934, which severely curtailed the civilian possession and general circulation of automatic weapons, as well as sawed-off shotguns, short-barreled rifles, and silencers. As Judge Wynn's fine opinion in *United States v. Price* explained, and as the Supreme Court recognized in *Miller* and *Heller*, such regulation accorded with the historical understanding of the scope of the Second Amendment right.

Over the course of the 20th century, the dangers posed by semiautomatic weapons began to manifest more potently as "a new generation of more expensive and more deadly guns[] entered the criminal market." Spitzer,

Understanding Gun Law History, 51 Fordham Urb. L.J. at 102. In the mid-to-late 20th century, a profound uptick in crime occurred. Law enforcement at the time lamented that "[t]he ready availability of and easy access to assault weapons by criminals has increased . . . dramatically" — a particular problem given that standard-issue police weapons were "no match against a criminal armed with a semi- automatic assault weapon." H.R. Rep. No. 103-489, at 13-14 (1994). Simultaneously, the nation's mass shooting crisis was beginning to emerge, with a 1989 killing of five schoolchildren in Stockton, California prompting public outcry about assault rifles. In response, President George H.W. Bush temporarily banned the import of assault rifles in 1989, and California became the first state to restrict the possession of assault weapons that same year. As the excessively dangerous nature of these weapons became apparent, Congress enacted a ten-year ban on assault weapons and large-capacity magazines in 1994. Once again, citizens had called for something to be done about the illicit use of excessively dangerous arms, and their elected representatives responded.

* * *

Taking a long view of this history, a definable arc of technological innovation and corresponding arms regulation begins to emerge. Whether these laws and regulations were wise or effective is surely a matter of debate. The point is, however, that legislatures were not disabled constitutionally from enacting them. Spurred often by the demands of the military for use in international armed conflict, weapons became progressively sophisticated and capable of inflicting enormous offensive harm. Arms, for example, were far more advanced at the end of The Great War and World War II than they were at the start of those conflicts. Once introduced to stop an oncoming battlefield foe, firearms frequently transitioned to civilian use and became capable of inflicting greater harms in a lessened time period. The Cold War and contemporary competition between great powers have not diminished arms competition. To the contrary, if the pace of innovation today is any indication, this is just the beginning.

Throughout this history lies a strong tradition of regulating those weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians. In documenting the course of weapons regulations, we see states and localities responding to the calls of their citizens to *do something* about the horrors wrought by excessively dangerous weapons, while preserving the core right of armed self-defense. When violence surged in the public square, states and localities responded by regulating the manner of carry; forbidding brandishing; and banning the sale, manufacture, and possession of weapons that were particularly useful for offensive and criminal purposes. And as some modern firearms became capable

of inflicting mass horrors, government did not hesitate to circumscribe their possession while leaving intact the right to own weapons more suitable to the Second Amendment's purpose of personal protection.

The Maryland statute at issue is yet another chapter in this chronicle. It only regulates weapons that are ill-suited for and disproportionate to the objective of self- defense, while honoring the right of Americans to possess arms more compatible with the Second Amendment's purpose. The legislation is a direct response to the calls of citizens who fear it is only a matter of time before mass violence will afflict their communities absent government intervention. In heeding their outcry, Maryland is in the company of centuries of state governments that have done the same.

The Supreme Court has made clear that the Second Amendment is an integral component of the Bill of Rights. But as our nation's history has shown, it is "neither a regulatory straightjacket nor a regulatory blank check." *Bruen*, 597 U.S. at 30. The Amendment has not disabled the ability of representative democracy to respond to an urgent public safety crisis. To disregard this tradition today—when mass slaughters multiply and the innovation of weaponry proceeds apace—could imperil both the perception and reality of well-being in our nation. We therefore hold that Maryland's regulation of assault weapons is fully consistent with our nation's long and dynamic tradition of regulating excessively dangerous weapons whose demonstrable threat to public safety led legislatures to heed their constituents' calls for help.

V.

When our Founders bravely coalesced around that revolutionary piece of parchment, quill pens in hand, they certainly sought to protect the citizenry's inherent liberties from the often oppressive hand of government. At the same time, though, our Founders organized their fellow countrymen into a civilized society with an elected government, which necessarily entailed the ceding of unadulterated freedom for the nation's common good. Much as the branch of a willow offers a gentle bend so that the wind may blow and the birds may nest, so too did our predecessors craft a political community in which rights must sometimes bend to better accommodate the rights of others.

One way in which our nation agreed to temper our individual liberties was by accepting that the pre-existing rights codified within our Constitution came with inherent qualifications crafted through centuries of common law. The Second Amendment was no exception. The right to keep and bear arms must be read within the context of how the Framers conducted this balancing of individual rights with societal prerogatives when they enacted the Second Amendment. Far from disturbing this basic balance, *Heller* and *Bruen* reaffirmed it, making clear that lower courts are duty bound to apply the terms

of the balance enshrined in the Constitution's text, not to dictate such terms themselves. The language of entitlement is qualified by the language of limitation in those opinions, and we are bound to respect both.

The founding generation's understanding that the Second Amendment codified a right that is less than absolute is all the more important today, when modern armaments are increasingly used for crimes so mean and vile that it is difficult even to read about them. Imagine, then, *living* through these recent tragedies. Imagine the sense of loss that afflicts not only the moment, but the lifetimes of those families and friends affected. And then imagine that you mobilize and lobby your representatives to pass preventative legislation, only to be told by a court that your Constitution renders you powerless to save others from your family's fate. The Second Amendment, as elucidated by *Heller* and *Bruen*, does not require courts to turn their backs to democratic cries—to pile hopelessness on top of grief. We shudder to imagine the hubris with which a court would disable representative government at the very moment that lethal technologies are proceeding at an accelerated and indeed unprecedented pace. In 79 A.D., the Roman Emperor Vespasian proclaimed, "Woe is me, I think I am becoming a god." *Oxford Concise Dictionary of Quotations* 386 (Susan Ratcliffe ed., 6th ed. 2011). The Supreme Court, in alluding to the balance struck by our own founding generation, has avoided a judicial environment where Vespasian would fit right in.

The Framers recognized they could not foresee all the dangers that novel weaponry would someday pose, or the circumstances that would invoke the basic power of government to protect the governed. Maryland is a testament to their prescience, though other states with other characteristics and other approaches to this problem may be as well. We have before us nothing more or less than a challenge to one state's regulation of assault weapons. Following *Heller* and *Bruen*, we hold that the Maryland statute is plainly a constitutional enactment.

VI.

For the foregoing reasons, the judgment of the district court is affirmed.

DIAZ, Chief Judge, with whom Judges KING, WYNN, THACKER, BENJAMIN, and BERNER join, concurring. . .

GREGORY, Circuit Judge, concurring in the judgment. . .

RICHARDSON, Circuit Judge, with whom Judges NIEMEYER, AGEE, QUATTLEBAUM, and RUSHING join, dissenting:

After the Supreme Court decided *New York State Rifle and Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), it remanded this case for us to determine whether Maryland's "assault weapons" ban violates the Second Amendment. Yet before the panel could issue its opinion, our court voted to take the case en banc. Now, the majority decides that Maryland's ban is perfectly consistent with the Second Amendment. But the majority's rationale disregards the Second Amendment and controlling precedent. Rather than considering the Amendment's plain text, the majority sidesteps it altogether and concocts a threshold inquiry divorced from the right's historic scope. To make matters worse, it then misconstrues the nature of the banned weapons to demean their lawful functions and exaggerate their unlawful uses. Finally, to top it all off, the majority cherry-picks various regulations from the historical record and pigeonholes them into its preferred — yet implausible — reading of our Nation's historical tradition of firearms regulation.

I respectfully dissent. The Second Amendment is not a second-class right subject to the whimsical discretion of federal judges. Its mandate is absolute and, applied here, unequivocal. Appellants seek to own weapons that are indisputably "Arms" within the plain text of the Second Amendment. While history and tradition support the banning of weapons that are both dangerous *and* unusual, Maryland's ban cannot pass constitutional muster as it prohibits the possession of arms commonly possessed by law-abiding citizens for lawful purposes. In holding otherwise, the majority grants states historically unprecedented leeway to trammel the constitutional liberties of their citizens.

. . .

II. Maryland's ban violates the Second Amendment.

This case is our en banc Court's first attempt to implement the Supreme Court's decision in *Bruen*. It is incumbent on us to do so correctly and faithfully to our original law. So I begin by examining the historical background of the Second Amendment before turning to the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A), *Bruen*, and, most recently, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (2024 Supp. Ch. 13.A). Next, I explain why our decision in *Kolbe* departed from *Heller* and was abrogated by *Bruen*. I then examine the tradition of prohibiting dangerous and unusual weapons and conclude that Maryland's ban is not justified by this tradition, since the tradition does not support a complete ban on the possession of weapons that are commonly used for lawful purposes. Finally, I respond to the majority's novel and unfounded construction of the Second Amendment and its application to this case.

A. The Second Amendment and Supreme Court Precedent

1. Historical Background of the Second Amendment

The Second Amendment provides: "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." Like many amendments, this text codified a preexisting right. Grasping its scope thus depends on an understanding of its historical development.

[Judge Richardson summarizes the history of the right to arms in England, especially the English Bill of Rights, which was understood by the American founding "to enshrine an individual right to keep arms for protection against public and private violence."]

This English backdrop informed the public's understanding of the right to keep arms in the American colonies. Living thousands of miles from their homeland, with neither a professional police force nor a standing army, the colonists were forced to rely on themselves to keep the peace and defend against external threats. Unsurprisingly, they resorted to familiar institutions, like the hue and cry and the *posse comitatus*, to fight crime and respond to other public emergencies. They also relied heavily on the militia; every colony except Pennsylvania required most able-bodied, free, white men, usually those between ages sixteen and sixty, to enlist in the militia. Militias served many important public functions during this time: They "protected communities from bandits and vigilantes, guarded prisoners, served as patrols, prevented lynchings when unpopular executions were scheduled, had riot duty, helped settle land-related disputes, and helped manage public ceremonies and parades, providing domestic security of the state." Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 Wm. & Mary Bill Rts. J. 1021, 1044 (2013). Domestic security in the colonies, like in Medieval England, was a community endeavor.

None of this would have been possible without ready access to arms. So it is no surprise that firearm possession was widespread in the colonies. Those who departed for the New World received express assurances from the Crown that they could keep and use weapons for their defense. To ensure sufficient arms, most colonies required members of the militia to keep certain arms — usually one "cutting weapon" (like a sword or bayonet) and at least one firearm — that would be useful for defense of the community. Additionally, many colonies required even those exempt from militia service to keep weapons in their homes in case of emergency, such as a sudden attack on the settlement. Yet because most colonists could not afford to own an array of arms,

particularly firearms, they typically satisfied these requirements by keeping weapons that were common for individual self-defense or hunting. Arms keeping in the colonies was thus a privilege and duty of all individuals that facilitated both "defense of oneself and one's community." *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 427 (4th Cir. 2021) [*vacated as moot by Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322 (4th Cir. 2021)].

Defense of one's community was not limited to protecting against criminals or hostile foreign forces, though. Social contract theory hypothesized that individuals voluntarily entered political society to protect their rights, including their right to self- defense, from violation by others. The body politic then delegated political authority for its protection to the government via a constitution. But the people remained constantly wary that the government would abuse its political authority and invade their rights. Indeed, the English experience under the Stuarts demonstrated that this was a real danger. So the people reserved a degree of military power for themselves and exercised it through institutions like the militia and the *posse comitatus*. Maintaining a decentralized and dispersed force in this way would mitigate the need for a standing army, which was commonly feared to have interests separate from those of the community and to be a ready instrument of tyranny. And it ensured that if the government ever did turn armed force upon the people, they could readily resist. The keeping of arms in the colonies thus facilitated self-defense not only against acts of private violence and foreign threats, but also against any despotic government that tried to invade the colonists' liberties.

The colonists' fear of tyranny ultimately materialized in the leadup to the American Revolution. Concerned by growing colonial resistance to British policies, King George III and his royal officials imposed an embargo on all incoming arms and ammunition shipments, obstructed access to colonial magazines, and even ordered soldiers to confiscate arms and ammunition. David Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 Charleston L. Rev. 283 (2012). The colonists responded by organizing special militias free from royal control and invoking their right to keep arms for their defense. And when British troops marched on Lexington and Concord in 1775 to seize the colonists' military supplies, they were met by militiamen bearing their own arms and willing to sacrifice their lives to defend their liberties.

Over a decade later, concerns about a tyrannical federal government would dominate debates over the proposed Constitution. Antifederalists feared that the lack of a bill of rights and increased national powers would allow Congress to disarm the populace and rule by standing army or select militia. In response, Federalists argued that Congress would be given no authority to infringe the fundamental right of the people to keep arms and that, if Congress ever

attempted to do so, the widespread ownership of arms would enable the people to resist. . . .

The Federalists eventually managed to persuade Americans to ratify the Constitution. Yet they failed to assuage the people's concerns over the lack of specifically enumerated rights. So when the First Congress convened, Madison proposed a bill of rights to be added to the Constitution. After various revisions, the First Congress eventually approved, and the states ratified, ten amendments to the Constitution, the second of which secured for the people the right to keep and bear arms.

The Second Amendment can be understood only in light of the centuries of history that preceded it. It did not create a fundamental right anew. Rather, as has long been recognized, it secured a preexisting right that developed over centuries in the Anglo- American tradition. At its most basic level, that right guarantees that "the people" can have and carry arms in defense of themselves and their communities. Self-defense, in other words, is its foundational purpose. But self-defense can be individual or collective. And the Second Amendment expressly ensures that the people can preserve "the security of a free State" — that is, a "free country" or "free polity" — should their government ever threaten their inviolable liberties. Individual and communal self-defense against both foreign and domestic threats were thus the purposes enshrined in the Second Amendment upon ratification. That text still being law, they remain the Amendment's purposes to this day. . . .

B. *Kolbe* is demonstrably inconsistent with *Heller* and has been abrogated by *Bruen*.

This case requires us to consider the viability of our decision in *Kolbe* after *Bruen* . . . .

Kolbe had two holdings. It first held that the rifles Maryland bans are not protected by the Second Amendment because they are "'like' 'M-16 rifles,'" in that both are "'weapons that are most useful in military service.'" 849 F.3d at 121 (quoting *Heller*, 554 U.S. at 627). In the alternative, *Kolbe* held that, even if the banned rifles are protected by the Second Amendment, Maryland's ban passes constitutional muster under intermediate scrutiny

The latter holding obviously conflicts with *Heller* and does not survive *Bruen*. The Court in *Bruen* explained that means-end scrutiny has no place under the Second Amendment. *See Bruen*, 597 U.S. at 19. And it cited *Kolbe*'s second holding as an example of the analysis it was rejecting. *See id.* (citing *Kolbe*, 849 F.3d at 133). So that holding is no longer good law.

Kolbe's first holding cannot survive, either. Its "'like' 'M-16 rifles'" test bears no resemblance to either *Bruen*'s plain-text step or its historical-tradition step. Indeed, *Kolbe* explicitly declined to engage with the historical tradition authorizing the ownership of weapons commonly used for lawful purposes and

prohibiting the ownership of "dangerous and unusual" weapons. 849 F.3d at 135–36 & n.10. So its reasoning is nothing more than a pre-*Bruen* anachronism. . . .

Even without *Bruen*, we should readily overrule *Kolbe* because it is demonstrably inconsistent with *Heller*. *Heller* did not establish a standalone exception to the Second Amendment for weapons "most useful for military service." *Kolbe*, 849 F.3d at 136. Rather, the Court explained that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. It then identified an important "limitation" on the right based on "the historical tradition of prohibiting the carry of 'dangerous and unusual weapons.'" *Id.* at 627. But, as I will soon explain, that limitation only extends to weapons "commonly used by criminals," *id.* at 623 (quoting Brief of the United States at 18-21, *Miller*, 307 U.S. 174), that are "highly unusual in society at large," *id.* at 627. It does not extend to weapons that *are* commonly used for lawful purposes, *even if* they happen to be "most useful in military service." *See id. Kolbe* explicitly refused to consider whether Maryland's ban prohibits weapons that are in common use or are dangerous and unusual. This gross misreading of *Heller* is reason enough to abandon it.

C. Maryland's ban violates the Second Amendment.

Since *Kolbe* no longer controls, I must assess whether Maryland's ban is constitutional under *Bruen*'s two-part analysis. I first ask whether the Second Amendment's plain text covers Appellants' proposed course of conduct. *Bruen*, If so, then the regulation is unconstitutional unless Appellees can show that it "is consistent with the Nation's historical tradition of firearm regulation." *Id.*

Applying this framework, it is evident that Maryland's semiautomatic-rifle ban violates the Second Amendment. Maryland's law regulates conduct protected by the plain text of the Second Amendment, since it prohibits "the people" from "keep[ing]" certain "Arms." And Appellees have failed to justify Maryland's ban under history and tradition. The proscribed arms are indisputably in common use by law-abiding citizens for lawful purposes. So they are not "dangerous and unusual" weapons and cannot be prohibited consistent with the Second Amendment.

1. Maryland's law regulates conduct protected by the plain text of the Second Amendment.

The Second Amendment reads: "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." To successfully launch a facial challenge against a firearm regulation, a challenger must first show that the law regulates conduct that falls within the Amendment's plain text. Accordingly, the challengers here

must demonstrate three things: (1) Maryland's law applies to "the people" entitled to the right; (2) it covers "Arms"; and (3) it regulates the "keep[ing]" or "bear[ing]" of those arms. *Heller*, 554 U.S. at 579-86; *Bruen*, 597 U.S. at 32-33.

Maryland's law regulates conduct covered by the Second Amendment's plain text. First, it applies to "the people." *Heller* explained that "the people" is a term that "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. . . .

Second, Maryland's law bans a class of semiautomatic rifles that fall within the plain meaning of "Arms." Relying on Founding-era dictionaries, *Heller* recognized an expansive definition of "Arms" that includes all "weapons of offence, or armour of defence" and "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 U.S. at 581 (quotations omitted). And *Heller* clarified that the right is not limited to weapons that existed at the time of the Founding, nor to certain classes of weapons, but "extends, prima facie, to all instruments that constitute bearable arms, even those that were not found in existence at the time of the Founding." *Id.* at 582.

There is no question that the class of banned semiautomatic rifles meets this definition. Rifles are instruments that can be borne and used to harm others. So it is no surprise that they have been recognized as "Arms" covered by the Second Amendment since the Founding. Nor does it matter that these rifles, unlike those at the Founding, are semiautomatic. That feature only enhances their ability to "cast at or strike another" in "offence" or "defence" — the defining characteristics of "Arms." *Heller*, 554 U.S. at 581 (citations omitted). If it were otherwise, then *Heller* could not have found modern semiautomatic handguns protected by the right. Therefore, the class of banned semiautomatic rifles are "Arms" under the Second Amendment's plain text.

Third, Maryland's law regulates conduct protected by the Second Amendment. *Heller* confirmed that the Second Amendment "guarantee[s] the individual right to possess and carry arms in case of confrontation." *Id.* at 592. But Maryland prohibits Appellants and others from keeping or bearing such arms at all, even "for self-defense and other lawful purposes." So Maryland's law targets conduct protected by the Second Amendment's plain text.

Appellees do not contest any of the above analysis. Instead, they argue that Appellants should have to make one more showing at *Bruen*'s plain-text first step. *Heller*, Appellees note, emphasized that "the Second Amendment right . . . extends only to certain types of weapons," *i.e.*, those in common use by law-abiding citizens for lawful purposes. 554 U.S. at 623, 625–26. And Appellees contend that *Heller*, in saying this, was defining what constitutes an "Arm" under the plain meaning of the Second Amendment. So Appellees think that Appellants must prove at *Bruen*'s first step that the prohibited firearms are in common use today.

The easiest way to assess this claim would be to determine where *Bruen* conducted this inquiry. Yet *Bruen* is somewhat ambiguous on this point. On the one hand, when determining whether the plaintiffs' conduct fell within the plain text of the Second Amendment, the Court mentioned that handguns are "weapons 'in common use' today for self-defense." *Bruen*, 597 U.S. at 32 (quoting *Heller*, 554 U.S. at 627). This could be read to suggest that the "common use" inquiry defines what counts as an "Arm" within the plain meaning of the text. On the other hand, the Court later explained that the tradition of prohibiting the carry of "dangerous and unusual" weapons did not justify New York's may- issue regime, because handguns are "indisputably in 'common use' for self-defense today." *Id.* at 47. So *Bruen* alternatively could be read as making the "common use" question part of the step-two inquiry. Unsurprisingly, *Bruen*'s invocation of this language at both steps has generated confusion among the circuits.

When we take a wider view of *Bruen*'s framework, though, it is easier to fit the pieces together. The Court explained that the step-one inquiry is based on whether the "plain text" of the Second Amendment covers an individual's conduct. 597 U.S. at 17. That text protects the right to keep and bear "Arms" — "not 'Arms in common use at the time.'" *Bevis*, 85 F.4th at 1029 (Brennan, J., dissenting). And when considering this plain text, the Court in *Heller* defined "Arms" to include "[w]eapons of offence" and "anything that a man wears for his defence." *Heller*, 554 U.S. at 581 (citations omitted). The Court never mentioned the "common use" inquiry when discussing the Amendment's plain text.

Instead, it was not until *forty pages later*, when dealing with other precedents, that the Court first mentioned the "common use" limitation. *See id.* at 621-26. While discussing *Miller*, the Court stated that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 623, 626. But it never grounded this limitation in the Amendment's text. Rather, the Court derived it from "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627. It was thus from our Nation's historical tradition of firearm regulation, and not the plain meaning of "Arms," that *Heller* drew this limitation on the scope of the right.

This being the case, the "common use" inquiry best fits at *Bruen*'s second step. After all, that step concerns limitations drawn from historical regulations. *Bruen*, 597 U.S. at 34. So a litigant challenging a weapons ban should be able to satisfy step one by showing that he is part of "the people," that his weapon is covered by the plain meaning of "Arms," and that he seeks to "keep" or "carry" those arms. Then, at step two, the burden ought to fall on

the government to prove that the challenged regulation is relevantly analogous to our Nation's historical tradition of firearm regulation.[29]

Maryland's ban thus regulates conduct covered by the plain text of the Second Amendment. I therefore proceed to consider whether it resembles our Nation's historical tradition of firearm regulation.

2. Maryland's ban on certain semiautomatic rifles violates the Second Amendment because these arms are in common use for lawful purposes.

At *Bruen*'s second step, Appellees must prove that our Nation's historical tradition justifies Maryland's ban on semiautomatic rifles. *Heller* already identified one such tradition: the tradition prohibiting the carry of "dangerous and unusual weapons." *See* 554 U.S. at 627. So a straightforward application of *Heller* would seemingly require us to determine whether the banned weapons are dangerous and unusual. If they are, then they can be prohibited. But if they either are not dangerous or not unusual, then their prohibition would violate the Second Amendment.

Rather than following in *Heller*'s footsteps, Appellees try to blaze their own path through the historical record. Drawing mostly from nineteenth- and twentieth-century regulations on the carry of certain weapons, Appellees argue that our Nation's historical tradition allows the government to ban "extraordinarily dangerous weapons that pose heightened risks" to public safety. And Appellees seem to think that such weapons can be banned *even if* they are commonly possessed for lawful purposes. In other words, Appellees seem to think that our history and tradition support *two* kinds of arms bans: (1) bans on weapons that are dangerous and unusual, and (2) bans on weapons that are exceptionally dangerous.

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[29] Why, then, did the Supreme Court mention "common use" at the plain-text step? Most likely, the Court was simply recognizing that arms in common use, like handguns, are "Arms" within the plain text. But this does not mean that weapons not in common use are not "Arms" within the plain text. Indeed, *Rahimi* confirms this interpretation. Besides mentioning that handguns are in common use, the Court in *Bruen* also noted that the plaintiffs—"two ordinary, law-abiding, adult citizens"—were part of "the people." 597 U.S. at 31–32. But when considering whether the defendant in Rahimi, a violent lawbreaker, was entitled to possess a gun, the Court did not reject his claim from the jump by holding that he was not part of "the people." Rather, the Court proceeded immediately to *Bruen's* second step and upheld the restriction under history and tradition, thus heavily implying that it considered him part of "the people" at Bruen's *first* step. *See Rahimi*, 144 S. Ct. at 1898–1903; see also id. at 1907 (Gorsuch, J., concurring) ("In this case, no one questions that the law Mr. Rahimi challenges addresses individual conduct covered by the text of the Second Amendment."); id. at 1933 (Thomas, J., dissenting) (explaining why Rahimi was part of "the people"). So just as the term "the people" includes but is not limited to ordinary, law-abiding, adult citizens, the term "Arms" includes but is not limited to arms in common use.

But the historic laws Appellees cite do not represent a new and previously unknown tradition. Rather, when properly understood, they represent the same principle already identified in *Heller*: The Second Amendment protects weapons commonly used for lawful purposes but does not protect dangerous and unusual weapons. As I will demonstrate, this principle extends back far before the Second Amendment and forward long after its enactment.

Accordingly, I begin by extrapolating support for and examining the contours of this tradition. Then, I apply my findings to Maryland's ban on certain semiautomatic rifles, concluding that the challenged ban violates the Second Amendment because it prohibits possession of weapons commonly possessed by law-abiding citizens for lawful purposes. . . .

a. History and tradition support the banning of dangerous *and* unusual weapons, but not weapons commonly used for lawful purposes.

I begin by considering the English history of regulating the right to keep or carry certain arms. This is, after all, where *Heller* and *Bruen* started. . . .

Appellees do not cite any English history or custom from before the Founding that supports a ban on possessing certain firearms. This is probably because *Bruen* already covered this ground and found it lacking. As detailed above, English subjects were required for much of England's history to possess military weapons. And what arms bans did exist were scarce. . . . All in all, I know of no longstanding English practice lasting until the Revolution of prohibiting the possession of types of arms, extraordinarily dangerous or otherwise.

English history is more ambiguous when it comes to regulating the *carry* of certain weapons. When Edward III assumed the throne in 1327, the country was in a state of unrest, as bands of knights and other malefactors roved the land committing acts of violence. Parliament responded by enacting the Statute of Northampton in 1328. . . . Exactly how often the statute was enforced, however, is less apparent. As *Bruen* explained, it had become basically obsolete by the late seventeenth century, and it was interpreted narrowly to prescribe only actions done with evil intent or malice.

For our purposes, the Statute of Northampton is relevant because of the kinds of weapons it prohibited people from carrying with such ill intent. Blackstone explained that the Statute codified the preexisting, common-law "crime against the public peace" of "*riding* or *going armed*, with *dangerous or*

unusual weapons," which would "terrify[] the good people of the land."[31] 4 Blackstone, *supra*, at *148–49 (third emphasis added). Serjeant William Hawkins similarly recognized that an individual violated the common- law offense when he carried "*dangerous and unusual Weapons*, in such a Manner as will naturally cause a Terror to the People." 1 *A Treatise of Pleas of the Crown* 135 (3d ed. 1739) (emphasis added). By contrast, Hawkins explained, "Persons of Quality are in no Danger of offending against this Statute by wearing *common Weapons* . . . for their Ornament or Defence," since then it would be apparent that they had no "Intention to commit any Act of Violence or Disturbance of the Peace." *Id.* at 136 (emphasis added) . . . . The distinction undergirding the crime therefore seems to have been between the carry of dangerous and unusual weapons, which would terrify the people, and the carry of common weapons, which would not terrify the people. And this largely tracks the weapons that the Statute apparently proscribed. As *Bruen* explained, likely the only weapons covered by the Statute were those like launcegays, which were frequently worn to breach the peace. By contrast, the Statute did not prohibit the wearing of those weapons commonly carried for self-defense and other lawful purposes, like knives or daggers.

When we cross the Atlantic, the picture in the colonies looks much the same. Appellees do not identify any practice of prohibiting certain arms in the English colonies. This should come as no surprise. As explained earlier, the colonists were guaranteed by the Crown the right to have arms and needed those arms to protect themselves against internal and external threats. For this reason, most colonies *required* their inhabitants — whether they were members of the militia or not — to keep firearms in their homes. And those same colonies *resisted* efforts by the British to deprive them of their arms, recognizing that this posed an existential threat to their liberties. I am

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[31] As this quote demonstrates, Blackstone described the offense as applying to dangerous or unusual weapons. Several other sources borrowed this formulation. Still, as the quotations illustrate, the overwhelming majority of English and American authorities described the offense as applying to dangerous and unusual weapons. Nineteenth-century state courts similarly required that a weapon have both qualities to fit within this tradition. And lest there be any doubt on this question, Heller explained that the tradition applies to "dangerous and unusual weapons." 554 U.S. at 627 (emphasis added) (internal quotation marks omitted). Accordingly, history and tradition require a weapon to be both dangerous and unusual—not merely dangerous or unusual.

unaware of any laws before the American Founding that deprived citizens of the right to possess certain weapons.[32]

There were, however, similarities between English and early American practices when it came to prohibiting the carry of weapons. Most notably, several colonies and states recognized the common-law offense codified by the Statute of Northampton.

Later sources confirm that in America, as in England, the common-law offense was construed to cover the carry of dangerous and unusual weapons, but not the carry of common ones. This is how antebellum courts understood the offense. . . . So in America, as in England, the common-law offense was widely construed to distinguish between dangerous and unusual weapons and common weapons.

It is worth pausing to summarize the ground I have covered so far. The above survey of the relevant history reveals no longstanding or well-settled practice of prohibiting the possession of certain weapons in England, colonial America, or the early American Republic. To the contrary, both countries were permissive when it came to which arms their citizens kept, since widespread arms ownership ensured public safety and served as a buttress against tyrannical rulers. At the same time, both England and America did regulate the carry of certain "dangerous and unusual weapons." These weapons seem to have been targeted because they were uncommon and inspired fear of lawbreaking or violence in the general public. But the prohibitions on carry did not extend to "common" weapons.

Moving forward to consider nineteenth-century regulations, I recognize the need to proceed with caution. On the one hand, both *Heller* and *Bruen* considered nineteenth- century practice. . . . On other hand, *Bruen* cautioned that post-ratification practice, like pre-enactment history, is only useful insofar as it informs the original scope of the Second Amendment. So even though "open, widespread, and unchallenged" practices from after 1791 can inform our understanding of an ambiguous text, 597 U.S. at at 36 . . . , post-ratification practice *inconsistent* with the text's original meaning "obviously cannot overcome or alter that text," *id*. . . . Thus, I must determine whether the principles revealed by nineteenth-century evidence are consistent with principles that predated that time.

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[32] Appellees do cite one late eighteenth- and several late nineteenth-century regulations prohibiting the setting of "trap guns" — weapons rigged to fire on burglars or game when a device was tripped. But these regulations did not prohibit the possession of any type of firearm; they prohibited only certain dangerous *uses* of firearms. *See* Kopel & Greenlee, *supra*, at 365-66. They therefore did not impose a relevantly similar burden on the right to keep arms and cannot justify Maryland's total ban on certain firearms.

As the majority helpfully explains, nineteenth-century America was a place of improved weapons technologies and increased interpersonal violence. This prompted widespread legislative responses to the dangers posed by the sale, possession, and carry of weapon weapons considered particularly "dangerous" or "deadly." Between the start of the nineteenth century and the beginning of the Civil War, at least six jurisdictions outlawed the possession, sale, or exchange of weapons like pistols, Bowie knives, or slung-shots. At least four jurisdictions taxed the ownership or sale of such weapons. Meanwhile, at least seven jurisdictions prohibited the concealed carry of dangerous weapons in all or most circumstances, while about four jurisdictions prohibited all carry — concealed or open — of dangerous weapons. Efforts to crack down on these weapons only increased after the Civil War. From Reconstruction through the end of the nineteenth century, at least nine jurisdictions enacted or reenacted statutes outlawing the possession, sale, or exchange of dangerous weapons, while six jurisdictions taxed their ownership or sale. Additionally, at least twenty-three jurisdictions prohibited the concealed carry of dangerous weapons, while at least ten jurisdictions prohibited all carry of such weapons.

Relying on these statutes, Appellees argue that there is a historical tradition of prohibiting the keeping or carrying of exceptionally dangerous weapons that are closely associated with criminal activity. And as a matter of historical fact, this does seem to have been the main problem these statutes addressed. But we must remember that historic regulations are relevant only insofar as they evince constitutional *principles* that undergird the right. And when determining what that principle is, we ought to consider, when possible, how contemporary courts passed on the constitutionality of those laws.. . . . Indeed, both *Heller* and *Bruen* relied extensively on state court decisions to understand the same laws Appellees put forth to justify Maryland's ban.

Fortunately, we do not lack reading material. Throughout the nineteenth century, state courts often entertained challenges to the very statutes Appellees cite. Many of these decisions upheld various statutes because they merely regulated the *manner* of carrying these weapons, without considering whether their possession or carry could be completely prohibited. Yet some decisions went a step further and considered the kinds of arms citizens could be prohibited from keeping or carrying. And when drawing this line, courts generally tracked a distinction we've seen before: that between dangerous and unusual weapons and common weapons.

The best way to grasp this principle is to see it in action. I'll start with two decisions out of Tennessee. In *Aymette v. State*, a man was convicted for wearing a Bowie knife concealed under his clothing, which violated Tennessee's 1838 concealed carry ban. . . . The Tennessee Supreme Court began its opinion by explaining that the right to keep and bear arms was "adopted in reference" to the events of the Glorious Revolution and exists for

the "common defense" of "the people." 21 Tenn. at 157–58. In light of this purpose, the court found that the right protects those arms "usually employed in civilized warfare[] and that constitute the ordinary military equipment." *Id.* These being protected arms, the court concluded that the legislature may "regulat[e] the manner in which [such] arms may be employed," but it may not totally prohibit their use. *Id.* at 159. By contrast, it explained, the right does not protect "those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin." *Id.* at 158. These weapons "would be useless in war" and "could not be employed advantageously in the common defense of the citizens." *Id.* "The legislature, therefore, ha[s] a right to prohibit the wearing or keeping [of] weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defense." *Id.* at 159. Applying these principles, the court upheld the conviction, since the statute prohibited concealed carry of a Bowie knife—a weapon the court deemed uncommon for lawful purposes and closely associated with criminal activity.

After the Civil War, Tennessee went a step further and banned all carry of certain dangerous weapons, including pistols and revolvers. . . . This prompted new constitutional challenges. In *Andrews v. State*, a defendant moved to quash an indictment against him for violating the statute because it failed to specify what kind of pistol he was carrying. As in *Aymette*, the Tennessee Supreme Court recognized that the right to keep and bear arms only protects "the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties as well as of the State." *Id.* at 179 (including "the rifle of all descriptions, the shot gun, the musket, and [the] repeater"). And even though the uses of common arms could be *regulated* "to subserve the general good" (such as to prevent crime), their keep and carry could not be completely *prohibited*, for "[t]he power to regulate does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated." *Id.* at 179-81. The court then applied these principles to the statute before it. It first upheld the prohibition on carrying dirks, sword canes, Spanish stilettos, and pistols, since, under *Aymette*, these were uncommon for lawful purposes and closely associated with criminal activity. But the court found that the Act potentially included military revolvers — *i.e.*, weapons commonly owned for public defense — within its reach. If so, then "the prohibition of the statute is too broad to be allowed to stand," since it would completely prohibit the bearing of a protected arm. *Id.* at 187-88. The court therefore quashed the indictment for failing to specify which weapon the defendant was carrying.

Next, consider the Texas Supreme Court's decision in *State v. Duke*, 42 Tex. 455. *Duke* involved a constitutional challenge to an 1871 Texas statute prohibiting the carry of "deadly" weapons, including pistols, unless the person

had reasonable grounds to fear an immediate and pressing attack on his person. . . . Unlike the Tennessee Supreme Court, the Texas Supreme Court took a broader view of the Second Amendment right, explaining that it protects "such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State." *Duke*, 42 Tex. at 458. The court's definition thus encompassed arms common for public *and private* defense. The court then explained that, while the legislature could regulate the right to carry such common arms, it could not so heavily regulate them as to "trespass[] on the constitutional rights of the citizen." *Id.* at 459. Yet the court ultimately concluded that the Texas statute did not go so far as to infringe the right, since it still permitted individuals to carry for self-defense when they had "reasonable grounds" to fear for their safety. *Id.*

Finally, *Fife v. State*, 31 Ark. 455 (1876). In *Fife*, the Arkansas Supreme Court upheld a man's conviction for openly carrying a pocket pistol, in violation of Arkansas' 1875 ban on the carry of pistols. . . . Relying on *Aymette*, the court found that "the arms which [the Second Amendment] guarantees American citizens the right to keep and to bear, are such as are needful to, and ordinarily used by a well regulated militia, and such as are necessary and suitable to a free people, to enable them to resist oppression, prevent usurpation, [and] repel invasion." . . . . Yet the pistol in question was no such arm. It was "not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for 'the common defense.'" . . . . And it was also "such as is usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels and brawls." . . . . Thus, the court concluded that the legislature could completely prohibit the carry of such firearms "without any infringement of the constitutional right of the citizens of the State to keep and bear arms for their common defense." . . . .

What do these four cases have in common? At a basic level, these state courts disagreed over the underlying purposes of the Second Amendment: *Aymette*, *Andrews*, and *Fife* thought that it only exists to provide for the public defense, while *Duke* held that it also protects individual self-defense. (In hindsight, and with the benefit of *Heller*, we now know that *Duke* got it right.) Yet despite this preliminary disagreement, all four courts assessed the challenged statutes according to the same principle. Each of them determined whether the regulated weapon was in common use for lawful purposes. If it was, then they held that the government could regulate the possession or carry of that weapon, but that it could not completely ban it. Yet if that weapon was not in common use for lawful purposes, and if the weapon was particularly useful for criminal activity, then the government could outlaw it.

This reasoning was the rule, not the exception. With possibly two outliers, every state court that considered the types of arms that could be prohibited

coalesced around this basic principle.[47] These courts may have disagreed over the purposes for which the right was secured, the line between a regulation

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[47] *See Aymette*, 21 Tenn. at 158; *State v. Smith*, 11 La. Ann. 633, 633–34 (1856) ("The arms there spoken of are such as are borne by a people in war, or at least carried openly. This was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well-disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provide."); *Cockrum*, 24 Tex. at 402–03 (holding that the legislature could regulate the use of Bowie knives but could not completely prohibit their use, since these weapons were "in common use" for, among other things, "lawful defense"); *English*, 35 Tex. at 474 ("[T]he provision protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals, since such only are properly known by the name 'arms,' and such only are adapted to promote 'the security of a free state.'"); *Duke*, 42 Tex. at 455; *Andrews*, 50 Tenn. at 179; *Wilburn*, 66 Tenn. at 59–63; *Fife*, 31 Ark. at 461; *State v. Burgoyne*, 75 Tenn. 173, 175–76 (1881) (reaffirming *Aymette* and *Andrews*); *Dabs v. State*, 39 Ark. 353, 355 (1882) (reaffirming *Fife*); *State v. Workman*, 35 W. Va. 367,373 (1891) ("So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knife, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state."); *see also Reid*, 1 Ala. at 619 ("[T]he Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.").

There are two potential outliers that merit discussion. In Nunn v. State, the Georgia Supreme Court held that Georgia's 1837 statute was unconstitutional insofar as it prohibited both the concealed and open carry of certain dangerous weapons. 1 Ga. 243, 251 (1846); Act of Dec. 25, 1837, supra, § 1, at 90. Along the way, the court explained that the Second Amendment guarantees the right "to keep and bear arms of every description, and not such as are merely used by the militia." Nunn, 1 Ga. at 251. One could read this decision as holding that the Second Amendment does not permit the banning of any weapons, even dangerous and unusual ones. See Hill v. State, 53 Ga. 472, 475–76 (1874) (interpreting Nunn to establish that weapons like pocket-pistols, dirks, sword-canes, toothpicks, Bowie knives, and other dangerous weapons were protected by the Second Amendment). Insofar as this is what the Georgia Supreme Court held, it is inconsistent with the overwhelming authority to the contrary.

The North Carolina Supreme Court arguably swung too far in the opposite direction in *State v. Huntly*, 25 N.C. 418 (1843) (per curiam). In *Huntly*, the court found that North Carolina common law incorporated the common-law offense recognized by the Statute of Northampton. *Id.* at 421–22. It then concluded that all guns were "unusual" weapons within the meaning of that offense, even though they were commonly owned at the time, because they

and a prohibition, or how to categorize particular weapons (*e.g.*, is a Bowie knife dangerous and unusual?). Yet they widely concurred that the government can prohibit particular weapons only if they are (1) particularly useful for criminal activity, and (2) not common for lawful purposes. By contrast, these same courts broadly concluded that the government can regulate, but cannot prohibit, the keeping or bearing of arms commonly used for lawful purposes. *See id.* It was on this basis that nineteenth-century regulations were assessed, and only on this basis that they withstood (or failed) constitutional scrutiny.

We can now step back and view the whole historical picture. From English common law to early American practice, many jurists contended that the carry of dangerous and unusual weapons, unlike common weapons, could be subject to heightened regulation. Several colonies and states eventually enacted laws regulating the carry of such weapons. Later, as state regulations and bans of dangerous weapons multiplied, nineteenth-century state courts drew from the earlier tradition to assess the constitutionality of the challenged regulations. They widely concluded that the Second Amendment permits the government to ban dangerous and unusual weapons but that it does not permit the government to ban weapons commonly used for lawful purposes. The line between dangerous and unusual weapons, on the one hand, and common weapons, on the other, thus has deep roots in our tradition.

Besides being deeply rooted, this principle also accords with the customary basis of the Second Amendment. The Second Amendment recognizes a preexisting right rooted in the practices and usages of the American people. At the Founding, the people commonly kept certain arms for lawful purposes like self-defense and brought those same arms to perform militia service. So it makes sense that, when identifying the weapons that fall within the scope of the right, our tradition would at least protect those arms customarily held by the people for lawful purposes. At the same time, we know that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. The government has an

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were not commonly *carried*. *Id.* at 422. But this position conflicts with that of English and American treatise writers, which distinguished dangerous and unusual weapons from "common" weapons without limiting the latter category to weapons commonly carried. *See, e.g.*, Hawkins, *supra*, at 136; 1 Russell, *supra*, at 271–272. It is also inconsistent with the multitude of other state court decisions from this period that focused on whether a weapon was commonly possessed or used, not carried. And it is likewise at odds with *Heller*, which similarly focused on possession or usage. 554 U.S. at 624–25. So *Huntly*, like *Nunn*, is an outlier of little value in discerning the nature of "dangerous and unusual" weapons in the Anglo-American legal tradition. *See Bruen*, 597 U.S. at 65 ("[W]e will not give disproportionate weight to . . . a pair of court decisions . . . that contradicts the overwhelming majority of other evidence regarding the right to keep and bear arms." (internal quotation marks omitted)).

obligation to combat lawlessness and deter violence. Our tradition thus permits the government to prohibit weapons particularly useful for unlawful activity, so long as those weapons are not of the kind common for lawful purposes. In this way, the government can target lawbreaking and violence without trammeling the rights of the remaining, law- abiding members of the body politic.

This, then, is the history underlying *Heller*'s "dangerous and unusual" limitation on the right to possess or carry certain arms. The Supreme Court may not have "undertake[n] an exhaustive historical analysis" of the exact details of this tradition. *Heller*, 554 U.S. at 626. But it nevertheless picked up on an enduring principle that stretched back far before and extended far after the Second Amendment's adoption. This principle reveals that the Second Amendment permits the government to ban weapons that are not commonly possessed for lawful purposes and are particularly useful for criminal activity. But it does not permit the government to ban weapons that are not particularly useful for unlawful activity,[51] nor weapons that are commonly possessed for lawful purposes, even if they happen to be dangerous.

b. Maryland's ban prohibits weapons that are commonly used for lawful purposes.

Having canvassed the historical record, I now apply my findings to this dispute. Appellees indirectly attempt to place their law within the historical tradition of regulating dangerous and unusual weapons, but to do so they must

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[51] This conclusion might not seem obvious at first, but it follows necessarily from the foregoing discussion. The tradition of regulating dangerous and unusual weapons applied only to weapons that were unusual *and* "dangerous," *i.e.*, particularly useful for unlawful activity. In other words, that a weapon was dangerous was a necessary, but not sufficient, condition for it to fall within this tradition. It therefore follows that if a weapon is not "dangerous," as that term was historically understood, then it may not be prohibited under this tradition. *See Bruen*, 597 U.S. at 29 (focusing on whether a historic regulation was "comparably justified"); *Rahimi*, 144 S. Ct. at 1898 (instructing us to examine the "reasons" a historic law was enacted). There might be other regulatory traditions that could justify such a ban (I venture no opinion on this question today), but the tradition of regulating dangerous and unusual traditions wouldn't be one of them.

Consider an example. Suppose that, as firearms proliferate, hunting crossbows become increasingly uncommon. Suppose further that Maryland subsequently banned all hunting crossbows. If Maryland tried to justify its law by pointing to the tradition of regulating dangerous and unusual weapons, it could not simply assert that hunting crossbows are now unusual. Rather, Maryland would also have to show that hunting crossbows are particularly useful for criminal activity. Otherwise, Maryland's ban would not be analogous to historic regulations of dangerous and unusual weapons, since it would not "impose[] similar restrictions for similar reasons" as the laws within that tradition. *Rahimi*, 144 S. Ct. at 1898.

prove two things. First, Appellees must show that the banned weapons are "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Second, Appellees must show that the banned weapons are particularly useful for criminal activity. If Appellees make both showings, then Maryland's ban is constitutional. But if the prohibited weapons are commonly possessed for lawful purposes, or if they are not dangerous, then they cannot be banned consistent with the Second Amendment.

I start with common usage because it turns out to be dispositive. A thing is "common" if it has "the quality of being public or generally used." Bryan Garner, *Garner's Dictionary of Legal Usage* 179 (3d ed. 2011). Whether a type of weapon is in common use is thus largely an "objective and largely statistical inquiry" that examines broad patterns of usage and the reasons behind that usage . . . *Heller*, 554 U.S. at 628-29 (noting that handguns are common because they are "overwhelmingly chosen by American society for [self-defense]"); *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (explaining that tasers and stun guns are common because hundreds of thousands of them have been sold to private citizens and they are considered a legitimate means of self- defense). Importantly, we assess common usage based on usage patterns *today*, not those at the time of the Founding. And in conducting this inquiry, we consider the practices of *all* Americans, not simply those within the state of Maryland.

I have no difficulty concluding that the class of semiautomatic rifles banned by Maryland's law are in common use by law-abiding citizens today. The easiest way to see why is to focus on one weapon within this class, the AR-15 — the most popular (and most polarizing) semiautomatic rifle in circulation today.[53] The AR-15 was first developed as a military rifle in the 1950s by ArmaLite. After limited success, ArmaLite sold the patent to Colt, which rebranded it as the M-16 and sold it to the military for use in Vietnam in the 1960s. Later, Colt created a semiautomatic version of the AR-15 and began marketing it to civilians and law enforcement. Colt's patent expired in 1977, and other companies began mass producing similar models for civilian use.

Today, the AR-15 and its variants are one of the most popular and widely owned firearms in the Nation. As of 2021, there are at least twenty-eight

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[53] As I explain elsewhere, the tradition of regulating dangerous and unusual weapons focused on types or classes of weapons, which it distinguished by their functional characteristics. Maryland's law targets a class of semiautomatic rifles that are distinguished by certain functional characteristics. *See* Md. Code Ann., Crim. Law § 4-301(h); Md. Code Ann., Pub. Safety § 5-101(r)(2). The appropriate analysis, therefore, is whether these weapons as a class are dangerous and unusual. And because the AR-15 is one weapon within this class, if the AR-15 is in common use, it follows that the class as a whole is in common use. Accordingly, I focus on the common usage of the AR-15.

million AR-style semiautomatic rifles in circulation. Roughly 2.8 million of those weapons entered the market in 2020 alone, making up around 20% of all firearms sold that year. For context, this means that there are more AR-style rifles in the civilian market than there are Ford F-Series pickup trucks on the road — the most popular truck in America. And when we look at actual ownership statistics, the numbers tell the same story. Various studies estimate that at least 16 million, but possibly up to 24.6 million, Americans own or have owned AR- style rifles.

Not only are these arms widely owned; they also are widely owned for many lawful purposes. One survey from 2021 found that the most commonly reported reasons for owning AR-style rifles are recreational target shooting (66% of respondents),[59] home defense (61.9%),[60] hunting (50.5%), defense outside the home (34.6%), and competitive sports shooting (32.1%). Another survey conducted in 2022 found that respondents reported self-defense (65%), target shooting (60%), the potential breakdown of law and order (42%), and hunting (18%) as major reasons for owning AR- 15s. These are lawful purposes for owning weapons, ones which have a long pedigree in our Nation's tradition of firearm ownership and ones recognized by *Heller* as protected by the Second Amendment.

It is therefore unsurprising that Appellees, faced with this overwhelming evidence, do not contest that semiautomatic rifles like the AR-15 are common for lawful purposes. Indeed, for many years now, this question has been "beyond debate." *Kolbe*, 849 F.3d at 156 (Traxler, J., dissenting). In *Staples v. United States*, for example, the Supreme Court contrasted semiautomatic

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[59] Target shooting is necessary for "maintain[ing] proficiency in firearm use," which is "an important corollary to . . . self-defense." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); *see also* Blizard, *supra*, at 60 ("From the proposition, that the possession and the use of arms, to certain purposes, is lawful, it seems to follow, of necessary consequence, that it cannot be unlawful *to learn how to use them* (for such lawful purposes) with *safety* and *effect*."); *Andrews*, 50 Tenn. at 178 ("[T]he right to keep arms . . . involves the right to practice their use.").

[60] I pause to reject the majority's distinction between "common use" and "common possession," Majority Op. at 39–40, and explain why "possession" is itself a "use." As stated, almost 62% of AR-15 owners point to self-defense of the home as their primary reason for owning their weapons. But that does not mean those owners have ever had to discharge their firearms for that purpose. On the contrary, keeping the arm is merely a contingency. Yet in possessing the arm, those citizens are "using" it as a form of insurance. The same can be said for those who possess firearms to be prepared in the event of hostile invasion or tyrannical government. In those circumstances, keeping the arm functions both as a backup plan and even as a deterrent. Though these might be passive "uses," they are still uses. *See Heller*, 554 U.S. at 630 (using "ban the *possession* of handguns" and "prohibition of *their use*" interchangeably and determining that handguns are commonly used without discussing how often they're fired).

rifles like AR-15s with "machineguns, sawed-off shotguns, and artillery pieces," finding that the former are "commonplace," "generally available," and "widely accepted as lawful possessions." 511 U.S. at 603, 610-12. After *Heller*, at least two appellate courts reached this same conclusion, as did the authors of both *Heller* and *Bruen*. Two of *Bruen*'s dissenters, and the replacement for the *Bruen* dissent's author, seem to agree. Plus, other branches of government have affirmed this conclusion. For example, in 2022, the Bureau of Alcohol, Tobacco, Firearms and Explosives described AR-15 style rifles as "one of the most popular firearms in the United States," including for "civilian use." *Definition of 'Frame or Receiver' and Identification of Firearms*, 87 Fed. Reg. 24652, 24652, 24655 (Apr. 26, 2022).

Thus, the evidence shows that millions of Americans have chosen to equip themselves with semiautomatic rifles, like the AR-15, for various lawful purposes. So Appellees have failed to prove that these weapons are "unusual" such that they can be constitutionally outlawed. Maryland's ban therefore violates the Second Amendment.

III. The Majority

Faced with this mountain of evidence, what does the majority do? It ignores it completely. In its place, the majority first constructs a "plain-text" inquiry that has no basis in the Second Amendment's plain text or the Supreme Court's precedents. It then applies this test in an exaggerated and hyperbolic fashion divorced from actual facts about the firearms at issue. Finally, the majority offers a cursory account of the relevant history that crumbles under the slightest scrutiny.

A. The majority concocts a threshold inquiry divorced from the Second Amendment's plain text.

The majority begins its analysis by reaffirming our decision in *Kolbe*. Yet rather than taking isolated statements from *Heller* out of context, as we did in *Kolbe*, the majority gallantly attempts to ground *Kolbe*'s holding in the Second Amendment's plain text. The Second Amendment's plain text, the majority explains, must be read "in context" according to its central (and seemingly lone) purpose: the right of individual self-defense. Drawing from the common law of self-defense, the majority concludes that the right only protects weapons that are "most appropriate and typically used for self- defense," but not "excessively dangerous weapons ill-suited and disproportionate to such a purpose" and "most suitable for criminal or military use." The majority then applies this novel framework and concludes that the banned weapons are not even protected by the Second Amendment's plain text, because they are military-style, criminal weapons that are, in my good friend's expert opinion, "ill-suited and disproportionate to self-defense."

It is remarkable that the majority, for all its claimed fidelity to the Second Amendment's plain text, barely mentions that text at all, let alone *Heller*'s construction of it. *Heller* already conducted a "textual analysis" of the Second Amendment based on its "normal and ordinary meaning" and confirmed its interpretation against "the historical background" of the right. 554 U.S. at 576–78, 592 (internal quotation marks omitted). It found that the term "Arms" includes all "[w]eapons of offence" and therefore "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 581–82 (internal quotation marks omitted). And it concluded that the right codified by the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. Under this definition, semiautomatic rifles obviously qualify as "Arms." Before deftly ripping the rug out from under the ordinary reader, even the majority seems to agree. *See* Majority Op. ("At first blush, it may appear that these assault weapons fit comfortably within the term 'arms' as used in the Second Amendment.").

Instead of analyzing this text, however, the majority pivots to reading it in light of its alleged sole purpose: the right of individual self-defense. It then contrives limits on the constitutional text based on how the majority thinks this purpose is best fulfilled. But the Supreme Court rejected this exact approach to constitutional interpretation in *Giles v. California*, 554 U.S. 353 (2008). There, the Court warned against deriving exceptions to constitutional rights based on judicial notions of the text's underlying "policies," "purposes," or "values." *Id.* at 374–75 (internal quotation marks omitted). . . . Rather, judges must honor the "specific means" chosen by the people to achieve those underlying purposes. *Id.* And in the Second Amendment context, we derive those means using text and history—not by speculating how *we* as judges would have conducted that original balance *today*.

Even if I were to ignore the Supreme Court's warning and interpret the plain text in this fashion, the majority still errs by adopting an overly cramped view of the Second Amendment's original purpose. The majority thinks that the Second Amendment exists solely to protect individual self-defense. Tellingly, however, the majority cites *no* evidence that the "ratifying public's consciousness" ever read the Second Amendment in such a cramped fashion. Nor does the majority cite anywhere in *Heller*, *Bruen*, or *Rahimi* where the Court adopted such a limiting construction. That would have been an odd reading, indeed, seeing as the ratifying population widely agreed that the Second Amendment served larger purposes than individual self-defense, including the defense of the body politic and the prevention of tyranny.

The idea that the Second Amendment serves purposes besides personal self-defense is not some fantasy of a bygone era. Americans *today* rely on privately owned arms for several lawful purposes beyond defending their

individual persons. For example, many states, including Florida, Georgia, and Texas, are being overrun by feral hogs that cause massive agricultural damage and spread disease. . . . Without adequate means to quell this porcine invasion, the afflicted states rely heavily on private citizens to hunt these animals and slow their spread. Some states, meanwhile, still deploy privately armed possess to aid law enforcement in maintaining public order and apprehending wrongdoers. And when law and order break down and police fail to provide aid, the duty for ensuring the safety of vulnerable communities falls on the people who occupy them. . . . All in all, though individual self-defense is an important purpose of the Second Amendment right, the other historic purposes behind its enactment remain relevant today.

Besides unduly narrowing the scope of the Second Amendment, the majority also misapprehends the nature of historic "limitations" on the right. Majority Op. at 19. Contrary to the majority's claims, these limitations did not arise from abstract reflection on the pros and cons of self-defense, nor from an idiosyncratic reading of the Second Amendment's plain text. Rather, these contours are "limits on the exercise of th[e] right" drawn from our Nation's historical tradition of firearms regulation — limits derived at *Bruen*'s *second* step. *Bruen*, 597 U.S. at 21. *Heller*, *Bruen*, and *Rahimi* are clear on this point. . . . At no point did the Court ever ground these qualifications in the Second Amendment's plain text, let alone in vague musings about the boundaries of individual self-defense. Reading the text in "context" is no more than a Trojan Horse the majority uses to sneak its preferred values into the plain- text inquiry.

When it comes to describing the substance of these limitations, the majority fares no better. At no point did *Heller* instruct federal judges to decide whether a particular weapon is "reasonably related or proportional to the end of self-defense." That would be an odd mandate, indeed, as it would require federal judges to decide which weapons are most suitable for a country of individuals with different needs and abilities. Rather, the Supreme Court looked to the usage of the American people to determine which weapons *they* deem most suitable for lawful purposes. And though the Court did mention several reasons why Americans prefer handguns for self-defense, this was not dispositive to the Court's analysis. "Whatever the reason," the Court explained, "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* It is thus the customary practices of the American people — not the uninformed meditations of federal judges — that determine which weapons are protected by the Second Amendment.

Equally perplexing is the majority's construction (or deconstruction) of the category of "dangerous and unusual" weapons. The majority is correct that weapons particularly useful for criminal activity were historically considered

"dangerous" within the meaning of that phrase. But such dangerous weapons could be banned only if they were also *unusual*. That is why *Heller* could say that laws banning weapons like short-barreled shotguns and machine guns are constitutional. These weapons have long been linked to criminal activity, as the majority notes. And they also are "not typically possessed by law-abiding citizens for lawful purposes," and thus "highly unusual in society at large." *Heller*, 554 U.S. at 625, 627. *Heller* confirmed what history and tradition already established: A weapon must be both dangerous *and* unusual in order to be banned.

Nor is there any support for the majority's assertion that the term "dangerous," at least by the time of the Revolution, included within its ambit *military* weapons. As I have explained, history and tradition establish the exact opposite. At the Founding, citizens commonly possessed weapons useful for both self-defense *and* for militia service. And throughout the nineteenth century, state courts and treatise writers widely and repeatedly asserted that protected "Arms" included those commonly kept by citizens for public defense. . . . The idea that weapons useful for military purposes are "dangerous," as that term was historically understood, has no basis in our historical tradition.

Finally, the majority's treatment of *Heller*'s common-use test is unclear and perplexing. At various points, the majority seems to acknowledge that the Second Amendment protects weapons in common use for lawful purposes. *See* Majority Op. at 20 (explaining that the Second Amendment protects "[a]rms typically used by average citizens for self-defense"); *id.* at 23 (describing protected weapons as those "typically used for self- defense"). And at one point, the majority seems to require Appellants to prove that *each individual banned firearm* is in common use even though *Heller* conducted this inquiry at a class-wide level. At other times, however, the majority seems unenthusiastic about this inquiry, lambasting it as an "ill-conceived popularity test" that leads to "absurd consequences." And when it comes to AR-15s, the majority refuses to consider their common usage at all, choosing instead to replace Americans' opinions of their utility with its own.

This flip-flopping is especially strange in light of this Court's parallel holding in *United States v. Price*, which also puts the common-use test at *Bruen*'s first step. While this case's majority describes the common-use inquiry as ill-conceived and absurd, the *Price* majority (composed of many of the same judges) describes it as "an inquiry that courts are equipped to apply consistently." *Price*, slip op. And it articulates a common-use framework broadly similar to the one I developed above. It is odd that the same Court would malign an inquiry in one case that it praises in a different case issued on the same day. This inconsistency is sure to perplex district courts and litigants in future cases.

In the end, the majority's plain-text inquiry is anything but that. It has no basis in the text of the Second Amendment. It has zero support in the Amendment's historical background. And it misconstrues the Supreme Court's binding precedent already interpreting these two sources. For a decision purporting to faithfully apply *Heller* and *Bruen*, today's majority departs from their commands.

B. Even under the majority's concocted test, semiautomatic rifles would be protected by the Second Amendment, because they are useful and appropriate for self-defense and are neither "military weapons" nor more useful for criminal activity than handguns.

Even if the majority's novel framework were correct, however, Maryland's ban would still be unconstitutional. If you're going to manufacture a test that turns on a weapon's functionality and utility, you must look at actual evidence of its functions and uses, rather than speculate about both. And the facts show that semiautomatic rifles like the AR-15 are useful and appropriate for self-defense. They are not "military-style" weapons; they are civilian versions with meaningfully different functionalities. Not to mention, they are used far less for criminal ends than other protected weapons like handguns.

Before I begin, it's important to establish the basics of individual self-defense. Lawful self-defense is not and has never been a one-size-fits-all endeavor. The goal in self-defense situations is stopping attackers in their tracks. This means that a defender needs a weapon accurate enough to strike the attacker, powerful enough to knock him down, and maneuverable enough to get on target. Unfortunately, tradeoffs exist between these variables. A more powerful weapon can generate greater recoil and muzzle climb, making each shot less accurate. Maximizing accuracy, meanwhile, can reduce stopping power. And a weapon's size and style often affect not only maneuverability but also accuracy and stopping power. Thus, there is no magic bullet when it comes to self-defense. Anyone who desires a weapon to defend himself must weigh these variables and judge which weapon best maximizes them for his particular circumstances.

As *Heller* observed, many Americans believe that handguns strike this balance best. Indeed, handguns offer many features that are conducive to individual self-defense in the home. Handguns are easier to store and more readily accessible in case of emergency. They cannot easily be knocked aside or taken by a would-be attacker. They require less strength to carry than your typical rifle. And they can be wielded with one hand in case of injury or to call the police. It is consequently no surprise that "handguns are the most popular weapon chosen by Americans for self-defense in the home."

But there are drawbacks to handguns, too, ones that meaningfully curtail their utility for self-defense in the home. The most important of these is their

inferior stopping power. A bullet's wounding power is based mainly on the kinetic energy it generates when it strikes a target, which in turn depends on the combination of the bullet's mass and its exit velocity (½ x M x V^2, to be precise). E. Gregory Wallace, *"Assault Weapon" Lethality*, 88 Tenn. L. Rev. 1, 44 (2020). As handguns generally have significantly lower exit velocity, the average handgun is less likely to halt an aggressor than a rifle.

Inferior stopping power isn't the only problem. Handguns are also less accurate than most rifles. Unlike rifles, handguns lack a shoulder stock, so it is harder to hold them steady and aim them accurately. This also means that they absorb less recoil from the propulsion of the bullet and generate more kick and muzzle climb. *Id.* The net combination of these features is that handguns, though compact and easily maneuvered, are less accurate than rifles.

Given these limitations, many Americans choose other weapons to protect themselves and their homes against unlawful aggressors. To them, the AR-15 strikes a superior balance of force and accuracy. For one, the AR-15 is more powerful than a handgun; though it typically uses a smaller bullet than many handguns, it generates greater exit velocity and thus imparts significantly more force upon striking its target. Yet it is simultaneously more accurate than a handgun, thanks to features like a shoulder stock for absorbing recoil. At the same time, the AR-15 can be more accurate than many other rifles, too, since it shoots a smaller bullet and generates less recoil. Many Americans therefore believe that the AR-15 thus strikes an optimal balance between stopping power and accuracy, making it, for them, a superior instrument of lawful self-defense.[69]

The AR-15's perceived superiority is aided by many features that make it wieldable for people of all ages and sizes. The AR's pistol grip, for example, controls recoil and enhances accuracy. David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381, 396 (1994). Likewise, the telescoping stock allows users to adjust the weapon's length based on their size and enhances maneuverability in tight spaces. Boone Declaration, *supra*, at J.A. 2182. The flash suppressor, meanwhile, prevents blindness in low-light conditions (such as a nighttime home invasion) and protects the barrel from dirt and other obstructions. And the barrel shroud guards the shooter's hand from the hot barrel and protects the barrel from damage. E. Gregory Wallace,

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[69] The majority, relying on *Kolbe*, claims that the AR-15's increased stopping power risks over-penetration and threatens innocent bystanders. In reality, the opposite is true. Handgun rounds are more likely to over-penetrate structures like walls than an AR-15's 5.56mm rounds because the latter more often fragment or lose stability as they pass through structures. And because handguns are less accurate than AR-15s, especially at longer range, they pose a greater threat of stray fire to innocent bystanders. For these reasons, law enforcement has long found the AR-15 to be an effective weapon for urban building raids and hostage situations.

"Assault Weapon" Myths, 43 S. Ill. U. L.J. 193, 231 (2018). This combination of features makes the AR-15, for many, a useful tool for self-defense that is in many ways superior to a typical handgun.[70]

Thus, the mere fact that the AR-15 lacks some advantages of the handgun does not make it unsuitable for self-defense. The majority seems to think that *Heller* created a one- size-fits-all list of factors for determining whether a gun is proportional and appropriate for self-defense. But the Court did no such thing. Rather, it simply identified the reasons why many Americans choose handguns for self-defense while leaving open the possibility that many *other* Americans choose different weapons for this purpose. And the evidence shows that the AR-15 is abundantly useful and appropriate for individual self-defense.

The majority's treatment of the AR-15's utility for lawful self-defense is bad enough. Yet just as bad is the majority's claim that this weapon is "better suited" for military and criminal purposes. Rather than engaging with the actual facts, the majority trades in tropes and hyperbole to portray the AR-15 as a menacing weapon with no other utility than the slaughtering of enemy combatants and innocents. Not only is this picture untrue, but it also demonizes the millions of Americans who lawfully keep these weapons to defend themselves and their communities.[71]

The majority begins by detailing the AR-15's military origins. But this is nothing unique to the AR-15; *most* popular civilian firearms were first designed for military use. Wallace, *"Assault Weapon" Myths*, *supra*, at 200; Gary Kleck, *Point Blank: Guns and Violence in America* 70 (1991) ("Most firearms, no matter what their current uses, derive directly or indirectly from firearms originally designed for the military."). The Glock 17 — the most popular handgun in the world — was designed for the Austrian military and police. The Remington Model 30 bolt-action sporting rifle is a derivative of the M1917 Enfield rifle deployed by American troops in the First World War. The Winchester Model 1873, which was popular with cowboys, soldiers, and law

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[70] The majority claims that the large-capacity magazines compatible with the AR- 15 are unnecessary for self-defense because homeowners typically fire a low volume of shots to incapacitate intruders. Majority Op. at 37. But this implies that homeowners are not entitled to prepare for the worst just in case they need more bullets than are normally necessary. The majority's complaint also "applies to all semiautomatic weapons, including constitutionally-protected handguns, [since] any firearm that can hold a magazine can theoretically hold one of any size." *Kolbe*, 849 F.3d at 158 (Traxler, J., dissenting).

[71] What must the majority think of the millions of Americans who own these weapons? Either they must be fools, completely ignorant of what is required to defend themselves and their homes, or they are secret mass murderers. Or perhaps there's a third option. Maybe, just maybe, these law-abiding citizens understand something that the majority doesn't.

enforcement alike because of its reliability and accuracy, evolved from repeating rifles first used in the Civil War. And the Browning 1911, today widely in civilian use, was first designed to provide greater stopping power for members of the United States military. Far from inhabiting separate spheres, civilian and military uses of particular firearms often go hand in hand.

This fact should surprise no one. Firearms are *supposed* to be effective — that is why civilians use them for self-defense. The very functions that make a weapon useful for military purposes—lethality, accuracy, durability, and maneuverability, to name a few— are functions that make a weapon useful for lawful self-defense, too. So in choosing a firearm for that purpose, civilians naturally gravitate toward weapons that have already proved capable of repelling attackers.

Moreover, the majority's argument fails for the simple fact that *the AR-15 is not a military weapon*. The defining feature of a military rifle is its "selective-fire" capability, which allows the user to toggle between semiautomatic, burst, and fully automatic modes of fire. Weapons like the M-16 and the M-4, for instance, are selective-fire rifles. But the AR-15 is not a selective-fire rifle. Rather, it can only fire semiautomatically, which is why the Supreme Court once described it as "the *civilian version* of the military's M-16 rifle." *Staples*, 511 U.S. at 603 (emphasis added). The ability to fire in automatic or burst mode is thus the defining feature of a military rifle, and this is the feature that the AR-15 lacks.[73]

The majority dismisses this distinction as irrelevant because it believes that there are supposedly few, if any, tactical advantages to having a selective-fire rifle. Its primary evidence? A *single tweet* from a former Navy Seal, who stated that firing in fully automatic mode is "not always necessary." But if the majority is correct, then why is there not one military in the world that uses purely semiautomatic rifles? And why does the National Firearms Act heavily regulate automatic weapons, but not semiautomatic rifles? The obvious answer is that there *are* significant tactical advantages to having a weapon that can shoot in automatic mode, even if these features are not deployed regularly. The very same U.S. Army Field Manual cited by the majority later explains that "[i]n some combat situations, the use of automatic or burst fire can improve survivability and enhance mission accomplishment." U.S. Army FM 3-22.9, at 7-13 (Aug. 12, 2008). These situations include clearing buildings, launching final assaults, engaging in close-quarters combat, gaining initial firing superiority, laying down suppressive fire, and warding off surprise enemy

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[73] The majority notes that the AR-15's rate of fire can be increased with devices like bump stocks, trigger cranks, and binary triggers. But the solution to this problem is to regulate the modifications, not the weapons themselves.

attacks. Only selective-fire rifles can perform these important functions. It is therefore no surprise that the military has shunned the AR-15 for selective-fire rifles like the M-16 and M-4.[74]

The majority then touts the AR-15's criminal uses, portraying it as a destructive device which is only useful for slaughtering innocents and police officers. Not only are these claims exaggerated, but they also can and have been made about handguns. Yet when faced with these same arguments, the Court in *Heller* concluded that public-safety concerns cannot justify disarming millions of law-abiding citizens of the handguns they commonly own for lawful purposes. The millions of Americans who similarly own semiautomatic rifles are entitled to the same treatment.

If proportional use in crime is the correct metric, then handguns pose a greater threat to public safety than semiautomatic rifles. Compared to handguns, rifles of all kinds are used in far fewer crimes. For example, the FBI estimates that there were about 152,969 homicides committed between 2013 and 2022. Of these, approximately 3,560 (just over 2%) were committed with rifles (of any kind), while roughly 67,431 (about 44%) were committed with handguns. More broadly, a 2018 study suggests that "assault weapons" account for only 2–9% of gun crimes in general. And a 2016 survey by the Bureau of Justice Statistics found that only 1.5% of state and federal prisoners reported possessing a rifle during the offense for which they were incarcerated, and only 0.8% reported actually showing, pointing, or discharging it. At the macro level, therefore, semiautomatic rifles seem to be used in only a small proportion of crimes compared to handguns.

Perhaps because it recognizes these overall trends, the majority focuses instead on statistically narrower categories of criminal activity. First, the majority claims that assault rifles are "uniquely dangerous to law enforcement." Yet once again, the majority overstates the facts and elides nuance. It is true that the banned semiautomatic rifles have a higher firepower that allows perpetrators to engage officers at a long distance and potentially penetrate body armor. But this is true of basically *all* rifles, not simply the banned ones. Moreover, in claiming that "assault weapons" are used to kill between 13% to 20% of all officers killed in the line of duty, the majority combines two studies conducted over different time periods. One study, conducted over *twenty years ago*, found that "assault weapons" were used in at least 20% of officer killings. The other study found that, between 2009 and 2013, "assault weapons" were used in only 13.2% of police murders. But

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[74] The irony of the majority's position is that the United States military is now *phasing out* the M-16 and M-4 rifles for some infantry units because their smaller rounds make them less lethal against improved body armor technology.

whichever number is more accurate, the majority never mentions that the murder of police officers is statistically rare. For example, the second study found that 219 firearms were used to kill police officers between 2009 and 2013. At a rate of 13%, this means that only around 29 of those 219 weapons were "assault weapons." I do not want to be misunderstood. Any death of our first responders is tragic. But our natural outrage over such deaths should not cause us to overlook actual facts. Twenty-nine is an extremely small number of murders when compared to the overall number of homicides or the overall number of assault rifles owned in America.[75]

Second, the majority invokes the use of AR-15s and similar rifles in several recent mass public shootings.[76] Like shootings of police officers, mass public shootings are terribly tragic events, but they are also statistically far rarer than other shootings. The Violence Project estimates that between 1966 and 2023, there have been 193 mass public shootings, which have resulted in 1,391 deaths. The Violence Project, *supra*. To put that in perspective, mass public shootings accounted for fewer than 1% of all firearm-related homicides in the United States over this period. Plus, the majority glosses over the utility of

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[75] For a more updated count, the FBI estimates that sixty law-enforcement officers were feloniously killed in the line of duty in 2022. Of those sixty, forty-nine were killed with firearms. *Id.* at 3. And of those forty-nine, only six were confirmed to have been killed with rifles of any kind.

[76] When discussing this topic, it's important use the right terminology. Scholars who study this area typically distinguish between "mass shootings" and "mass public shootings." The Congressional Research Service defines a "mass shooting" as "a multiple homicide incident in which four or more victims are murdered with firearms — not including the offender(s) — within one event, and in one or more locations in close geographical proximity." William J. Crouse & Daniel J. Richardson, *Mass Murder with Firearms: Incidents and Victims, 1999-2013*, at 10 (2015) . . . . It meanwhile defines a "public mass shooting" as "a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s) — within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity (e.g., a workplace, school, restaurant, or other public settings), and the murders are not attributable to any other underlying criminal activity or commonplace circumstance (armed robbery, criminal competition, insurance fraud, argument, or romantic triangle)." *Id.*

These terminological differences matter for analyzing the data. Studies generally show that "assault weapons" (predominately rifles) are used in just over 25% of mass public shootings. *See* Crouse & Richardson, *supra*, at 16 (27.5%); *Key Findings*, The Violence Project (last visited June 4, 2024) . . . (28%). By contrast, studies typically show that assault weapons are used in a smaller proportion of mass shootings. *See* Crouse & Richardson, *supra*, at 29 (9.78%); Koper et al., *supra*, at 317 (estimating that assault weapons are used in somewhere between 10% and 36% of mass shootings but clarifying that the latter number is likely attenuated). So when the majority claims that AR-style rifles are used in 25% of "mass shootings," it presumably is referring to narrower category of mass public shootings, not the broader category of all mass shootings.

handguns for mass public shooters. If assault weapons are only used in 25% of mass public shootings, this means that other weapons like handguns are used in almost 75% of those shootings. And some studies indicate that the use of handguns in these situations can actually pose unique risks not associated with semiautomatic rifles.[78]

In no sense do I intend to minimize the value of the lives lost in these shootings. Far from it. But it is necessary to place the majority's claims in context. There is little basis for claiming that semiautomatic rifles are more useful for or more used in criminal activity than other weapons. The data shows the exact opposite: Handguns are by far a greater existential threat to the peace and safety of our communities. Yet rather than assessing these facts, the majority spends pages upon pages describing mass shootings in graphic detail. This is not judicial reasoning; it is fearmongering designed to invoke the reader's passions and mask lack of substance.

It is noteworthy that the majority's arguments against semiautomatic rifles are nothing new. In *Heller*, the District of Columbia argued that it prohibited handgun possession because these were "particularly dangerous types of weapons." It presented statistics showing that handguns "are disproportionately linked to violent and deadly crime," including murder, robbery, and assault, and that "[a] crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon." *Heller*, 554 U.S. 570 (internal quotation marks omitted). And it asserted that handguns are uniquely dangerous to law-enforcement officers, since they account for the vast majority of law-enforcement murders and "pose particular dangers" to officers performing everyday duties. *Id.* at 4, 51.

The dissenting Justices in *Heller*, *McDonald*, and *Bruen* echoed these same claims. In *Heller*, Justice Breyer argued that "[h]andguns are involved in a majority of firearm deaths and injuries in the United States," 554 U.S. at 697 (Breyer, J., dissenting), and that they "appear to be a very popular weapon among criminals," *id.* at 698. Later, in *McDonald*, both Justice Stevens and Justice Breyer extolled the unique dangers posed by handgun violence in urban environments and opposed incorporating the Second Amendment against the states. And in *Bruen*, Justice Breyer lamented rising mass shootings, noted

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[78] For example, a 2018 study of wounding patterns found that a victim's probability of death is *higher* in shootings involving a handgun than in shootings involving a rifle. Babak Sarani et al., *Wounding Patterns Based on Firearm Type in Civilian Public Mass Shootings in the United States*, 228 J. Am. Coll. Surgeons 228, 232 (2019) (basing this conclusion on the finding that handgun victims are four times more likely to have three or more bullet wounds than rifle victims, possibly because the greater kinetic energy from a rifle bullet is more likely to knock the victim down before they can be hit by a successive bullet).

the exceptional danger firearms pose to police officers, and described handguns as "the most popular weapon chosen by perpetrators of violent crimes."

Yet faced with these constant invocations of the unique dangers of handguns, the Supreme Court refused to cast aside the constitutional liberties of millions to prevent the unlawful actions of the few. In *McDonald*, for instance, the Court emphasized that the Second Amendment "is not the only constitutional right that has controversial public safety implications" and declined to withhold its protections from state citizens simply because "the right at issue has disputed public safety implications." 561 U.S. at 783. Similarly, in *Bruen*, the Court underscored that "[t]he constitutional right to bear arms in public for self- defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780).

Despite these repeated admonitions, today's majority chooses to balance away Second Amendment freedoms because it judges their value to be outweighed by their public safety implications. And make no mistake about it, the majority is engaging today in precisely the kind of interest balancing that *Heller*, *McDonald*, and *Bruen* rejected. The majority's new framework allows judges to decide just how important they think certain firearms are for self-defense and then to weigh this finding against the threat they believe those arms pose to the public at large. Indeed, the entire concept of "proportionality" is merely a license for unelected judges to usurp the public's role in determining whether a particular weapon is sufficiently *tailored* to the important *interest* of self-defense. Sound familiar? Whereas the Supreme Court has instructed that constitutional claims live or die based on the original scope of the Second Amendment, the majority places them at the feet of federal judges who are ill-suited to deciding what is "most" suitable and proportionate to defend one's person and one's home.

C. History and tradition do not support the banning of dangerous arms that are in common use for lawful purposes.

Finally, I turn to the majority's historical arguments. The majority claims to identify a historical tradition of prohibiting "excessively dangerous weapons," whether or not those weapons are in common use for lawful purposes. Majority Op. at 43. Yet the majority simply retells the same death-and-destruction story it told at the plain-text stage, waxing poetic about the dangers of gun violence and the blood of children. This is a far cry from *Bruen*'s careful consideration of our Nation's history and tradition.

Start with the majority's evidence (or lack thereof) from the Founding era. The majority does not identify any laws from this period limiting the possession of especially dangerous weapons. Nor does it mention the English and early American restrictions on the carry of "dangerous and unusual"

weapons. This is probably because these regulations cut *against* the majority's stated principle. The common-law offense codified by the Statute of Northampton only applied to weapons that were both dangerous *and unusual*, which is why commentators repeatedly explained that it did not prohibit the carry of "common" weapons. The fact that a weapon was especially harmful was necessary but not sufficient to limit its possession or carry.

The majority's only Founding-era evidence is several gunpowder regulations from the early Republic. Contrary to the majority's claims, these laws did not limit the quantity of gunpowder a person could possess, nor did they aim to mitigate "the accumulation of firepower disproportionate to the lawful purpose of individual self-defense." Majority Op. at 48–49. Rather, they just restricted the amount of powder a person could store *in any single location* and required excess powder to be kept in the public magazine. And their stated purpose was to prevent the outbreak of fires, not to prevent people from amassing enough firepower to commit acts of violence. For these reasons, the Court in *Heller rejected these exact laws* when offered to justify the District's handgun ban because they did "not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632. Historic gunpowder regulations therefore offer no support for a tradition of prohibiting the possession of especially dangerous, but commonly held, weapons.

The majority next invokes the many nineteenth-century restrictions on the possession and carry of deadly weapons like pistols and Bowie knives. Once again, the majority never considers why these laws were consistent with the Second Amendment. States certainly *enacted* these laws because they wanted to limit possession or carry of weapons commonly used by criminals. But to restate yet again, they were considered *constitutional* only insofar as they applied to weapons that were both dangerous *and unusual*. By contrast, courts repeatedly explained that these laws were unconstitutional insofar as they prohibited the keeping or carrying of "such arms as are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State." *Duke*, 42 Tex. at 458.

The majority tries to invoke several of these decisions to support its position, yet it selectively quotes them in a way that obscures their full reasoning. *Aymette* did not simply hold that "[t]he Legislature . . . ha[s] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens." Majority Op. at 55 (quoting *Aymette*, 21 Tenn. at 159). Rather, the full quotation reads: "The legislature . . . ha[s] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and *which are not usual in civilized warfare, and would not contribute to the common defence*." *Aymette*, 21 Tenn. at 159 (emphasis added). In other words, *Aymette* adopted the longstanding distinction between dangerous and unusual

weapons and common weapons, and it upheld Tennessee's statute after determining that the regulated weapons fell into the former category. *Id.* at 158 (describing the regulated weapons as "usually employed in private broils," "efficient only in the hands of the robber and the assassin," "useless in war," and incapable of being "employed advantageously in the common defence of the citizens").

The majority then correctly notes that the Texas Supreme Court in *Cockrum v. State* upheld a penalty enhancement for manslaughters committed with Bowie knives because such arms were "an exceeding[ly] destructive weapon" and "the most deadly of all weapons." But in that same opinion, the court clarified that, because it judged that the Bowie knife was "in common use," "[t]he right to carry a bowie-knife for lawful defense [was] secured" and the legislature could not penalize its carry so as to "deter the citizen from its lawful exercise." *Cockrum*, 24 Tex. at 402–403. The court then upheld the conviction only because the legislature had merely punished the use of a Bowie knife to kill someone and had not prohibited carrying Bowie knives altogether. Thus, neither *Aymette* nor *Cockrum* stand for the idea that the government may ban any weapon so long as it is exceedingly dangerous. Rather, both establish that weapons common for lawful purposes, even especially deadly ones, cannot be prohibited.

Finally, the majority relies on twentieth-century regulations on automatic and semiautomatic rifles. But as the majority rightly notes, this evidence is probative only if it is consistent with the tradition that came before it. The mere fact that semiautomatic and automatic rifles were regulated during this time cannot alone establish that Maryland's law is constitutional. We must judge the constitutionality of these bans in light of the longstanding tradition allowing the outlawing of dangerous and unusual weapons.

Some of these regulations may pass constitutional muster. *Heller* suggested that sawed-off shotguns and machine guns are unprotected by the Second Amendment because they are "commonly used by criminals," 554 U.S. at 623 (quoting Brief for United States at 18–21, *Miller*, 307 U.S. 174), *and* are "not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625; *see id.* at 627 (explaining that these weapons "are highly unusual in society at large"). So *Heller* indicates that laws like the National Firearms Act fit within the historical tradition of prohibiting dangerous and unusual weapons.

But there is no similar constitutional case to support restrictions on semiautomatic firearms. Relatively speaking, semiautomatic rifles are less useful for crime than short-barreled shotguns, automatic rifles, or even handguns. More importantly, they are commonly possessed by millions of law-abiding American citizens for many different lawful purposes. As a result, there is no basis for banning these kinds of weapons. The majority's evidence to the contrary is simply nonexistent.

..*

In *Heller*, the Supreme Court held that the Second Amendment prohibits the government from banning firearms that are commonly possessed today by law-abiding citizens for lawful purposes. 554 U.S. at 628–30. Soon after, the citizens of Maryland asked us to vindicate their right to own a type of firearms routinely chosen for individual self-defense and other lawful purposes. But rather than applying *Heller*'s clear mandate, we balked and created a "heretofore unknown test" based on stray dicta, taken out of context, from the Court's opinion. *Kolbe*, 849 F.3d at 155 (Traxler, J., dissenting) (internal quotation marks omitted). Then, adding insult to injury, we held that, even if they did have a right to own such weapons, that right was defeasible because of broader societal problems for which they were not responsible.

Eventually, the Supreme Court intervened and corrected course. *Bruen* reaffirmed that the Second Amendment does not license federal judges to balance away precious liberties for the sake of broader societal interests. And it reiterated that when it comes to "defining the character of the right," "suggesting the outer limits of the right," "or assessing the constitutionality of a particular regulation," courts must rely on text and history. 597 U.S. at 22.

Once again, Maryland citizens ask us to protect their right to keep and bear arms, secured to them by the Second Amendment. Yet once again, our Court rejects their claim, this time substituting one previously unknown test for another. Now, to trigger Second Amendment scrutiny at all, a litigant must first prove that the precise model of firearm he seeks to own (and only that model) is in common use for personal self-defense (and only personal self-defense). He then must convince federal judges that his preferred firearm is more useful for self-defense than it is for criminal or military purposes (whatever that means). But even if he somehow makes this showing, all the government has to do is gesture toward the weapon's dangerous capabilities and argue that the weapon is just too good at being a weapon. As soon as it does, our Court will bend his right like a willow branch to accommodate societal interests it deems more important.

This is not how constitutional rights are supposed to work. I, like the majority, revere the authority of the people to govern themselves. But in our system, the ultimate expression of "We the People" is the Constitution of the United States. And the act of enforcing it over contrary legislation implies no superiority of judicial over legislative power. Rather, as Hamilton once explained, "[i]t only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the fundamental laws." *The Federalist No. 78*, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). "This is of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

Our duty to enforce the Constitution does not evaporate when the right at issue has "controversial public safety implications." *McDonald*, 561 U.S. at 783. The Second Amendment was adopted to ensure that the people are equipped to protect themselves against both public and private violence. It is a weighty responsibility, undoubtedly, and one that other nations deem unworthy of entrusting to their citizens. Yet our system does so all the same. The Founders learned from experience that the people are most vulnerable to abuse when they lack the means to defend themselves, so they guaranteed that the people would always have adequate means to safeguard their liberties. Today, the majority disregards the Founders' wisdom and replaces it with its own. "But before popping the champagne on the [Fourth Circuit's] latest edict, maybe someone should wonder whether we purchase today's victory at the cost of tomorrow's freedom." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 257 (2009).

I respectfully dissent.

NOTES & QUESTIONS

1. Does the majority or dissent have the better argument? Why?

2. This decision illustrates how *Bruen's* history-and-tradition test can present unique challenges for judicial decision-making. Both the majority and dissenting opinions are thoughtful and historically well-researched, but they reach diametrically opposed conclusions about what that history means. How is this explained? Is the history-and-tradition test itself unworkable? Are the judges highlighting only history and tradition that supports their desired outcomes?

3. How does *Heller's* "in common use" test fit with *Bruen's* emphasis on historical tradition? Does it matter whether the challenged law is a regulation or complete ban? (Remember, there was no dispute about handguns being protected arms in *Bruen*, only whether New York's restrictive public carry regulation was historically supported.). If a firearm is commonly possessed by law-abiding citizens for lawful purposes, does the analysis end there when the challenged law operates as a complete ban on possession and use of that firearm? Or does a firearm being "in common use" at the time merely create a rebuttable presumption that the challenged ban is unconstitutional, shifting the burden to the government to show that the law is justified by historical analogues? How do the majority and dissents in *Bianchi* resolve these questions?

For an analysis of *Heller*'s common use test post-*Bruen,* see Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have*

Defied Heller in Arms-Ban Cases–Again, 41 Harv. J. L. & Pub. Pol. Per Curiam (Fall 2023). The abstract is a good summary of how some plaintiffs have, usually unsuccessfully, attempted to win "assault weapon" cases with purely doctrinal argument

This Article addresses a theory advanced by government litigants and their amici in current, post-Bruen Second Amendment challenges to arms bans. That theory seizes on a single sentence from the Supreme Court's 2022 decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022), which is then used as a justification to set aside the holding of the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). As this Article shows, such an approach to upholding modern-day arms bans is meritless; nothing in *Bruen* permits lower courts to ignore, or in any way deviate from, *Heller*'s "in common use" test in arms-ban cases.

Since the U.S. Supreme Court decided *Bruen*, some litigants and lower courts have attempted to set up an artificial conflict between that case and Heller. Their theory is that *Bruen*'s mandate to seek a historical tradition to delimit the bounds of the Second Amendment's text controls in all Second Amendment cases, effectively undoing *Heller*'s "in common use" test in cases involving bans on arms. This Article explains why that theory is wrong, why it is untenable to read *Bruen* and Heller as conflicting, and why *Heller*'s "in common use" test controls in arms-ban cases, even after *Bruen*. In short, *Heller*'s "in common use" test is a product of the very text-and-historical-tradition methodology *Bruen* describes in detail. *Bruen* did not depart from or undermine Heller in any way but, in fact, reinforced Heller with every reference to it. So, when a case pending before a lower court involves the very issue at stake in *Heller*—a ban on a class of firearms—it is the constitutional test that the Supreme Court established in Heller that continues to control.

This Article discusses the language from *Bruen* frequently used in these attempts to undermine *Heller*—namely, *Bruen*'s explanation of how analogical reasoning works in cases presenting "unprecedented societal concerns or dramatic technological changes." Drawing on the key conceptual distinction between an explanation of a methodology and a rule of decision discerned by executing that methodology, this Article shows how *Bruen* described the methodology to be applied in Second Amendment cases not involving the constitutionality of bans on arms in common use or discretionary licensing regimes, which *Heller* and *Bruen*, respectively, settled.

In explaining and exemplifying a methodology for all Second Amendment cases to come, *Bruen* bolstered *Heller*'s approach and constitutional test. *Bruen* not only described the methodology to be applied, but also served as its own example of how the text-and-historical-tradition methodology is to be applied by the lower courts—i.e., *Bruen* showed by practice how to do what it and *Heller* preached.

Finally, this Article briefly surveys the landscape of Second Amendment litigation over arms bans, explains how some lower courts have been led astray by the discussed theory, and urges a return by those wayward courts to faithful constitutional interpretation in arms-ban cases.

4. How does *Heller*'s recognition of a historical tradition of prohibiting "dangerous and unusual" weapons affect the constitutional analysis in cases involving "assault weapon" bans? Is "dangerous and unusual" the same as "unusually dangerous"? *See Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring in the judgment) (explaining that "this is a conjunctive test: [a] weapon may not be banned unless it is *both* dangerous and *unusual*.") (original emphasis). Can the government justify such bans by pointing to historical analogues establishing a tradition of banning commonly-owned firearms or other arms because of their exceptional dangerousness?

5. If there is a historical tradition banning weapons — even commonly owned arms — that are unusually dangerous, there remains the separate question of whether the "assault weapons" covered by modern bans are far more dangerous than other firearms. The exceptional lethality of such firearms is the centerpiece of the government defendants' arguments supporting the bans: AR-style rifles are far more dangerous than other modern firearms and ill-suited for lawful activities like self-defense, therefore bans on such firearms are both justified and constitutional. This argument has strong emotional appeal. But is it accurate factually? Are AR-style rifles *in fact* far more dangerous than other firearms, especially other rifles and shotguns? Is the AR-15 too dangerous for civilians to possess?

For arguments disputing such claims, see Brief of *Amicus Curiae* The International Law Enforcement Educators and Trainers Ass'n, et al., in Support of Plaintiffs-Appellants, Delaware State Sportsmen's Assoc., Inc., et al., v. Delaware Department of Safety and Homeland Security, et al., (Nos. 23-1633, 23-1634, 23-1641), 3rd Cir. (July 10, 2023); David Kopel & E. Gregory Wallace, *AR Rifle Ammunition Is Less Powerful Than Most Other Rifle Ammunition,* The Volokh Conspiracy (Apr. 11, 2023); David Kopel & E. Gregory Wallace, *How Powerful Are AR Rifles?,* The Volokh Conspiracy (Feb. 27, 2023). Did the majority in *Bianchi* misstate or ignore these facts? Did the dissent?

How did the majority in *Bianchi* claim that AR-15s are not suitable for self-defense, when both military and law enforcement use AR-style rifles for close-quarters engagements? If such rifles are the weapon-of-choice for military and law enforcement, why wouldn't they be useful for civilian home defense?

6. For a complete survey of state, territorial, and colonial restrictions on particular types of arms before 1900, see David B. Kopel & Joseph G. S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 23 (2024). For further analysis of "assault weapon" bans and *Bruen*'s history and tradition inquiry, see C.D. Michel & Konstadinos Moros, *Restrictions "Our*

Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans, 24 Wyo. L. Rev. 89 (2024):

> While prior generations of Americans undoubtedly believed self-defense, hunting, and sport were all important components of the right to keep and bear arms, an overriding purpose frequently dominated their discussion of that right: preventing and responding to tyranny.
>
> Today, the idea that the Second Amendment exists in part as a "doomsday provision" to repel a foreign invader or a domestic tyrant is treated as a joke. From the President to legal scholars, many deride it as an insurrectionary notion without any true historical pedigree that was concocted by pro-gun activists in the last half-century.
>
> For its part, the Supreme Court has only tiptoed around this question. In *Heller*, it did acknowledge that early generations of Americans "understood across the political spectrum that the [Second Amendment] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." But in the years since *Heller*, the Court has been silent on this history, even as *Bruen* corrected the errant circuit courts by returning the focus to historical tradition.
>
> . . .This article aims to bring renewed attention to the overwhelming amount of founding-era and 19th century commentary that emphasizes the importance of the Second Amendment right as a tool to resist tyranny. In light of this clear history, so-called "assault weapon" bans and similar laws are incompatible with our historical tradition and should be struck down.

7. One argument justifying "assault weapon" bans is that they easily can be modified to fire as rapidly as a fully-automatic weapon (machine gun) by using bump stocks, trigger cranks forced-reset triggers, or binary triggers. *See* 2024 Supp. Chs. 8.E.2.b, 15.D.3. The "Glock Switch" is a type of "auto-sear," that is, a "relatively simple, but illegal, device that allows a conventional semi-automatic Glock pistol to function as a fully automatic firearm. The switch is classified as a machine gun under federal law." Bureau of Alcohol, Tobacco, Firearms and Explosives, *Internet Arms Trafficking* (2020). The switches are often manufactured in China, or with 3D printing, and illegal sold in the U.S. Glock switches have surged in popularity among criminals the last few years. The City of Chicago, possibly with support from the White House, has sued Glock, arguing that Glock pistols were intentionally designed without the internal hardware to prevent insertion of an auto sear. Glock replies, inter alia, that the Glock Gen4 (introduced 2010) and Gen5 (2017) do have such devices. The Chicago suit was originally filed in U.S. District Court, but was voluntarily dismissed, and replaced with a suit under Illinois state law, filed in Cook County Circuit Court. *See* Complaint, *City of Chicago v. Glock*, No. 2024CH06875 (Cook County Cir. Ct., July 22, 2024). For White House participation, see Rep. James Comer, Chair, U.S. House Committee on

Oversight, letter to Stefanie Feldman, Director, White House Office on Gun Violence Prevention, June 14, 2024.

8. What effect do laws limiting magazine capacity to 10 rounds or less have on defensive gun uses? The Heritage Foundation says, "bans on the civilian possession of standard-capacity magazines threaten to have devastating effects on law-abiding gun owners who find themselves outnumbered, outgunned, or otherwise at a disadvantage against criminal actors." Amy Swearer, *If You Can't Beat 'Em, Lie About 'Em: How Gun Control Advocates Twist Heritage's Defensive Gun Use Database in the "Larger-Capacity" Magazine Debate*, Heritage Found. (May 17, 2023). The report concludes that "[a]dvocates of magazine capacity limits overstate their potential public safety benefits and underestimate the myriad ways criminals can circumvent such limits."

9. Shortly after ratification of the Constitution, Congress passed the first national militia legislation, the Militia Act of 1792. (Ch. 5.F.1). That legislation invoked the federal militia power of Article 1 Section 8, and included detailed mandates of arms and accoutrements that citizens were to provide for themselves. The mandate applied to *every free able bodied* white male citizen. Each of whom was required to:

> provide himself with a good musket or firelock, *a sufficient bayonet* and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutered and provided, when called out to exercise or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

The Militia Act also gave militia arms special status. After citizens complied with the mandate to acquire their personal militia arms and accouterments, the entire kit became protected property, *"exempt from all suits, distresses, executions or sales, for debt or for the payment of taxes."*

Consider the implications of this legislation on disputes over the constitutionality of modern restrictions on "military-style assault weapons" such as the AR-15. One of the characteristics used to identify these prohibited firearms is the capability to mount a bayonet. Note the tension between this modern legislation and the Militia Act of 1792. The bayonet-capable longarm prohibited by modern legislation was something that every free abled bodied white male citizen was mandated to acquire and keep. Are modern restrictions

on bayonet-capable long arms consistent with this history and tradition, per *Bruen*?

"Assault weapon" legislation virtually always includes the AR-15 style rifle on the list of prohibited firearms. Those guns are semiautomatic renditions of the select-fire military infantry rifles and are generally available to civilians (except where banned). Can you frame the argument that the AR-15 is the modern equivalent of the rifle the 1792 militia act granted protected status? Can you frame the argument that they are not? What about other types of box-fed semiautomatic rifles?

Finally, is the Militia Act of 1792 (applicable only to able bodied, white males, of a certain age) one of the tainted precedents that some argue should be disregarded or should have diminished precedential value under *Bruen?*

B. SERIAL NUMBERS

Section 922(k) prohibits possession of a firearm with a removed, obliterated, or altered serial number. The first post-*Bruen* circuit court case on serial numbers, *United States v. Price*, held that 18 U.S.C. § 922(g)(1) does not violate the Second Amendment on its face. This decision is more fractured than the Fourth Circuit's en banc decision in *Bianchi* (*supra* Part A), which was issued the same day.

United States v. Price

2024 WL 3665400 (4th Cir. Aug. 6, 2024) (en banc)

Judge Wynn wrote the majority opinion, in which Chief Judge Diaz, Judge Wilkinson, Judge King, Judge Thacker, Judge Harris, Judge Heytens, Judge Benjamin, and Judge Berner joined. Judge Niemeyer wrote an opinion concurring in the judgment. Judge Agee wrote an opinion concurring in the judgment. Judge Quattlebaum wrote an opinion concurring in the judgment, in which Judge Rushing joined. Judge Gregory wrote a dissenting opinion. Judge Richardson wrote a dissenting opinion.

WYNN, Circuit Judge:

Randy Price was charged in a two-count indictment with possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k), and possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). After the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), Price moved to dismiss the indictment in its entirety, arguing that both statutes were facially unconstitutional. The

district court denied his motion to dismiss as to the count charging him with a violation of § 922(g)(1) but granted it as to the count charging him with a violation of § 922(k), finding that the analysis required under *Bruen* rendered § 922(k) an impermissible restriction on the Second Amendment right to keep and bear arms. The Government appealed the dismissal.

This appeal thus presents us with a single question: Is § 922(k), which bans the possession of a firearm with a removed, obliterated, or altered serial number, facially unconstitutional in light of the framework *Bruen* requires us to apply to Second Amendment challenges? We conclude that the conduct regulated by § 922(k) does not fall within the scope of the right enshrined in the Second Amendment because a firearm with a removed, obliterated, or altered serial number is not a weapon in common use for lawful purposes. Accordingly, we reverse the dismissal of the § 922(k) count in Price's indictment and remand for further proceedings. . . .

III.

Section 922(k) provides, in relevant part, that "[i]t shall be unlawful for any person knowingly . . . to possess . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(k). Price argues that enforcement of this provision violates the Second Amendment. We disagree. To explain why, we begin by establishing the framework under which we analyze Second Amendment challenges. . . .

In *Bruen*, the Supreme Court rejected courts' post-*Heller*, two-step framework as involving "one step too many." *Bruen*, 597 U.S. at 19. Although the Court held that step one of that framework was "broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history," it rejected the means-end approach of step two. *Id.* Instead of applying means-end scrutiny to determine whether a challenged regulation passes constitutional muster, *Bruen* set forth a new framework under which courts must now analyze Second Amendment challenges: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. More recently, in *United States v. Rahimi*, the Supreme Court further clarified that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

Bruen thus establishes a new "two-step evaluation." *Id.* at 1928 (Jackson, J., concurring); *accord id.* at 1932–33 (Thomas, J., dissenting). First, we must ask whether the Second Amendment's plain text covers the conduct at issue. If

not, that ends the inquiry: the Second Amendment does not apply. But if it does, then, second, we must ask whether the Government has justified the regulation as consistent with the "principles that underpin" our nation's historical tradition of firearm regulation. *Rahimi*, 144 S. Ct. at 1898. Because we conclude below that Price's challenge falters at step one, we need only address what is required at that phase of the analysis.

Price argues that our inquiry at step one is extremely narrow: that, at least in this case, the only relevant question is whether the regulation criminalizes "keep[ing] and bear[ing]" any "Arms." But that argument does not accord with the text of the Second Amendment, nor with the analysis put forth in *Heller, Bruen*, and *Rahimi*. . . .

Bruen's first step requires us to evaluate whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 597 U.S. at 24. The *Bruen* Court asked three questions to resolve this inquiry: (1) whether the petitioners were "part of the people whom the Second Amendment protects"; (2) whether the weapons regulated by the challenged regulation were "in common use" for a lawful purpose, in that case, "self-defense"; and (3) whether the Second Amendment protected the petitioners' "proposed course of conduct." *Id.* at 31-32 (cleaned up).

The Court in *Bruen* focused on the third of these inquiries, and for good reason — there was no dispute in that case that the petitioners, "two ordinary, law-abiding, adult citizens," were among the people protected by the Second Amendment, and neither party disputed that the weapons regulated by the challenged regulation — handguns — were in common use for self-defense. *Id.* But by engaging in these inquiries at step one, *Bruen* made clear that the limitations on the scope of the Second Amendment right identified in *Heller* are inherent in the text of the amendment.

We thus reject Price's argument that we are barred from considering the historical limitations on the scope of the right at step one of the framework set forth in *Bruen.* A plain reading of *Heller* and *Bruen* leads us to the opposite conclusion: we can *only* properly apply step one of the *Bruen* framework by looking to the historical scope of the Second Amendment right. (majority opinion) (citing historical limitations on the "right secured by the Second Amendment," and noting that "[i]n *Heller*, our inquiry into the scope of the right began with 'constitutional text and history'" (first quoting *Heller*, 554 U.S. at 626, and then quoting *Bruen*, 597 U.S. at 22)).

IV.

Having explained the inquiry required by *Bruen*'s first step, we now turn to applying it in the present case. Because it is outcome determinative here, we focus our analysis on *Bruen*'s second step-one inquiry: whether the weapons regulated by § 922(k) are in common use for a lawful purpose.

We know from Supreme Court precedent that short-barreled shotguns and machineguns are not in common use for a lawful purpose but handguns—"the quintessential self-defense weapon"—are. *Heller*, 554 U.S. at 629. Still, the Supreme Court has not elucidated a precise test for determining whether a regulated arm is in common use for a lawful purpose. And we are the first circuit court to resolve the constitutionality of § 922(k) after *Bruen.*

In 2010 — before *Bruen* — the Third Circuit analyzed how *Miller* and *Heller* applied to firearms with obliterated serial numbers. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). In relevant part, the Third Circuit analyzed whether a firearm with an obliterated serial number is a dangerous and unusual weapon by comparing it to the short-barreled shotgun at issue in *Miller*. The court observed that "[t]he District Court could not identify, and [the defendant] does not assert, any lawful purpose served by obliterating a serial number on a firearm." *Id.* at 95. It further noted that there was "no compelling reason why a law-abiding citizen would prefer an unmarked firearm" because unmarked firearms have value "primarily for persons seeking to use them for illicit purposes." *Id.* We find these aspects of its opinion persuasive.

That said, the Third Circuit was not convinced that firearms with obliterated serial numbers were entirely analogous to the prototypical example of an unprotected weapon — the short-barreled shotgun — because, it reasoned, "[w]hile a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, *it is also dangerous and unusual because of its heightened capability to cause damage*." *Id.* (emphasis added). By contrast, while arms with obliterated serial numbers were dangerous because of their likelihood to be used illicitly, they were nonetheless "no more damaging than a marked firearm" when used. *Id.* For that reason, the Third Circuit court moved to the second step of the pre-*Bruen* analysis, assuming without deciding that § 922(k) placed some burden on an individual's Second Amendment right.

Price would have us reach the same impasse as the Third Circuit: that while arms with obliterated serial numbers are preferable to criminals because of their concealability, they are functionally no different from serialized arms. And Price argues that, to the extent any bearable arms are excepted from the Second Amendment's protection, such exception applies only to weapons that are exceptionally dangerous because of their function. So, in his view, any arguable exception to the Second Amendment is based solely on dangerousness of function and thus does not apply to the arms regulated by § 922(k).

We reject Price's view of the scope of the Second Amendment. To the extent the court in *Marzzarella* was unable to conclude that firearms with obliterated serial numbers were categorically unprotected, that was because it misread

Heller as directing courts to look only to a weapon's dangerousness, rather than also to whether it is commonly used for a lawful purpose.

We focus our analysis as to whether a weapon is protected on whether it is in common use for a lawful purpose, not solely on its functionality. Under this test, if we conclude that a weapon is not in common use for a lawful purpose, it can be permissibly excluded from the Second Amendment's protection based on the *tradition* of regulating "dangerous and unusual" arms. *Heller*, 554 U.S. at 627. In other words, while historical tradition regarding the regulation of dangerous weapons *supports* a limitation on the scope of the Second Amendment right, a weapon must be in common use for a lawful purpose to be protected by that right.

Thus, the Supreme Court has directed us to determine whether a weapon's common purpose is a lawful one — such as self-defense — or one that would be unlawful for ordinary citizens to engage in — such as concealing the commission of crimes, as with short-barreled shotguns, or waging war, as with machineguns. This is an inquiry that courts are equipped to apply consistently. For example, if available, courts can look to statistics regarding weapons commonly used in crimes versus weapons commonly chosen by law-abiding citizens for self-defense. And courts can also, as the Supreme Court did in *Heller*, apply common sense and consider whether there are any reasons a law-abiding citizen would want to use a particular weapon for a lawful purpose. *See Heller*, 554 U.S. at 629 ("There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police."). If no common-sense reasons exist for a law-abiding citizen to prefer a particular type of weapon for a lawful purpose like self-defense, and no evidence suggests that law-abiding citizens nonetheless commonly choose the weapon for lawful uses, then courts can conclude that the weapon is not in common use for lawful purposes.

Of course, a weapon's dangerousness is not unrelated to whether it is in common use for a lawful purpose. The powerful and unpredictable nature of a sawed-off shotgun contributes to why it would be an unlikely choice for a law-abiding citizen to use for self-defense, and the lethality of a machinegun has led the Supreme Court to conclude that such weapons are best suited for war, not self-defense. As Judge Wilkinson's good opinion in *Bianchi v. Brown* (*supra* Part A) makes clear, a weapon being extraordinarily dangerous is certainly a *relevant* factor when evaluating whether that weapon is protected by the Second Amendment. But we reject dangerousness of functionality as the sole *determinative* factor. Put another way, in our view, the Third Circuit in *Marzzarella* failed to reach a firm conclusion on whether firearms with

obliterated serial numbers are categorically excluded from the Second Amendment's scope because of its mistaken belief that it needed to conclude *both* that a firearm with an obliterated serial number was not in common lawful use *and* that it was functionally more dangerous than other weapons. While the second conclusion is relevant, only the first conclusion is required.

The question before us is thus whether firearms with obliterated serial numbers are in common use for lawful purposes. On that point, we agree with the Third Circuit that there is "no compelling reason why a law-abiding citizen" would use a firearm with an obliterated serial number and that such weapons would be preferable only to those seeking to use them for illicit activities. This is the same common-sense reasoning applied by the Supreme Court in *Heller.*

Further, there is no evidence before us that law-abiding citizens nonetheless choose these weapons for lawful purposes like self-defense. In fact, the opposite appears to be true—firearms with obliterated serial numbers are not common at all. A 2023 report from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") noted that less than three percent of the firearms submitted by law enforcement agencies to the ATF for tracing between 2017 and 2021 had an obliterated serial number. Of course, this statistic relates only to those firearms seized by law enforcement agencies. But if firearms with obliterated serial numbers are not even in common use for criminal purposes — the only scenario in which we can conceive a reason to prefer such weapons — then we think it fair to conclude that such arms are not in common use for lawful purposes. Thus, we conclude that § 922(k)'s regulation of such arms does not implicate the Second Amendment.

We find the hypothetical example offered by the district court to conclude otherwise to be unpersuasive. The district court evoked a hypothetical "law-abiding citizen" who legally purchases a firearm bearing a serial number and then removes the serial number with "no ill intent." *United States v. Price*, 635 F. Supp. 3d 455, 460 (S.D.W. Va. 2022). When this hypothetical law-abiding citizen dies, he leaves his gun collection to his similarly law-abiding daughter, who — aware that the firearm has an obliterated serial number — displays it in her father's memory. The district court concluded that both its hypothetical law-abiding citizen and the citizen's daughter would be in violation of § 922(k) despite engaging in conduct "squarely within the Second Amendment's plain text." *Id.* So, the court reasoned, § 922(k) prohibits conduct protected by the Second Amendment, failing the first step of the *Bruen* analysis.

In so concluding, the district court noted that "while the law-abiding citizen's possession of the firearm was originally legal, it became illegal only because the serial number was removed," thus infringing on the citizen's right to possess a firearm. *Id.* But the illegal conduct is not the possession of the firearm qua firearm: it is the possession of a firearm *with an obliterated serial number.* Firearms that are originally lawfully purchased are not somehow

imbued with constitutional coverage no matter what happens after they leave the dealer. Regardless of any originally lawful nature, a shotgun becomes contraband once its barrel is modified to be less than eighteen inches. The fact that such contraband was created using an originally lawful item is irrelevant.

Another hypothetical example further illustrates this point. Imagine a handgun — the admittedly quintessential self-defense weapon — has been modified such that the grip is made of illegally imported ivory. To accept Price's view of § 922(k) — that an otherwise constitutional restriction on the obliteration of a serial number becomes unconstitutional when applied to a firearm — we would also have to accept that the Government's ability to regulate this illegally imported ivory was voided once that ivory was attached to a firearm. We do not believe *Bruen* compels such a startling result. Just like an obliterated serial number, a grip made of illegally imported ivory bears no relationship to the lawful use of the weapon, would be unquestionably unlawful in other contexts, and produces a weapon that is not in common use for a lawful purpose. The Government does not lose its ability to regulate ivory, or a serial number, merely because it is affixed to a firearm.

The district court's hypothetical is also flawed for another reason: it hinges on the notion that the law-abiding citizen removed the serial number *with no ill intent.* The district court apparently did not consider *what* legitimate motivation it imagines the law-abiding citizen had for removing the serial number, but even if we could dream up such a peculiar scenario, our conclusion would not change. *Heller* and *Bruen* direct us to analyze not only whether a weapon might have some conceivable lawful use, but also whether such use is *common.* And here, because we cannot fathom any common-sense reason for a law-abiding citizen to want to use a firearm with an obliterated serial number for self-defense, and there is no evidence before us that they are nonetheless commonly lawfully used, we conclude that firearms with obliterated serial numbers are not in common use for a lawful purpose and they therefore fall outside the scope of the Second Amendment's protection.

V.

The Supreme Court has made clear that while the Second Amendment protects an individual right to keep and bear arms, certain arms fall outside the scope of that protection. To determine whether a regulated arm is protected by the Second Amendment, we must first ask whether it is in common use for a lawful purpose. Because we conclude that firearms with obliterated serial numbers are not, we conclude they fall outside of the scope of the Second Amendment's protection. Thus, § 922(k)'s regulation of such arms does not violate the Second Amendment. We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

NIEMEYER, Circuit Judge, concurring in the judgment: . . .

The focus of the provision — the element that distinguishes it from other § 922 offenses — is the possession of a firearm that has had its "serial number removed, obliterated, or altered." Otherwise, as far as § 922(k) is concerned, a person can keep and bear a firearm. As the majority opinion explains, "the illegal conduct is not the possession of the firearm qua firearm: it is the possession of a firearm *with an obliterated serial number*." I thus question whether the provision even implicates the Second Amendment. It does not prohibit generally the possession or carrying of firearms for self-defense. Rather, it effectively aims at preventing the removal and obliteration of serial numbers on firearms, the presence of which furthers important law enforcement interests. And as the majority opinion rightly observes, no "lawful purpose [can be] served by obliterating a serial number on a firearm." Such a statute is hardly different from a hypothetical one that might prohibit possessing a firearm without having in the home a means to store it safely, which too would not prohibit the possession or carrying of a firearm. As such, it is far from clear that the prohibited conduct even implicates the right to keep and bear arms.

Nonetheless, even subjecting § 922(k) to the analysis required by *Bruen* leads inevitably to the conclusion that the statute does not violate the Second Amendment. As the majority holds,

> [B]ecause we cannot fathom any common-sense reason for a law-abiding citizen to want to use a firearm with an obliterated serial number for self-defense, and there is no evidence before us that they are nonetheless commonly lawfully used, we conclude that firearms with obliterated serial numbers are not in common use for a lawful purpose and they therefore fall outside the scope of the Second Amendment's protection.... Thus, § 922(k)'s regulation of such arms does not violate the Second Amendment.

I agree with this holding. In reaching it, however, the majority employs an analysis that unnecessarily moves the historical component of the *Bruen* test into its first step, contrary to what *Bruen* instructs. . . .

The majority nonetheless loads its historical analysis — from which it determines that because firearms with obliterated serial numbers are "not in common use for a lawful purpose," they fall outside the scope of the Second Amendment right — into step one of *Bruen*, contrary to *Bruen*'s test, as reaffirmed in *Rahimi*. In rationalizing its position, the majority states that at step one, three questions must be answered, one of which is "whether the weapons regulated by the challenged regulation were 'in common use' for a lawful purpose." It then reasons that "[a] plain reading of *Heller* and *Bruen*

leads us to the ... conclusion [that] we can *only* properly apply step one of the *Bruen* framework by looking to the *historical scope* of the Second Amendment right." (latter emphasis added). Finally, the majority points to the historical tradition, already recognized by the Supreme Court, of governments' restricting weapons that are not "in common use for a lawful purpose." As it states, the "*historical tradition* regarding the regulation of dangerous weapons *supports* a limitation on the scope of the Second Amendment right," namely that "a weapon must be in common use for a lawful purpose to be protected by that right," a conclusion the majority reaches at step one. (first emphasis added).

In short, while the majority recognizes that historical tradition is the means by which to assess whether § 922(k) is constitutional, it treats that historical analysis as a component of the first step, despite *Bruen* and *Rahimi*'s clear statements that historical analysis falls in step two. In particular, after reviewing the historical tradition of government regulation of firearms and other weapons at some length, the *Bruen* Court concluded, "*Drawing from this historical tradition*, we explained [*in Heller*] that the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" This is the same conclusion reached by the majority, but unlike the Supreme Court's approach, the majority applied it as part of step one. In short, defining the limits on the right protected by the Second Amendment by looking to the historical tradition is the entire function of step two of the *Bruen* test, a step committed to the government to satisfy.

Respectfully, I conclude that the majority's shift of the historical tradition to step one is simply wrong.

Nonetheless, I believe that the majority reaches the right conclusion — that a "firearm with a removed, obliterated, or altered serial number is not a weapon in common use for lawful purposes" and thus falls outside "the scope of the right enshrined in the Second Amendment." As *Bruen* pointed out, *Heller* made clear that the Second Amendment protects "only the carrying of weapons that are those 'in common use at the time' as opposed to those that 'are highly unusual in society at large.'" 597 U.S. at 47 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). Based on the publicly available statistics, combined with common sense, the majority was right to conclude that firearms that have had their serial numbers obliterated are rare because the reason people tamper with firearm serial numbers is to make it harder for law enforcement officers to trace their use in criminal activity. Thus, I agree that the weapons regulated by § 922(k) are "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.

Accordingly, I concur in the judgment.

AGEE, Circuit Judge, concurring in the judgment:

I agree with the majority in that it reverses the district court's order dismissing Price's § 922(k) charge. However, I reach that result by a different path. In my view, Price's facial challenge to § 922(k) can be, and should be, resolved on a far simpler basis: because Price is a convicted violent felon who may not possess *any* firearm, § 922(k) is not unconstitutional as applied to him. As that fact alone dooms Price's facial challenge, I concur only in the judgment. . . .

QUATTLEBAUM, Circuit Judge, with whom Judge RUSHING joins, concurring in judgment:

When it comes to determining whether regulations violate the Second Amendment, *New York Rifle & Pistol Association v. Bruen* presents both a test and a puzzle. The test allocates burdens across two steps. If the Second Amendment's "plain text" covers the individual's conduct, the amendment "presumptively protects that conduct." 597 U.S. at 24. And if so, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. The puzzle is ascertaining where the amendment's limits—acknowledged in *Bruen* and before — fit into *Bruen*'s two steps.

The limit central to this appeal is common use. The sorts of weapons that the Second Amendment protects are those "in common use at the time." *Id.* at 21 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). That is, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. But, while this limit to the Second Amendment is clear, the puzzle we face is whether to consider it at *Bruen*'s first or second step.

This methodological point matters. *Bruen* seems to burden different parties on each of its two steps. *Bruen* does not specify who bears the burden on the plain text step but confirms that if the plain text does cover the conduct of the person challenging the law, the government "must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. This sequencing suggests the burden shifts, from the challenger on the first step to the government on the second. In some cases, the burden makes all the difference.

In this case, the majority analyzes common use at *Bruen*'s plain text step, while Judge Richardson in dissent and Judge Niemeyer in concurrence reason that common use falls under *Bruen*'s historical tradition step. Our sister

circuits have also splintered on the issue. In my view, common use comes into play on step two. Even so, I would reverse the district court's decision holding 18 U.S.C. § 922(k) unconstitutional because I believe the government has satisfied its burden of establishing that weapons with obliterated serial numbers are not " 'in common use' today for self-defense" or other lawful purposes. *Id.* at 32 (quoting *Heller*, 554 U.S. at 627).

I.

Before articulating or applying rules on common use, we must first solve *Bruen*'s puzzle. Does common use fit into *Bruen*'s first step as a matter of plain text or into *Bruen*'s second step as a matter of historical tradition? To answer this question, we must understand what "plain text" encompasses.

On one theory, "plain text" implies a limited inquiry on *Bruen*'s first step into definitional sources, saving historical sources for an ultimate determination on the second step. *Id.* at 24. Since common use limits the types of weapons protected, the critical word is "Arms." So, this reading would direct us to ascertain the semantic meaning of "Arms" on *Bruen*'s first step by referring to founding-era dictionaries defining "Arms." And if this reading is correct, our work at step one is easy. *Heller* already explained that eighteenth-century dictionaries defined "Arms" as "weapons of offence, or armour of defence" or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 554 U.S. at 581. Nothing in those definitions limits "Arms" to those in common use for lawful purposes. Thus, *Bruen*'s first step leaves no room for common use if plain text is defined only by dictionaries and other lexical sources that inform semantic meaning.

But *Bruen* is not so simple. *Bruen* alternatively could be read to suggest plain text is based on more than lexical sources. For starters, *Bruen* relied heavily on *Heller*, and *Heller* demonstrated that history informs the entire Second Amendment analysis, including the textual analysis. As *Bruen* recognized, history permeated every part of *Heller*,"[w]hether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation." *Bruen*, 597 U.S. at 22. When *Heller* addressed the scope of the Second Amendment, *Heller* did not rely only on lexicon. Instead, it privileged historical sources of all sorts. To be sure, the Court's interpretation of the word "Arms" leaned most heavily on eighteenth-century dictionaries. *See Heller*, 554 U.S. at 581. But when interpreting "keep and bear," the Court referred not only to those dictionaries but also to other founding-era sources, like treatises and state constitutions. *Id.* at 582-84. After stringing together these "textual elements," *Heller* declared that they codified a preexisting individual right to possess and carry weapons in case of confrontation, and the Court used history dating back to late seventeenth-century England to confirm its reading of the

words. *Id.* at 592-95. The Court also surveyed "analogous arms-bearing rights in state constitutions" and history from the drafting of the amendment through the end of the nineteenth century. *Id.* at 600-19. In short, *Heller*'s reliance on varied historical sources and *Bruen*'s reliance on *Heller* suggest that *Bruen* did not contemplate limiting its textual step to lexical sources.

Rather, history has some role to play on both of *Bruen*'s steps. On the first step, history "elucidates how contemporaries understood the text — for example, the meaning of the phrase 'bear Arms.'" *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (quoting *Heller*, 554 U.S. at 582–92, 128 S. Ct. 2783). On the second step, history "also plays the more complicated role of determining the scope of the pre-existing right that the people enshrined in our fundamental law." *Id.* Justice Barrett has called this latter use of history "original contours" history, in that "[i]t looks at historical gun regulations to identify the contours of the right." *Id.* Like Justice Barrett, I believe that *Bruen*'s first step saves room for more than founding-era dictionaries, allowing courts to refer to historical sources to interpret the Second Amendment's text, just as the Supreme Court did in *Heller.* As already discussed, lexicon would not limit "Arms" to weapons in common use, but going beyond lexical sources to interpret the Second Amendment's plain text opens the possibility of considering common use on *Bruen*'s first step.

Nevertheless, further digging unearths additional puzzle pieces that confirm common use falls under step two. In *Bruen*, the Supreme Court described common use as "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). "Drawing from this historical tradition," the Court explained, "the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Id.* at 47 (quoting *Heller*, 554 U.S. at 627) (internal citations omitted); *see also id.* at 28 ("Much like we use history to determine which modern 'arms' are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding."). As such, weapons in common use for lawful purposes and "dangerous and unusual weapons" are opposite sides of the same coin. Given that linkage, since the regulation of "dangerous and unusual weapons" is a step two question—and no one questions that—it follows that common use is too.

Also supporting this conclusion is *Heller*'s description of other historically grounded limitations of the Second Amendment. Just before discussing common use, *Heller* mentioned other historically grounded limiting principles. Without purporting to undertake "an exhaustive historical analysis ... of the full scope of the Second Amendment," *Heller* listed several examples of "presumptively lawful regulatory measures" including "longstanding

prohibitions on the possession of firearms by felons and the mentally ill." 554 U.S. at 626-27 & n.6. *Heller* characterized those longstanding regulations as "presumptively lawful," not conclusively lawful. *Id.* *Bruen*'s first step presumptively protects conduct covered by the Second Amendment's plain text. But, if the plain text does not cover conduct, the Second Amendment does not protect it, full stop. So, if felons and the mentally ill are not among "the people" as a matter of plain text, then "longstanding prohibitions on the possession of firearms by felons and the mentally ill" would be *conclusively* consistent with the Second Amendment. But *Heller* didn't say that. It said such limitations are only *presumptively* consistent with the Second Amendment. *Heller*, 554 U.S. at 626-27 & n.6. To generate a presumption of constitutionality, as opposed to a conclusion of constitutionality, historically justified limiting principles must be left to *Bruen*'s second step. And, since common use is also a historically justified limiting principle, it is also the stuff of step two.

To be fair, the conclusion that common use falls under *Bruen*'s second step must be squared with how *Bruen* applied the common-use principle to a New York licensing regime for the concealed carry of a handgun. *Bruen* discussed common use in the step one, plain text portion of the opinion. There, the Court stated that handguns are "weapons 'in common use' today for self-defense." *Id.* at 32 (quoting *Heller*, 554 U.S. at 627). Why? Candidly, I have no compelling explanation. One possibility might be, as the plaintiffs suggested at oral argument, that the Court referred to this concept just to clear the deck of an undisputed point at the outset regardless of whether it belonged in step one or step two. Under that reading, the reference to common use occurred before the Court did any real step one work. And since common use was not an issue with which the Court was grappling in *Bruen*, we should not place undue weight on the location of that discussion. Another possibility might be that, although the plain definition of "Arms" encompasses more than weapons in common use, weapons in common use are necessarily "Arms." By this understanding, the Court may have referred to common use simply to note that, if there was no question as to this narrower concept, there certainly could be no dispute that the conduct at issue was covered by the Second Amendment's broader plain text.

Whatever reason common use appeared in *Bruen*'s step one discussion, *Bruen* also discussed common use in its step two analysis. There, *Bruen* invoked the common-use concept as it scoured a historical record spanning medieval England to the early twentieth century. It referred to common use to explain why historical laws prohibiting the carrying of weapons then considered dangerous and unusual could not justify current laws restricting the carrying of the same weapons today when they are no longer dangerous and unusual. If *Bruen*'s discussion of common use at step one means that issue must be assessed there, why engage with the issue at step two?

In recent weeks, the Supreme Court has provided another piece to *Bruen*'s puzzle. In *United States v. Rahimi*, 144 S. Ct. 1889 (2024), the Court applied the *Bruen* test to hold that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 1903. The Court reasoned that such bans fit within our nation's historical tradition of "preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at 1896-97. Without pausing to discuss the Second Amendment's plain text, the *Rahimi* majority used historical tradition to "delineate the contours of the right," *id.* at 1897, and in articulating *Bruen*'s test, it referred only to the second step, *see id.* at 1896 ("In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation." (quoting *Bruen*, 597 U.S. at 24)); *see also id.* at 1898 ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."). Though they joined the majority, several Justices emphasized in separate writings that limits on the right to bear arms stem from historical tradition, not the amendment's broad text. *See id.* at 1912–13 (Kavanaugh, J., concurring) (endorsing the use of history "to determine exceptions to broadly worded constitutional rights"); *id.* at 1925 (Barrett, J., concurring) (asserting that the Court uses history to identify the "original contours" of the right to bear arms). Thus, although it did not take up the common use question, *Rahimi* signals, if not confirms, that many of the various principles that limit the Second Amendment's scope stem from historical tradition rather than the amendment's plain text.

In the end, perhaps not all the puzzle pieces are in place. But enough are. Common use—one of the limits on the Second Amendment that the Supreme Court has repeatedly recognized — flows from *Bruen*'s historical tradition second step.

II.

Since common use is a step two question, the government bears the burden of showing that 18 U.S.C. § 922(k) is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. To do so, the government can and did invoke the historical tradition of regulating dangerous and unusual weapons, which the Supreme Court has repeatedly recognized "fairly support[s]" regulations of weapons not commonly used for lawful purposes. *Id.* at 21 (quoting *Heller*, 554 U.S. at 627, 128 S.Ct. 2783); *see also Heller*, 554 U.S. at 625, 627. Since *Bruen* and *Heller* have already derived this limiting principle from historical tradition, the government does not need to replicate the Court's historical spadework. *See Rahimi*, 144 S.Ct. at 1898 ("The

law must comport with the *principles* underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.' " (emphasis added) (quoting *Bruen*, 597 U.S. at 30, 142 S.Ct. 2111)). Rather, it need only demonstrate that the historical principle—here, common use—supports § 922(k). Section 922(k) prohibits the possession of firearms with removed, obliterated or altered serial numbers. The critical question, then, is whether the government has carried its burden of establishing that those weapons are not commonly used for lawful purposes.

If common use hinges on hard data alone, the answer is likely no. The government offers no compelling statistics that show how frequently people use guns with obliterated serial numbers for lawful purposes like self-defense. Instead, the government relies on statistics indicating the low frequency with which such guns are used or suspected of being used in crimes and submitted for tracing to the Bureau of Alcohol, Tobacco and Firearms. If guns with obliterated serial numbers are rarely used for unlawful purposes, the government argues, they cannot be commonly used for lawful purposes. From an empirical standpoint, that seems like a stretch to me. I am hard-pressed to see how the data support any conclusions as to the use of such guns for lawful purposes. But, does common use turn on statistical proof?

To be sure, of the various limiting principles that the Court has distilled from historical tradition, common use could, in many cases, be proved or disproved with statistics on the frequency with which a weapon is used. And doing so grounds the decision in a more objective, predictable analytical framework.

But the Supreme Court has never said statistical proof is required. In fact, it has said little about how to assess common use. In describing its second step, *Bruen* says only that the government must demonstrate that the regulation is consistent with historical tradition. *See* 597 U.S. at 17 ("[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."); *id.* at 19 ("[T]he government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."); *id.* at 24 ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."). . .

Bruen did not resort to statistical evidence to establish that handguns are "in 'common use' for self-defense today." Instead, it quoted *Heller*'s observation that handguns are "the quintessential self-defense weapon." *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 629). For its part, *Heller* did not support its statement of empirical fact with data either. Rather, *Heller* posited:

> There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

554 U.S. at 629. Elsewhere, *Heller* wrote that handguns are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." *Id.* at 628-29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)). These comments seem at least partly rooted in what the Court deemed obvious rather than in data. Following the Supreme Court's lead, I see no reason courts cannot determine absent data whether guns with obliterated serial numbers are in common use for lawful purposes. To me, at least here, logic and common sense are appropriate to consider in assessing whether the government has met its burden.

Reliance on more malleable tools, I confess, leaves me a bit queasy. Straying from more concrete evidence might tempt judges to dress their preferred outcomes as flowing from logic or common sense. Both, like beauty, may naturally lie in the eye of the beholder. For two reasons, however, those concerns do not sway me here. One, as already discussed, *Heller* and *Bruen* show us that logic and common sense are appropriate to consider when determining common use. Two, statistics seem particularly inconclusive, and perhaps even unhelpful, in this particular case. To explain, it is unsurprising that the parties produced limited data. After all, can we expect folks voluntarily to disclose that they use outlawed guns? The answer seems to be no, making statistics — aside from those seized in criminal investigations— hard to harvest. So, in this case, I would look beyond statistics to evaluate common use.

Doing so, the government asserts that the predominant reason to possess a gun with an obliterated serial number, as opposed to one with an intact serial number, is to evade law enforcement. After all, as the parties agree, the presence or absence of a serial number has no effect on how a gun functions. "Because a firearm with a serial number is equally as effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm. The weapons would then have value primarily for persons seeking to use them for illicit purposes." *United States v. Marzzarella*, 614 F.3d 85, 95 (3d Cir. 2010) (affirming constitutionality § 922(k) during the interregnum of *Heller* and *Bruen*).

In response, Price posits that a person "might possess an unserialized firearm because they received it as a gift" or "for other "innocuous reasons."

The dissent adds that a gun owner might wish to avoid Big Brother's watchful eye, even if not to conceal criminal activity. These are fair points, I suppose. But those possibilities do not overcome the government's more persuasive logic. Crediting that logic, the Third Circuit before *Bruen* and a burgeoning brigade of district courts after *Bruen* have all proven unable to "conceive of a lawful purpose for which a person would prefer an unmarked firearm." . . . .

What's more, guns with obliterated serial numbers have long been regulated. Since 1938, federal law has made it unlawful for anyone "to transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been removed, obliterated or altered." Federal Firearms Act of 1938, Pub. L. No. 75-785, § 2(i). Then, in 1968, Congress began to require serial numbers on all guns manufactured in or imported to the United States. Gun Control Act of 1968, Pub. L. No. 90-351. Eventually, in 1990, Congress prohibited *possession* of guns with removed, obliterated, or altered serial numbers. Crime Control Act of 1990, Pub. L. No. 101-647, § 2202(b). Besides those federal laws, forty-one states have outlawed either obliterating serial numbers, possessing guns with an obliterated serial number or both. Considering federal and state governments have long cracked down on the trafficking of guns with obliterated serial numbers, it is hard to imagine that such guns are even commonly available to law-abiding Americans, let alone commonly used for lawful purposes.

Wrapping up, I conclude that the government has "justif[ied] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. It has demonstrated that guns with obliterated serial numbers are not " 'in common use' today for self-defense" or other lawful purposes. *Id.* at 24, 32, (quoting *Heller*, 554 U.S. at 627).

III.

For the reasons explained above, not those of the majority, I concur in the majority's conclusion that the district court's decision as to § 922(k) should be reversed and the case remanded.

GREGORY, Circuit Judge, dissenting:

Today, our Court holds that some weapons that are indisputably commonly owned for lawful purposes — handguns, rifles, and shotguns — are not covered under the Second Amendment. In coming to that conclusion, the majority: (1) labels firearms with removed, altered, or obliterated serial numbers as a type of weapon; (2) concludes that type of weapon is not in common use for a lawful purpose; and (3) excludes those weapons from Second Amendment protection

based solely on the Amendment's plain text under step one of the framework set forth in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). But nothing in the Second Amendment's text or in the Supreme Court's precedent supports the majority's approach to the analysis required at step one under *Bruen.*

Nevertheless, our Court has decided that 18 U.S.C. § 922(k) is constitutional because the majority cannot fathom why a person would own a firearm with an imperfect serial number for any non-criminal purpose. But "[a] constitutional guarantee subject to future judges' assessments of [what is fathomable] is no constitutional guarantee at all." *Bruen*, 597 U.S. at 22. For fathomability, like beauty, is often in the eye of the beholder. Regrettably, not only does today's decision depart from the analytical framework set forth in *Bruen*, it also could have a disparate impact that may not be apparent.

I.

The flaws in the majority's analysis begin with its focus on the prohibition identified in § 922(k) as opposed to the Second Amendment right. According to the majority, this case can be resolved at step one of the *Bruen* analysis because the only question before us is "whether firearms with obliterated serial numbers are in common use for lawful purposes." In framing the question in that way, the majority implies that firearms with removed, altered, or obliterated serial numbers are themselves a "type of weapon" based solely on that characteristic. From there, the majority purports to determine the constitutionality of § 922(k) by assessing whether this "new type of weapon" is protected by the Second Amendment. Against that backdrop, the majority points to the lack of evidence that such weapons are commonly owned and their potential use for criminality to conclude that the weapons are not in common use for lawful purposes.

Although the majority's approach is not identical to means-end scrutiny, it nonetheless improperly subjects the Second Amendment right to a type of case-by-case inquiry. Notably, the Supreme Court has rejected that approach and admonished the judiciary for deferring to the legislature's interest balancing in the context of the Second Amendment right. *Bruen*, 597 U.S. at 26 ("But while that judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate—it is not deference that the Constitution demands here"). According to the Supreme Court "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (emphasis in original). It follows that the judiciary cannot assess Second Amendment challenges with reference to its own view of how citizens should exercise their right to bear arms. This is particularly so when

determining whether the presumption of constitutional protection applies at step one.

Instead, the court's role at step one is limited to determining whether the Second Amendment generally protects the people, the type of weapon, and the proposed course of conduct that § 922(k) covers. That is evinced by the Supreme Court's limited undertaking during its own analysis in *Bruen.* At step one of its *Bruen* analysis, the Supreme Court determined that the Second Amendment generally protected carrying handguns publicly for self-defense. It reached that conclusion without referencing any particular handgun or considering any specific characteristics.

The Supreme Court's decision to conduct a general inquiry in that portion of the opinion suggests the following. First, the Second Amendment's protection presumptively applies at step one if the challenged statute covers people, arms, and conduct generally covered under the Constitution. Second, in determining whether a weapon is an "arm," courts must determine whether the type of weapon is commonly used for lawful purposes. *Id.* at 32-33. Third, "type of weapon" is understood in its ordinary sense — handguns, rifles, and shotguns, for example. A serial number is therefore not relevant to the *Bruen* step one analysis because it does not alter a firearm's type or common use for a lawful purpose. But the majority claims that it does. According to the majority, removing a serial number from a weapon or adding illegal contraband to it "produces a weapon that is not in common use for a lawful purpose." I disagree.

As a threshold matter, the *Bruen* step one inquiry into "types of weapons" is general and therefore does not concern a specific firearm. In other words, a court need not determine whether firearms with any unique characteristic—a particular grip, sight, or stock, for example — are in common use in order for the firearm to be presumptively protected under the Second Amendment. As long as the weapon is of a type in common use (a handgun or rifle, for example) the presumption applies.

Section 922(k) applies to *all* firearms with removed, altered, or obliterated serial numbers. Given its broad reach, it necessarily bans at least some handguns, rifles, and shotguns — types of firearms that we know are in common use for lawful purposes. That fact alone is sufficient for the Second Amendment's protection to presumptively apply at step one in this case. Indeed, the statute even bans firearms with serial numbers that were removed or altered simply by wear and tear, although they were perfectly serialized when purchased. In this way, the statute risks criminalizing the mere passage of time and general use.

Moreover, under the majority's reasoning, any change to a firearm, no matter how minor, would produce a new type of weapon. But the notion that any change to an object produces an entirely new object is simply false. Just as

docking a dog's tail does not alter the breed of dog, or trimming a tree does not produce a new genus of tree, the removal of a serial number does not transform a handgun or rifle into a new type of weapon under the *Bruen* step one analysis. Absent any enhancing accessories or functional modifications, a Glock 19 handgun, is a Glock 19 handgun, whether it is shiny or dull, red or green, serialized or not. Categorically banning firearms that are otherwise presumptively protected under the Second Amendment based solely on the condition of their serial number is as logical as concluding that a Schnauzer is not a canine simply because its tail is docked. The only way to make that conclusion tenable is to define canine with reference solely to the condition of a tail.

That is what our Court has chosen to do. In defining the type of weapon at issue as firearms with removed, altered, or obliterated serial numbers, the majority commits an error that dooms its common use analysis from the very start. That initial error is only compounded by the majority's later determination that firearms with removed, altered, or obliterated serial numbers are useful only for criminal purposes. According to the majority, "if firearms with obliterated serial numbers are not even in common use for criminal purposes — the only scenario in which we can conceive a reason to prefer such weapons — then we think it fair to conclude that such arms are not in common use for lawful purposes." Not so.

While we do not have data regarding lawful use of firearms without serial numbers, it is well known that certain types of firearms are in common use today. For example, handguns and rifles, two types of weapons banned under § 922(k), are undoubtedly in common use for self-defense, home defense, hunting, and other lawful purposes. Given that reality, whether specific handguns and rifles — those with removed, altered, or obliterated serial numbers — are in common use is of no moment at step one.

What's more, even weapons useful for criminal purposes are presumptively protected at step one if they are in common use for lawful purposes. Handguns, for example, are used in the majority of mass shootings, murders, and suicides in our nation each year. But, because handguns are the type of weapon many Americans choose for self-defense, they are presumptively protected under the Second Amendment. *See Bruen*, 597 U.S. at 47 (stating that handguns are "in fact, 'the quintessential self-defense weapon'" and "indisputably in 'common use' for self-defense today"). It follows then that any weapon of a type in common use for lawful purposes is presumptively protected at step one irrespective of whether the condition of its serial number makes it useful in committing crimes.

That being the case, there is no basis to support the conclusion that all firearms with removed, altered, or obliterated serial numbers are excluded from the right to keep and bear arms based on the Second Amendment's plain

text. However, given the error the majority committed at the outset—defining the type of weapon at issue based on § 922(k)'s prohibition — nothing could have saved its step one analysis. Unfortunately, our Court's determination that certain firearms in common use fall outside of the Constitution's protection may have a disparate impact on males of color.

II.

The unintended consequences of our Court's decision in this case add weight to the albatross of mass incarceration that burdens our nation. African Americans and Hispanic Americans make up most of the population in many of the communities designated as high crime areas. Although presence in a high crime area alone is insufficient to justify a *Terry* stop, presence combined with another factor, such as "nervous, evasive behavior" or flight (even if unprovoked), constitutes reasonable suspicion sufficient to render the stop constitutional. *Illinois v. Wardlow*, 528 U.S. 119, 124, 127 (2000).

Notably, for some, avoidance of police may evince an act of self-preservation. Indeed, as Justice Stevens put it:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal."

Id. at 132 (Stevens, J. concurring). That reality may explain why over 60% of the people stopped and searched in New York City each year from 2003 until 2023 were innocent, and why Black and Latinx people consistently represented over 50% and 25% of the people stopped, respectively.

What's more, if convicted of a firearms offense, minority male offenders are more likely to receive a sentence that includes a term of imprisonment as opposed to probation. According to a study conducted last year by the United States Sentencing Commission, Black and Hispanic males convicted of firearms offenses are 40.4% and 29.8%, respectively, less likely to receive a probationary sentence compared to White males. Additionally, when sentenced for firearms offenses, Black and Hispanic males receive terms of imprisonment that are 2% and 1.4%, respectively, longer than sentences given to White males.

One can deduce from the aforementioned statistics that Black and Hispanic males may be disproportionately impacted by § 922(k), as they are more likely to reside in communities designated as high crime areas and therefore have more frequent negative police encounters. And that potential disparate impact is made worse by U.S.S.G. § 2K2.1(b)(4)(B), which provides for a four-level

enhancement when sentencing a defendant convicted of a firearm offense other than § 922(k) if the firearm had an altered or obliterated serial number.

I use a hypothetical offender convicted of a firearm offense under 18 U.S.C. § 922(a)-(p) who has no more than one prior criminal conviction to illustrate the effect of the enhancement. The United States Sentencing Guidelines suggest a sentencing range of less than a year on the low end (10–16 months) for our hypothetical offender. However, if the firearm has an altered or obliterated serial number, the four-level enhancement increases the minimum recommended sentence to just under two years in prison (21-27 months). If the prior conviction was a felony, a sentence at the low end of the range would require the offender to serve a few months more than a year (15-21 months) at minimum. The minimum recommended term of imprisonment increases by a year (27-33 months) if the serial number on the firearm is not intact. If the offender's prior felony conviction was for a crime of violence or a controlled substance offense, the guidelines advise a minimum sentence of nearly three years (33-41 months) but increases to over four years (52-63 months) with the four-level enhancement. In each scenario, the offender's sentencing range increases simply because the firearm he possessed had an altered or obliterated serial number.

At bottom, mass incarceration is exacerbated by the way communities are policed, conduct is prosecuted, and convictions are punished. We may not know if those who most commonly possess firearms with removed, altered, or obliterated serial numbers are law-abiding citizens or not. But we do know that males of color bear the brunt of § 922 punishments. And our decision today will likely further that injustice. Respectfully, I must dissent.

RICHARDSON, Circuit Judge, dissenting:

This case should be an easy win for Randy Price. The Government wants to punish him for conduct that falls within the plain text of the Second Amendment. So the Government must demonstrate that its regulation — 18 U.S.C. § 922(k) — can be justified by our Nation's historical tradition of firearm regulation. *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) ("[W]hen the Government regulates arms bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to justify its regulation." (quotation omitted)). Rather than doing so, however, the Government offers blanket assertions backed by scant evidence and then cobbles together an amalgam of unrelated historical regulations that bear no relevant similarity to the law at issue. That should resolve it: The Government has not carried its burden, so the Government loses.

Rather than holding the Government to its burden, today's decision loosens the rules in the Government's favor. Adopting a limitation that appears nowhere in the Second Amendment's plain text, the majority requires Price to prove that unmarked firearms are in common use for lawful purposes. It then dismisses Price's challenge by speculating about why a law-abiding citizen would prefer an unmarked firearm and drawing illogical inferences. This is not how Second Amendment challenges are supposed to proceed. I thus respectfully dissent.

I. Section 922(k) regulates conduct that falls within the plain text of the Second Amendment. . . .

Price asserts a facial challenge so *Bruen*'s first step requires him to show that § 922(k) regulates conduct protected by the Second Amendment's plain text. Our inquiry therefore includes three discrete questions: (1) does § 922(k) apply to "the people"?; (2) is a firearm with an obliterated serial number an "Arm"?; and (3) is possession of such a firearm an act of "keep[ing]" or "bear[ing]" arms? *Bruen*, 597 U.S. at 31-32.

The answer to each inquiry is yes, so § 922(k) is presumptively invalid under the Second Amendment. The Government does not dispute that the statute applies to the "the people." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). Nor does it contest that possessing a firearm is conduct protected by the Second Amendment. What it contests is that a firearm with a removed, obliterated, or altered serial number is an "Arm" within the plain meaning of that term. But in *District of Columbia v. Heller*, the Supreme Court explained that the term "Arms" "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 582. A firearm, at risk of stating the obvious, is a bearable arm. *See Rahimi*, 144 S. Ct. at 1897-99 (implicitly determining that § 922(g)(8), which prohibits certain individuals from "possess[ing] . . . any firearm," falls within the plain text of the Amendment); *see also id.* at 1933 (Thomas, J., dissenting) ("It is undisputed that § 922(g)(8) targets conduct encompassed by the Second Amendment's plain text."). And whatever effect the lack of a serial number has on the statute's constitutionality, it does not transform a firearm into something else. Number or no number, a firearm is still a "weapon[ ] of offense" that can be worn for "defence . . . or use[d] in wrath to cast at or strike another." *Heller*, 554 U.S. at 581 (first quoting 1 Samuel Johnson, *Dictionary of the English Language* 106 (4th ed 1773); and then quoting 1 Timothy Cunningham, *A New and Complete Law Dictionary* (1771)). So § 922(k) regulates "Arm[s]" within the plain meaning of the Second Amendment.

The majority does not consider, let alone mention, any of these textual prerequisites. Instead, it contends that Price must prove at *Bruen*'s first step

that firearms with obliterated serial numbers are in common use for lawful purposes. In defense of this atextual notion, the majority observes that the Second Amendment's text includes, among other things, the phrase "the right of the people." It also notes that *Heller* found that the right of the people must be interpreted based on its historic scope. And when interpreting *United States v. Miller*, 307 U.S. 174 (1939) (Ch. 8.D.7), *Heller* stated that the "historical understanding of the scope of the right" did not extend to weapons "not typically possessed by law-abiding citizens for lawful purposes." From this, the majority concludes that weapons not in common use for lawful purposes fall outside the plain meaning of the words "right of the people," and therefore that any challenger must prove his weapon is in common use before we even proceed to *Bruen*'s second step.

I have already explained elsewhere why *Heller* requires the government to prove that a weapon is both dangerous *and* unusual at *Bruen*'s *second* step. *Bianchi*, *supra* Part A (Richardson, J., dissenting). Here, I will add that the majority, like the majority in *Bianchi v. Brown*, misunderstands the relationship between the Second Amendment's plain text and our Nation's historical tradition of firearm regulation. Put simply: *Both* of *Bruen*'s steps — text and historical tradition — are used to determine the original scope of the preexisting right. Sometimes, we know a person's conduct is unprotected because it isn't even covered by the text. Other times, an individual's conduct does fall within the plain text, but the government nonetheless proves "that its firearm regulation is part of the historical tradition *that delimits the outer bounds of the right to keep and bear arms.*" *Bruen*, 597 U.S. at 19 (emphasis added). In both instances, we have determined that the regulation is consistent with the original scope of the right.

With respect to dangerous and unusual weapons, *Bruen* explained that *Heller* derived this limit by "rel[ying] on the historical understanding of the Amendment to demark the limits on the exercise of that right." *Id.* at 21. So while dangerous and unusual weapons are not within the scope of the Second Amendment, it is because history and tradition show that the government can permissibly ban them, not because they fall outside the Amendment's plain text. The majority therefore errs in requiring Price to prove that his weapon is in common use at the plain-text stage.

The Supreme Court's recent decision in *United States v. Rahimi* shows how untenable the majority's position is. Whereas the majority holds that "the limitations on the Second Amendment right . . . are inherent in the meaning of 'the right of the people' and should be addressed at [*Bruen*'s] first step," the Court in *Rahimi* explicitly stated that the government bears the burden to justify its law any time it "regulates arms-bearing conduct," *Rahimi*, 144 S. Ct. at 1897. In other words, the burden flips to the government — and we transition to *Bruen*'s second step — as soon as the challenger establishes that

the regulation covers "arms-bearing conduct."[4] And notably, the Court didn't limit "arms-bearing conduct" to "conduct that historically fell within the traditional scope of the right to keep and bear arms." Instead, historical limitations on the scope of the right are relevant to establish whether the government is permitted to regulate the "arms-bearing conduct" in the manner it does — the step-two inquiry. *Id.*

This is supported by what the Court actually did in *Rahimi.* There, the Court concluded that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 1903. Put differently, the Court found that the right to keep and bear arms guaranteed by the Second Amendment has a limitation that applies, at least temporarily, when a dangerous person poses a credible threat of future violence. But although the Court was addressing a historical limitation outlining one facet of the "scope of the Second Amendment," *id.* (quoting *Bruen*, 597 U.S. at 31), it didn't couch that analysis in a step-one interpretation of the word "right" or "people." Instead, the Court upheld the law in question because "[o]ur tradition of firearm regulation allows the Government" to regulate in the way it had. *Id.* at 1902. And it did so by finding that the law at issue there had historical analogues for both its "why" and "how." *Id.* at 1903. Those are quintessential step-two questions. *Id.*

II. The Government has failed to show that § 922(k) is consistent with our Nation's historical tradition of firearm regulation.

Since § 922(k) regulates protected conduct, the Government must prove that it is consistent with our Nation's historical tradition of firearm regulation. This requires the Government to reason by analogy and establish that § 922(k) is "relevantly similar" to past laws in our regulatory tradition. *Bruen*, 597 U.S. at 29. The central considerations in this inquiry are "how" and "why" a law burdens the Second Amendment right. *Id.* In other words, whether past and present regulations "impose a comparable burden" and "whether that burden is comparably justified" are the central considerations for analogical reasoning. *Id.* Our ultimate objective is to determine "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898.

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[4] This explains why the Government's alternative step-one argument fails from the jump. The Government argues that even if § 922(k) covers protected conduct, it does not "infringe" the Second Amendment right because it allegedly imposes a marginal, at most, burden on a person's ability to defend himself. Several district courts have upheld § 922(k) on this basis. But as *Rahimi* shows, *Bruen*'s first step does not inquire into the magnitude of injury inflicted by a firearm regulation. Rather, the question is simply whether a law regulates arms-bearing conduct, which § 922(k) does.

The Government offers two buckets of historical analogues to justify § 922(k). First, the Government argues that § 922(k) is analogous to the historical tradition of regulating dangerous and unusual weapons. Second, the Government argues that § 922(k) is analogous to an assortment of inspection and marking statutes and commercial regulations stretching from the colonial to Antebellum periods. The Government claims that these regulations, considered individually or collectively, establish § 922(k)'s constitutionality.

As I explain below, I disagree. The tradition of regulating dangerous and unusual weapons distinguished between classes or types of weapons based on their functional characteristics. But serial numbers are ubiquitous features that have no bearing on a weapon's functionality. So firearms that lack them do not compose a separate class of arms that are dangerous and unusual. Additionally, the Government's analogy fails because the Government did not offer reliable evidence that firearms without a serial number are dangerous and unusual.

Nor do the Government's remaining analogues establish § 922(k)'s historical pedigree. The Government first offers several laws that required inspection and marking of firearms and gunpowder, but these laws targeted meaningfully distinct problems from those addressed by § 922(k). It then puts forth a series of restrictions on firearm and gunpowder trade, yet it offers no evidence that these laws burdened any member of the political community's right to keep or bear arms, and the historic justification for these laws is even more far afield from that of the previous ones. While relevantly similar analogues might exist, the Government has not furnished any here. So I conclude that the Government has not carried its burden of proof at *Bruen*'s second step. *See Bruen*, 597 U.S. at 25 n.6 ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties.").

A. The Government has not shown that § 922(k) is analogous to historic laws regulating dangerous and unusual weapons.

The Government's primary argument is that § 922(k) is analogous to historical laws regulating dangerous and unusual weapons. According to the Government, firearms with removed, obliterated, or altered serial numbers have no lawful utility and are only used by those intending to engage in unlawful activity. Nor are these arms typically possessed by law-abiding citizens for lawful purposes. So the Government asserts that § 922(k) bans arms that fall under the tradition of regulating dangerous and unusual weapons.

I agree that history and tradition demonstrate that the government may regulate or ban dangerous and unusual weapons. But § 922(k) is not relevantly analogous to this tradition. The tradition stands for the principle that the government can ban the possession or carry of classes of weapons with certain

shared functional characteristics if that class of weapons is dangerous and unusual. It does not stand for the principle that the government can ban the possession or carry of *all* weapons that have or don't have certain *non*functional characteristics, even if weapons with those characteristics are unusual. We can see this by working through the relevant precedent and history in reverse-chronological order.

Each time the Supreme Court has discussed or applied this tradition, it has considered whether the banned weapons as a "class" or "type" are dangerous and unusual. *See Miller*, 307 U.S. at 179 ("kind" of weapon); *Heller*, 554 U.S. at 628 ("class of arms"); *id.* at 622-23 ("type of weapon"); *Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring) ("the Second Amendment ... protects such weapons as a class"); *Bruen*, 597 U.S. at 47 ("class of firearms"). And in each case, the class of weapons in question was defined by physical characteristics that impacted the gun's functioning. *See Miller*, 307 U.S. at 175 (analyzing the National Firearms Act's ban on possession of "shotgun[s] having a barrel or barrels of less than 18 inches in length"); *Heller*, 554 U.S. at 574 (analyzing [the] D.C. Code . . . , which banned the possession of "pistols," defined as "any firearm originally designed to be fired by use of a single hand or with a barrel less than 12 inches in length"); *Bruen*, 597 U.S. at 1 (analyzing a New York statute that required a license to carry any "pistol or revolver"); *Caetano*, 577 U.S. at 414 n.1 (Alito, J., concurring) (analyzing a Massachusetts statute that banned any "portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill"); *see also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1286 n.10 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (analyzing a District of Columbia statute that "bans semi-automatic rifles by listing specific guns that . . . share the characteristics of being a long gun and firing in a semi-automatic manner, and typically have features such as protruding pistol grips"). The Court then asked whether the class of weapons — *i.e.*, weapons with the defined functional characteristics — was dangerous and unusual. Thus, the Court has always assessed whether the banned weapons were dangerous and unusual on a class-wide level, and the Court has always considered classes that were defined by shared functional characteristics.

This makes sense when you look at the tradition the Court is drawing upon. The relevant nineteenth-century cases that undergird the dangerous-and-unusual tradition also addressed statutes that prohibited the possession or carry of classes of weapons defined by functional — not nonfunctional — characteristics. These cases then determined whether the proscribed class of weapons was dangerous and unusual by assessing whether that class of weapons was particularly useful for unlawful purposes (dangerous) and whether it was uncommon for lawful purposes (unusual).

Putting this all together, we see that history and tradition permit the government to ban the possession or carry of certain classes of weapon, as defined by their shared *functional* features, if those classes are dangerous and unusual. But § 922(k) does not ban the possession of a class of firearms that share certain functional characteristics. Rather, it bans the possession of *all* firearms that share a *non*functional characteristic—having a removed, altered, or obliterated serial number. Serial numbers are ubiquitous and appear on modern firearms of all shapes and sizes. And whether a gun has or lacks a serial number does not change how the gun operates as a weapon so that it is more effective for one purpose or another. Instead, it's more like asking whether tan-colored guns are protected by the Second Amendment because black guns are more common. We might think that there are other reasons why the government can regulate firearm color, but it wouldn't be because the change in color changes the nature of the weapon. So too for guns with removed, obliterated, or altered serial numbers. While other historical traditions may justify § 922(k), the tradition of regulating dangerous and unusual weapons doesn't.

But even if a firearm's functionality does not define this tradition, there's a second reason why § 922(k) is not analogous to the regulation of dangerous and unusual weapons. *Bruen* places the burden of proving that a regulation resembles history and tradition on the *government* — the entity restricting liberty protected by the Second Amendment. But the Government has made a minimal effort, at best, to show that firearms with removed, obliterated, or altered serial numbers are either dangerous or unusual, let alone both. Indeed, it devoted only a single paragraph of its opening brief — spanning less than a page — to this question. And what evidence the Government has offered is outdated, unreliable, and arguably contradictory. Simply put, the Government has not carried its burden of proof.

Start with the Government's first piece of evidence. In its panel briefing, the Government's only evidence that § 922(k) prohibits dangerous and unusual weapons was a 1996 law review article which claimed that "[t]here are fundamentally only three reasons to obliterate a serial number: to avoid being tied to a burglary through possession of a firearm whose serial number has been reported to police; to avoid being connected to a crime gun one has purchased legally; and to avoid being identified through [ATF] records as the straw seller, or buyer, of a gun with paperwork on it." David M. Kennedy, Anne M. Piehl & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 L. & Contemp. Probs. 147, 174-75 (1996). But it's hard to discern how relevant this article is to present circumstances. The study examined usage patterns for Boston youth over five years in the 1990s. It is thus (1) almost three decades old and (2) based on a small subset of young lawbreakers (3) within a single city. And after being

confronted with the study's other conclusions at oral argument, the Government submitted a Rule 28(j) letter claiming that we cannot extrapolate from some of the study's findings to the larger gun-owning population. *See* ECF No. 84, at 1–2 ("statistics about the subset cannot be extrapolated to the larger gun-owning public").

The majority instead finds solace in the Government's second piece of evidence. In its supplemental en banc briefing, the Government cited a recently created ATF report showing that, between 2017 and 2021, 2.5% of firearms submitted for tracing that could not be traced to a purchaser had partial, incomplete, or obliterated serial numbers. The majority takes this statistic and runs with it. It first relies on it to conclude that firearms with removed, obliterated, or altered serial numbers are not even in common use for *criminal* purposes. It then speculates from this that such arms must not be in common use for lawful purposes, either. Basically, the majority posits that, because even criminals aren't commonly using guns with obliterated serial numbers, law-abiding citizens also must not be using them.

This is a remarkable leap in logic. The majority might be correct that arms with removed, obliterated, or altered serial numbers are not commonly used by criminals. But how can we infer from this fact that such weapons are not in common use for *lawful* purposes? One might naturally assume that law-abiding and law-breaking citizens have different needs and own guns for different reasons. I simply do not understand how we could equate the two when determining whether a particular firearm is commonly used.[8]

Furthermore, if arms with removed, obliterated, or altered serial numbers really aren't commonly used by criminals, as the majority seems to think, then doesn't this undercut the idea that such arms are "dangerous," as that term was historically understood? Our historical tradition allows the government to ban classes of weapons—defined by shared functional characteristics—if they are particularly useful for unlawful activity (dangerous) and uncommon for lawful purposes (unusual). When nineteenth-century courts considered whether a class of weapons was dangerous, an important consideration was whether that class was commonly used by criminals and lawbreakers. Yet arms lacking serial numbers are functionally no different than arms that have

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[8] Even if this statistic supported the asserted claim, any such support is undermined by the report's questionable history. At argument, the Government was asked about inconsistencies or errors in the ATF's report that called its validity into question. After Government counsel discussed the "apparent discrepancy" with the ATF, the ATF rescinded and reissued the report with different numbers. In a Rule 28(j) letter, Government counsel now claims that the report is accurate. We sometimes permit a party, like the Government, to rely on its own reports to support its position. But I would do so only when the report is both reliable and actually supports the asserted claim.

them. And apparently, according to the majority, they are not even commonly used by criminals. If that's right, then they cannot be dangerous and unusual weapons that fall outside the scope of the Second Amendment.

The majority ultimately relies on its self-supported conviction that no law-abiding citizen would prefer an unmarked firearm for lawful purposes. The majority interprets *Heller* to require us to query whether "common-sense reasons exist for a law-abiding citizen to prefer a particular type of weapon for a lawful purpose like self-defense." But *Heller* established no such thing. Rather, the Court examined the practices of the American people and identified the weapons *they* commonly own for lawful purposes.[10] And though it mentioned several reasons why "the American people" may prefer handguns for self-defense, it clarified that "[w]hatever the reason," the fact of common usage for lawful purposes was enough to make the District of Columbia's handgun ban constitutional. 554 U.S. at 629. *Heller* thus grounded the scope of the Second Amendment in the customs of the American people, not the speculations of federal judges.

In the end, I do not know whether or why law-abiding citizens might prefer firearms with removed, obliterated, or altered serial numbers. Don't get me wrong, I could take the majority's tactic and surmise reasons. Maybe some people inherit these weapons from relatives and choose to keep them because of their sentimental value. Or maybe some have no intent to use the firearm to break the law but are still uncomfortable with the government potentially tracking their purchases. After all, many law-abiding citizens prefer to use encrypted messaging platforms and disable location tracking on their cell phones for similar reasons. But whatever the answer is to this question, the burden is not on me or Price to provide it. It is the Government's burden, which it must carry by offering something more than mere conjecture. If that's too tall a task for the Government, then maybe it confirms that the tradition of regulating dangerous and unusual weapons was never the right analogue for § 922(k) in the first place.

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[10] It is true the *Heller* did not explicitly rely on statistics or otherwise cite evidence to support its statement that handguns are "overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. 554 U.S. at 628. But that is because neither party in that case contested that handguns are in common use for lawful purposes. Moreover, the briefing in *Heller* was replete with empirical evidence for the widespread ownership of and lawful uses for handguns. Here, by contrast, the extent of and purposes behind ownership of firearms with removed, obliterated, or altered serial numbers are "certainly . . . not within judicial notice," *Miller*, 307 U.S. at 178, so the Government must produce objective evidence that such weapons are not commonly held for lawful purposes.

B. The Government's other historic regulations are not analogous to § 922(k).

Besides the tradition of regulating dangerous and unusual weapons, the Government also points to an assortment of inspection and marking laws and commercial restrictions from before and after the Founding. But none of these regulations justify § 922(k).

The Government's best historical evidence is early state regulations requiring the inspection and marking of gunpowder and firearm barrels. Between 1776 and 1820, five states required gunpowder to be inspected and marked for quality and prohibited the sale of unmarked powder. One state went a step further and prohibited anyone from "fraudulently alter[ing] or defac[ing] any mark" placed by an inspector. Similarly, two states in the early nineteenth century required inspectors to proof and mark firearm barrels and prohibited the sale of unmarked weapons. Both also prohibited anyone from altering the marks once in place.

To the Government's credit, these laws arguably imposed a "comparable burden" on the right to keep and bear arms as § 922(k) does. *Bruen*, 597 U.S. at 29. Like § 922(k), they required firearms and gunpowder to display a government-imposed mark that conveyed certain information. Of course, only three of them explicitly forbade the alteration of these marks. And unlike § 922(k), none of them prohibited the mere *possession* of unmarked firearms and gunpowder. Still, I grant that these laws and § 922(k) may share similar-enough burdens.

Even so, these regulations were not "comparably justified" to § 922(k). *Id.* at 39. As the Government notes, § 922(k) exists to help law enforcement recover stolen firearms and trace firearms that have been used in crimes. But the historic gunpowder-and firearm-marking laws were enacted for product-quality purposes: They ensured that weapons were effective and did not jeopardize public safety when deployed. For instance, the Pennsylvania statute explained that gunpowder inspection and marking was necessary because some powder was of "inferior qualit[y]" and "its defects [were] not discovered until brought into actual use." Act of Apr. 18, 1795, *supra*, at 240. Similarly, the Massachusetts law explained that barrel proofing and marking were required because otherwise "many [firearms] may be introduced into use which are unsafe, and thereby the lives of the citizens be exposed." Act of Mar. 8, 1805, *supra*, at 259. So these regulations did not "impos[e] similar restrictions for similar reasons" as § 922(k) does and are thus not relevantly similar to it. *Rahimi*, 144 S. Ct. at 1898.

It is no answer to say that these laws and § 922(k) are analogous because they all promote public safety. Basically every firearm regulation aims to reduce the risk of danger to the public in one form or another. If this were the proper level of generality at which to assess a law's justification, then every modern restriction would share a comparable justification with every past one.

But we know this is not how the Supreme Court has conducted its analysis. Instead, the Court has focused on more refined government justifications, such as targeting dangerous and unusual weapons, limiting the right to those with a special need, or temporarily disarming individuals who threaten physical harm to others. And it has simultaneously warned against defining a regulation's justification so broadly as to eviscerate its historic roots. Thus, when reasoning by analogy, our task is to zero in on the particular "problems" a law addresses and determine whether historic regulations addressed analogous problems in an analogous manner. Here, the justification for historic inspection and marking laws — ensuring firearm effectiveness and safety — is not relevantly similar to the justification for § 922(k) — solving crime.

Besides inspection and marking laws, the Government also analogizes § 922(k) to various colonial regulations on the sale of firearms and gunpowder. Before Independence, several colonies prohibited anyone from selling or providing firearms or ammunition to Native Americans. Similarly, two colonies prohibited the exportation of gunpowder outside their jurisdictions without a license, while one state prohibited the selling of gunpowder in a major town without a license. The Government argues that these regulations are analogous to § 922(k) because they imposed *de minimis* burdens on the right to self-defense and were designed to keep weapons out of dangerous hands.

Contrary to the Government's claims, these statutes are not analogous to § 922(k). The Government offers no evidence that these laws burdened the ability of any member of the political community to keep or bear arms. So even if § 922(k) only imposes a minimal burden, these laws still are not analogous because they imposed no burden at all. Furthermore, like the inspection and marking statutes, they did not share a similar justification to § 922(k): The government's interest in solving crimes is not relevantly similar to the government's interests in keeping arms away from dangerous people outside the polity or ensuring safe transport of highly flammable gunpowder. So these laws and § 922(k) are analogous in neither their "how" nor their "why."

* * *

Section 922(k) seems like a sensible policy. But *Bruen* did not instruct us to decide cases based on good vibes. It placed the burden on the government to prove that a challenged regulation has a historical pedigree. Rather than carrying this burden, the Government offers halfhearted and surface-level arguments with the expectation that we will squint and say: "Well, good enough." We should expect more from the government, especially when constitutional liberties are at stake. I thus respectfully dissent.

NOTES & QUESTIONS

1. *Price* was divided over *Bruen's* methodology. Identify the judges' various positions on what each step in the *Bruen* analysis entails. Which approach best captures the test from *Bruen*? Which approach is more workable?

2. A different result was reached in Indiana pre-*Bruen*. *United States v. Reyna*, 2022 WL 17714376 (N.D. Ind. Dec. 15, 2022):

> Guns with obliterated serial numbers belong to "those weapons not typically possessed by law-abiding citizens for lawful purposes" so possession of such guns isn't within the Second Amendment's scope. . . . A law-abiding citizen who uses a gun for self-defense has no reason to prefer a deserialized gun to a gun with serial number intact.
>
> . . . Prohibiting possession or use of a particular type of gun might bring a regulation within the Second Amendment's scope if the class of firearms is defined by its functionality. [As in *Heller*'s explanation why many persons prefer handguns.]. . .
>
> . . . [T]he § 922(k) prohibition applies to a class of guns defined solely by a nonfunctional characteristic: the serial number. See *United States v. Marzzarella*, 614 F.3d [85, 94 (3d Cir. 2010)](Ch. 16.B) ("Furthermore, it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. Heller distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality.").

C. NONFIREARM ARMS

3. Knives

The 1958 federal Switchblade Act prohibits interstate commerce of switchblades, but not in-state sales or possession. A Second Amendment challenge to the Act was dismissed for lack of standing, based on the government's representations that there had been only four enforcement actions since 2004, and none at all since 2010. *Knife Rights v. Garland,* No. 4:23-cv-00547-O (N.D. Tex., June 3, 2024).

Recent changes in knife laws are: statewide knife law preemption enacted in Louisiana (SB 194) and Idaho (H0620); preemption enhancement in Iowa (HF 2556, allowing monetary damages in lawsuits for violations of the general statute preemption of weapons laws), and West Virginia (HB 4782, for arms businesses in general, planning and zoning laws may not be more restrictive than for other businesses). Fifteen states now have knife-specific preemption laws: Alaska, Arizona, Georgia, Idaho, Kansas, Louisiana, Montana, New

Hampshire, Ohio, Oklahoma, Tennessee, Texas, Utah, West Virginia and Wisconsin.

Philadelphia's broad ban on public carry of knives, Phil. Code § 10-820, was enjoined as to knives that are legal in under state law. *Knife Rights v. City of Philadelphia*, No. 23-1758 (E.D. Pa., July 31, 2023). The injunction did not cover Phil. Code § 10-810(5), which bans switchblades, although switchblades were relegalized under state law as of January 2023.

A new law in Washington State bans the carry of all knives, and any other weapon, Libraries, zoos, aquariums, and transit facilities (including bus stops), applying to all weapons. There is an exception for handguns with carry permit. Washington SB 5444 (2024).

Finally, the Ninth Circuit held Hawaii's complete ban on butterfly knives to violate the Second Amendment. *Teter v. Lopez*, 76 F.4th 938 (2023). The 3-0 panel decision's methodology boded ill for bans on "assault weapons" and magazines. The Hawaii Attorney General's petition for en banc review was granted. 93 F4th 1150 (2024). But subsequently, the Hawaii state legislature repealed the state ban on manufacture, sale, transfer, possession, and transportation of butterfly knives (balisongs), electric guns (e.g., stun guns), clubs (including batons, collapsible batons, and nightsticks) switchblades, gravity knives, brass knuckles, swords, and spears. Act 021 (2024). Concealed carry is still prohibited, which does pose a problem for butterfly knife owners, as such weapons, when folded, are so small that open carry is unusual.

In spite of a motion filed by Hawaii to have the case declared moot and remanded, the en banc rehearing went forward on June 25, 2024 without the Ninth Circuit addressing the mootness issue in a separate written order.

5. Electric Weapons

A U.S. District Court in Rhode Island held that the state's bans on electric stun guns violated the Second Amendment according to *Heller*. The opinion also explained why the judge believed *Heller* to have been wrongly decided. *O'Neil v. Neronha*, 594 F. Supp. 3d 463 (D.R.I. 2022).

6. Billies

In the nineteenth century, "billie" and "billet" were used for some flexible impact weapons — short leather bags containing a weight at one end, used as a bludgeon. Robert Escobar, *Saps, Blackjacks and Slungshots: A History of Forgotten Weapons* 9 (2018). But by the twenty-first century American law was treating them like a "billy club" — a hardwood straight stick.

Pre-*Bruen*, a challenge to California's ban on the "billy" failed because the law was 104 years old, and therefore "longstanding" under *Heller*. *Fouts v.*

Bonta, 561 F. Supp. 3d 941 (S.D. Cal. 2021). Post-*Bruen*, the decision was reversed and remanded for reconsideration in light of *Bruen*. 2022 WL 4477732 (9th Cir. Sept. 22, 2022). The same judge who had upheld the ban based on pre-*Bruen* Ninth Circuit precedent granted a motion for summary judgement against the ban, based on *Bruen*. 2024 WL 751001 (S.D. Cal., Feb. 23, 2024).

A Hawaii statute outlawed possession of a "billy" outside the home. Haw. Rev. Stats. § 134-51. Hawaiian law had prohibited possession of billy clubs by defining them as dangerous weapons. A suit was brought on Second Amendment grounds arguing that clubs are protected arms. Like Federal Judicial Security guard Dick Heller, who carried a handgun at work but was not allowed to have one at home, the plaintiffs in Hawaii were security guards at federal buildings. They wished to carry batons when not at work.

As the case was framed, "Plaintiffs say a 'billy' is the same as a 'baton.' They mean 'the same type of baton/billy policemen are usually issued and an expandable baton for self-defense and other lawful purposes.'" *Yututake v. Lopez*, No. 22-00323 (Jan. 10, 2023).

On March 23, 2023 a Stipulated Final Judgment and Permanent Injunction was filed. The injunction permanently enjoins enforcement against the named plaintiffs and "all other persons who are not otherwise legally prohibited from possession of a "billy" [as that term is defined by HRS § 134-51(a)]." As described in this 2024 Supplement Chapter 15.C.3, the Hawaii legislature in 2024 repealed all laws against clubs, except for the prohibition on concealed carry, and enhanced punishment for criminal misuse.

The stipulation provides that "baton" and "billy" meant the same thing. They are "designed for self-defense," "not dangerous and unusual weapons," "in common use," and "[t]he typical use of a baton is for a lawful purpose." The stipulated judgment does not prevent prosecution for unlawful use of a "billy" (defined in the stipulation as: cudgels, truncheons, police batons, collapsible batons, billy clubs, or nightsticks), nor does the stipulated judgment impede the enforcement of HRS § 134-51(a) against any person with respect to "any dirk, dagger, blackjack, slug shot, . . . metal knuckles, pistol, or other deadly or dangerous weapon." The stipulated judgment effectively excludes billy clubs from the definition of "other deadly or dangerous weapon" in HRS § 134-51(a).

D. NEW TECHNOLOGIES

2. Homemade Guns, Computer Numerical Control (CNC), and 3D Printing

The new ATF "Frame or Receiver" rule, which is long, complicated, and sometimes indefinite, is detailed in Chapter 9.D.1 of this 2024 Supplement. It is the subject of a Supreme Court case that will be argued in October 2024.

According to the Giffords Law Center, the District of Columbia, and thirteen states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Nevada, New Jersey, New York, Oregon, Rhode Island, and Washington) have enacted laws to restrict homemade firearms, as have some cities. The Nevada provision has been held to unconstitutional by a Nevada district court, but upheld by the Nevada Supreme Court. *Sisolak v. Polymer80*, 546 P.3d 819 (Nev. 2024), *rev'g Polymer80 v. Sisolak*, 2021 WL 12257164 (Nev. 3rd Dist. Dec. 10, 2021). The Nevada Supreme Court held that statutory terms "blank," "casting," "machined body" and "fire-control cavity area" were not unconstitutionally vague. While the statute had not specified a mens rea, the court read the law as requiring "general intent" —t hat is, neither strict liability nor specific intent. In other words, the prosecution would have to prove that a defendant knew the physical characteristics of items that he owned, but would not have to prove that the defendant intended illegally to assemble those items into a functional firearm. A similar injunction was issued against Delaware's new statute broadly banning home manufacture. 11 Del. C. § 1459A; HB 125. The court granted a preliminary injunction against the prohibition of possession of unfinished firearm frames and receivers, the prohibition of possession of unserialized firearms, and the prohibition of manufacture of unserialized firearms. *Rigby v. Jennings*, 630 F. Supp. 3d 602 (D. Del. 2022).

A preliminary injunction was denied for the prohibition on distribution of unserialized firearms. If FFLs are not allowed to transfer unserialized guns, the same restriction can be applied to private transactions. Also denied, under First Amendment intermediate scrutiny, was an injunction for the prohibition on distribution of 3D-printing gun files.

In California, a new statute prohibits anyone other than an FFL from using, possessing, selling, or transferring a computerized numerical code ("CNC") milling machine that has a sole or primary purpose of manufacturing firearms. Cal. Pen. Code § 29185; AB 1621 § 25. The district court denied a motion for a preliminary injunction. The plain text of the Second Amendment does not cover personal manufacture. *Defense Distributed v. Bonta*, 2022 WL 15524977 (C.D. Cal. Oct. 21, 2022), *adopted* 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

For the ATF's new regulation on homemade firearms, see Chapter 9.D of this 2024 Supplement.

NOTES & QUESTIONS

12. [New Note] Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35 (2023). This is first law review article to examine the legal and policy history of home manufacture. The article explains "why the knowledge for building arms was essential in colonial America," "the arms

shortages throughout the Revolutionary War and how domestic arms production filled the void," "how many of the most important innovations in firearms and ammunition were inspired by self-made arms, including the wheellock mechanism, percussion ignition, detachable box magazines, and classic firearms such as the Henry Rifle, M1 Garand, and AR-15." Finally, the article surveys "the history of regulations on arms built for personal use," and finds those laws to be "uncommon and of recent vintage." Whereas "the tradition of building arms for personal use is deeply rooted in American history, . . . there is no tradition of regulating self-built arms. Moreover, under Supreme Court precedent, common arms are constitutionally protected regardless of how they are acquired. Thus, the Second Amendment protects an arm that is self-built if that type of arm is commonly possessed.

13. [New Note] For an overview of 3D printed gun regulations, see Vanesa Listek, *A Landscape of 3D Printed Gun Regulations in the U.S.,* 3DPRINT.COM (Dec. 6, 2023), and Renzulli Law Firm, LLP, *Federal and State Legislation Introduced Banning Digital Files for 3D Printing Firearms and Requiring Background Checks for 3D Printers* (Jan. 3, 2024). *See also* Rebecca Quintana Centeno, *Ghost Guns: Between Clandestine Practices and Second Amendment Rights*, 92 Revista Juridica Universidad de Puerto Rico 705 (2023) (surveying judicial decisions). In the New York City borough of Brooklyn, Dexter Taylor was sentenced to 10 years in prison for home 3D printer to manufacture firearms for his personal use. *See* Billy Binion, *He Was Sentenced to a Decade in Prison for Having Unlicensed Weapons: Dexter Taylor is now a "violent felon," even though his hobby was victimless*, Reason, May 15, 2024. The trial judge did not allow Taylor's lawyer to make a jury nullification argument based on the Second Amendment. The judge explained to the defense attorney, "Do not bring the Second Amendment into this courtroom. It doesn't exist here. So you can't argue Second Amendment. This is New York." Jeff Charles, *NYC Man Convicted Over Gunsmithing Hobby After Judge Says 2nd Amendment 'Doesn't Exist in This Courtroom'*, RedState, Apr. 22, 2024.

14. [New Note] Laser sights for firearms were introduced in 1979. Travis Pike, *Laser Sights: A History*, TheMaglife Blog, July 15, 2024. The city of Chicago's 1999 ban on laser sights was upheld because laser sights are "firearms accessories" rather than arms, because they are not essential to the function of a firearm, and so not protected by the Second Amendment. Moreover, "all standard firearms have iron sights, which are 'just as easy' to use as laser sights." Plaintiffs' evidence that laser sights improve accuracy not disputed, but was held to be irrelevant because laser sights are not "necessary" to firearms function. *Second Amendment Arms v. City of Chicago*, 2024 WL 3495010 (N.D. Ill, July 22, 2024).

3. Improved Triggers and Other Modifications

See Chapter 8.E.2.b of this 2024 Supplement for ATF's new enforcement actions against Forced Reset Triggers, with the Bureau expressly distinguishes from binary triggers.

Binary triggers are banned (or partially banned) in these states: California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Maryland, New Jersey, New York, Rhode Island, and Washington. They also are banned in Washington, DC. Several states ban "trigger activators" that simulate machine-gun fire, but not all of those laws cover binary triggers, as opposed to trigger cranks or forced-reset triggers. Giffords Law Center lists state laws on trigger activators and summarizes the content of each state's law.

E. BANS BY OTHER MEANS: USING GENERAL LAWS OR APPROVED GUN LISTS TO BAN FIREARMS AND AMMUNITION

1. Federal Consumer Product Safety Act

A new article argues that Congress should empower the Consumer Product Safety Commission "to regulate the safety of guns as products, without granting the Commission authority over 'gun control' as traditionally understood." "Under this approach, the firearms industry would be obligated to report safety defects, recall dangerously defective firearms, and offer remedies to consumers. The Commission could also consider adopting common-sense product safety standards (such as regulations to ensure that new firearms have functional safety devices, and do not discharge without a trigger pull), just as the Commission adopts safety standards for many other consumer products. But the Commission would be precluded from regulating guns to curtail gun violence or suicide, or to reduce guns' prevalence." Benjamin L. Cavataro, *Regulating Guns as Products*, 92 Geo. Wash. L. Rev. 87 (2024).

2. Toxic Substances Control Act

A new rule from the U.S. Fish & Wildlife Service phases out lead ammunition and fishing tackle at National Wildlife Refuges that are newly opened to hunting and fishing. 88 Fed. Reg. 74050 (Oct. 30, 2023) (amending 50 C.F.R. Part 32).

3. Massachusetts Consumer Protection Act

In decision a few weeks before *Bruen*, the Massachusetts law was upheld by a district court under intermediate scrutiny. Granata v. Healey, 603 F.Supp.3d 8 (D. Mass 2022). The First Circuit vacated and remanded for reconsideration under *Bruen*. *Granata v. Campbell*, 2023 WL 4145911 (1st Cir. Apr. 7, 2023).

4. California's List of Permissible Handguns

Two cases were filed in two different United States District Courts in California seeking to renew a challenge to California's Unsafe Handgun Act (UHA), that was upheld *in Pena v. Lindley,* 898 F.3d 969 (9th Cir. 2018), *cert. denied at Pena v. Horan,* 141 S. Ct. 108 (2020).

California's UHA purports to be a consumer product safety regulatory scheme that certifies handguns as "not unsafe" if handguns have various features, and pass various tests performed by a laboratory authorized to test handguns. E.g., Cal. Penal Code § 31900 requires a "drop test" of handguns to ensure they will not discharge under six defined drops test parameters. Cal. Penal Code § 31905 tests handguns for malfunction frequency. These are the kinds of tests that might be performed by private sector journalists or gun enthusiast publications that review new (and old) firearms for their readers, much the same way Consumer Reports™ might review cars or home appliances.

Firearm manufacturing firms are already incentivized to comply with the standards of the Sporting Arms & Ammunition Manufacturers' Institute (SAAMI). The Institute is an association of the nation's leading manufacturers of firearms, ammunition and components and was founded in 1926 at the request of the federal government to: create and publish industry standards for safety, interchangeability, reliability, and quality; coordinate technical data; and promote safe and responsible firearms use. SAAMI seeks certification and standardization of its own standards and procedures through accreditation by the American National Standards Institute (ANSI).

California's UHA attempts to mandate design changes and so-called safety features for handguns sold in California, and given the size of its market, these mandates would impose *de facto* national standards. Some of the mandates were already addressed by the marketplace. E.g., In addition to passing the drop-test and malfunction test, the hammer on all revolvers must retract to a point where the firing pin does not rest on the primer of the cartridge. Cal.

Penal Code § 31910(a)(1).[69] [31910(a)(1)(A)] The industry standard, since just after 1900, has been for revolver manufacturers to employ a transfer bar[70] (there are other solutions) which only allows the firing pin to strike the primer of a cartridge if the trigger is pulled, the bar also keeps the hammer from resting on the primer. Prior to this innovation, people carrying revolvers usually did so with one empty chamber to prevent accidental discharge.

The UHA gets more complicated and controversial when it comes to semi-automatic pistols and this is where the bulk of litigation has taken place. Cal. Penal Code § 31910(b) [31910(a)(2)]. Subsections (1) [A], (2) [B], and (3) [C] requires manual safeties and the ability to pass the drop-test and malfunction test. This parallels the requirements for revolves. But then:

- Subsection (b)(4) [(a)(2)(D)] requires all "pistols that are not already listed on the roster pursuant to Section 32015, [after July 1, 2022] [to] have a chamber load indicator." (CLI)
- Subsection (b)(5) [(a)(2)(E)] requires all "pistols that are not already listed on the roster pursuant to Section 32015, [after July 1, 2022] [to] have a magazine disconnect mechanism if it has a detachable magazine." (MDM)
- Subsection (b)(6) [repealed] required all pistols submitted for testing after July 1, 2022 be "equipped with a microscopic array of characters used to identify the make, model, and serial number of the pistol, etched or otherwise imprinted in one or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired." (microstamping)
- Subsection (b)(7) [(b)] required the California Department of Justice to remove from the existing roster three semiautomatic pistols lacking CLIs, and MDMs, (and microstamping, now repealed) until the entire roster of semiautomatic pistols all have CLIs, and MDMs, (and microstamping, now repealed). (The 3 for 1 Rule.)

Renna v. Becerra, 535 F. Supp. 3d 931 (April 23, 2021) was the first iteration of the case that later became *Renna v. Bonta,* 667 F. Supp. 3d 1048

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[69] After the litigation in *Renna v. Bonta* and *Boland v. Bonta, infra.,* in which California had to concede that requiring microstamping as a condition for sale of handguns violated the historical test in *Bruen,* California amended Penal Code § 31910. The amendments became law on September 26, 2023. 2023 Bill Text CA S.B. 452. The challenged code sections under the prior law that are cited in the opinions are set forth in this article. The current code sections after amendment are bracketed.

[70] Heidi Lyn Rao, *What are Transfer Bars?*, NRA Women, January 12, 2023.

(April 3, 2023) after the earlier matter was given new life in light of the Supreme Court's *Bruen* decision. This case was filed in the Southern District of California. *Boland v. Bonta,* 662 F. Supp. 3d 1077 (Mar. 20, 2023) was filed after the *Bruen* decision in the Central District of California.

In both cases, considerable testimony (both written and oral) was reviewed in order to apply the new *Bruen* test to gun control policies that existed at the time of the ratification of the Second Amendment, and to determine whether any of these modern laws being challenged today have founding era analogues.

Both district courts ultimately granted preliminary injunctions against the California UHA roster's requirement for magazine disconnects, chamber loaded indicators, and the impossible microstamping requirement. (Presumably, since the CLI, MDM, and microstamping requirements were struck down, the also challenged "3 for 1 Rule" was moot.) The courts observed that *Bruen's* legal history analysis shows zero evidence of a tradition allowing the government to mandate that firearms have certain features. Nineteenth century laws in Massachusetts and Maine had required "proofing" of firearms manufactured in those states. (With an exception for the federal armory in Springfield, Massachusetts).

But proof-testing is simply testing an individual gun to make sure that it can function properly — for example, that it is strong enough to withstand the gunpowder explosion and not explode in the user's hands. Proof-testing against manufacturing defects is not analogous to requiring manufacturers to provide specific features on firearms.

The decisions did not hold the California roster itself unconstitutional. The district court did not rule against the requirement that manufacturers must submit sample firearms to testing labs to ensure that, for example, the model of firearm does not discharge when dropped.

The California Attorney General appealed both decisions and requested a stay pending appeal that was granted, only as to the magazine disconnect and chamber loaded indicator requirements, but not the impossible microstamping requirement. (Which may yet resurrect the controversy over the "3 for 1 Rule.") As a result, new firearms models that have both a CLI and MDM are now eligible to be added to the California roster. As this Supplement is being written more than a dozen handguns have been added to the roster, but only seven handguns have been removed (without any indication that they were removed under the "3 for 1" rule, i.e., the model's certification may have expired and the manufacturer did not seek renewal.)

Both cases were argued and submitted to a Ninth Circuit panel on August 23, 2023. On March 25, 2024, in *Boland v. Bonta,* the Ninth Circuit vacated the submission of the case pending an en banc decision in *Duncan v. Bonta,* 9th Cir. No. 23-55805. The same order was issued in *Renna v. Bonta* on the same day.

Even with California's repeal of its microstamping mandate after its loss and concession that the technology does not yet exist in the *Renna* and *Boland* cases, the issue itself is not dead. The same bill (2023 Bill Text CA S.B. 452) that repealed existing microstamping mandates today, reimposes them (with modifications to account for feasibility rather than just availability) on January 1, 2028. The bill even imposes a duty on the California Department of Justice to explore the feasibility of microstamping technology on its own, in the event that the technology is not adopted by the firearm industry by certain benchmark dates.

New Jersey has a implemented a similar microstamping statutory scheme that will apparently apply to all firearms (unlike California's law that only applied to handguns) sold in that state. N.J. Stat. § 2C:58-2.13. However, under the New Jersey law, once the Attorney General certifies the viability of microstamping, rather than mandating the feature for all guns, each retail gun dealer in the state must make available for purchase at least one firearm with the certified microstamping feature, and then also comply with other regulations designed to promote the sale of firearms with that feature. On or about February 29, 2024, the Attorney General issued a certification that microstamping technology was available under New Jersey's Law.

5. [New Section] *Restrictions on Speech about Firearms*

a. [New Section] California Ban on Firearms Advertising for Minors

Enacted in 2022, section 22949.80 of the California Business & Professions Code forbids any "firearm industry member" to "advertise, market, or arrange for placement of an advertising or marketing communication concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors." Several associations, businesses, firearms instructors, and gun rights groups filed a First Amendment lawsuit. One of the plaintiffs, the Second Amendment Foundation, is represented by Professor Donald Kilmer, coauthor of this textbook.

The District Court denied the plaintiffs' motion for a preliminary injunction. *Junior Sports Magazines v. Bonta*, 2022 WL 14365026 (C.D. Cal., Oct. 24, 2022).

On its face the statute applies to "commercial speech." Commercial speech is regulated by its own four-part *Central Hudson* test, which is a weaker version of a First Amendment challenge under an intermediate scrutiny test.

Applying *Central Hudson*, the trial court found that some of the speech was not categorically unprotected. The ban covers some speech that is not about an unlawful product and is not misleading. "For example, an advertisement for a firearm that depicted a minor possessing a firearm while engaged in a

recreational sport under parental supervision would not concern unlawful activities or be misleading."

However, the trial court upheld the ban because of the government's interest in addressing the "substantial problem of firearm-caused deaths among minors" "When compared to advertising restrictions on alcohol and tobacco products, § 22949.80's focus on advertising that is attractive to minors — despite possibly sweeping within its ambit some advertising that may also appeal to adults — almost certainly survives intermediate scrutiny."

"[I]t is likely that a restriction on firearm advertising directed towards minors will lead to a reduction in the demand for firearms by minors, it follows that there will be fewer firearms in the hands of minors, and, as 'simple common sense' dictates, fewer instances of gun violence — whether intentional or unintentional . . ."

The Ninth Circuit reversed and remanded to the trial court for entry of a preliminary injunction. *Junior Sports Magazines, Inc., v. Bonta,* 80 F.4th 1109 (9th Cir. 2023). This case was related to, but not consolidated with *Safari Club International v. Rob Bonta*, Case No.: 23-15199. The Ninth Circuit stated:

> California has many tools to address unlawful firearm use and violence among the state's youth. But it cannot ban truthful ads about lawful firearm use among adults and minors unless it can show that such an intrusion into the First Amendment will significantly further the state's interest in curtailing unlawful and violent use of firearms by minors. But given that California allows minor to use firearms under adult supervision for hunting, shooting, and other lawful activities, California's law does not significantly advance its purported goals and is more extensive than necessary. In sum, we hold that [Cal. Bus. & Prof. Code] § 22949.80 is likely unconstitutional under the First Amendment, and we thus REVERSE the district court's denial of a preliminary injunction and REMAND for further proceedings consistent with this opinion.

Id. at 1121.

Judge Vandyke wrote a concurring opinion finding that the statute was also likely a species of viewpoint discrimination. *Id. at* 1127 n.1. California petitioned for en banc rehearing, but after no judge called for a vote, the petition was denied.

Upon remand, a preliminary injunction was entered by the district court against only subsection (a) of the challenged law, despite what appears to be the all-inclusive language at the conclusion of the opinion. 2024 WL 3236250 (C.D. Cal., June 18, 2024). A second appeal was then filed, including. a request for a preliminary injunction from the Circuit Court of Appeals against the whole statute, and against all state actors authorized to enforce the statute. *Junior Sports Magazines Inc. v. Bonta,* Case No. 24-4050 (9th Cir., July 2, 2024).

b. [New Section] California Bans Commercial Speech at Gun Shows (Again)

California gun show litigation has been on dockets in the Ninth Circuit for more than a quarter-century. In earlier cases, county governments attempted to ban gun shows through regulation of the counties' fairgrounds that were under the management of county government. The first significant case involved Santa Clara County, which leased its fairgrounds to a corporation that managed the annual county fair along with other events that were intended to maximize the profitability of the venue. (e.g., RV shows, home shows, dog shows.) The Santa Clara County Fairgrounds had also hosted gun shows for decades. In 1996 Santa Clara County sought to outlaw gun shows by forbidding the sale of firearms through a lease provision with the fairgrounds management company, who in turn, would no longer contract with gun shows at that venue because allowing gun sales would violate the lease.

A suit was brought on First Amendment commercial speech grounds. There was no Second Amendment claim as this was more than a decade before *Heller* and *McDonald*. The Ninth Circuit struck down the lease provision banning gun sales that are otherwise in compliance with appropriate regulations—because a ban on sales necessarily included a ban on commercial speech for lawful products. *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997).

In 1999, the County of Alameda banned the possession of guns — but not sales of guns — at gun shows. After more than a decade of litigation, the county reversed its interpretation of its own ordinance to allow the possession of "properly secured" guns as commercial products at gun shows, and gun shows resumed at the county venue. *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012).

Then in 2018, the California legislature imposed a moratorium on gun shows at fairgrounds that were under the management of the state. The 22nd Agricultural District ("DAA") (with an assist by co-defendant Governor Newsom) imposed a moratorium on gun shows at the Del Mar (San Diego County) Fairgrounds. That gun show moratorium was struck down on First Amendment and equal protection grounds. *B&L Productions, Inc. v. 22nd Dist. Agric. Ass'n*, 394 F. Supp. 3d 1226, 1249 (S.D. Cal. 2019). The state legislature enacted a new statute, outlawing commercial speech associated with firearm sales at fairgrounds in San Diego County (AB 893, Cal. Food & Agric. Code § 4158) and Orange County (SB 264, Cal. Penal Code § 27575); and after a suit was filed, another statute banning on commercial speech associated with gun sales on all state owned/managed land (SB 915, Cal. Penal Code § 27573).

AB 893 was challenged on First Amendment, Second Amendment, and Fourteenth Amendment Equal Protection grounds. The U.S. District Court for the Southern District of California granted California's Rule 12 motion to

dismiss. *B&L Productions, Inc., v. Newsom,* 661 F.Supp.3d 999 (S.D. Cal. 2023).

Both SB 264 and SB 915 were challenged on the same grounds in a Central District case, where the judge took evidence and held a hearing on whether California could meet its burden under the new *Bruen* standard for Second Amendment claims. That court issued a preliminary injunction against enforcement of both statutes on multiple grounds and ordered the Orange County Fairgrounds to offer contract terms for a gun show that were substantially similar to the terms for prior shows at that venue.

Both cases were appealed to the Ninth Circuit and consolidated for oral argument. The three-judge panel upheld the dismissal from the Southern District case and reversed the preliminary injunction from the Central District case. The Circuit found that the right to acquire/purchase firearms and ammunition were part of the Second Amendment right to keep and bear arms, but that there was no "meaningful burden" on that right, since there were plenty of gun stores in those jurisdiction where people could still exercise their right to purchase a firearm and ammunition. The panel also found that prior circuit law (i.e., *Nordyke, supra.*) only invalidated state action that banned "offers for sale" and had said nothing about a contractual "acceptance" to consummate a contract for sale. Therefore, the court reasoned, California's law banning any "acceptance" of an "offer for sale" as long as "offers" were not banned, did not violate the commercial speech doctrine of the First Amendment. *B & L Productions, Inc, v. Newsom,* 104 F.4th 108 (9th Cir. 2024). In other words, gun show vendors can "offer" products for sale by displaying them on tables at gun shows, but they cannot "accept" a customer's purchase while at the gun show, which also stalls the background check and waiting period required under California law for transfer of a firearm. The gun show promoters have petitioned for rehearing en banc in the Ninth Circuit.

c. [New Section] **Required Firearms Dealer Disclosure and Signs**

Anne Arundel County, Maryland, requires gun stores to distribute health literature selected by the county health department. The county chose a suicide prevention pamphlet jointly produced by the National Shooting Sports Foundation and the American Foundation for Suicide Prevention. The health department also requires a one-page pamphlet on conflict resolution resources, produced by the department. The plaintiff association's claims of harms to its members were insufficient for standing. Moreover, the First Amendment allows some compelled commercial speech, such as safety disclosures. *Maryland Shall Issue v. Anne Arundel County*, 662 F.Supp.3d 557 (D. Md. 2023).

Since the Clinton administration, ATF has required firearms retailers to post the following notice in their stores:

> YOUTH HANDGUN SAFETY ACT NOTICE
>
> (1) The misuse of handguns is a leading contributor to juvenile violence and fatalities.
>
> (2) Safely storing and securing firearms away from children will help prevent the unlawful possession of handguns by juveniles, stop accidents, and save lives.
>
> (3) Federal law prohibits, except in certain limited circumstances, anyone under 18 years of age from knowingly possessing a handgun, or any person from selling, delivering, or otherwise transferring a handgun to a person under 18.
>
> (4) A knowing violation of the prohibition against selling, delivering, or otherwise transferring a handgun to a person under the age of 18 is, under certain circumstances, punishable by up to 10 years in prison.

ATF, *Youth Handgun Safety Act Notice*, ATF Information 5300.2 (rev. July 2017). Items (3) and (4) are simplified statements of the terms of the Youth Handgun Safety Act, 18 U.S.C. § 922(x). Item (1) is indisputably true. Item (2) is a contested matter of social science debate.

In 2024, the New York legislature enacted a statute requiring firearms dealers to post the following, and to deliver a copy thereof to their customers. "Access to a weapon or firearm in the home significantly increases the risk of suicide, death during domestic disputes, and/or unintentional deaths to children, household members and others. If you or a loved one is experiencing distress and/or depression, call the National Suicide Prevention Lifeline at 988." N.Y. Penal Code §400(20). The statement presents a one-sided view of contested social science matters. For example, social science studies are unanimous that a domestic abuser's access to a firearm increases the risk of victim death. Studies do not support the idea that *victim* access to a firearm increases a risk to the victim, if her firearm is not accessible to the criminal, such as because she does not live with him. *See*, *e.g.*, Jacquelyn Campbell et al., Risk Factors for Femicide in Abusive Relationships, 93 Am. J. Pub. Health 1089, 1090 (2003) ("Addition of the relationship variables resulted in victims' sole access to a firearm no longer being statistically significant and substantially reduced the effects of abuser's drug use.").

d. [New Section] Federal Trade Commission

The Federal Trade Commission (FTC) has been granted authority by Congress to act against "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An advertisement is "unfair" if it causes "substantial injury to consumers which is not reasonably avoidable by consumers

themselves and not outweighed by countervailing benefits to consumers or to competition." *Id.* § 45(n). Anyone may file a complaint with the FTC, but the FTC has no obligation to respond or take any action.

In 1996, two petitions were filed asking the FTC to prevent advertising on the protective benefits of handgun ownership. They argued that handguns make a home more dangerous, not safer, and that defensive gun use is rare. Center to Prevent Handgun Violence et al., Petition before the Federal Trade Commission; Jon S. Vernick et al., *Regulating Firearm Advertisements that Promise Home Protection: A Public Health Intervention*, 277 JAMA 1391 (1997) (describing petition and other work by the Johns Hopkins Center for Gun Policy and Research). The FTC did not take action on the petitions. The petitions are critiqued in David B. Kopel, *Treating Guns Like Consumer Products*, 148 U. Penn. L. Rev. 1701 (2000).

In April 2022, Brady United (the new name for the 1996 Center to Prevent Handgun Violence), along with the Giffords Law Center, March for Our Lives, and the Firearms Accountability Task Force filed a new FTC petition, this one is much longer than the 1996 version.

e. [New Section] **Administrative Harassment**

The below case deals with a situation in which New York's Department of Financial Services (DFS), that state's insurance and banking regulator, allegedly improperly coerced regulated entities doing business with the National Rifle Association (NRA) to drop the NRA as a client because of the NRA's gun-rights advocacy. The NRA sued, asserting, inter alia, First Amendment violations. The trial court dismissed the NRA's claims, and the Second Circuit affirmed. In a unanimous decision, the Supreme Court held that the NRA stated a valid First Amendment claim.

The excerpt below focuses on the facts alleged by the NRA. For a more detailed and less sanitized description of the facts and circumstances, involving DFS, the DDF Commissioner, and New York Governor Andrew Cuomo, see George A. Mocsary, *Administrative Browbeating and Insurance Markets*, 68 Vill. L. Rev. 579, 595-604 (2023) (also arguing that the alleged insurance-law violations at issue were either not actual violations, required "stretching legal definitions," or "range from being inconsequential to affirmatively counterproductive"). Professor Mocsary also discusses the "broad range of injuries" caused to insureds, insurers, and society more broadly by DFS's abuse of its regulatory power to attack "insurers doing business with the political enemies of the gubernatorial administration of which it was a part." *Id.* at 602.

Justice SOTOMAYOR delivered the opinion of the Court.

Six decades ago, this Court held that a government entity's "threat of invoking legal sanctions and other means of coercion" against a third party "to achieve the suppression" of disfavored speech violates the First Amendment. Today, the Court reaffirms what it said then: Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors. Petitioner National Rifle Association (NRA) plausibly alleges that respondent Maria Vullo did just that. As superintendent of the New York Department of Financial Services, Vullo allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups. Those allegations, if true, state a First Amendment claim.

I

A. . .

The New York Department of Financial Services (DFS) oversees insurance companies and financial services institutions doing business in the State. DFS can initiate investigations and civil enforcement actions against regulated entities, and can refer potential criminal violations to the State's attorney general for prosecution. The DFS-regulated entities in this case are insurers that had business relationships with the NRA.

Since 2000, the NRA has offered a variety of insurance programs as a benefit to its members. The NRA contracted with affiliates of Lockton Companies, LLC (Lockton), to administer the various policies of these affinity insurance programs, which Chubb Limited (Chubb) and Lloyd's of London (Lloyd's) would then underwrite. In return, the NRA received a percentage of its members' premium payments. One of the NRA's affinity products, Carry Guard, covered personal-injury and criminal-defense costs related to licensed firearm use, and "insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person."

In September 2017, a gun-control advocacy group contacted the New York County District Attorney's office to tip them off to "compliance infirmities in Carry Guard." That office then passed on the allegations to DFS. The next month, then-Superintendent of DFS Vullo began investigating Carry Guard, focusing on Chubb and Lockton. The investigation revealed at least two kinds of violations of New York law: that Carry Guard insured intentional criminal

acts, and the NRA promoted Carry Guard without an insurance producer license. By mid-November, upon finding out about the investigation following DFS information requests, Lockton and Chubb suspended Carry Guard. Vullo then expanded her investigation into the NRA's other affinity insurance programs, many of which were underwritten by Lloyd's and administered by Lockton. These NRA-endorsed programs provided similar coverage and suffered from the same legal infirmities.

In the midst of the investigation, tragedy struck Parkland, Florida. On February 14, 2018, a gunman opened fire at Marjory Stoneman Douglas High School, murdering 17 students and staff members. Following the shooting, the NRA and other gun-advocacy groups experienced "intense backlash" across the country. Major business institutions, including DFS-regulated entities, spoke out against the NRA, and some even cut ties with the organization. MetLife, for example, ended a discount program it offered with the NRA. On February 25, 2018, Lockton's chairman "placed a distraught telephone call to the NRA," in which he privately shared that Lockton would sever all ties with the NRA to avoid " 'losing [its] license' to do business in New York." Lockton publicly announced its decision the next day. Following Lockton's decision, the NRA's corporate insurance carrier also severed ties with the organization and refused to renew coverage at any price. The NRA contends that Lockton and the corporate insurance carrier took these steps not because of the Parkland shooting but because they feared "reprisa[l]" from Vullo.

Around that time, Vullo also began to meet with executives at the insurance companies doing business with the NRA. On February 27, Vullo met with senior executives at Lloyd's. There, speaking on behalf of DFS and then-Governor Andrew Cuomo, Vullo "presented [their] views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA." She also "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" in New York. Vullo told the Lloyd's executives "that DFS was less interested in pursuing the[se] infractions" unrelated to any NRA business "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." [The NRA also [alleged] that Vullo made it clear to Lloyd's that it "could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups"[].[1] Vullo and Lloyd's struck a deal: Lloyd's "would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business," and

[1] According to the complaint, other affinity organizations offered similar insurance policies, including the New York State Bar Association, the New York City Bar, and the New York State Psychological Association, among others.

"in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies."

On April 19, 2018, Vullo issued two virtually identical guidance letters on DFS letterhead entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." (Guidance Letters). Vullo sent one of the letters to insurance companies and the other to financial services institutions. In the letters, Vullo pointed to the "social backlash" against the NRA and other groups "that promote guns that lead to senseless violence" following "several recent horrific shootings, including in Parkland, Florida." Vullo then cited recent instances of businesses severing their ties with the NRA as examples of companies "fulfilling their corporate social responsibility."

In the Guidance Letters' final paragraph, Vullo "encourage[d]" DFS-regulated entities to: (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manag[e] these risks and promote public health and safety."

The same day that DFS issued the Guidance Letters, Vullo and Governor Cuomo issued a joint press release that echoed many of the letters' statements. The press release included a quote from Vullo "'urg[ing] all insurance companies and banks doing business in New York'" to join those "'that have already discontinued their arrangements with the NRA.'" The press release cited Chubb's decision to stop underwriting Carry Guard as an example to emulate. The next day, Cuomo tweeted: "'The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public.'"

Less than two weeks after the Guidance Letters and press release went out, DFS entered into consent decrees with Lockton . . . and Chubb. . . The decrees stipulated that Carry Guard violated New York insurance law because it provided insurance coverage for intentional criminal acts, and because the NRA promoted Carry Guard, along with other NRA-endorsed programs, without an insurance producer license. The decrees also listed other infractions of the State's insurance law. Both Lockton and Chubb admitted liability, agreed not to provide any NRA-endorsed insurance programs (even if lawful) but were permitted to sell corporate insurance to the NRA, and agreed to pay fines of $7 million and $1.3 million respectively. On May 9, Lloyd's officially instructed its syndicates to terminate existing agreements with the NRA and not to insure new ones. It publicly announced its decision to cut ties with the NRA that same day. On December 20, 2018, DFS and Lloyd's entered into their own consent decree, which imposed similar terms and a $5 million fine. . .

6. [New Section] *Qualified Immunity for Illegal Seizures of Arms*

The ratification of the Fourteenth Amendment in 1868 granted clear textual power for Congress to enact civil rights legislation. Section 5 of the Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Accordingly, Congress revised and re-enacted the Civil Rights Act of 1866 (Ch. 7.C), and added new laws. One of them was the 1871 Ku Klux Klan Act; it was one of the three Enforcement Acts aimed at stopping the Klan's reign of terror in the former Confederate states. The Acts succeeded, and the administration of President Ulysses Grant (1969-77) crushed the First Ku Klux Klan. The 1871 Act created a federal cause of action against government employees who violate a victim's civil rights. 42 U.S.C § 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The violation must be "under color" of law. That is, the government employee must at least be purporting to be carrying out official duties. So if a police officer who was off-duty and out of uniform attacked a random person for no reason, the act would not be under color of law. The legal remedy would not be a section 1983 action; rather, the victim would be able to sue under ordinary state tort law for assault and battery.

Suppose instead that the officer were carrying out official duties, but used grossly excessive force against a motorist who had been stopped for a traffic violation. If so, the motorist could file a section 1983 suit against the officer.

In 1967, the U.S. Supreme Court adopted the doctrine of *qualified immunity* for Section 1983 cases. The decision was based on the common law defenses of good faith and probable cause to tort lawsuits for false arrest. *Pierson v. Ray*, 386 U.S. 547 (1967). While *Pierson*, like the common law, required a section 1983 defendant to have at least subjective good faith in the legality of his actions, a broader immunity was created in a 1982 case. That

case set the modern doctrine that Section 1983 defendants are immune whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The current breadth of qualified immunity has been criticized by Justices Sotomayor and Thomas. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (The Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment) (criticizing current doctrine for going beyond common law defenses, ignoring legal history, and amounting to free-standing judicial interest-balancing); *see also Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante), withdrawn on rehearing and replaced by 928 F.3d 457 (5th Cir. 2019) ("[O]wing to a legal *deus ex machina* — the "clearly established law" prong of qualified-immunity analysis — the violation eludes vindication. I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. . . . [T]he entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. But immunity ought not be immune from thoughtful reappraisal.").

A continuing controversy in the "clearly established" rule is how clearly something must be established — how closely the facts of a precedent holding some governmental action to be unconstitutional must match a later unconstitutional act in order to be "clearly established." Some cases have required very close fits, and others less so.

A district court's denial of qualified immunity is immediately appealable, pre-trial. Many appellate qualified immunity cases end with a court holding that a defendant is entitled to qualified immunity because the illegality of the defendant's acts were not "clearly established." But many appellate decisions do not then address whether the defendant's acts were in fact illegal. Thus, the grant of qualified immunity dismissal is used to prevent a judicial resolution of the legality of law enforcement conduct even prospectively.

Two professors suggest that aggressive use of the qualified immunity doctrine could be a useful tool for firearms confiscation post-*Bruen*.

> [A] state law enforcement officer may, after *Bruen*, confiscate an individual's firearm if the officer deems that person too dangerous to possess it. The officer's justifications may conflict with the federal courts' understanding of *Bruen* or the Second Amendment — perhaps flagrantly. But unless a previous, authoritative legal decision examining near-identical facts says so, the officer risks no liability. And because each individual act of disarmament will be unique, such prior decisions will be vanishingly rare. The result is a

> surprisingly free hand for states to determine who should and should not be armed, even in contravention of the Supreme Court's dictates.

Guha Krishnamurthi & Peter Salib, *Qualified Immunity as Gun Control*, 99 Notre Dame L. Rev. Reflection 93 (2023).

But compare and contrast the U.S. Supreme Court case of *Caniglia v. Strom,* 593 U.S. 194 (2021). In a 9-0 decision (with three concurrences) the court refused to extend the "community caretaking exception" to the Fourth Amendment's warrant requirement when removing firearms from someone's home. The *Caniglia* decision limited the holding of *Cady v. Dombrowski,* 413 U.S. 433 (1973). The *Caniglia* opinion sets forth a "clearly established" rule that removal of firearms from someone's home requires something stronger than "community caretaking." What about exigent or emergency circumstances? Or must police now seek a warrant from a neutral and detached magistrate, after a probable cause finding, upon sworn testimony?

7. [New Section] *California's Fee Shifting Statute for Gun-Law Challenges*

"That to secure these rights, Governments are instituted among Men, deriving their just powers from the content of the governed. . . " comes from the second paragraph of the Declaration of Independence. How exactly do constitutional rights get enforced, when the most likely source of any violation will be the government itself? Whether attributed to Plato or the satirical poet Juvenal (Declmus Junius Juvenalls) the phrase: "who will guard the guards themselves" (quis custodiet ipsos custodes) asks a practical question in the context of a political model that is based on limited government.

The generation that produced the Constitution and Bill of Rights were aware of the challenge. In 1788, James Madison, in Federalist No. 51 wrote: "You must first enable the government to control the governed; and in the next place to control itself."

Eighty years later, after the government established by that Constitution survived a Civil War, the Constitution was amended to address the causes of that war. Congress produced a set of statutes and constitutional amendments that "federalized" the enforcement of civil and (new and old) constitutional rights. *See* Ch. 7.C. The animating theme of the American Constitution is a system of checks and balances — using "ambition to check ambition." Federalist No. 51 (James Madison).

Over the years, Congress has established many federal agencies to enforce various constitutional and statutory rights. The Equal Employment Opportunity Commission investigates and brings suits to remedy employment discrimination. The Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity performs the same function with

respect to housing discrimination. The U.S. Department of Justice's Civil Rights Division has taken on its share of violations since its establishment but is often driven by the politics of any given administration. Federal agencies enforcing violations of the U.S. Constitution is still a paradigm in which one type of guardian (the federal government) is guarding another type of guardian (state and local governments, and in some cases private employers and corporations.)

Congress's innovation for motivating the ambition of nonguardians to guard the guardians, was to provide for the *private* enforcement of constitutional rights against violations by state governments, local governments, and private actors. *See* 42 U.S.C. §§ 1981, 1982 (violations of economic and civil rights based on racial animus by both state and private actors), 1983 (violations of federally recognized constitutional rights by state actors), 1985 (conspiracy to violate constitutional rights by both state and private actors), and 1986 (negligent failure to prevent wrongs under § 1985). Violations of constitutional rights by federal actors is addressed under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and case law.

To further inspire private actors, Congress provides for the payment of attorney fees and costs to parties when they succeed in lawsuits brought to enforce constitutional rights. 42 U.S.C. § 1988. This fee shifting policy is the fuel ensuring that ambitious lawyers, expert witnesses, and civic organizations will "invest" the time, energy, and money necessary to enforce the Constitution against deep-pocketed ambitions of (usually) government defendants.

In 2022, the State of California attempted to undermine 42 U.S.C. § 1988 by passing Senate Bill 1327. As amended, California's Code of Civil Procedure § 1021.11 would provide a cause of action for any government agency in California to bring suit (with 3 years retroactive effect) to recover the government's cost of litigation — including attorney fees — when defending any gun law. If plaintiffs brought ten claims and prevailed on nine, the plaintiffs and their attorneys would be jointly and severally liable for all of the government's attorney fees in the entire case.

The law was partially modeled on an anti-abortion Texas law that both the Governor and Attorney General of California had publicly criticized. California had even filed an amicus brief opposing the Texas law in a U.S. Supreme Court case arguing that the Texas statute was unconstitutional.

When the law was challenged, the California Attorney General declined to defend SB 1327. The Governor intervened to defend it. The preliminary injunction halting enforcement described the law as follows:

> The Intervenor-Defendant Governor describes the California law as identical or virtually identical to a Texas law known as S.B. 8. But that is not quite accurate. S.B. 8, among other things, creates a fee-shifting provision that applies only to cases challenging abortion restrictions. It is codified at Texas

> Civil Practice & Remedies Code § 30.022. California's Code of Civil Procedure § 1021.11 applies only to cases challenging firearm restrictions. Both provisions tend to insulate laws from judicial review by permitting fee awards in favor of the government, tilting the table in the government's favor, and making a plaintiff's attorney jointly and severally liable for fee awards. California's law then goes even further. As a matter of law, a California plaintiff cannot be a prevailing party. See § 1021.11. The Texas statute has no similar provision and thus it appears that a Texas prevailing plaintiff can be awarded his attorney's fees. The California provision, on the other hand, denies prevailing party status to a plaintiff, even a plaintiff who is entirely successful, and thus denies any possibility of recovering his attorney's fees. The California plaintiffs-never-prevail provision is not insignificant. And although both § 1021.11's and § 30.022's effect on court access should be constitutionally scrutinized, it is important to note that only § 1021.11 applies to laws affecting a clearly enumerated constitutional right set forth in our nation's founding documents. Whether these distinctions are enough to save the Texas fee-shifting provision from judicial scrutiny remains to be seen. And although it would be tempting to comment on it, the Texas law is not before this Court for determination. . . .
>
> A state law that threatens its citizens for questioning the legitimacy of its firearms regulations may be familiar to autocratic and tyrannical governments, but not American government. American law counsels vigilance and suspiciousness of laws that thwart judicial scrutiny. The Supreme Court does not countenance such efforts by Congress. "The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). How much more problematic are states that enact laws that insulate its own laws from legitimate judicial challenge?

Miller v. Bonta, 646 F. Supp. 3d 1218 (S.D. Cal. 2022) and *S. Bay Rod & Gun Club v. Bonta*, 646 F.Supp.3d 1232 (S.D. Cal. 2022). (The law was challenged by several firearm civil rights groups. The opinion in both cases is substantially identical.)

The Court found that SB 1327 chilled not only Second Amendment rights, but also the First Amendment right to petition the government for redress of grievances by limiting the public's access to the courts. The Court also went on to find SB 1327 violated the Supremacy Clause of the Constitution (ART. VI, CL 2) in attempting to nullify 42 U.S.C. § 1988.

A subsequent challenge was brought by the Firearms Policy Coalition against various local jurisdictions (cities and counties) to prevent enforcement of the law struck down in the in *Miller* and *S. Bay Rod & Gun Club,* on the theory that the injunction issued in the prior cases only bound the state of California and its agencies. The case was dismissed on standing grounds. *Firearms Pol'y Coal., Inc. v. City of San Diego*, 2024 U.S. Dist. LEXIS 4779

(January 9, 2024). Plaintiffs have appealed. A Ninth Circuit panel has granted an injunction pending appeal. The case number is 24-472. Oral argument has been scheduled for October 8, 2024.

NOTES & QUESTIONS

1. [New Note] The California and Texas statutes are criticized in Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 Yale L.J. 2048 (2023). The authors argue that Texas SB 8 (on abortion) and California's parallel law (on gun control) are "unprecedented and deeply threatening" to "fair play, access to courts, and legitimate contestation of bitterly disputed issues. Accepting its proliferation will result in a profound aggrandizement of state power that is inconsistent with federalism and separation of powers principles as well as due process and First Amendment rights." *See also* Amin R. Yacoub & Becky Briggs, *Can States Restrict The Constitutional Right to Bear Arms by Following the Design of Texas Bill 8?*, 25 U. Pa. J. Const. L. 404 (2023) (criticizing Supreme Court's decision on standing grounds not to act against the Texas statute).

F. BODY ARMOR

In New York, effective July 6, 2022, the purchase, taking possession of, sale, exchange, giving or disposing of body armor is prohibited, unless a person is engaged or employed in an eligible profession. *See* N.Y. Exec. Law § 144-a; N.Y. Gen. Bus. Law § 396-eee; N.Y. Penal Law §§ 270.20, 270.21, 270.22. Eligible professions include police officers and persons in military service, but not members of the "unorganized militia." *See* 19 N.Y.C.R.R. Ch. XIX, Part 905 (regulations on eligible professions for purchase, sale, and use of body armor). Professions currently under review include journalists and broadcast news crews, process servers, firearms instructors, and nuclear security officers.

An earlier law, hastily adopted after the mass shooting in Buffalo, New York on May 14, 2022, banned only "bullet-resistant soft body armor" and would not have prohibited the hard-plated armor worn by the Buffalo shooter. On July 1, 2022, a new law was signed, effective July 6, 2022, that defines "body armor" as "any product that is a personal protective body covering intended to protect against gunfire, regardless of whether such product is to be worn alone or is sold as a complement to another product or garment." N.Y. Penal Law § 270.20(2).

Unlawful wearing of body armor is a felony, N.Y. Penal Law § 270.20(1), while unlawful purchase or possession of such armor is a misdemeanor for the first offense and a felony for the second offense, N.Y. Penal Law § 270.21.

Unlawful sale of body armor is a misdemeanor for the first offense and a felony for the second offense, N.Y. Penal Law § 270.22, and is subject to additional civil fines, N.Y. Gen. Bus. Law § 366-eee(4).

New York's ban on body armor may not be constitutional after *New York State Rifle & Pistol Ass'n. v. Bruen.* Body armor likely is a protected "arm" under the Second Amendment. (See Ch. 15.F). *Heller* relied on dictionaries to define "arms," and all of those dictionaries included armor in the definition:

> Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

Heller, 554 U.S. at 581.

Until New York's law, no state had adopted a broad ban on body armor for law-abiding citizens. While the federal government and many states punish the use of body armor in a crime or forbid convicted criminals from possessing armor, there is no American historical precedent or analogues for such a broad prohibition on law-abiding citizens.

The only English precedent is of no use under *Bruen*'s rule that the only English precedents that matter are longstanding ones that were adopted in the American colonies and that continued into the Founder Era. In 1181, King Henry II promulgated the Assize of Arms. It required everyone to possess certain types and quantities of arms — no more and no less — based on economic class. Ch.2.; online Ch. 22.B. The Jewish section of the Assize stated: "7. Item, no Jew shall keep in his possession a shirt of mail or a hauberk [an armored shirt made of mail or leather], but he shall sell it or give it away or alienate it in some other way, so that it shall remain in the king's service."

In 1285, however, King Edward I replaced the Assize of Arms with the Statute of Winchester (Ch. 2.B; online Ch. 22.B). It too required minimum quantities of arms and armor, based on economic class. But there were no maxima, and no rule against someone in a particular class also voluntarily acquiring arms and armor that were mandatory for another class. As for Jews, Edward I expelled them from England, following incidents in which armed Jews had used arms and armor to resist mob attacks. Neither the Assize of Arms nor the Statute of Winchester arms and armor requirements were ever adopted in the American colonies, the types of arms and armor described in

those statutes being mostly obsolete by the time the Virginia Company landed in 1607.

In June 2024, a body armor manufacturer filed a complaint asking that the New York prohibitions be declared unconstitutional. *Armored Republic Holdings v. Mosley*, No. 2:24-cv-04261 (E.D.N.Y., June 17, 2024).

Further reading: Joseph G.S. Greenlee, *The Tradition of Armor Use and Regulation in America*, 23 Geo. J.L. & Pub. Pol'y (Forthcoming 2024).

CHAPTER 16
HOW AND WHY? OTHER RESTRICTIONS

C. WAITING PERIODS AND LICENSING

1. Waiting Periods and One-Gun-Per-Month Laws

a. [New Section] Waiting Periods

A federal district court denied a preliminary injunction against New Mexico's new seven-day waiting period. The court held that purchasing a firearm is not covered by the plain text of the Second Amendment, that the waiting period is a type of *Heller*'s "presumptively lawful" "conditions and qualifications on the commercial sale of arms," and that *Heller*'s reference to "longstanding" regulations provided a safe harbor for regulations (like bans on felon possession) that only arose in the twentieth century. Even if there were a Second Amendment issue, the waiting period was analogous to early restrictions on firearms sales to Indians, slaves, free people of color, and people who would not take loyalty oaths during wartime. *Ortega v. Grisham*, 2024 WL 3495314 (D.N.M., July 22, 2024).

Colorado's new ten-day waiting period was also upheld on grounds that the Second Amendment is not implicated, and even if it were, it is supported by historic laws against selling firearms to intoxicated persons, by the modern problem of impulsive gun homicide being worse than in the Founding Era, and by the fact that historically, even after mail order gun sales became common, obtaining a firearm would take at least several days for many people. *Rocky Mountain Gun Owners v. Polis*, 701 F.Supp.3d 1121 (D. Colo. 2023).

In 2015 Wisconsin repealed its two-day waiting period in 2015, and in 2018 Florida enacted a three-day wait. Examination of these two natural experiments found no "support for any positive effect of waiting period restrictions for handgun purchases on suicide or homicide rates." E.J. Morera & K. Alexander Adams, *Empirically Testing Waiting Period Restrictions to Challenge the Underlying Legal Paradigm*, Duke Ctr. for Firearms L. (July 26, 2022) (describing paper presented at Works-in-Progress workshop held by the

Duke Center for Firearms Law and University of Wyoming College of Law Firearms Research Center).

In contrast, a metastudy by the Rand Corporation found "moderate" evidence that waiting period reduce suicides and homicides. Rand Corp., Gun Policy in America, *The Effects of Waiting Periods*, July 16, 2024. The Rand report is rather opaque about its sources. For example: "Nine studies evaluated the relationship between waiting-period laws and homicides or violent crime. While the direction of effects varied across studies (two found that waiting-period laws increased homicides), the three methodologically stronger studies either found uncertain effects or that mandatory purchase delays significantly reduced total or firearm homicides." The report does not specify the nine studies that were reviewed, nor which ones were classified as "the three methodologically stronger studies." The Rand report did not examine the Adams paper.

b. [New Section] **One-Gun-Per-Month Laws.**

Though not a per se waiting period, several states prohibit what gun control advocates call "bulk purchases." This usually gets translated as a limitation on how many firearms someone can buy from a licensed dealer in one month. California applies the sales restriction to all firearms. Cal. Penal Code § 27540. (It does not apply to private party sales conducted through a licensed dealer. Cal. Penal Code § 27535.) Connecticut imposes a limit of three handguns per month, with no restriction on long guns. Conn. Gen. Stat. § 29-33(f). Maryland limits an individual to one handgun or one "assault weapon" every 30 days. Md. Code Ann., Pub. Safety §§ 5-128, 5-129, and 5-144. New Jersey's law limits sales of handguns to any individual to one per month. N.J. Stat. Ann. §§ 2C:58-2(a)(7), 2C:58-3(i), and 2C:58-3.4. A Virginia law has a default prohibition on purchasing more than one handgun within a 30-day period, but it is possible to obtain an exemption. Va. Code Ann. § 308.2:2(R).

Federal law requires FFLs to report multiple sales of handguns made by individuals within a 30-day period. 18 U.S.C. § 923(g)(3)(A). In the four states that border Mexico, FFLs have been ordered to report multiple sales of certain semi-automatic rifles. Letter from Charles Houser, Chief, Nat'l Tracing Ctr., to Fed. Firearms Licensees (July 12, 2011); Agency Information Collection Activities; Proposed Collection Comments Requested: Report of Multiple Sale or Other Disposition of Certain Rifles, 76 Fed. Reg. 24,058 (Apr. 29, 2011); Bureau of Alcohol, Tobacco, Firearms & Explosives, Q&As for the Report of Multiple Sale or Other Disposition of Certain Rifles.

A challenge to California's "One-Gun-Per-Month" (OGM) law was brought in *Nguyen v. Bonta*. While the was case pending, the Supreme Court issued *Bruen*. After supplemental briefing, the trial court denied the cross motions for

summary judgment and reopened discovery so that the parties could conduct discovery under the new *Bruen* standards. 675 F. Supp. 3d 1065 (S.D. Cal. 2023). After discovery and renewed cross-motions for summary judgment, the trial court found that there was no historical analog to California's OGM law and entered judgment for the plaintiffs, with a stay of enforcement to facilitate an appeal by the defendants. A motion to maintain the stay pending appeal was filed by California in the Ninth Circuit and was initially granted. The case was argued to a Ninth Circuit merits panel on August 14, 2024. On August 15, 2024, the merits panel reversed the stay pending appeal. The docket number is 24-2036.

2. [New Section] ***Licensing***

In Maryland, the permanent transfer for any firearm, including a gift among family members, requires registration and a seven-day waiting period during which a background check is performed. Md. Code, Pub. Safety §§ 5-117, 118-130. In 2013, the state legislature added an additional requirement, the "handgun qualification license." *Id.* at § 5-117.1. It requires fingerprints and a four-hour safety course that includes the firing of at least one live round; once those are completed, the government has up to 30 days to approve or deny the handgun qualification license. After approval, the individual may acquire a handgun, after completion of the seven-day waiting period and a second background check.

In a case that did not challenge the seven-day waiting period, a Fourth Circuit panel ruled 2-1 in favor of a challenge to the handgun qualification license. Maryland Shall Issue v. Moore, 86 F.4th 1038 (4th Cir. 2023). Several weeks after the decision, the Fourth Circuit vacated the opinion and granted en banc review. 2024 WL 124290 (4th Cir. Jan. 11, 2024).

The three-judge panel majority held that the handgun qualification license had no foundation in history and tradition. Laws against "dangerous" people being armed were not relevantly similar; first the matter was already covered by other Maryland laws; second the handgun qualification license obstructed everyone, not only dangerous people. *Maryland Shall Issue*, 86 F.4th at 1046-47. Historical laws requiring training by militia members were not analogous, because none of those laws prevented anyone, whether in the militia or not, from acquiring a firearm. *Id.* at 1047-49

The dissent countered that the handgun qualification license was similar to modern Shall Issue concealed carry licensing laws, which had been specifically approved by the Supreme Court in *Bruen*. *Id.* at 1055-57 (Keenan, J., dissenting). The majority answered:

> [E]ven if we stretch the Court's language to actually bless most shall-issue *public carry* regimes, this says little about shall-issue regimes that limit *handgun possession altogether*. A restriction on whether someone can even possess a firearm in or out of the home is more burdensome than one that only limits his right to carry that firearm publicly.

Id. at 1045-46 n.9. The dissent replied, "this distinction turns on a false premise, namely, that there is a difference between the Second Amendment right to keep arms and the Second Amendment right to bear arms. Neither the text of the Second Amendment nor the Supreme Court's precedent supports such a reading." *Id.* at 1055 (Keenan, J., dissenting).

The debate raises important questions for which the Supreme Court has not yet specified an answer. As a matter of historical practice up to 1900, state laws against concealed carry in public places were common, whereas few legislatures purported to have the authority to outlaw concealed carry on one's own property. Licensing laws for concealed carry originated the late nineteenth century, and by the time *Bruen* was decided, had become standard. In contrast, licensing laws for home possession were nonexistent for free citizens for almost all of the pre-1900 period, and even today remain a distinct minority position.

Thus, judges and policymakers face a dilemma. On the one hand, the Second Amendment text makes no distinction between the right to "keep" and the right to "bear." However, the American legal tradition has always treated the right to bear as susceptible to regulations that might be considered infringements if applied to the right to keep.

California's system of background checks for ammunition purchases has been a catastrophe, with over 10 percent of buyers falsely denied. Much of the problem is how the background checks are structured, which go far beyond checking that the buyer is not on the California Department of Justice list of prohibited persons. In an opinion suggesting that a competently administered system for ammunition purchases licenses might be constitutional a U.S. District Court issued a permanent injunction against the California system. *Rhode v. Bonta*, 2024 WL 374901 (S.D. Cal. 2024). However, a few days later a 2-1 panel of the Ninth Circuit issued a stay of the injunction pending appeal.

In contrast, in a challenge to New York new background check for ammunition purchases, ten plaintiffs presented evidence that their purchases had been unreasonably delayed. But the district court consider these anecdotes insufficient to justify a preliminary injunction. The government's evidence showed that in the first weeks of the system — Sept. 13 to Oct. 9, 2023 — there were 29,464 checks, and 29,037 buyers were eventually approved. The court described these approvals as "instantaneous," although the government had not submitted any evidence in that regard. The new fees on ammunition sellers were not an unconstitutional tax singling out a constitutional right, because

the fees are used to administer the background check system. *New York State Firearms Association v. James*, 2024 WL 1932050 (W.D.N.Y. May 2, 2024).

NOTES & QUESTIONS

1. In *California Rifle & Pistol Assoc. v. Los Angeles County Sheriff's Department*, No. 2:23-cv-10169-SPG-ADS (C.D. Cal.), a United States District Court judge issued a preliminary injunction on August 20, 2024 against the Los Angeles County Sheriff's office to correct practices that resulted in extreme delays in issuing concealed carry permits to applicants. The same order also requires California to accept and process permits from out-of-state applicants. The preliminary injunction will be in place pending full litigation of plaintiffs other claims that include challenges to the extraordinarily high costs of obtaining a permit, a psychological exam requirement, full reciprocity for out-of-state permits, and other irregularities in permit denials, such as denying permits to people accused of criminal conduct, who later had charges dismissed by prosecutors.

3. [New Section] ***Insurance***

A novel requirement of gun licensing is a requirement that the owner have insurance against misuse of a firearm. For example, after the *Bruen* decision, the New Jersey legislature, acknowledging that local police departments would have to start issuing carry permits, enacted a statute requiring Carry Permit applicants to show proof of insurance. N.J. Stat. Ann. §§ 2C:58-3, -4. The applicant must have at least $300,000 coverage "insuring against loss resulting from liability imposed by law for bodily injury, death, and property damage sustained by any person arising out of the ownership, maintenance, operation or use of a firearm carried in public." *Id.* at 4(d)(4). That carry insurance requirement was one part of a broad bill imposing substantial restrictions on the exercise of the right to licensed carry, in response to the *Bruen* decision.

When the insurance mandate was challenged, the New Jersey Attorney General argued that that an applicant's homeowner's or renter's insurance policy would suffice. The argument is valid for firearms accidents. But insurance law generally forbids insurance for intentional crimes perpetrated by the insured, such as intentionally shooting a third person without legal justification. *See* George A. Mocsary, *Insuring Against Guns?*, 46 Conn. L. Rev. 1209 (2014).

A U.S. District Court for New Jersey held the mandate unconstitutional. *Koons v. Platkin*, 673 F.Supp.3d 515 (D.N.J. 2023). The nineteenth-century surety laws (Ch. 6.B.5) were not persuasive precedents. First, they required a judicial finding that the particular individual was threatening to breach the

peace, generally in response to a complaint brought by someone else. Second, the civil penalty for violating the surety by breaching the peace with a firearm was forfeiture of the bond, whereas New Jersey imposes a sentence of up to 18 months imprisonment. Third, surety bonds were time-limited, whereas the New Jersey mandate is perpetual.

The New Jersey court distinguished the San Jose, California, *National Association for Gun Rights* case (discussed next) on the grounds that the San Jose insurance ordinance for home possession of a firearm was materially different: insurance was only required against accidents; the law exempted anyone with a concealed carry permit or who could not afford insurance; and the only penalty for noncompliance was a civil fine.

The New Jersey court rejected the San Jose court's reliance on surety laws. Contrary to the San Jose court's claim, insurance underwriting does not actually include individualized determination of the likelihood that an individual will misuse a firearm.

In the nineteenth century, some jurisdictions imposed tort liability for injuries caused by another person's firearm, under theories of strict liability or trespass. The availability of tort redress, said the *Koons* court, "demonstrates that the Insurance Mandate is unconstitutional." *Id.* at 590. As *Bruen* said, "[I]f earlier generations addressed the societal problem, but did so through materially different means, that . . . could be evidence that a modern regulation is unconstitutional." *Id.* (quoting *Bruen*, 142 S. Ct. at 2131). "Firearm injuries have occurred throughout this Nation since its founding. Yet the State has not shown that earlier generations addressed this problem by mandating that all arms bearers obtain insurance or post a bond to prevent injuries that may not occur." *Id.*

Accordingly, the court issued a preliminary injunction against the insurance mandate — and also against many other provisions of the new New Jersey statute. *See* 2024 Supp. Ch. 14.A The New Jersey Attorney General immediately sought an emergency stay from the Third Circuit. The panel issued a stay for many of the "sensitive places" limits in the new statute, but declined to stay the preliminary injunction against the insurance mandate. *Koons v. Platkin*, No. 23-1900 (3d Cir., June 20, 2023).

The San Jose, California, case involved an insurance mandate for gun owners, and other requirements. An ordinance enacted in 2022 required gun owners to pay an Annual Gun Harm Reduction Fee, which the City Council will distribute to a nonprofit. Gun owners must also have insurance, unless they have a Concealed Handgun License or would suffer "financial hardship." San Jose Code of Ordinances, §§ 10.32.200-250.

The laws were immediately challenged in *National Association for Gun Rights v. City of San Jose*, 618 F. Supp. 3d 901 (N.D. Cal. 2022). Plaintiffs' motion for a preliminary injunction was denied in all respects.

Some claims failed for lack of ripeness, such as First Amendment speculation that the yet-to-be-chosen nonprofit that gets the money will use the money for speech with which plaintiffs disagree. Similarly, until the fee is set, the court could not determine whether the fee is so high as to violate the Second Amendment.

The insurance requirement was upheld because: (1) Historically, gun owners could be sued for accidents, under theories of negligence or strict liability. (2) Gun carriers who were found by a court to be threatening to breach the peace could be required to post a bond if they wanted to continue carrying. "[T]he mid-19th century surety statutes, cited by the City and discussed at length in *Bruen*, bear striking analogical resemblances to the Insurance Requirement." (3) *Bruen* approved of various requirements for shall-issue carry permits, such as safety training. The court later granted a motion to dismiss for all but the fee claims. *National Association for Gun Rights v. City of San Jose*, No. 22-cv-00501 (N.D. Cal. July 13, 2023).

Further reading: Surveying the history of tort law, insurance law, and surety of the peace statutes (Ch. 6.B.5), a new article concludes that "insurance mandates are ineffective and unconstitutional." Adam B. Shniderman, *Gun Insurance Mandates and the Second Amendment*, 75 S. Car. L. Rev. 97 (2023); *see also* George A. Mocsary, *Insuring Against Guns?*, 46 Conn. L. Rev. 1209 (2014) ("examining whether mandating liability insurance for firearm owners would meet its avowed goals of efficiently compensating shooting victims and deterring unlawful and accidental shootings").

D. EMERGENCIES

In January 2022, a Ninth Circuit panel ruled in *McDougall v. County of Ventura*, 23 F.4th 1095 (9th Cir. 2022), that Ventura County's pandemic lockdowns of gun stores and shooting ranges had violated the Second Amendment, since the county had allowed other businesses with comparable (small) risks to stay open. The three-judge panel had rigorously applied the Ninth Circuit's particular rules for the Two-Step Test.

The exercise of constitutional rights cannot be treated *worse* than other activities that are comparably dangerous. The U.S. Supreme Court took a similar approach to the free exercise or religion. The Court held that California could not impose Covid-19 lockdowns on home religious gatherings when California allowed other, larger, and at least equally risk gatherings to take place for other purposes. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Judge Lawrence VanDyke, author of the *McDougall* panel opinion, also wrote a "concurring opinion" in which he predicted that *McDougall* would be en-banced. Judge Van Dyke's concurrence was a "draft" opinion for the future en banc, upholding the Ventura County lockdown. He explained, "Since our court's Second Amendment intermediate scrutiny standard can reach any result one desires, I figure there is no reason why I shouldn't write an alternative draft opinion that will apply our test in a way more to the liking of the majority of our court. That way I can demonstrate just how easy it is to reach any desired conclusion under our current framework, and the majority of our court can get a jump-start[.]" *Id.* at 1119-20. The "concurring" opinion's footnotes explained Judge Van Dyke's disagreements with what he argued was sloppy and biased reasoning in the circuit's en banc gun cases. He noted that, since *Heller*, the Ninth Circuit had heard at least 50 Second Amendment challenges, of which none succeeded. Every panel case in which a challenger won was reversed en banc — even if no party had petitioned for en banc review.

As predicted, the *McDougall* decision was en banced a few weeks later, despite neither party having asked for en banc review. 26 F.4th 1016 (9th Cir. Mar. 8, 2022) (en banc). But after the *Bruen* decision, the Ninth Circuit remanded *McDougall* to the district court, for reconsideration in light of *Bruen*. 2022 WL 2338577 (Mem.) (9th Cir. June 29, 2022).

On September 7, 2023, New Mexico Governor Michelle Lujan Grisham issued an order declaring "gun violence" to be a public health emergency. With questionable statutory authority, she imposed a variety of gun controls, including forbidding licensed handgun carry in the city of Albuquerque. A U.S.. District Court issued a temporary restraining order. *National Association for Gun Rights v. Grisham*, 2023 WL 5951940 (D.N.M. Sept. 13, 2023). The state government then issued an amended order, removing the broad ban on carry, and forbidding carry "in public parks and playgrounds, or other public areas provided for children to play in." The court denied a motion for an injunction against the narrower ban. *We the Patriots, Inc. v. Grisham*, 697 F.Supp.3d 1222 (D.N.M. Oct. 11, 2023). The case is presently before the Tenth Circuit, with oral argument scheduled for Sept. 25, 2024.

Further Reading: Jessica R. Graham & Kyle J. Morgan, *God, Guns, and Hair Salons: Public Perceptions of Rights and Liberties During the COVID-19 Pandemic*, 125 W. Va. L. Rev. 87 (2022) (analyzing a database of letters to the editor submitted to 33 newspapers early in the pandemic, the authors report that the public generally had a "nuanced" view of lockdowns and was willing to trade liberty for security).

E. GUN CONTROL BY NONSTATE ACTORS

NOTES & QUESTIONS

3. [New Note] A well-informed overview of current controversies involving bank actions against firearms businesses is Dru Stevenson, *Guns and Banks: New Laws & Policies*, Duke Ctr. for Firearms L. (Apr. 7, 2022).

4. [New Note] Drury D. Stevenson, *William Rotch and Second Amendment History*, 100 U. Det. Mercy L. Rev. 413 (2023). During the American Revolution, prominent Quaker businessman William Rotch "was summoned before a revolutionary tribunal because he sank a boatload of desperately needed bayonets at sea to prevent their use in the war; and he faced treason charges over his attempt to declare his home island of Nantucket neutral or independent during the war." The author uses Rotch's plight, and the conscientious objectors clause in James Madison's first draft of the future Second Amendment (Ch. 5.D), to argue that state anti-boycott laws should not infringe the conscience rights of businesses that refuse to have any dealings with the firearms industry, such as banks that refuse to accept firearms businesses as customers.

5. [New Note] While banks are private corporations, they are closely regulated, and typically cooperate with warrantless government requests for information about customers. For example, after the January 6, 2021, attack on the U.S. Capitol, Bank of America, acting at the request of federal investigators who did not have warrants, reviewed its customer transaction records, and provided investigators with 211 customer names, based on their having:

> 1. Customers confirmed as transacting, either through bank account debit card or credit card purchases in Washington, D.C. between 1/5 and 1/6. 2. Purchases made for Hotel/Airbnb RSVPs in DC, VA, and MD after 1/6. 3. Any purchase of weapons or at a weapons-related merchant between 1/7 and their upcoming suspected stay in D.C. area around Inauguration Day. 4. Airline related purchases since 1/6.

Of the 211 customers identified by Bank of America, at least one individual was interviewed and cleared. Tucker Carlson, *Bank of America Handed Over Customer Data to Feds Following Capitol Riot*, FoxNews, Feb. 4, 2021.

More broadly, a February 14, 2024, U.S. House hearing probed a U.S. Treasury Department, Financial Crimes Enforcement Network (FinCEN), practice that began during the Trump administration and which continues to this day, of FinCEN requesting information from banks about customer purchases of firearms, Bibles, or MAGA products. *See* U.S. House, Financial

Services Comm., hearing on *Oversight of the Financial Crimes Enforcement Network (FinCEN) and the Office of Terrorism and Financial Intelligence (TFI)*, Feb. 14, 2024, questions of Rep. Bill Huizenga and Rep. Ann Wagner. Such informational requests about lawful products are, arguably, contrary to the Bank Secrecy Act and related regulations. 31 U.S.C. § 5311 et seq.; 12 C.F.R. § 21.11; 12 C.F.R. § 21.21.

According to Bank of America's current lending practices, "any client or transaction involving the manufacture of military-style firearms for non-law enforcement, non-military use must be escalated to the Senior-level Risk Committee for decisioning." Bank of America Corporation, *Environmental and Social Risk Policy (ESRP) Framework* 10 (Dec. 2023). In August 2024, the Louisiana State Treasurer, pursuant to La. Rev. Stats. §§ 49:317 & 320, recommended the rejection of Bank of America's application to become an authorized fiscal agent for the state government, due to discrimination against "religious organizations, gun manufacturers, fossil fuel producers and others." Louisiana Dep't of Treasury, *Dr. Fleming's Statement on Bank of America*, Aug. 12, 2024.

6. [New Note] California registers all gun owners and all their guns. The state government discloses personal identifying information to research institutions that work on preventing "gun violence." Among the information transmitted is Social Security Numbers of concealed carry applicants. At present, the data are given to gun-control research organizations at U. Cal. Davis and Stanford. A federal court denied a motion for a preliminary injunction. If the government can collect the data (as plaintiffs concede) why can't the government share it? Concerns that personal identifying will be leaked by malice or negligence are speculative, held a federal district court. *Doe v. Bonta*, 650 F.Supp. 3d 1062 (S.D. Cal. 2023); California Assembly Bill 173 (2021).

But a preliminary injunction was granted by a state court. Plaintiffs were likely to succeed in their claim on privacy rights under the California Constitution.

> . . . while this motion has been pending, a massive data breach reportedly occurred that leaked personal identifying information from the firearm databases for concealed carry applicants in or about June of 2022. . . .
>
> The California Department of Justice is enjoined from transferring to researchers (1) personal identifying information collected in the Automated Firearms System pursuant to Penal Code section 11106(d) and (2) personal identifying information collected in the Ammunition Purchase Records File pursuant to Penal Code section 30352(b)(2), until further notice and order by the Court.

Brandeis v. Bonta, 37-2022-00003676-CU-CR-CTL (Superior Ct., San Diego County, Oct. 13, 2022).

In an appeal of the U.S. District Court case, the Ninth Circuit ruled that plaintiffs' facial challenge to the statute failed. First, Fourteenth Amendment protection of informational privacy applies only to "highly personal" information, and not to "innocuous biographical data" available in other databases. While the Department of Justice's disclosure of Social Security numbers of concealed carry applicants to the researchers might, arguably, involve highly personal information, the California statute did not mandate disclosure of those numbers. As for plaintiffs' claims that the disclosure of personal data to the universities chilled the exercise of their Second Amendment rights, plaintiffs had offered no evidence that the universities had publicly disclosed any information. (The hacking discussed above involved Department of Justice computers, not university computers.) *Doe v. Bonta*, 101 F.4th 633 (9th Cir. 2024).

7. [New Note] In 2022, the major American credit card companies, responding to requests from Democratic lawmakers, announced plans to create a new merchant category code (MCC) for stores that sell firearms. The code was created by the International Organization for Standardization (ISO), on Sept. 9, 2022, at the request of Amalgamated Bank, which declares itself to be "proud to support candidates, political parties, political action committees, and political organizations as they seek to build power for progressive change." The new MCC would mean that, for example, a cardholder's purchases from Cabela's would be put in a category different from purchases from department stores. The MCC, in its current form, does not reveal what items were purchased at a particular store. The new MCC was said to be a means of finding out about large purchases by incipient mass shooters.

Seventeen states have enacted legislation forbidding a separate MCC for stores that sell firearms: SB 281 (Alabama), SB 214 (Florida), HB 1018 (Georgia), HB 295 (Idaho), HB1084 (Indiana), House File 2464 (Iowa), HB 357 (Kentucky), SB301 (Louisiana), HB 1110 (Mississippi), SB 359 (Montana), HB 1186 (New Hampshire), HB 1487 (North Dakota), **SB 2223** (Tenneesee), HB 2837 (Texas), HB406 (Utah). HB 2004 (West Virginia), and Senate File 105 (Wyoming).

Conversely, laws to mandate separate MCCs from stores that sell firearms have been enacted in AB-1587 (California), S.8479A & A.9862A (New York), and SB24-066 (Colorado).

One difficulty with MCC mandates is that the reported information is very nonspecific, because stores that sell firearms and ammunition always sell many other products, and some firearms stores sell a wide variety of sporting goods. According to California Assemblyman Phil Ting, sponsor of the

California law, "If there was someone suspiciously purchasing a large number of firearms, right now it would be very difficult to tell. You couldn't tell if they were soccer balls or golf balls or basketballs." David A. Lieb, *Should Gun Store Sales Get Special Credit Card Tracking? States Split on Mandating or Prohibiting It*, Assoc. Pr., June 29, 2024. That issue could perhaps be resolved in the future by requiring stores that sell firearms and ammunition to set up separate checkout registers for firearms and ammunition, with those checkout stations registered with credit card companies as a store separate from the rest of the store.

A predictable effect of MCC mandates is that some customers will pay by cash or check, rather than by credit card. To the extent state financial regulators require banks to report sales to law enforcement, the reporting creates a partial registry of gun owners.

While mass shootings are typically planned long in advance, to the extent that an incipient mass shooter, such as the criminal who attacked an elementary school in Uvalde, Texas, on May 24, 2022, cannot afford to pay cash, then the purchases would be recorded in the MCC system. If MCC reports only included large transactions (rather than buying one gun or several boxes of ammunition) a challenge for law enforcement would be distinguishing a MCC transaction such as that of the Uvalde criminal from the vast number of firearms store sales in which law-abiding individuals purchase several firearms at once, or hundreds of rounds of ammunition. With only large sales reported, an incipient criminal could structure purchases so as to only purchase one firearm and/or a small quantity of ammunition at a time.

Further reading: David B. Kopel, *Written testimony on SB24-066*, Colorado Senate Business, Labor, & Technology Committee, Feb. 8, 2024.

F. TRAINING AND RANGES

NOTES & QUESTIONS

3. [New Note] *Drummond v. Robinson Township*, 9 F.4th 217 (3d Cir. 2021). The Third Circuit applied intermediate scrutiny to zoning restrictions in a Pittsburgh suburb. The panel held that the government failed to provide a "close fit" (intermediate scrutiny's analogue to strict scrutiny's "narrowly tailored") for the two zoning rules: shooting ranges could only be operated by nonprofits, and rifle ranges for calibers other than .22 rimfire were forbidden.

4. [New Note] Joseph G.S. Greenlee, *The Right to Train: A Pillar of the Second*

Amendment, 31 Wm. & Mary Bill of Rts. J. 93 (2022). The first detailed historical analysis of the legal history of the right to train examines English law, American colonial law, the American Revolution, the adoption of the Constitution and the Bill of Rights, historical restrictions on firearms practice, and modern cases. The modern cases all agree that there must be a right to train, but the cases have not yet investigated legal history in depth. In the author's view, "training is a pillar of the right to keep and bear arms because it is required to develop the skills necessary to effectively exercise the other protected rights, such as self-defense, hunting, and militia service. Given the historical foundation of the right to train, courts should ensure that it is robustly protected by the Second Amendment, as the Founders intended."

5. [New Note] A Michigan business wanted to build a public outdoor shooting range, including 1,000 yard bay. The township changed the zoning to stop the range. After the U.S. District Court dismissed the case, the Sixth Circuit reversed and remanded for reconsideration under *Bruen*. *Oakland Tactical Supply, LLC v. Howell Twp., Michigan*, 2022 WL 3137711 (6th Cir. Aug. 5, 2022). On remand, the case was dismissed again. 2023 WL 2074298 (E.D. Mich. Feb. 17, 2023). The Sixth Circuit held that "Although Plaintiffs are correct that the Second Amendment protects the right to engage in commercial firearms training as necessary to protect the right to effectively bear arms in case of confrontation, they make no convincing argument that the right extends to training in a particular location or at the extremely long distances Oakland Tactical seeks to provide." 103 F.4th 1186, 1197 (6th Cir. 2024). The zoning ordinances allowed the operation of commercial ranges, and also shooting firearms on one's own land. As for the fact that the zoning made training at 1,000 yards impossible:

> It is difficult to imagine a situation where accurately firing from 1,000 yards would be necessary to defend oneself; nor have Plaintiffs identified one. To the extent that historical evidence is probative of the scope of a right derived by necessary implication, like the right to train, the historical evidence Plaintiffs present — a handful of examples of rifleman making shots from 600 to 900 yards during the Revolutionary War — is not convincing. Assuming these examples show that the Founding-era public understood military proficiency to include accuracy at these long distances, they do not establish that the Second Amendment right — which is unconnected to "participation in a structured military organization," *Heller*, 554 U.S. at 584 — was similarly understood. And beyond this historical evidence, Plaintiffs make no real argument that long-distance training is necessary for the effective exercise of the right to keep and bear arms for self-defense, other than briefly noting that the federally chartered Civilian Marksmanship Program offers 1,000-yard training. We cannot conclude, based on these arguments, that the plain text of the Second Amendment covers the second formulation of Plaintiffs' proposed

> course of conduct—the right to commercially available sites to train to achieve proficiency in long-range shooting at distances up to 1,000 yards.

Id. at 1198-99. The dissent would have remanded for consideration of two undeveloped issues: "first, whether training for purposes of confrontation or self-defense is limited to target shooting at certain distances (which, as discussed above, the plaintiffs have not adequately briefed); and second, whether the Township's restrictions on the plaintiffs' proposed conduct is consistent with the Nation's historical traditions of firearm regulation (which the Township thus far has not briefed at all)." *Id.* at 1204 (Kethledge, J., dissenting).

G. FIREARMS LITIGATION FOR NEW ATTORNEYS

6. [New Section] *Firearms Forensics*

Cases involving the misuse of a firearm often turn on forensic evidence. In firearms with rifled barrels (that is, all rifles and the very large majority of handguns), the bullet engages with the bore as it travels through the barrel, and the barrel imparts marks onto the bullet. Due to slight differences in the manufacturing process (*e.g.*, drilling the firearm's bore), and also due to differences in use over time, bores from the same model of a firearm impart different marks on a bullet.

Sometimes, forensic scientists compare the marks on bullets discovered at different crime scenes to determine whether they were fired from the same gun. Or a forensic examiner might testify that a particular bullet, recovered at a crime scene, was likely or certainly fired from a particular gun — namely, the gun belonging to a defendant.

Likewise, the firing pin or striker leaves a mark on the shell, and the shell may also receive marks from being inserted into and removed from the firing chamber. The history of firearms forensic analysis, including growing acceptance over the twentieth century and some more recent skepticism, is described in Brandon L. Garrett, Eric Tucker & Nicholas Scurich, *Judging Firearms Evidence*, Duke L. Sch. Pub. L. & Leg. Theory Series No. 2023-10.

In the first decade of the twentieth century, some gun control groups advocated that every handgun must be test-fired and the forensic results placed in a state government database, for future use in criminal investigations. These proposals have been criticized by Professor David B. Kopel because they would make forensic analysis more difficult and time-consuming. When an examiner is using a computer database of ballistic images, computers can narrow down candidates for a match, but the

examination of the finalist images must be performed carefully by humans. Flooding the databases with huge numbers of images (*e.g.*, all handguns) would overwhelm the system with false positives. Professor Kopel and co-author Sterling Burnett argue that the better approach is for databases to comprise only images from particular guns or bullets that have been associated with criminal activity. The Kopel-Burnett monograph details the process of ballistic matching analysis. Sterling Burnett & David B. Kopel, *Ballistic Imaging: Not Ready for Prime Time*, National Center for Policy Analysis, Policy Backgrounder No. 160 (Apr. 2003).

Maryland's Supreme Court recently held 4-3 that forensic experts may not testify that a particular bullet was definitely fired from a particular gun. Instead, the expert may only testify that the marks on a bullet were consistent (or inconsistent) with having come from a particular gun. *Abruquah v. Maryland*, no. 10 (June 20, 2023). The decision comes in the context of growing concerns that some forms of forensic evidence are unreliable pseudo-science. For example, "bite mark analysis," once widely used by courts, is now generally discredited. No-one claims that forensic analysis of bullets or cases is purely junk science, but the scope of what such analysis can prove is now more carefully scrutinized than in the past.

Another forensic subject for attorneys practicing criminal law is wound ballistics. In this forensic field, examination of gunshot wounds attempts to reconstruct how the shooting occurred. For example, if the gunshot victim's clothing has gunpowder residue around the bullet hole, the residue indicates that the muzzle of the gun was in contact with the victim when the bullet was fired. *See*, *e.g.*, Vincent J.M. DiMaio & Vernon J. Geberth, Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques (3d ed. 2021).

A recent article surveys the growing judicial skepticism about some types of forensic evidence in firearms cases, such as expert claims that bullet X was almost certainly fired from gun Y. The article suggests that courts, thanks in part to recent changes in Federal Rule of Evidence 702, are being less credulous about accepting such claims. *See* Brandon L. Garrett, Eric Tucker, & Nicholas Scurich, *Judging Firearms Evidence*, 97 S. Cal. L. Rev. 101 (2024).

NOTES & QUESTIONS

6. [New Note] *New York Rifle & Pistol Assoc. v. Bruen,* has instigated a blizzard of litigation seeking to apply the Court's "plain text presumption" and permissible "analogues of laws from the founding" when modern courts must adjudicate the constitutionality of modern gun laws. Recall that once the presumption is met (e.g., that the law infringes on the keeping and bearing arms), the burden of proof and persuasion shifts to the government to show

that the modern law has a pedigree (or analogue) that can be traced back to the 1790s.

Firearms-law practitioners (and judges) might be tempted to delegate resolution of this task solely to historians as expert witnesses. That would be a mistake. The task is more properly a collaborative effort between the historian as consultant, the lawyers as advocates, with judges retaining the final *legal* determination of applicable ancient legal texts under the test articulated in *Bruen.*

It is a "false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 399 (2012).

> "Lawyers are . . . necessarily historians . . . . If they do not take this task seriously, they will not cease to be historians. They merely will be bad historians."
>
> Max Radin, *The Law and You* 188–89 (1948).

> Originalism admittedly requires lawyers and judges to engage in historical semantics. It is often charged that they are ill equipped for the task: "It is quite true that lawyers are for the most part extremely bad historians. They often make up an imaginary history and use curiously unhistorical methods." The leveler of that charge, Max Radin, cited a British example of a 1939 judicial misinterpretation of sources dating back to 1215 — in a different language altogether (medieval Latin and Law French). The example serves as a useful admonition. But note that Radin was an originalist:
>
> > We have thus imposed a new burden on the lawyer on the bench. Besides all the other things asked of him, he is also to be a historian. But there is no help for it. There is simply no way by which the law can be made either simple or easy.
>
> Nor is it a valid refutation of originalism that "no one can reconstruct original understanding precisely." Our charge is to try.

Id., at 399-400. (footnotes omitted)

To illustrate this point, *Reading the Law*, references *Heller*,

> which upheld the individual right to possess firearms, one of the significant aspects of the Second Amendment was that it did not purport to *confer* a right to keep and bear arms. It did not say that "the people shall have the right to keep and bear arms," or even that "the government shall not prevent the people from keeping and bearing arms," but rather that "the right of the people to keep and bear arms" (implying a *preexisting* right) "shall not be infringed." This triggered historical inquiry showing that the right to have arms for personal use (including self-defense) was regarded at the time of the framing

> as one of the fundamental rights of Englishmen. Once the history was understood, it was difficult to regard the guarantee of the Second Amendment as no more than a guarantee of the right to join a militia. Moreover, the prefatory clause of the Second Amendment ("A well regulated militia being necessary for the defense of a free state") could not be logically reconciled with a personal right to keep and bear arms without the historical knowledge (possessed by the framing generation) that the Stuart kings had destroyed the people's militia by disarming those whom they disfavored. Here the opinion was dealing with history in a broad sense.
>
> It is reasonable to ask whether lawyers and judges can adequately perform historical inquiry of this sort. Those who oppose originalism exaggerate the task. In some cases, to be sure, it is difficult, and originalists will differ among themselves on the correct answer. But that is the exception, not the rule. In most cases — and especially the most controversial ones — the originalist answer is entirely clear. There is no historical support whatever for the proposition that any provision in the Constitution guaranteed a right to abortion, or to sodomy, or to assisted suicide. Those acts were criminal in all the states for two centuries. Nor is there any historical support for the proposition that the Eighth Amendment (which prohibits cruel and unusual punishments) prohibited the death penalty, which was the only penalty for a felony (indeed, the definition of a felony) at the time of the framing.
>
> Today's lawyers and judges, when analyzing historical questions, have more tools than ever before. They can look to an evergrowing body of scholarship produced by the legions of academic legal historians populating law and history faculties at our leading universities. No history faculty of any note would consider itself complete without legal experts; and no law faculty would consider itself complete without its share of expert historians.

Id., at 400-01.

7. [New Note] What can the advocate do to assist the Court in applying the *Bruen* test? Prepare exhibits that can be attached to briefs setting forth the original text of the law from the 1790s that will be used to justify a modern law. And since many of this ancient statutes will have been recodified, repealed, re-written, they may not be available in standard legal reporters.

Common courtesy, both to opposing counsel and the court, should necessitate links to or legible and accurate copies of the ancient text to be adjudicated. (Seek guidance from your court as to its preference for hard copies of old statutes or hyperlinks.)

The use of tables and spreadsheets is highly advantageous and useful to the Court. For example:

Brief Page	Year Passed	Jurisdiction	Citation in Brief	Primary Source Link	Comments
13	1647	Maryland	1647 Md. Laws 216	Proceedings and Acts of the General Assembly	The lower house of the colonial Maryland legislature was

				January 1637/8-September 1664, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--215.html	making rules for its legislative sessions rather than statutes applicable to the public at large.
9	1836	Connecticut	An Act Incorporating the Cities of Hartford, New Haven, New London, Norwich and Middletown, 1836 Conn. Acts 105 (Reg. Sess.), chap. 1, § 20	Public acts passed by the General Assembly of the state of Connecticut, 1836-1850, https://collections.ctdigitalarchive.org/islandora/object/30002%3A22002122#page/102/mode/2up	This state law grants powers to cities to regulate (via fine or forfeiture) "the bringing in, and conveying out, or storing of gun-powder." The State's citation omits the following: quantities of gun-powder that do not exceed twenty-five pounds are not subject to fine or forfeiture.

Whether an ancient law regulating the storage and sale of gun powder is sufficiently analogous to a modern law regulating the sale of firearms may be a question of law for the judge to answer. But failing to provide the Court with the context of a gun powder law (regulation of quantities for personal use vs. regulation of quantities that pose a fire hazard) risks misleading the Court on the underlying context and purpose of the ancient statute.

Providing the Court with original source material (hard copy or reliable hyperlink to reputable databases), and putting that original source material in a useable format, will establish your credibility with the Court.

CONCLUDING EXERCISES

3. Emergency Powers: Tyranny Control

War in Ukraine

Following the 2022 Russian invasion of Ukraine, Ukrainian President Volodymyr Zelensky urged ordinary citizens to take up arms to defend their

homeland. He offered to supply them with weapons or invited them to bring their own.

In one day, the Ukrainian government distributed as many as 18,000 assault rifles to civilians. These were genuine assault rifles in the precise military sense — intermediate size rifles capable of firing automatically and semiautomatically, with the flip of a selector switch.[69] Most were Kalashnikov rifles from the days when Ukraine was occupied by the Soviet Union. The rifles are updated models of the famous AK-47 ("Avtomat Kalashnikov," invented by Mikhail Kalashnikov in 1947.)

Previously, Ukrainians had not been allowed to own machine guns. The government plans to arm as many as a million citizens to fight the Russians.

Just days before the invasion, Zelensky had signed a law allowing citizens to carry firearms in public and act in self-defense. He later signed another law regulating the procedure of providing firearms and ammunition to civilians and absolving them of any liability for use of such weapons against those carrying out armed aggression against Ukraine.

Interior Minister Denys Monastyrsky, Ukraine's top law-enforcement official, has proposed loosening the country's restrictive gun laws once the war ends. He noted that "Russia's war showed that 'tens of thousands' of guns, including assault weapons, that have been distributed by the government for national defense were proof that Ukrainian citizens can 'handle arms.'"

Ukraine's arming of ordinary civilians to resist the invading Russians was largely a last-minute effort. Finland has a different model, requiring young civilian males to undergo a short but intense period of military training, followed by shorter refreshers for most of their adult life.

Organized by the National Shooting Sports Foundation, the trade association for America's firearm industry, the industry is donating guns, ammunition, optics, and accessories to Ukraine to assist in efforts to fight the Russian invaders. Some have noted that American leaders support sending semi-automatic rifles to Ukrainian civilians, while urging bans on such rifles in the U.S.

Some of the newly armed Ukrainian citizens have been organized into Territorial Defense units, who receive three days of training. Like the militia of the American Revolution (Ch. 4.B.9), they are not expected to confront Russian infantry in pitched battles. Rather, their objectives are to harass occupation forces, make it unsafe for small groups of the invaders to leave their base, provide intelligence for artillery strikes, and so on. Active partisan resistance behind the lines of Russian occupation is currently taking place in

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[69] As opposed to the amorphous term "assault weapon" in U.S. politics, which has at various times been said to encompass almost every type of firearm *other* than automatics. Ch. 15.A.1.

eastern Ukraine — just as Ukrainian partisans resisted Nazi and Soviet invaders in the twentieth century.

Below the level of the Territorial Defense units, armed citizens participate in defense of their villages — similar to the "alarm list" of early America. As was demonstrated in the 1942-43 Battle of Stalingrad, and in much urban warfare before and after, small partisan units can cause enormous trouble for even a well-equipped invading army, providing the partisans know some basic tactics. For example: Do not lean out of a building window to fire on invaders in the street; instead, fire from within the building to avoid visual exposure. Create safe interior or underground passages from one building to another, and do not stay in the same location after shooting at the invaders.

Ukraine's arming of civilians has given their nation a greater chance at repelling the Russian invasion, demonstrating the importance of an armed populace in resisting tyranny from within and without.

Further reading: *Forces: Ukraine Must Decide*, StategyPage.com (Apr. 18, 2022) (comparing and contrasting militia and territorial defense systems of Ukraine, Israel, Switzerland, Sweden, and Finland); Stephen Halbrook, *Ukraine war reintroduces U.S. politicians to the Second Amendment: Ukrainian police should burn their gun registration records now*, Wash. Times (Apr. 2, 2022); Online Chapters 19.D.2-3 (discussing armed resistance to mass murder by government, with case studies of Christians in the Ottoman Empire during World War I, Jews in Europe in World War II, the Chinese under the Mao Zedong regime, and Tibetans after the Mao invasion).

NOTES & QUESTIONS

9. [New Note] Kindaka Sanders, *Let My People Go, Part One: Black Rebellion and the Second Amendment Political Necessity Defense*, 31 Wm. & Mary Bill of Rts. J. 764 (2023). This is the first in a two-part article. Current U.S. legal doctrine does not recognize a necessity defense when a defendant violates law A in order to protest law B. The article argues that current doctrine is inconsistent with the Boston Tea Party, the Stamp Act Riots, and illegal marches by the Civil Rights Movement. The author argues that the Second Amendment should be construed so as to allow the possibility of a "political necessity defense" even when the law being violated is not the law that is the source of the violators' grievances.

10. [New Note] Patrick M. Garry, *The Anti-Tyranny, Anti-Faction Aspect of the Second Amendment*, 53 U. Memphis L. Rev 345 (2022):

In addition to protecting an individual right of self-defense, the Second Amendment more generally acts as a limited government provision that serves to check government abuses, as does the rest of the Bill of Rights. In particular, the Second Amendment contains an anti-tyranny provision, protecting the individual against oppression by government-sanctioned factions. During the summer of 2020, this oppression took the form of urban anti-police and anti-racism protests that descended into rioting and looting. In various ways, local and state governments gave implicit or explicit sanction to this mob violence, directed against the private property of innocent individuals. Either by denying the violent character of those protests, or by refusing to prosecute lawbreakers, or even by failing to condemn the violence itself, public officials lent the weight of government to this outbreak of violence. Consequently, the only defense available to private property owners came by way of the Second Amendment. This Article will explore this anti-tyranny aspect of the Second Amendment in light of the urban violence of 2020.

CHAPTER 17
FIREARMS POLICY AND STATUS

A. FIREARMS POLICY AND THE BLACK COMMUNITY

3. Divergent Views on Race and Firearms Policy from a Long-Term Historical Perspective

NOTES & QUESTIONS

2. [New Note] Nicholas J. Johnson, THE MODERN ORTHODOXY IS A FAILED EXPERIMENT: TOWARD A RACE SENSITIVE, HARD LOOK AT FIREARMS POLICY AND THE BLACK COMMUNITY, U. C. Irvine L. Rev. (forthcoming 2024) (arguing that racially biased enforcement of contemporary gun regulations warrants Black skepticism about US firearms policy and justifies retreat from reflexive allegiance to the legacy gun control agenda).

3. [New Note] Jennifer L. Behrens & Joseph Blocher, *A Great American Gun Myth: Race and the Naming of the "Saturday Night Special"*, 108 Minn. L. Rev. Headnotes (forthcoming 2024). In an influential 1976 article in *The Public Interest*, Barry Bruce-Briggs stated that "Saturday Night Special" (a derisive term for small, inexpensive guns) was derived from the phrase "ni[**]ertown Saturday night." B. Bruce-Briggs, *The Great American Gun War*, Pub. Int. 37, 50 (Fall 1976). (*The Public Interest* was later absorbed by *National Affairs*, and the former's archives are hosted on the latter's website.) Professors Behrens and Blocher find the phrase "Saturday Night Special" being used as early as the 1910s to describe firearms, and before that in use for train schedules or for special sales in stores. The phrase also appears in the first half of the twentieth century for a girl who was easy to date. The authors conclude that the phrase, as applied to inexpensive guns, does not have a racist origin.

4. [New Note] An ongoing case against the District of Columbia Metropolitan Police Department's Gun Recovery Unit (GRU) alleges that it "unlawfully targets predominately Black neighborhoods and young Black males

specifically." For example, the GRU is claimed to carry out stop and frisks with no genuine reasonable suspicion or probable cause. The actions are then supported by fabrications in sworn testimony by officers. The plaintiffs are individuals who allege that they were subjected to the above misconduct. Defendants are individual officers, plus the D.C. government for its patterns and practices. The district court denied the officers; claim of qualified immunity; the officers' (alleged) false statements indicate that they knew their conduct was illegal. Defendants' motions to dismiss were denied in every regard. Accordingly, plaintiffs may proceed with their Fourth and Fourteenth Amendment claims. *Crudup v. District of Columbia*, 2023 WL 2682113 (D.D.C. Mar. 29, 2023).

D. Sexual Orientation

9. [New Note] To protect sexual minorities, a new article suggests adding a new prohibitor to 18 U.S.C. 922(g): conviction of a misdemeanor hate crime for which the potential sentence would be less than one year. (Any crime with a potentially longer sentence is already a prohibitor under 922(g)(1)). To augment the prohibitor, the author proposes amending the federal hate crime statute, 18 U.S.C. § 249, to include a misdemeanor for conduct that does involve injury or attempt to injure another person. Brett V. Ries, *Looking Backward to Move Forward: Ending the "History and Tradition" of Gun Violence against The LGBTQ+ Community*, 73 Duke L.J. Online 119 (2023).

E. CATEGORIES OF PROHIBITED PERSONS: MENTAL ILLNESS, MARIJUANA, AND THE MILITARY

2. [New Section Title] *Marijuana and Other Drug Users*

Since *Bruen*, a variety of defendant's have challenged the constitutionality of federal prohibition on possession of firearms by persons who have violated federal drug laws. This prohibition might implicate either 18 USC § 922 (g)(1) (conviction of a crime with a potential sentence of more than one year, or (g)(3) ("unlawful user of or addicted to any controlled substance").

The federal firearms and ammunition prohibition applies to anyone "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. § 922(g)(3). The prohibition as enacted by the Gun Control Act of 1968 banned receipt and commerce in firearms; the prohibition on simple possession by drug users was added in the Firearms Owners' Protection Act of 1986. *See United*

States v. Carter, 669 F.3d 411, 417-18 (4th Cir. 2012) (1986 bill closed a "loophole").

Before 1968, some state laws prohibited intoxicated persons from wearing or shooting firearms, and a very few banned possession or acquisition based on based use of drugs or alcohol. *See* Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. Crim. L. 211 (2020); Ch. 13.F.3.

According to ATF policy, any illegal use of any controlled substance in the past year qualifies for the federal felony. Although marijuana use is legal under at some circumstances in most states, it remains prohibited federally, including for medical use. Most federal circuits require that the government prove some pattern of illegal use, whereas the Eighth Circuit adopted the ATF position that a single use in the past year is sufficient proof for a felony conviction. *United States v. Carnes*, 22 F.4th 743 (8th Cir. 2022). A Cato Institute amicus brief in support of an unsuccessful cert. petition describes the extraordinary breadth of the implications of the ATF rule. For example, if a husband with prescription Ambien (Schedule 5 in the Controlled Substances Act) gives his wife a single pill to help her sleep on a long airplane flight, she becomes a federal felon. Cato Inst., amicus brief in *Carnes v. United States*, No. 22-76 (U.S. Aug. 25, 2022). The brief argued that the ATF interpretation is impossible to justify under *Bruen*.

A leading post-*Bruen* case upholding section 922(g)(3) in general, although not necessarily the single-use interpretation, was *Fried v. Garland*, 640 F.Supp.3d 1252 (N.D. Fla. 2022). The case was brought by the Florida Commissioner of Agriculture, on behalf of Florida-legal medical marijuana users. The court ruled that medical marijuana users are violating federal law, and thus not the "law-abiding citizens" protected by *Heller*. The ban was analogized to historic bans on using firearms while intoxicated with alcohol, and against gun possession by the mentally ill. The ban was also upheld *United States v. Lewis*, 650 F.Supp.3d 1235 (W.D. Okla. 2023); *United States v. Black*, 649 F.Supp.3d 246 (W.D. La. 2023); *United States v. Sanchez*, 646 F.Supp.3d 825 (W.D. Tex. 2022).

A Utah U.S. District Court held that 922(g)(3) is void for vagueness, because there is no notice of "temporal nexus." Also, "user" is vague; as the statute says, an "unlawful user" is different from an "addict." *United States v. Morales-Lopez*, 2022 WL 2355920 (D. Utah, June 30, 2022). But the Tenth Circuit reversed on the grounds that a defendant whose conduct is clearly covered by a statute cannot raise a facial vagueness. As for defendant, "use" was not vague as applied to him, if "unlawful user" is defined to mean use that is "regular and ongoing." Here defendant admitted to methamphetamine use in the prior month, and when he was caught burglarizing a gun store, there

was methamphetamine in his automobile. *United States v. Morales-Lopez*, 92 F.4th 936 (10th Cir. 2024)

The Eighth Circuit recently rejected a facial challenge to 922(g)(3), and relied on historical treatment of the mentally ill. *United States v. Veasley*, 98 F.4th 906 (8th Cir. 2024)Two district courts in the Fifth Circuit held the ban unconstitutional under *Bruen*. *United States v. Connelly*, 2022 WL 17829158 (W.D. Tex., Apr. 6, 2023) (The ban "deviates from our Nation's history of firearm regulation." It is like "a law that would prevent individuals from possessing cars at all if they regularly drink alcohol on weekends."); *United States v. Harrison*, 654 F.Supp.3d 1191 (W.D. Okla. 2023) (historic bans on people actually intoxicated are not analogous to bans on sober people who sometime use intoxicants).

The case that partially addressed the disagreements in the Fifth Circuit's district courts began as *United States v. Daniels*, 610 F.Supp.3d 892 (S.D. Miss. 2022), which held that the provision was valid on the ground that "analogous statutes which purport to disarm persons considered a risk to society—whether felons or alcoholics—were known to the American legal tradition."

Mr. Daniels appealed his conviction. After party briefing in the *Daniels* case, the Fifth Circuit called for additional briefing from amici. Among the responses was one co-authored by Professors Mocsary and Kopel. Focusing only on marijuana (the drug at issue in *Daniels*) and only on users who are not "addicts" (there was no evidence that Daniels was an addict) the brief argued against the application for 922(g)(3) to Mr. Daniels. Based on history and tradition, particularly, historic laws pertaining to alcohol, the brief argued that shooting or wearing firearms while intoxicated may be prohibited, but not use while sober. *See* Brief for Scholars of Second Amendment Law as Amici Curiae Supporting Defendant-Appellant Urging Reversal, United States v. Daniels, 77 F.4th 337 (5th Cir.). The Fifth Circuit's decision follows.

After the government lost, the Solicitor General petitioned for certiorari. Once the Supreme Court decided *Rahimi*, it granted, vacated, and remanded several cert. petitions involving prohibited persons for reconsideration under *Rahimi*, including the *Daniels* case. 2024 WL 3259662 (U.S., July 2, 2024). The Eighth Circuit's decision in Veasley and the Fifth Circuit's decision in *Daniels* are excerpted below.

STRAS, Circuit Judge.

Devonte Veasley pleaded guilty to possessing a firearm—a federal offense for someone who is using or addicted to a controlled substance. The question is whether criminalizing this conduct *always* violates the Second Amendment. The answer is no, so we reject Veasley's facial challenge to the statute.

I.

A drug deal went sideways when, rather than going through with it, Veasley pulled out a handgun and shot at his dealer. After the attack, the government charged him with possessing a firearm while [unlawfully using a controlled substance.]

A month after he pleaded guilty, the Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen*, which concluded that a New York law requiring "proper cause" to carry a firearm violated the Second Amendment. . . .

Inspired by *Bruen*, Veasley asks us to reach the same conclusion about 18 U.S.C. § 922(g)(3), the federal drug-user-in-possession statute. . . .

Constitutional challenges like these come in two varieties. The first is as-applied, which requires courts to examine a statute based on a defendant's individual circumstances. If a frail and elderly grandmother uses marijuana for a chronic medical condition a day before possessing a gun, for example, the constitutional analysis will consider only those circumstances, not what a different defendant might do.[2]

A facial challenge, the only type still available to Veasley, goes further. As the Supreme Court has explained, "[a] facial challenge is really just a claim that the law or policy at issue is unconstitutional in *all* its applications," regardless of the individual circumstances. . . .

[2] It is true that we have held that there is no need for "felony-by-felony litigation regarding the constitutionality of" a statute prohibiting the possession of firearms by felons. *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023). Key to that decision were the "assurances by the Supreme Court" that nothing in *Heller* or *Bruen* "cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 501-02 (quoting *Heller*, 554 U.S. at 626). Here, by contrast, the Supreme Court has made no such "assurances" about "prohibitions" on drug users and addicts. *Id.*

In effect, Veasley is speaking for a range of people. On its face, § 922(g)(3) applies to everyone from the frail and elderly grandmother to regular users of a drug like PCP, which can induce violence. . . .

III.

In this appeal, we assume that § 922(g)(3) "governs conduct that falls within the plain text of the Second Amendment." That is, drug users "are part of 'the people' whom the Second Amendment protects," and "handguns are weapons 'in common use' today." *Bruen*, 597 U.S. at 31-32. So "we proceed to ask whether [§ 922(g)(3)] fits within America's historical tradition of firearm regulation."

A.

It makes sense to start with the closest "historical analogue," *Bruen*, 597 U.S. at 30, which is the regulation of intoxicating substances. Alcohol and drug abuse have been "general societal problem[s]," *id.* at 26, for thousands of years. Colonial times were no exception. *See Bruen*, 597 U.S. at 26. Physician Benjamin Rush, a signer of the Declaration of Independence, recognized that alcohol can be so addictive that some drinkers "can afford scarcely any marks of remission either during the day or the night." Benjamin Rush, An Inquiry into the Effects of Ardent Spirits upon the Human Body and Mind 8 (8th ed., Boston, James Loring 1823)

Other drugs were around then too. The use of opioids was common. First introduced in the 17th century, the "formulation known as 'laudanum' (i.e., tincture of opium) . . . incorporate[d] opium along with other ingredients, such as cinnamon, clover, and saffron, in Spanish wine." Enrique Raviña, The Evolution of Drug Discovery: From Traditional Medicine to Modern Drugs 11 (2011), Cannabis was in use too. And so were natural hallucinogens.

Many of these drugs, and others like them, remain a problem today. When a "challenged regulation [like § 922(g)(3)] addresses a general societal problem that has persisted since the 18th century," like substance abuse, "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26-27. Our task is to figure out whether § 922(g)(3) looks like anything that "earlier generations" did to keep firearms out of the hands of drug and alcohol users. *Id.* at 26.

For drinkers, the focus was on the use of a firearm, not its possession. And the few restrictions that existed during colonial times were temporary and narrow in scope. One came from Virginia, which banned "shoot[ing] any gunns

at drinkeing." Act XII of Mar. 10, 1655, *reprinted in* 1 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619, at 401, 401-02 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823). Another from New York, which prohibited firing guns for the three days bracketing New Years, December 31 to January 2, because of the "great Damages" done by those "intoxicated with Liquor." Act of Feb. 16, 1771, ch. 1501, *reprinted in* 5 The Colonial Laws of New York from the Year 1664 to the Revolution 244, 244-45 (Albany, James B. Lyon 1894). Disarmament, on the other hand, was not an option.

There was even less regulation when it came to drugs. "[T]housands of . . . Americans at the time[] had become dependent on opium," Elizabeth Kelly Gray, Habit Forming: Drug Addiction in America, 1776-1914, at 20 (2023), and lawmakers were certainly aware of the problem. Senator John Randolph of Virginia was a user. And so was Senator Robert Goodloe Harper's mother-in-law, who died of laudanum dependency. Founding Father Rufus King, also a senator, wrote letters to his doctor lamenting his sister's opium dependency, including how it impaired her ability to care for her children. Laudanum even held Thomas Jefferson in its grip for a while after he left the presidency. In a letter, Jefferson stated that "with care and laudanum I may consider myself in what is to be my habitual state."

Despite the widespread use of opium in particular, the government concedes that its "review of early colonial laws has not revealed any statutes that prohibited [firearm] possession" by drug users. In fact, the "general societal problem" of drug addiction did not receive congressional attention until 1909. And drug use went unmentioned in the National Firearms Act, which Congress passed almost 25 years later. Instead, it took until 1968, with the passage of § 922(g)(3), for Congress to keep guns away from drug users and addicts.

The lesson here is that disarmament is a modern solution to a centuries-old problem. The fact that "earlier generations addressed the societal problem . . . through materially different means . . . [is] evidence that" disarming *all* drug users, simply because of who they are, is inconsistent with the Second Amendment. *Bruen*, 597 U.S. at 26.

B.

The key word is *all*. As *Bruen* itself recognizes, "the Constitution can, *and must*, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 28 (emphasis added). Modern synthetic drugs present a "dramatic technological change[]." *Id.* at 27. James Madison never experimented with methamphetamine, Benjamin Franklin did not dabble in PCP, and Thomas Jefferson did not use fentanyl to take the edge off the day.

Today's drugs are different than the opiates and cannabis of the past. They are, in a word, "unprecedented." *Id.*

When it comes to regulations "implicating unprecedented societal concerns," *Bruen* is clear that we cannot look at history through a pinhole. *Id.* Rather, we must take "a more nuanced approach," again "reasoning by analogy," to determine whether there is "a well-established and representative historical analogue" that could make § 922(g)(3) constitutional in some of its applications. *Id.* at 27-30. It turns out there is.

1.

Our expanded search begins with the mentally ill. "Obviously, mental illness and drug use are not the same thing. But there is an intuitive similarity" because their behavioral effects overlap. *Daniels*, 77 F.4th 337, 349 (5th Cir. 2023). The fact that the analogy works for some, and that the mentally ill sometimes lost their guns, means that § 922(g)(3) cannot be facially unconstitutional.

The legal view of mental illness in the 18th century was different than it is now. Many believed it to be a transitory condition, just like intoxication. As Blackstone put it, "lunatic[s] . . . *had* understanding, but . . . hath lost the use of . . . reason." 1 William Blackstone, Commentaries *294 (emphasis added).

The law described intoxication in the same rudimentary way, with almost identical terminology. Consider Thomas Cooley, who described drunkenness as a form of "temporary insanity." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 599 n.2 (2d Ed., Boston, Little, Brown, & Co. 1874). Or Benjamin Rush, who viewed it as a "temporary fit of madness." Rush, *supra*, at 6. The same went for drug addiction, even though the scientific understanding of it was still evolving at the time.

The similarities did not stop there. Just like the intoxicated kept their civil liberties, including the right to possess firearms, the mentally ill frequently did too. Those who posed no danger stayed at home with their families, and their civil liberties remained intact.

Life was different, however, for those who were both mentally ill and dangerous. They "were confined in barred cells in the basement," and "particularly violent individuals" were "restrained . . . using a 'strait-waistcoat' or 'mad shirt,' or heavy arm and leg chains." Lynn Gamwell & Nancy Tomes, Madness in America 20 (1995). It should come as no surprise that confinement did not include access to guns. . . . .

Justices of the peace and other officials had a lot of discretion when deciding whether to confine the mentally ill. An early Massachusetts statute empowered "selectmen" to "take care of the" mentally ill to prevent them from "damnify[ing] others." Act of May 3, 1676, *reprinted in* 5 Records of the

Governor & Company of the Massachusetts Bay in New England 80–81 (Nathaniel V. Shurtleff ed., Boston, William White, 1853). A 1788 New York

statute authorized justices of the peace, many of whom had no formal legal training, to "lock[ ] up" and "chain[ ]" the "furiously mad" in a "secure place." Act of Feb. 9, 1778 N. Y. Sess. Laws 645. And a Connecticut law allowed them to order the confinement of "persons under distraction and unfit to go at large, whose friends do not take care for their safe confinement." Edward Warren Capen, The Historical Development of the Poor Law of Connecticut 62-63 (1905).

These colonies and states were not the only ones to do it. It was so common that one manual describing the duties of justices of the peace said that "[a]ny person may justify confining and beating his friend being mad . . . as is proper in such circumstances." James Parker, Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace 291 (New York, John Patterson 1788). In England too, they could "apprehend[]" and "lock[] up" people "disordered in [their] senses" or dangerous "[l]unatic[s]." Henry Care, English Liberties, or the Free-born Subject's Inheritance 329 (6th ed. Providence, John Carter 1774).

Initially, the colonies had no place for them. Sometimes, the solution was jail. Other times, building a one-person asylum. . . .

Mental hospitals later became the norm. . . .

Confinement led to the loss of liberties. . . .

By the late 1800s, state legislatures allowed the prosecution of people who gave guns to the mentally ill. An 1881 Florida law, for example, made it illegal "to sell, hire, barter, lend or give to any person or persons of unsound mind any dangerous weapon, other than an ordinary pocket-knife." Act of Feb. 4, § 1, 1881 Fla. Laws 87. And in Kansas, it was unlawful to sell "any pistol, revolver or toy pistol . . . or other dangerous weapons to . . . any person of notoriously unsound mind." Act of Mar. 5, § 1, 1883 Kan. Sess. Laws 159. . . .

The "burden" imposed by § 922(g)(3) is "comparable," if less heavy-handed, than Founding-era laws governing the mentally ill. *Bruen*, 597 U.S. at 29. It goes without saying that confinement with straitjackets and chains carries with it a greater loss of liberty than a temporary loss of gun rights. And the mentally ill had less of a chance to regain their rights than drug users and addicts do today. Stopping the use of drugs, after all, restores gun rights under § 922(g)(3).

The justification, which is to "keep guns out of the hands of presumptively risky people," is also comparable. It is reflected in colonial-era laws, whether it be disarming loyalists, or making sure the mentally ill could not harm themselves or others. At least as applied to drug users and addicts who pose a danger to others, § 922(g)(3) is just another example of this "longstanding" tradition. *Heller*, 554 U.S. at 626-27 n.26.

In Veasley's view, the analogy is flawed because confining someone has always required a judicial finding. And so does disarming the mentally ill today, which requires an "adjudicat[ion] as a mental defective" or "commit[ment] to a mental institution." 18 U.S.C. § 922(g)(4). Drug users and addicts, by contrast, receive no warning that they are ineligible to possess a firearm.

We reject Veasley's argument for two reasons. The first is the historical record, which shows that there was limited process accompanying the confinement of the mentally ill, particularly given the broad discretion afforded to justices of the peace. *See Bruen*, 597 U.S. at 27 (requiring a *historical*, not a *current*, analogue). Second, there is a finding required under § 922(g)(3), it just comes later. Getting a conviction requires proof beyond a reasonable doubt of "regular drug use," and possession of a firearm, not to mention close timing between the two.

2.

Another "historical analogue" makes it even clearer that Veasley's facial challenge cannot succeed. *Id.* This one focuses on conduct, not status. As the above discussion makes clear, possession of a firearm under § 922(g)(3) must accompany other conduct: drug use. In this way, it resembles the Founding-era criminal prohibition on taking up arms to terrify the people.

The offense, called Terror of the People, has a lengthy historical pedigree. Although it started as a common-law offense, England formalized it in the 1328 Statute of Northampton. In its earliest form, it prohibited going "armed to terrify the King's subjects." 597 U.S. at 43-44. At first, arms did not include *firearms*, which did not reach Europe until the mid-1500s.

As firearms became more common, however, so did the idea of criminalizing their misuse. . . .

But the offense was not about mere possession, or even openly carrying a firearm. It required more, the "offensive[]" *use* of a firearm in a way that terrorized others. George Webb, The Office of Authority of the Justice of the Peace 92 (Williamsburg, William Parks 1736). One example was Robert Huntly's decision to ride while armed in the North Carolina countryside with a stated intent to kill James Ratcliff, with whom he had been feuding at the time. In that case as well as others, terrorizing behavior had to accompany the possession. . . .

Just like its historical counterparts, § 922(g)(3) does not criminalize mere possession. It requires another act, the taking of drugs, which itself can cause terrifying and dangerous behavior. The decision to engage in illegal and dangerous conduct, in other words, is what leads to a temporary deprivation, which ends once the illegal behavior does. In that way, § 922(g)(3) imposes a "comparable burden" on the right to bear arms. *Bruen*, 597 U.S. at 29.

At least for *some* drug users, the justification is also "comparable." *Id.* Controlled substances can induce terrifying conduct, made all the more so by the possession of a firearm. All it takes is a few minutes flipping through the pages of the Federal Reporter to locate some examples.

To be sure, not every drug user or addict will terrify others, even with a firearm. Consider the 80-year-old grandmother who uses marijuana for a chronic medical condition and keeps a pistol tucked away for her own safety. It is exceedingly unlikely she will pose a danger or induce terror in others. But those are details relevant to an as-applied challenge, not a facial one. For our purposes, all we need to know is that at least some drug users and addicts fall within a class of people who historically have had limits placed on their right to bear arms.

* * *

Consistent with *Seay*, "we reject [Veasley's] facial challenge to § 922(g)[(3)]." 620 F.3d at 925. But we add to its analysis by doing the historical work and "analogical reasoning" that *Bruen* requires. … What it tells us is that, for some drug users, § 922(g)(3) is "analogous enough to pass constitutional muster." *Bruen*, 597 U.S. at 30. Whether it is for others is a question for another day.

IV.

We accordingly affirm the judgment of the district court.

United States v. Daniels

77 F.4th 337 (5th Cir. 2023)

Jerry E. Smith, Circuit Judge. . .

I.

In April 2022, two law enforcement officers pulled Daniels over for driving without a license plate. One of the officers — an agent with the Drug Enforcement Administration ("DEA") — approached the vehicle and recognized the smell of marihuana. He searched the cabin and found several marihuana cigarette butts in the ashtray. In addition to the drugs, the officers found two loaded firearms: a 9mm pistol and a semi-automatic rifle. Daniels was taken into custody and transported to the local DEA office.

At no point that night did the DEA administer a drug test or ask Daniels whether he was under the influence; nor did the officers note or testify that he appeared intoxicated. But after Daniels was Mirandized at the station, he admitted that he had smoked marihuana since high school and was still a

regular user. When asked how often he smoked, he confirmed he used marihuana "approximately fourteen days out of a month."

Based on his admission, Daniels was charged with violating 18 U.S.C. § 922(g)(3), which makes it illegal for any person "who is an unlawful user of or addicted to any controlled substance . . . to . . . possess . . . any firearm." An "unlawful user" is someone who uses illegal drugs regularly and in some temporal proximity to the gun possession.

While Daniels was under indictment, the Supreme Court decided *Bruen.* It clarified that firearms regulations are unconstitutional unless they are firmly rooted in our nation's history and tradition of gun regulation. Daniels immediately moved to dismiss the indictment, claiming that § 922(g)(3) is unconstitutional under that new standard. . .

A jury found Daniels guilty. He was sentenced to nearly four years in prison and three years of supervised release. By nature of his § 922(g)(3) felony, Daniels is also barred for life from possessing a firearm. *See* 18 U.S.C. § 922(g)(1).

II. . . .

In place of means-end balancing, *Bruen* "requires" us to interpret the Second Amendment in light of its original public meaning. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126, 2131. As the Court explained, the Second Amendment codified a "*pre-existing* right" with pre-existing limits. *Id.* at 2127. To ascertain those limits, history is our heuristic. Because historical gun regulations evince the kind of limits that were well-understood at the time the Second Amendment was ratified, a regulation that is inconsistent with those limits is inconsistent with the Second Amendment.

To determine whether a modern firearms law is unconstitutional, we now proceed in two steps. *First*, we ask whether the Second Amendment applies by its terms. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. *Second*, we ask whether a given gun restriction is "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. The government bears the burden of demonstrating a tradition supporting the challenged law. Only by showing that the law does not tread on the historical scope of the right can the government "justify its regulation." *Id.*

The second step requires both close attention to history and analogical reasoning. *Bruen* did not forswear all legislative innovation. To the contrary, "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 2132. What we are looking for is a "tradition" — well-accepted limits on the right to bear arms manifested by a tangible practice of comparable gun regulations. But how do we know whether an older regulatory practice is "comparable"?

Bruen helpfully gave us two conceptual pathways. If the modern regulation addresses "a general societal problem that has persisted since the 18th century," then "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.*at 2131. But if a modern law addresses "unprecedented societal concerns or dramatic technological changes," it calls for a "more nuanced approach." *Id.* at 2132. We must reason by analogy to determine whether older regulations are "relevantly similar" to the modern law. *Id.*

Bruen acknowledged the difficulty of determining whether two laws are "relevantly similar." *Id. Bruen* clarified that two laws are "relevantly similar" if they share a common "why" and "how"; they must both address a comparable problem (the "why") and place a comparable burden on the rightsholder (the "how"). *Id.* at 2132-33.

In all of that, *Bruen* reminded us that we are looking for a "representative historical analogue, not a historical twin." *Id.* at 2133 (emphasis removed). It is not a death knell to the government that the challenged regulation did not previously exist. What matters is whether a conceptual fit exists between the old law and the new. Deciding whether there is a match between historical and modern regulations requires the exercise of both analogical reasoning and sound judgment. Nevertheless, we hew closely to *Bruen's* own reasoning and hold the government to its heavy burden.

A.

We begin with the threshold question: whether the Second Amendment even applies to Daniels.

The right to bear arms is held by "the people." That phrase "unambiguously refers to all members of the political community, not an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). Indeed, the Bill of Rights uses the phrase "the people" five times. In each place, it refers to all members of our political community, not a special group of upright citizens. *Id.* Based on that consistent usage, *Heller* concluded that "the Second Amendment right is exercised individually and belongs to *all* Americans." *Id.* at 581 (emphasis added).

Even as a marihuana user, Daniels is a member of our political community. Therefore, he has a presumptive right to bear arms. By infringing on that right, § 922(g)(3) contradicts the plain text of the Second Amendment.

True, *Heller* described the Second Amendment as applying to "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635. And *Bruen* used the phrase "law-abiding" fourteen times, including in the opening sentence, where it says that the Second Amendment "protect[s] the right of an ordinary, *law-abiding* citizen to possess a handgun." 142 S. Ct. at 2122 (emphasis added). The government

seizes on that language and insists that the Second Amendment does not extend to Daniels because he is a criminal.

But we cannot read too much into the Supreme Court's chosen epithet. More than just "model citizen[s]" enjoy the right to bear arms. *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023), *cert. granted*, (June 30, 2023). Indeed, *Rahimi* held that citizens accused of domestic violence still had Second Amendment rights. It reasoned that when *Heller* and *Bruen* used the phrase "law-abiding," it was just "short-hand" to "exclude from the . . . discussion" the mentally ill and felons, people who were historically "stripped of their Second Amendment rights." *Id.* at 452. All others are presumptively included in the Second Amendment's ambit. Because Daniels is not a felon or mentally ill, *Rahimi*'s treatment of the "law-abiding" moniker suggests that he has presumptive Second Amendment rights as well. . . .

Once we conclude that Daniels has presumptive Second Amendment rights, the focus shifts to step two of the *Bruen* analysis: whether history and tradition support § 922(g)(3).

B.

Before we decide whether § 922(g)(3) is consistent with our tradition of gun regulation, we must first ask a methodological question: What kind of similarity are we looking for? "Distinct" similarity or a less precise "relevant" similarity? *See Bruen*, 142 S. Ct. at 2131-32. That depends on whether § 922(g)(3) "addresses a general societal problem that has persisted since the 18th century" or an "unprecedented societal concern[ ]" that the Founding generation did not experience. *Bruen*, 142 S. Ct. at 2131-32.

Bruen does not require more than "relevant" similarity here. It is true that the Founding generation was familiar with intoxication via alcohol, and it was familiar with marihuana plants. But the Founders grew hemp to make rope. They were not familiar with widespread use of marihuana as a narcotic, nor the modern drug trade. Thus, though intoxication generally was a persistent social problem, the Founding generation had no occasion to consider the relationship between firearms and intoxication via cannabis. . . .

Indeed, *Bruen*'s discussion of "distinct" and "relevant" similarity seems aimed at interpreting historical silence. That is, when the historical record reveals no regulations of a particular kind, we could interpret that silence in one of two ways. We could say that it means nothing (i.e., neither approval nor disapproval), or we could count silence as evidence that the public did not approve of such a regulation. *Bruen* says we should make the latter inference, at least when the public experienced the harm the modern-day regulation attempts to address. By contrast, when the ratifying public did not confront a particular harm, its failure to regulate it says little about whether it approved such regulation.

In that case, we look instead for analogues—similar harms that the Founding generation did confront and the regulations they used to address them. *Id.* at 2132. Just as Founding-era prohibitions on firearms in "sensitive places" can extend to "*new* and analogous sensitive places," *id.* at 2133, we can compare the Founders' treatment of one problem to new problems that the Founders could not have anticipated.

Even so, the government has the burden to find and explicate the historical sources that support the constitutionality of § 922(g)(3). Here, the government's proffered analogues fall into three general buckets: (1) statutes disarming intoxicated individuals, (2) statutes disarming the mentally ill or insane, and (3) statutes disarming those adjudged dangerous or disloyal. Each deserves independent consideration.

1.

Because there was little regulation of drugs (related to guns or otherwise) until the late-19th century, intoxication via alcohol is the next-closest comparator. Throughout the colonial period and into the 19th century, Americans drank alcohol — and lots of it. Common sense indicates that individuals who are impaired by alcohol lack the self-restraint to handle deadly weapons safely. So it is unsurprising to find historical laws dealing with guns and alcohol. Such rules are relevant to our history and tradition of gun regulation.

Unfortunately for the government, that regulatory tradition is sparse and limited during the relevant time periods. Despite the prevalence of alcohol and alcohol abuse, neither the government nor *amici* identify any restrictions at the Founding that approximate § 922(g)(3). Although a few states after the Civil War prohibited carrying weapons while under the influence, none barred gun possession by regular drinkers.

a.

Founding-era statutes concerning guns and alcohol were few. They were also limited in scope and duration. The laws that did exist had two primary concerns: (1) the misuse of weapons while intoxicated and (2) the discipline of state militias.

Consider the first group of statutes. In 1656, Virginia banned "shoot[ing] any gunns at drinkeing." But in historical context, that was not a disarming regulation like § 922(g)(3). Virginia was a brand-new colony at the time. The 1656 statute was explicitly passed to conserve gunpowder, which was at a premium, and because ill-timed gunshots might be mistaken for a signal that local Indians were attacking. Not only was the statute enacted for a different purpose, but it did not even ban gun possession or carry — it only prevented the colonists from misusing the guns they did have during bouts of drinking.

Another law, passed by New York in 1771, prohibited citizens from firing guns from December 31 to January 2 because of the "great Damages" done by those "intoxicated with Liquor" during New Year's celebrations. The statute had a similar purpose as § 922(3) does — preventing public harm by individuals under the influence. Nevertheless, the law was strikingly narrow. It applied on only three days out of the year; it only prevented firing guns (not possessing them); and it applied only to those under the influence, not habitual drinkers.

Beyond that duet of colonial regulations — separated by over a century — the government identifies no Founding-era law or practice of disarming ordinary citizens for drunkenness, even if that intoxication was routine.

Instead, the government points to a second group of statutes regulating militia service. For example, a soldier could be "disarm[ed]" if he showed up for militia service in New Jersey "disguised in Liquor." Pennsylvania did the same in 1780. For related reasons, dram shops were prohibited from selling to local soldiers.

Those laws, however, are even less probative. For one thing, their purpose is different. They exist to ensure a competent military—a service-member cannot perform his duties if he is impaired. Furthermore, the limitations applied only to the militia; none of the laws spoke to the ability of militiamen to carry outside of their military service. At the Founding, as today, restrictions on the liberties of servicemen tell us little about the limits acceptable for the general public.

Given the prevalence of drinking at the Founding, that handful of laws puts the government on shaky footing. The government has failed to identify any relevant tradition at the Founding of disarming ordinary citizens who consumed alcohol.

b.

The government's Reconstruction-era evidence, though stronger, still falls short of the history and tradition that could validate § 922(g)(3).

Between 1868 and 1883, three states prohibited carrying firearms while intoxicated: Kansas, Missouri, and Wisconsin. Missouri's law was challenged under the state constitution but was upheld by the Missouri Supreme Court. *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886). The opinion acknowledged that the state constitution "secure[d] to the citizen the right to bear arms in the defense of his home, person, and property." *Id.* at 469. But the court reasoned that if the state could regulate the "manner in which arms may be borne," there is "no good reason . . . why the legislature may not do the same thing with reference to the condition of the person who carries such weapons." *Id.* The ban on intoxicated carry was therefore "in perfect harmony with the constitution." *Id.*

Those laws come closer to supporting § 922(g)(3), but they are notably few. The *Bruen* Court doubted that three colonial-era laws could suffice to show a tradition, let alone three laws passed eighty to ninety years after the Second Amendment was ratified.

More fatally, § 922(g)(3) is substantially broader than the postbellum intoxication laws. On *Bruen's* two axes of relevant similarity, the postbellum laws and § 922(g)(3) share a common "why": preventing public harm by individuals who lack self-control and carry deadly weapons. But the "how" is different. At most, the postbellum statutes support the banning the *carry* of firearms *while under the influence.* Section 922(g)(3) bans all possession, and it does so for an undefined set of "user[s]," even if they are not under the influence.

As applied to Daniels, § 922(g)(3) is a significantly greater restriction of his rights than were any of the 19th-century laws. Although the older laws' bans on "carry" are likely analogous to § 922(g)(3)'s ban on "possess[ion]," there is a considerable difference between someone who is actively intoxicated and someone who is an "unlawful user" under § 922(g)(3). The statutory term "unlawful user" captures regular users of marihuana, but its temporal nexus is vague — it does not specify how recently an individual must "use" drugs to qualify for the prohibition. Daniels himself admitted to smoking marihuana fourteen days a month, but we do not know how much he used at those times, and the government presented no evidence that Daniels was intoxicated at the time he was found with a gun. Indeed, under the government's reasoning, Congress could ban gun possession by anyone who has multiple alcoholic drinks a week from possessing guns based on the postbellum intoxicated carry laws. The analogical reasoning *Bruen* prescribed cannot stretch that far.

A further problem with the Reconstruction-era statutes is precisely that they emerged during and after Reconstruction. *Bruen* did not discount the relevance of late-19th-century history, but it insisted that the Second Amendment's "meaning is fixed according to the understandings of those who ratified it." *Bruen*, 142 S. Ct. at 2132. A tradition cannot inform the original meaning of the Bill of Rights if it emerges one hundred years later. When 19th-century practice is inconsistent with the categorical protection of the Second Amendment, the "*text* controls." *Id.* at 2137 (emphasis added).

Admittedly, there is an "ongoing scholarly debate" about whether the right to bear arms acquired new meaning in 1868 when it was incorporated against the states. *Id.* at 2137-38. But the instant case involves a federal statute and therefore implicates the Second Amendment, not the Fourteenth. Even if the public understanding of the right to bear arms *did* evolve, it could not change the meaning of the Second Amendment, which was fixed when it first applied to the federal government in 1791.

And even if late-century practice sheds some dim light on Founding-era understandings, the most the Reconstruction-era regulations support is a ban on gun possession while an individual is *presently* under the influence. By regulating citizens like Daniels based on a pattern of drug use, § 922(g)(3) goes further. Our history and tradition do not support the leap.

2.

As an alternative, the government posits that the tradition of disarming the mentally ill supports § 922(g)(3). To quote *Heller*'s now-famous caveat, "longstanding prohibitions on the possession of firearms by . . . the mentally ill" are still "presumptively lawful." 554 U.S. at 626, 627 n.26. Obviously, mental illness and drug use are not the same thing. But there is an intuitive similarity: Those who are "briefly mentally infirm as a result of intoxication" are similar to those "permanently mentally infirm" because of illness or disability.

We note at the outset that there is not a clear set of positive-law statutes concerning mental illness and firearms. In fact, the federal ban on gun possession by those judged mentally ill was enacted in 1968, the same year as § 922(g)(3). But scholars have suggested that the tradition was implicit at the Founding because, "in eighteenth-century America, justices of the peace were authorized to 'lock up' 'lunatics' who were 'dangerous to be permitted to go abroad.'" In other words, the greater restriction included the lesser. If the insane could be wholly deprived of their liberty and property, the government could necessarily take away their firearms.

Of course, the practice of institutionalizing so-called "lunatics" does not give clear guidance about which lesser impairments are serious enough to warrant the loss of constitutional freedoms. But we can assume that intoxication with marihuana is analogous to short-term mental illness. Dr. Benjamin Rush—who signed the Declaration of Independence—said a "temporary fit of madness" was a symptom of drunkenness. And in an influential treatise on constitutional law, Thomas Cooley described drunkenness as a form of "temporary insanity." The same could be said of intoxication via marihuana.

Still, that comparison could justify disarming a citizen only while he is in a state comparable to lunacy. Just as there was no historical justification for disarming a citizen of sound mind, there is no tradition that supports disarming a sober citizen who is not currently under an impairing influence.

Indeed, it is helpful to compare the tradition surrounding the insane and the tradition surrounding the intoxicated side-by-side. The Founders purportedly institutionalized the insane and stripped them of their guns; but they allowed alcoholics to possess firearms while sober. We must ask, in *Bruen*-style analogical reasoning, which is Daniels more like: a categorically "insane" person? Or a repeat alcohol user? Given his periodic marihuana usage, Daniels

is firmly in the latter camp. If and when Daniels uses marihuana, he may be comparable to a mentally ill individual whom the Founders would have disarmed. But while sober, he is like the repeat alcohol user in between periods of drunkenness.

In short, neither the restrictions on the mentally ill nor the regulatory tradition surrounding intoxication can justify Daniels's conviction. Perhaps the government could show that the drugs Daniels used were so powerful that anyone who uses them is permanently impaired in a way that is comparable to ongoing mental illness. Or the government could demonstrate that Daniels's drug use was so regular and so heavy that he was continually impaired. Here, it has shown evidence of neither.

3.

Finally, the government asserts that Congress can limit gun possession by those "dangerous" to public peace or safety. It contends that principle was well understood when the Second Amendment was ratified. And it posits that Daniels—a repeat marihuana user—was presumptively dangerous enough to be disarmed. Although there is some historical evidence for the government's underlying principle, the historical examples of danger-based disarmament do not justify § 922(g)(3)'s application here.

a.

As Justice Barrett detailed when she was a judge on the Seventh Circuit, history supports the intuitive proposition that the government can keep deadly firearms away from dangerous people. Even the *amici* who believe that Daniels should prevail on his Second Amendment challenge suggest that the government *can* disarm the dangerous, even under *Bruen*'s history-and-tradition test.[29]

That said, no one piece of historical evidence suggests that when the Founders ratified the Second Amendment, they authorized Congress to disarm anyone it deemed dangerous. . . .

b.

Assuming the Second Amendment encodes some government power to disarm the dangerous, the question becomes: At what level of generality may we implement that principle? *Bruen* requires us to interrogate the historical

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[29] Brief of *Amicus Curiae* Scholars of Second Amendment Law and the Independence Institute at 9 ("Dangerousness should be the key feature for firearms prohibitors, and a person whose conduct is never dangerous may not be disarmed."). . .

record for "relevantly" similar regulations. It does not allow us to enforce unenacted policy goals lurking behind the Second Amendment.

Indeed, any ability to implement a "dangerousness principle" is fenced in by at least two strictures in the applicable caselaw. On the one hand, the legislature cannot have unchecked power to designate a group of persons as "dangerous" and thereby disarm them. Congress could claim that immigrants, the indigent, or the politically unpopular were presumptively "dangerous" and eliminate their Second Amendment rights without judicial review. That would have "no true limiting principle," *Rahimi*, 61 F.4th at 454, and would render the Second Amendment a dead letter.

On the other hand, we cannot inspect a legislature's judgment of dangerousness using traditional standards of scrutiny. *Bruen* forbids us from balancing a law's justifications against the burden it places on rightsholders. Imagine, for example, that a state legislature disarms all men, citing statistics that men commit more violent crimes than do women. Before *Bruen*, we would have considered whether the evidence supporting male dangerousness was substantial enough—and whether the law was sufficiently tailored—to justify such a categorical restriction on gun rights. But *Bruen* forswears that kind of review. Similarly, imagine that the government bars all convicted cybercriminals from owning guns, referencing the "dangerousness" of cybercrime. Cybercrime is assuredly dangerous, but in a different way than is violent crime. Applying a standard of scrutiny, we might have interrogated whether Congress had adequately demonstrated that someone who spreads ransomware or pirates television shows is likely to be dangerous with a firearm. Again, *Bruen* heads that analysis off at the pass.

How, then, do we square the post-*Bruen* circle? To remain faithful to *Bruen*, the solution is to analogize to particular regulatory traditions instead of a general notion of "dangerousness." The government must show that a historical danger-based disarmament is analogous to the challenged regulation. We must use *Bruen*'s "why" and "how" analysis to assess whether the Founding-era restriction is relevantly similar to the modern one. We must ask: *Why* was the group considered dangerous at the Founding and therefore disarmed? And *why* does the modern law classify a person as presumptively dangerous? Is the comparison supported by the record? Furthermore, *how* did the historical regulation limit the rights of the dangerous class? And *how* does the modern regulation do so?

c.

Applying *Bruen*'s framework to the proffered analogues, it follows that the government's theory of danger-based disarmament falls apart. The government identifies no class of persons at the Founding (or even at Reconstruction) who were "dangerous" for reasons comparable to marihuana

users. Marihuana users are not a class of political traitors, as British Loyalists were perceived to be. Nor are they like Catholics and other religious dissenters who were seen as potential insurrectionists. And even if we consider the racially discriminatory laws at the Founding, Daniels is not like the minorities who the Founders thought threatened violent revolt.

The government suggests that, in the spirit of the drafts of the Second Amendment and the [English 1662] Militia Act, marihuana users threaten the public "peace." But at the time of the Founding, that notion referred specifically to violence or rebellion, not generalized public harm. And § 922(g)(3) is not limited to those with a history of violent behavior—not all members of the set of "drug users" are violent. As applied in this case, the government has not shown how Daniels's marihuana use predisposes him to armed conflict or that he has a history of drug-related violence.

Furthermore, even as the Founders were disarming Catholics and politically disaffected citizens, they left ordinary drunkards unregulated. The government has no meaningful response to the fact that neither Congress nor the states disarmed alcoholics, the group most closely analogous to marihuana users in the 18th and 19th centuries. As with the government's analogy to mental illness, we must ask: Which are marihuana users more like: British Loyalists during the Revolution? Or repeat alcohol users? The answer is surely the latter.

The government asks us to set aside the particulars of the historical record and defer to Congress's modern-day judgment that Daniels is presumptively dangerous because he smokes marihuana multiple times a month. But that is the kind of toothless rational basis review that *Bruen* proscribes. Absent a comparable regulatory tradition in either the 18th or 19th century, § 922(g)(3) fails constitutional muster under the Second Amendment.

III.

Daniels's § 922(g)(3) conviction is inconsistent with our "history and tradition" of gun regulation. *Bruen*, 142 S. Ct. at 2128. We conclude only by emphasizing the narrowness of that holding. We do not invalidate the statute in all its applications, but, importantly, only as applied to Daniels. Nor do we suggest that a robust Second Amendment is incompatible with other reasonable gun regulations. Such statutes just need to be consonant with the limits the Founding generation understood to be permissible when they ratified the Second Amendment. The government has failed to demonstrate that here.

The judgment of conviction is therefore REVERSED, and a judgment dismissing the indictment is RENDERED.

Stephen A. Higginson, concurring. . .

[Judge Higginson wrote, "I fully concur in the majority's reasoning," but wrote separately to express hopes for further guidance from the Supreme Court:\]

It may be that the Supreme Court will remind us of the Second Amendment's middle, where the Framers stated explicitly that they were fashioning a right "necessary to the security of a free State." In this sense, unlike the textually unbounded pledges assuring freedom of speech and conscience, "the right of the people to keep and bear Arms" is less about the antithesis of liberty and control, and is more designed to assure "domestic Tranquility [and] ... the general Welfare." U.S. Const. pmbl. Put another way, the Second Amendment is not only a right to have, but is especially a right to have to protect the state. . . .

I cannot help but fear that, absent some reconciliation of the Second Amendment's *several* values, any further reductionism of *Bruen* will mean systematic, albeit inconsistent, judicial dismantling of the laws that have served to protect our country for generations. Furthermore, such decisions will constrain the ability of our state and federal political branches to address gun violence across the country, which every day cuts short the lives of our citizens. This state of affairs will be nothing less than a Second Amendment caricature, a right turned inside out, against freedom and security in our State.

F. Lee Francis*

Pardoning Marijuana Possession While Using Marijuana to Criminalize Firearm Ownership

(prepared for this work)

On October 6, 2022, President Joseph R. Biden issued a presidential proclamation that pardons federal convictions for simple marijuana possession.[1] This proclamation also extends to District of Columbia marijuana offenses.[2] In his official statement, President Biden said "no one should be in jail just for using or possessing marijuana."[3] Citing issues of mass incarceration and racial bias, Biden further explained that "Sending people to prison for possessing marijuana has upended too many lives and incarcerated

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[1] Joseph R. Biden, *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana* (Oct. 6, 2022).

[2] *Id.*

[3] Joseph, R. Biden, *Statement from President Biden on Marijuana Reform*, (Oct. 6, 2022).

people for conduct that many states no longer prohibit. Criminal records for marijuana possession have also imposed needless barriers to employment, housing, and educational opportunities."[4] The President's comments lament that marijuana use and possession is a federal offense punishable by imprisonment. This Essay examines the effect of the President's actions on the federal enforcement of marijuana. Specifically, this Essay focuses on the decline of marijuana prosecutions, save for those cases generally involving 18 USC § 922 offenses.

Article II, section 2 of the Constitution vests the president with the power "to grant Reprieves and Pardons for Offences against the United States."[5] The Framers understood a pardon's benefit on an individual. But they believed such a power would be of far greater use to the sovereign as a mechanism for national peace.[6] Generally speaking, past presidential pardons comported with the Framers intent.[7] Today, however, critics argue the president is merely "legislat[ing] by pardon" because Congress has failed to act.[8]

The President stressed that his intention was to pardon only those convicted of simple possession of marijuana.[9] But his decision drastically altered how federal marijuana offenses were prosecuted.

Between 2014 and 2021, the number of federal offenders sentenced for simple possession of marijuana decreased from 2,172 to 145.[10] In January 2022, that number dropped to zero.[11] Federal prosecutions of firearm offenses — specifically Section 922(g) related convictions — increased nearly 30 percent

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[4] *Id.*

[5] U.S. Const. art. II, § 2, cl. 1.

[6] The Federalist No. 74, at 386 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("In seasons of insurrection and rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.").

[7] *See* William F. Duker, The *President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475 (1977).

[8] George Demos, *Biden's Pot Pardon Introduces Presidential Nullification of Federal Law*, The Hill (Oct. 13, 2022).

[9] https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/ ("My intent by this proclamation is to pardon only the offense of simple possession of marijuana in violation of Federal law or in violation of D.C. Code 48-904.01(d)(1), and not any other offenses related to marijuana or other controlled substances.").

[10] Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System, U.S. Sentencing Commission (Jan. 2023).

[11] *Id.* ("As of January 2022, no offenders sentenced solely for simple possession of marijuana remained in the custody of the Federal Bureau of Prisons.").

from 2018 to 2022.[12] Of those federal offenders, more than 97 percent were sentenced to an active term of imprisonment.[13]

The data on marijuana prosecutions under Section 922(g)(3) paints a different picture. A Westlaw search for 922(g)(3) marijuana offenses yielded zero prosecutions of simple possession in 2022, while there were at least 82 cases brought against defendants under 922(g)(3) solely on the basis on marijuana possession or use between January 2021 to July 2023.[14] In that same time period, there were 151 prosecutions for all drug offenses under 922(g)(3). Nearly 54 percent of all 922(g)(3) cases from January 2021 to July 2023 involved marijuana and firearms. At bottom, the government has virtually ignored all marijuana related offenses, except for those cases brought under 922(g).

Main Justice considers marijuana possession cases a low priority.[15] This trend has shifted downward to United States Attorneys' Offices throughout the country.[16] Following the president's announcement, countless marijuana cases were either dismissed or the government declined to prosecute.

Prosecutorial discretion is widely accepted. However, prosecutors do not have the authority or discretion to prosecute many of the marijuana related offenses. If the government chose to prosecute a marijuana offense, a firearm was almost always involved.

Marijuana has become a proxy for targeting firearms. This is particularly evident in states where marijuana is legal for recreational use and purchase.[17] What is more, many of the individuals charged under 922(g)(3) have no violent criminal history and would otherwise lawfully possess a firearm but for the presence of marijuana.

The President and Main Justice effectively tied the hands of prosecutors with marijuana cases. To be clear, the drug is still illegal under federal law as it is in many states. Yet, without any congressional action, the President unilaterally made marijuana *per se* legal.

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[12] 18 U.S.C. § 922(g) Firearms Offenses, U.S. Sentencing Commission (2023).
[13] *Id.*
[14] The Westlaw search used was "adv: 18 USC 922(g)(3) and marijuana".
[15] *See, e.g.*, Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General before the S. Comm. on the Judiciary 24 (Feb. 28, 2021) (statement of J. Merrick Garland) ("The Department of Justice has not historically devoted resources to prosecuting individuals for simple possession of marijuana.").
[16] *See* Mikaela Lefrak & Matthew F. Smith, *New U.S. attorney for District of Vermont to focus on violent and white-collar crime; cannabis not a top priority*, VERMONT PUB. (January 18, 2022) ("There are potential matters involving marijuana that we would potentially consider prosecuting. But, as a general matter, that is not an area that's on the top of our priority list.").
[17] *See* Graham v. Williams, 2023 WL 2374367, at *1 (S.D. Ill. Mar. 6, 2023).

The government believes that no one should be in jail for possessing marijuana, but that sentiment does not track the government's prosecutorial pattern and practice. Simple possession of marijuana, according to our government, is effectively harmless and should not be criminalized. But .44 grams of marijuana and a firearm could send an individual to federal prison.[18]

NOTES & QUESTIONS

6. [New Note] Compare Daniels and Veasley. Is each one a fair application of Bruen? Does one clearly adhere more closely to the *Bruen* template? If both decisions are fair applications of *Bruen*, what does that suggest about the *Bruen* standard.

7. [New Note] Further reading: F. Lee Francis, *Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen*, 107 Marq. L. Rev. 803 (2024) (laws against possessing a firearm while intoxicated by alcohol or other substances violate *Bruen*, original understanding, history, and tradition; focus on statutes in Wisconsin, Ohio, and Michigan); James Cheney, *High Stakes: A Constitutional Analysis off the Gun Control Act's Prohibition against Medicinal Marijuana Users, Post-Bruen*, 2024 U. Ill. L. Rev. 673 (bans on medical marijuana users are unconstitutional under *Bruen*).

8. [New Note] *Medical marijuana.* The cases above have all involved recreational rather than medical use of marijuana. According to study specifically about medical marijuana, "Using difference-in-differences and triple difference-in-difference models on FBI Uniform Crime Reports data, we find medical cannabis reduces assaults and robberies with firearms by 5% . . . Further analysis shows the effect is concentrated near cannabis dispensaries . . ." Cameron Ellis, J. Bradley Karl, & Rhet A. Smith, *No Smoking Gun: The Brady Act, Medical Cannabis, and Violent Gun Crime*, SSRN.com (Oct. 23, 2023).

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[18] *See* Brief of Appellant at 17, United States v. Daniels, 610 F. Supp. 3d 892 (S.D. Miss. 2022).

3. Military Personnel and Veterans

c. Felonizing Gun Possession by Financially Incompetent Veterans

NOTES & QUESTIONS

4. [New Note] H.R. 8580v, the Military Construction, Veteran Affairs, and Related Agencies Appropriations Act of 2025, would forbid the Department of Veterans Affairs (VA) from reporting VA beneficiaries to the FBI's National Instant Check System as "mental defectives" without "the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself or others." President Joseph Biden's administration said in an official Statement of Administration Policy, "If the President were presented with H.R. 8580, he would veto it."

CHAPTER 19
COMPARATIVE LAW

B. MULTINATIONAL COMPARATIVE STUDIES OF THE EFFECTS OF PRIVATE GUN OWNERSHIP ON CRIME AND VIOLENCE

4. Statistical Data in Cultural Context

NOTES & QUESTIONS (AFTER THE KOPEL, MOODY & NEMAROV EXCERPT)

12. [New Note] Royce Barondes, *Red Flag Laws, Civilian Firearms Ownership and Measures of Freedom*, 35 Regent U.L. Rev. 339 (2023). While the first half of this article critiques Red Flag laws, particularly as implemented in Maryland, the second half advances on the Kopel et al. study: It covers 86 nations, rather than 59. Like Kopel et al., it uses Transparency International's Corruption Perception Index. Unlike the Kopel article, Professor Barondes does not use the Heritage Foundation's overall scores for economic freedom, but instead two components of that score: Judicial Effectiveness and Government Integrity. Whereas Kopel et al. used overall firearms per capita, Barondes also calculates registered firearms versus unregistered, law enforcement firearms per capita, and violent crime rates. He also refines the data geographically for Africa, America, Europe, Asia, and Oceania.

The study finds, at the 99% confidence level, that "lawful civilian firearms ownership is associated with increased freedom in all model constructs." At the same time, several measures of freedom are associated with higher levels of serious crime. As Barondes cautions, showing a strong association, as he does, does not prove causation, and does not prove a method of causation.

C. GUN CONTROL AND GUN RIGHTS IN SELECTED NATIONS

2. Switzerland

3. [Add to Note] At the turn of the century, Finland had about 2,000 shooting ranges. By 2024, the number had declined to about 670. A new government initiative aims to open more ranges, to bring the total over 1,000 by 2030, with a focus on outdoor ranges for rifles and tactical training. The measure is

intended to boost citizen firearms proficiency for defense against Russia. *Football, Ice Hockey . . . Shooting? Finland Hopes Hobby Will Boost National Defence: Nato's Newest Member, Which Shares 830-mile Border with Russia, Plans to Open Hundreds of New Shooting Ranges*, The Guardian, Feb. 19, 2024.

3. Canada

NOTES & QUESTIONS

7. [Replace with the following] Canada in December 203 enacted Bill C-21, to prohibit sale or transfer of handguns, to allow transfers of magazines only to persons licensed to own a firearm, to create a Canadian "red flag" law, and to outlaw a wide variety of firearms. The bill also created a Firearms Advisory Committee with the power to ban any firearm by regulation. A Canadian government summary of the bill is available here.

Separately, in 2020, the government issued an Order in Council to prohibit possession of many long guns. Registration, Can. Gaz. SOR/2020-96 (May 1, 2020). Current owners must either surrender their guns or have them permanently deactivated, although the amnesty period for surrender has repeatedly been extended, and now ends on Oct. 30, 2025. Government of Canada, *Firearms Buyback Program*, Aug. 7, 2024.

An Order in Council is similar to a regulation. Formally speaking, an Order in Council is issued by the Governor-General of Canada, who is the representative of the king or queen of Commonwealth of Nations. (As of 2020, Queen Elizabeth II, presently King Charles III.) But the Governor-General plays no policy-making role; the decision to issue an Order in Council is made by the Canadian Prime Minister and his cabinet.

A variety of plaintiffs, including the Province of Alberta, brought lawsuits challenging OIC. In April 2023, an eight-day trial was held in the Trial Division of the Federal Court of Canada, in Ottawa. One of the plaintiffs in the OIC cases, the Canadian Center for Firearms Rights, wrote a detailed report of the courtroom proceedings. The Federal Court has jurisdiction over certain issues involving the federal government, with immigration cases being most common. There is a Trial Division and a Federal Court of Appeal, and above that, the Supreme Court of Canada. The Trial Division ruled in favor of the government on all issues. *Canadian Coalition for Firearms Rights v. Attorney General of Canada*, No. T-581-20 (Fed. Ct. Ca., Oct. 30, 2023).

Also in 2023, Alberta passed the Alberta Firearms Act. Pursuant to a regulation thereunder, municipalities in Alberta may not enter into agreements with the federal government to carry out the OIC gun confiscation. The provinces of New Brunswick, Saskatchwan, Manitoba, and the Yukon territory have announced that to law enforcement resources being to used in

the confiscation program. Yukon Assembly, Motion no. 436, 77 Hansard 2167, Oct. 12, 2022; New Brunswick, Justice & Public Safety, *Provinces Oppose Federal use of Police Resources to Confiscate Legally Acquired Firearms*, Oct. 14, 2022.

9. [Add to Note] Gary A. Mauser, *The Right to Bear Arms in Canada: The Continuing Tension between Elite and Popular Beliefs* (Jan. 23, 2023).

> As former English colonies, both Canada and the United States inherited the right to bear arms from the English Bill of Rights of 1689. Despite their common heritage, the paths of the two neighbors diverged widely. . . . The central question in this paper is: how did Canadians lose the legal right to bear arms even though popular support has long existed for such a right? I argue that Canadian elites squandered the right to keep and bear arms despite widespread popular support, primarily because Canada lacks the constitutional protections built into American political institutions.

Putting aside the Second Amendment, can you think of other differences between the U.S. constitutional system and the Canadian parliamentary system (similar to that of the United Kingdom) that make the enactment of gun control more difficult in the U.S.?

4. Mexico

NOTES & QUESTIONS

5. [Add to Note] In the Boston case, the district court granted a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. *Estados Unidos Mexicanos v. Smith & Wesson Brands*, 633 F. Supp. 3d 425 (D. Mass. 2022). According to the court, the complaint was obviously preempted by the PLCAA, notwithstanding Mexico's creative claims that foreign governments are exempt from the PLCAA. For example, in torts, "choice of law" is usually where the injury occurred. But there is no "choice" to make, because the PLCAA is jurisdiction-stripping. The "presumption against extraterritoriality" in congressional legislation is not violated. The PLCAA simply controls the operation of government functions (courts) inside the U.S., and protects the lawful conduct of businesses within the U.S.

That decision was reserved by the First Circuit. 91 F.4th 511 (1st Cir. 2024). While agreeing with the district court about the presumption against extraterritoriality, and that the lawsuit was a "qualified civil liability action under PLCAA," the First Circuit reversed the grant of the motion to dismiss. The court held that Mexico had plausibly pled that the defendants had knowingly aided and abetted the illegal trafficking of arms into Mexico,

because, according to the pleadings: defendants knew which retail dealer illegally supply arms to cartels but continued to sell arms to those dealers; defendants designed and marketed the types of firearms that cartels desired; defendants placed serial numbers on their products in a way that facilitated illegal obliteration of the numbers, and grossed reaped $170 million per annually from the aforesaid sales. Because there is a PLCAA exception for anyone who "who knowingly violated a State or Federal statute applicable to the sale or marketing of the product," 15 U.S.C. § 7903(5)(A)(iii), and because supplying arms to Mexican drug cartels is illegal, Mexico's claim for common law negligence could proceed.

Smith & Wesson and other defendants have petitioned the U.S. Supreme Court for certiorari.

In the meantime, the U.S. District Court for Massachusetts dismissed the case against six of the seven firearms manufacturer defendants for lack of personal jurisdiction, for lack of plausible evidence from plaintiff that any of the defendants' activities in Massachusetts (such as selling guns to licensed firearms retailers in the state) had resulted in a Massachusetts gun being misused within Mexico. Memorandum and Order on Defendants' Motions to Dismiss for Lack of Personal Jurisdiction, 2024 WL 3696388 (D. Mass., Aug. 7, 2024). One of plaintiff's expert had submitted a report making inferences from ATF firearms trace reports, but pursuant to a permanent congressional appropriations rider, ATF trace date "shall be inadmissible in evidence" in all federal or state courts, except in proceedings commenced by ATF. *Id.* at *8, citing Pub. L. No. 112-55, 125 Stat. 552, 609 (2011). Smith & Wesson, which during the period covered by the complaint, manufactured all its firearms within Massachusetts, had not filed a motion to dismiss for lack of personal jurisdiction, nor had the lone wholesaler defendant.

Another Mexican government complaint was filed in U.S. District Court in Arizona, against Arizona firearms dealers. There, the district court dismissed some of the claims, but allowed others to proceed under a theory similar to that of the First Circuit. *Estados Unidos Mexicanos v. Diamondback Shooting Sports*, 2024 WL 1256038 (D. Ariz., Mar. 25, 2024).

Further reading: Maleah Riley-Brown, *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al.: How American Exceptionalism Emanates Beyond its Borders*, 32 Minn. J. Int'l L. 225 (2023) (discussing procedural issues and suggesting that Mexico sue in the International Court of Justice if it does not prevail in U.S. courts).

6. Australia

6. [Add to Note] The Philippine National Police has relegalized the possession of semi-automatic rifles in 7.62mm caliber by civilians, to bolster national defense against China, which has been acting aggressively in Philippine waters. Emmanuel Tupas, VACC: Rifles for civilians to boost defense vs China, PhilStar Global, reprinted in MSN.com (n.d., but apparently early March 2024).

Further reading: Brandon Raynes, *The Shot Heard Around the Outback: Why Adopting Australia's Firearm Laws Would Flout American Constitutionalism and Jus Cogens Norms*, 68 S.D. L. Rev. 133 (2023). "[T]he right to keep and bear firearms should evidently be viewed as a fundamental predicate of international jus cogens norms, including the individual right to self-defense and the imperative that citizens ought to have the unfettered ability to rebel against a tyrannical government."

11. South Africa

In 2021, the Minister of Police published the Firearms Control Amendment Bill (FCAB), 2021, to prohibit use or ownership of firearms for self-defense. *See* Windell Nortje & Shane Hull, *Disarming the dispirited South African: A critical analysis of the proposed ban on firearms for self-defence*, 27 Law, Democracy and Development 123 (2023). As of August 2024, the prohibition has not been enacted.

Further reading: Lukas T. Huldi, *Restraining the Second Amendment in the Era of the Individual Right: Adopting a Modified South African Gun Control Model*, 97 S. Cal. L. Rev. 211 (2024) (advocating South African system, with some modifications, as the most restrictive licensing model that might pass judicial review in the United States).

CHAPTER 22
UNITED KINGDOM

F. ARMS CARRYING

1. The Statute of Northampton

On page 2095, insert the following at the end of the jump paragraph at the top of page:

Judge Gardiner's article perhaps influenced the Supreme Court. Justice Thomas's opinion for the *Bruen* Court listed several post-Northampton English enactments, which are also cited in the Gardiner article, that treated the Statute of Northampton as applying to armor and lances, not to hand-carried weapons such as knives. *Bruen*, 142 S. Ct. at 2140. The Gardiner article has recently been published in a law journal. Richard E. Gardiner, *The True Meaning of" Going Armed" in the Statute of Northampton: A Response to Patrick J. Charles*, 71 Cleveland State L. Rev. 947 (2023).

CHAPTER 23

THE EVOLUTION OF FIREARMS TECHNOLOGY

A. FIREARMS TECHNOLOGY IN GREAT BRITAIN FROM EARLY TIMES

2. The Flintlock, the Brown Bess Musket, and Fowlers

On page 2194, insert the following at the end of the Section:

Initially, the flintlock could not shoot further or more accurately than a matchlock. Paul Lockhart, Firepower: How Weapons Shaped Warfare 105 (2021). It could also shoot much more rapidly. A matchlock takes more than a minute to reload once. *Id.* at 107. In experienced hands, a flintlock could be fired and reloaded five times in a minute, although under the stress of combat, three times a minute was more typical. *Id.* at 107-08. A flintlock was more likely than a matchlock to ignite a gunpowder charge instantaneously, rather than with a delay of some seconds. *Id.* at 104. "The flintlock gave infantry the ability to generate an overwhelmingly higher level of firepower." *Id.* at 107.

The Theoretical Lethality Index (TLI) is a measure of a weapon's effectiveness in military combat. The TLI of a seventeenth-century musket and eighteenth-century flintlock are 19 and 43. Trevor Dupuy, *The Evolution of Weapons and Warfare* 92 (1984).

B. COLONIAL AMERICA'S GROWING DIVERGENCE FROM GREAT BRITAIN

3. Breechloaders and Repeaters

On page 2205, please note the following clarification:

New research indicates that the famed English gunmaker John Cookson and the eponymous American may have been the same person. *See* David S. Weaver & Brian Godwin, *John Cookson, Gunmaker*, 19 Arms & Armour 43

(2022). According to the authors, the American Cookson did gunsmithing work, but it was not his main source of income. The firearm he advertised in Boston in 1756 might have been one that he had made in England.

On page 197, please note this correction to the Ferguson Rifle discussion:

The Ferguson Rifle was not a repeater. It was single shot breechloader. Unlike muzzleloaders, it was easy to reload while the user was walking.

On page 2194, insert the following at the end of the Section:

The first known advertisement for an American business selling repeaters in ordinary commerce, rather than as special items, appeared in 1785, when South Carolina gunsmith James Ransier of Charleston advertised four-shot repeaters for sale. Columbian Herald (Charleston), Oct. 26, 1785.

C. THE AMERICAN INDUSTRIAL REVOLUTION

1. The Rise of the Machine Tools

On page 2208, insert the following, before Section 23.C.1.a:

As ambassador to France, Thomas Jefferson observed French progress in producing firearms with interchangeable parts. He recommended that the United States do the same. *See* Letter from Thomas Jefferson to John Jay (Secretary of Foreign Affairs under the Confederation government), Aug. 30, 1785, in 1 *Memoirs, Correspondence, and Private Papers, of Thomas Jefferson* 299 (Thomas Jefferson Randolph ed., 1829). In 1801, President Jefferson recounted his French observations to Virginia Governor James Monroe and expressed hope for Eli Whitney's plan for interchangeable gun parts. Letter from Thomas Jefferson to James Monroe, Nov. 14, 1801, in 35 *The Papers of Thomas Jefferson* 662 (Barbara B. Oberg ed., 2008).

4. Repeaters

d. [New Section] Fast Reloading

David Kopel
Fast Reloading of Guns in the 19th Century: Manufacturing Improvements Made Affordable Many Types of Guns that Previously had been Available Only to the Wealthy

Reason, Volokh Conspiracy (June, 2023) (edited for this work)

This post describes the speediest means of reloading firearms in the 19th century. The main focus is not the ammunition capacity of any particular type of arm, but rather how quickly various arms could be reloaded after the initial ammunition was spent.

As the post also explains, although the 19th century was, by far, the century of the greatest advances in firearms, many of those advances were not truly new. Rather, the advances were the results of improvements in manufacturing that greatly reduced the price of gun types that previously had been very expensive.

The post covers, in order:

- Spencer lever-action rifles (fast reloads of 7-round tubular magazines);
- Girardoni rifles (20-round tubular speedloaders);
- bolt-action rifles (reloads via detachable box magazines or stripper clips);
- double-barreled shotguns (over 30 shots per minute);
- semiautomatic handguns (detachable box magazines or stripper clips);
- metallic cartridge revolvers (via circular speedloaders);
- cap-and-ball revolvers and pepperboxes (for revolvers, cylinder swaps starting with an 1858 Remington patent);
- finally, and perhaps most surprisingly, the large progress in reloading speed of single-shot muskets and rifles, thanks to the replacement of muzzleloading with breechloading.

Spencer lever-action rifles

The first repeating long guns that became a major commercial success were lever-action rifles. They were introduced in the late 1850s. The first commercially successful lever action was the Henry Rifle of 1860; it held 15 rounds in a tubular magazine under the barrel, plus one round in the firing chamber.

Lever action rifles are fast shooters. Today, the champions of the Single Action Shooting Society can fire 10 shots in 2 seconds. The competition requires use of unimproved replicas of common 19th century arms. Once the user had

fired all 16 shots from a Henry — or all 18 shots from its successor, the Winchester Model 1866 — reloading would take some time, as the user would have to drop cartridges one at a time into the magazine.

Much faster reloads were possible with the Spencer lever action repeating rifles and carbines, which was also introduced in 1860. During the Civil War, the Spencer Repeating Rifle Company, of Boston, made 144,500 rifles and carbines (short rifles), including 34,000 subcontracted to the Burnside Rifle Company of Providence, R.I. Burnside also made the Burnside Carbine, similar to the Spencer but with different rifling. The company's founder, Ambrose Burnside, was a Union general, strong advocate of using black volunteers in combat, future R.I. Senator and Governor, future first President of the National Rifle Association, and the namesake of "sideburns."

Of the Boston production, 107,372 were sold to the U.S. government, as were 30,052 of the Providence production. The disposition of the rest was presumably private sale, which would almost certainly include some Union soldiers buying arms for themselves. The Spencer was a preferred firearm for cavalrymen. Norm Flayderman, *Flayderman's Guide to Antique American Firearms* 633 (9th ed. 2007).

The Spencer held 7 rounds in a tubular magazine in the buttstock. After firing 7 rounds, the user could insert 7 fresh rounds using the Blakeslee speedloader, patented in 1864. The Blakeslee cartridge box kit could hold up to 13 tubes, with 7 rounds each.

The principle of the detachable magazine had been put into use long before, albeit not on a scale as large as Spencer's. After the American Revolution, American inventor Joseph Belton moved to England, where starting in 1786 he created 7-shot breechloading repeaters with detachable metal magazines for the British East India Company. The 1786 gun had 7 separate firing pans, each of which needed to be reprimed after a magazine change.

Another ancestor of Civil War Spencer was the lever-action Kalthoff repeater of 17th-century Europe. Some of them could fire 30 rounds without reloading. They "spread throughout Europe wherever there were gunsmiths with sufficient skill and knowledge to make them, and patrons wealthy enough to pay the cost. . . . [A]t least nineteen gunsmiths are known to have made such arms in an area stretching from London on the west to Moscow on the east, and from Copenhagen south to Salzburg. There may well have been even more." Harold L. Peterson, *The Treasury of the Gun* 230 (1962).

However, like all repeaters of the time, the Kalthoffs were much more expensive than standard infantry firearms. This is because repeaters, by their nature, have more intricate internal parts than single-shot guns, and the repeater's parts must fit together more precisely than in single-shots. If a Kalthoff part broke, the gun could only be repaired by a specialist gunsmith. The widespread adoption of lever action repeaters was impractical until the

American industrial revolution, when, as described in a previous post, federal government industrial policy created a firearms industry that could mass produce high-quality intricate and interchangeable parts.

Although many Union soldiers provided their own firearms, as did Confederates, the majority of Union soldiers used firearms issued by War Department. When the Civil War ended, the U.S. government owned many more firearms than it would need for the soon-to-be much smaller post-war Army. Pursuant to General Order no. 101 (May 30, 1865), Union soldiers were allowed to buy their government-issued firearm for a deduction from their monthly pay. The most expensive was the Spencer, for $10. Muskets were $6, and revolvers or non-Spencer carbines $8. In 1865, the monthly pay for a Union private was $16. For sergeants it was $17 to $21, for lieutenants $105.50, and more for higher ranks.

Bolt-action rifles

The bolt-action rifle had been invented in 1836. Single-shot bolt-action rifles started becoming widespread in 1866. The magazine-fed bolt-action repeaters became standard infantry arms in the 1880s. Some of them used detachable box magazines, such as the 8-round 1888 British Lee-Metford.

Other models had a fixed (permanently attached) magazine that could quickly be reloaded with stripper clips. The clips held the rounds of ammunition in a straight line at their base, so they could speedily be shoved into an empty fixed magazine.

Girardoni rifles

The Spencers, with their speedloaded tubular magazine, used a system also used by the earlier Girardoni air rifle. Invented for Austrian army snipers in 1779, the Girardoni had a tubular magazines for 21 or 22 rounds, depending on .49 or .46 caliber. Each Girardoni came with four speedloading tubes; once the gun's magazine was empty, pouring in 20 more rounds was simple and fast. Because of the air bladder's finite capacity, a Girardoni could fire about 40 shots before the air bladder needed to be pumped up again. That took 1,500 strokes of the special pump.

Ballistically equal to a powder gun, the Girardoni could take an elk with one shot. The best gun of its time, the Girardoni was used by the Austrian army for decades, but did not become widespread in America. Most importantly, it was quite expensive. Second, after years of rough use, the neck connecting the bladder to pump would weaken, so that air refills became impossible. Like other early firearms, the very expensive Girardoni set a high standard that would eventually become attainable by firearms made for ordinary consumers.

Semiautomatic firearms

These were invented in 1884. The first ones to become major commercial successes were the Mauser C96 pistol starting in 1896, and the Luger in 1899. The former had a fixed magazine fed by stripper clips, the latter a 10-round detachable box magazine.

Double-barreled long guns

The double-barreled gun was invented in 1616. W.W. Greener, *The Gun and Its Development* 102 (9th ed. 1910). By the 1880s, breechloading and metallic cartridges had made the double-barreled shotgun into a fast shooter. With a flip of a switch, the gun could break open: the barrels would tilt down and the two empty cartridges would be ejected. The user could then drop two fresh cartridges into the exposed barrel breeches. The rate of fire was about 26 rounds per minute for aimed shots, and "upwards of thirty" otherwise. *Id.* at 504.

Metallic cartridge revolvers and pepperboxes

The modern form of the metallic cartridge was invented in 1853, and is used by the vast majority of modern firearms. A metal cylinder holds the bullet, gunpowder, and primer all in a single unit. Its predecessors date back to the reign of King Henry VIII.

The first American revolver to use metallic cartridges was the 7-round breechloading Smith & Wesson New Model 1, introduced in 1857.

In the next section, I will explain how previous models of revolvers — the muzzleloading cap-and-ball type — had to be laboriously reloaded by ramming a bullet from the front of the cylinder to the back. The new Smith & Wesson opened on a hinge, exposing all 7 chambers at the back of the cylinder. When reloading, the user would use an attached rod to push out the now-empty shell of a fired cartridge. Then the user could drop a fresh round into the empty cylinder chamber. For a full reload, the process would be repeated for each chamber. The ammunition for the Model 1 was Smith & Wesson's new .22 rimfire short, which is still in use today.

Pepperboxes are similar to revolvers, but have multiple rotating barrels; they are discussed in more detail in the next section. In 1859, the first pepperbox using metallic cartridges was produced by Sharps. Production would be over 150,000. Lewis Winant, *Pepperbox Firearms* 78, 87 (1952).

Reloading a S&W revolver was faster than reloading a pre-1858 cap-and-ball revolver; cap-and-ball reloading became much quicker starting in 1858, thanks to a Remington patent discussed in the next section.

In the 1860s and 1870s, metallic cartridge firearms displaced firearms using older types of ammunition. As the process continued, reloading of revolvers with metallic cartridges sped up.

The S&W New Model 1 broke open from the bottom, via a hinge on the top. Later, "top break" revolvers put the hinge on the bottom. The user did not have to turn the gun upside-down to reload. Opening a top break revolver automatically ejected all the empty shells from the entire cylinder.

In 1879 the first speedloader for revolvers was patented. It was a circular clip that held six rounds of ammunition in the exact position of a revolver cylinder. While 6 rounds had become the standard capacity for revolvers, some models had more or fewer, so they would need speedloaders made for the revolver's particular capacity and caliber.

With the entire back of the cylinder exposed, the user places the speedloader over the empty cylinder and then turns a knob on the speedloader to release the cartridges all at once, dropping them into the cylinder. With some practice, the process is quick, albeit not as fast as swapping detachable box magazines on a semiautomatic firearm. In the days when many or most law enforcement officers carried revolvers — that is, up until about the 1990s — speedloaders were standard on an officer's duty belt.

In 1889 came the swing-out cylinder, which is ubiquitous on modern revolvers. The cylinder is attached to revolver's frame via a hinge called a "crane." Like the top break, the swing-out exposes all cylinder chambers simultaneously. A few years later Smith & Wesson introduced an ejector rod to push out every empty shell from the cylinder all at once. Speedloaders made for a top break revolver can work for a swing-out, and vice versa.

Cap and ball revolvers and pepperboxes

The first repeating firearms to become huge commercial successes in the United States were handguns, starting in the 1830s. Although the Colt revolver was patented in 1836, until the 1850s revolvers were overshadowed by pepperboxes. In a revolver, a cylinder holds several rounds of ammunition, most typically 5 to 7. Before each shot, the cylinder is rotated by mechanical action from the trigger or hammer, and the cylinder aligns the next round in the cylinder's chambers with the barrel. A pepperbox works similarly, except that the pepperbox has a separate barrel for each round of ammunition; the barrels rotate around an axis. (Some earlier models of pepperboxes wrapped the barrels around an axis, but the barrels did not rotate.)

Pepperboxes were less accurate than Colt revolvers, but accurate enough at close range. Many pepperboxes could fire faster than a Colt revolver because they were double-action; that is, they fire as fast as the user can press the trigger. In contrast, the Colt revolvers were single-action; before pressing the trigger, the user had to cock the hammer with his thumb. The first Colt revolvers had five shots, whereas many pepperboxes had six. Perhaps most importantly, the Colt revolver could cost four times as much as a pepperbox.

Paul Henry, *Ethan Allen and Allen & Wheelock* 4, 17, 48, 59 (2006) (Allen price of $8 to $8.50 to dealers).

The largest-capacity American-made pepperbox appears to be the 10-shot Pecare & Smith, introduced in 1849. Lewis Winant, *Pepperbox Firearms* 58 (Palladium Press 2001) (1952).

The first American pepperbox patent was by Darling in 1836. Winant at 20. The leading American manufacturers were various companies associated with Ethan Allen. Allen was not the same person as the illustrious Vermont patriot of the American Revolution. The 19th-century Allen *is* the person who founded the company that today sells fine furniture. He "was a pioneer in the transition from handmade to machine-made and interchangeable parts." *Id.* at 28.

"The Allens were very popular with the Forty Niners. . . . The pepperbox was the fastest shooting handgun of its day. Many were bought by soldiers and for use by state militia. Some saw service in the Seminole Wars and the War with Mexico, and more than a few were carried in the Civil War." They were last used in a major engagement by the U.S. Cavalry in an 1857 battle with the Cheyenne. *Id.* at 30.

Like lever actions, neither revolvers nor pepperboxes were truly new. In the 18th century and before, expert gunsmiths made revolvers for wealthy customers, but their main business was single-shot flintlocks. Starting in the 1810s, Eilisha H. Collier of Boston began working on revolving pistols and rifles. He was the first gunsmith "to be known *solely* as a manufacturer of revolvers." John Nigel George, *English Guns and Rifles* 231 (1947). In 1819-20, while working in London, Collier produced 150 revolvers, "a very respectable figure for an expensive hand-made weapon of that type." *Id.* at 236.

In 1715, John Pimm (or Pim) of Boston made a 6-shot flintlock revolver that resembles a modern Smith & Wesson .38 Special. M.L. Brown, *Firearms in Colonial America: The Impact on History and Technology 1497-1792*, at 255-56 (1980). King Henry VIII (reigned 1509-47) owned a four-shot matchlock revolver. Greener at 81-82.

Far more mainstream than King Henry's gun were the magazine-fed Lorenzoni handguns of the 1600s. They used a cylinder that was rotated via a lever into three different positions to load a fresh ball, a fresh gunpowder charge, and fresh priming powder. While the Lorenzoni cylinder did revolve, the cylinder held only one bullet and an appropriate amount of gunpowder at a time. The cylinder was revolved in order to reload a fresh bullet from one internal magazine, and fresh powder from another such magazine.

Pepperboxes also predate 1600. One well-known model was the "Holy Water Sprinkler," consisting of several barrels wrapped around the staff of a mace; some said that Henry VIII carried one. Winant at 7, 11. In the latter 17th century, pepperboxes were made by Jan Flock of Holland, and in the late 18th by Henry Nock of England. *Id.* at 13-14. Once the percussion cap was

invented in the early 19th century, an unknown gunsmith in Pennsylvania made a 6-shot pepperbox. *Id.* at 18.

There are two main reasons why pepperboxes and revolvers started to become widely popular in the 1830s rather than the 1540s. The first was a change in firearms ignition.

Previously, firearms had used either flintlock or matchlock ignition. Matchlocks were obsolete in America and England long before 1791. The wheellock, invented by Leonardo da Vinci, was a step on the way to the flintlock. In flintlocks and matchlocks, the firing begins by igniting loose gunpowder in the firing pan. For a flintlock, the ignition is by sparks from a flint striking steel; for a matchlock, by the trigger lowering a slow-burning hemp cord to the firing pan. The firing pan is connected to the main gunpowder charge in the breech (back) of the barrel by a narrow channel that enters the barrel via a small touch hole. In 1805, after 12 years of careful work, Scotland's Rev. Alexander Forsyth invented percussion ignition: the hammer of a firearm would strike a small explosive (the fulminate) and that explosion would ignite the main gunpowder charge in the firearm's barrel. Percussion priming made it possible to have several rounds ready to fire, without the need to refill a priming pan.

A second reason why revolvers and pepperboxes became ordinary consumer items in the 1830s rather than the 1540s was manufacturing cost. Being mechanically more complex than single-shot guns, repeaters could be, and were, produced artisanally from the fifteenth century onward, but required many hours of expert labor. Mass production for a large consumer market became possible as a result of the Madison-Monroe industrial policy, begun in 1815, of federal investment in research and development of machine tools for the mass production of firearms from interchangeable parts.

All the American pepperboxes, as well as the Colt revolvers in their first decades, were cap and ball firearms. That is, they were a type of muzzleloader. To load a round, the user poured gunpowder into a revolver's cylinder chamber (or one of the barrels on a pepperbox) from the front, and then rammed a bullet into place. At the back of the same cylinder chamber (or barrel, for a pepperbox), the user would place a percussion cap on a nipple. Then the process would have to be repeated for the next cylinder chamber (revolver) or barrel (pepperbox). For revolvers, a short ramrod on a pivot was typically attached underneath the barrel. With the cap and ball system, once a handgun was empty, a full reload was far from instantaneous.

That changed in 1858, with the third version of the new Remington "Beals" revolvers. Remington had patented the first and second Beals models in 1856 and 1857. Charles Schif, *Remington's First Revolvers: The Remington Beals .31 Caliber Revolvers* 6-8 (2007) (Patents 15,167 & 17,359). In the 1858 patent, no. 21,478, the barrel was affixed to the revolver frame by a single pin, and the

pin was designed to be easy to remove. The user would push out the attachment pin, replace the empty cylinder with a fresh, preloaded cylinder, put the barrel and pin back into place, and be ready to shoot. *Id.* at 48. As Remington advertising explained, "The efficiency of the arm may be greatly increased by the addition of duplicate cylinders, thus affording the advantage of a brace [pair] of Pistols at a trifling additional expense." *Id.* at 106 (reprinting advertisement that ran in the *George W. Hawes' Ohio State Gazetteer and Business Director* in 1859-60).

Another company, U.S. Starr Arms, made revolvers with a similar mechanism, using a screw for attachment, and designed for fast reloads. Colt revolvers had an attachment pin, but it had not been made with reloads in mind. Thus, some Colt users would file the pin so that was easy to remove, and the gun could then be reloaded just as fast as a Remington. I do not know if Fordyce Beals figured out the idea of a removable attachment pin by noticing what Colt users were doing, or if Colt users got the idea of filing their pins after seeing the Remington Beals revolvers.

Single-shot rifles

The American colonists switched from matchlock firearms to flintlocks much sooner than their European cousins did. (Ch. 23.B.1.) Because a flintlock is much easier to reload, the change quintupled the fire — at least in the hands of a proficient user — from no more than one shot per minute to five per minute.

Flintlock firearms started becoming much more powerful in 1787 when England's Henry Nock patented a new breechblock. Formerly, the touch hole had been located near the back of the main powder charge. Nock moved the touch hole to around the middle of the powder charge, so that all the powder would ignite at once. Greener at 118; George at 188-90. Because all the powder now burned in an instant, gun barrels could be shortened; there was no longer a need for long barrels that provided time for various parts of the powder to combust. George at 190.

Nock's breechblock was one of many inventions that made the flintlocks of 1787 much better than the flintlocks of 1687. George at 103 ("immense improvement in such matters as the cutting of screw threads, the tempering of springs, the case-hardening of working parts and lock-plates, and the accurate fitting of all members of the lock"); 114 ("waterproof" flash-pan allowing moisture to drain out the bottom); 115 ("small bearing-wheel" on the pan cover or pan cover spring that reduced friction and "greatly increased" the speed of opening the pan cover and "lessened the chances of its missing fire").

In the first decades of the 19th century, as percussion ignition became standard, retrofitting a flintlock to use percussion ignition was inexpensive and easy. With percussion ignition, the user no longer had to pour loose

priming gunpowder into the firing pan; simply putting a cap on the nipple was much faster. So reloading became faster.

After experimentation, the best form of percussion ignition was determined to be the copper percussion cap, "shaped like a thimble and with a small charge of fulminate in the crown." *Id.* at 258. The cap sat on a nipple near the breech.

The retrofit instantly made a firearm more reliable and powerful. Because the detonation of the fulminate instantly ignited all the gunpowder at once, the gun fired more powerfully. At the time, not everybody with a flintlock owned one with a Nock breechblock, which also ignited all the powder at once. Even with a Nock breechblock, there was sometimes a short delay between when the sparks landed in the firing pan and when main powder charge exploded, since the flame had to travel from the priming pan to the main powder charge. George at 246-48.

Unlike flintlocks, which had loose powder in the firing pan, a percussion cap gun was in little danger of not firing because of rain or heavy moisture. An 1834 British army test, conducted "in all types of weather," fired 6,000 rounds, and reported 936 misfires from flintlocks, compared to only 22 from percussion locks. (At the time, "lock" was the term for what we today call the "action" of gun — the part of the gun that performs the mechanical operations of loading and firing.)

Moreover, as described above, in a flintlock the burning powder in the firing pan communicates with the main power charge via a touch hole in the barrel. Necessarily, some of the burning gas from the main powder charge would escape via the touch hole, rather than staying in the barrel to push the bullet out through the muzzle. When the flintlock touch hole was replaced with the percussion nipple, a path for rearward gas escape was eliminated. "The penetration and recoil are therefore proportionately increased." Greener at 117.

Meanwhile, breechloaders were becoming increasingly common. The vast majority of modern firearms are breechloaders. They load from the back of the barrel (the breech) rather than from the front of the barrel (the muzzle).

Of course, King Henry VIII had breechloaders in 1537. His armory included breechloading matchlock arquebus handguns and rifles. Upon examination centuries later, the guns "with some minor difference in details, were found to be veritable Snider rifles." Charles B. Norton*, American Breech-loading Small Arms* 10 (1872). Invented in 1865, the Snider rifle was the standard British service arm of 1866-74. Greener at 103-04.

But unlike Henry VIII's lever action and revolver guns, the breechloader became widespread well before the 19th century. "[M]any specimens" of breechloaders "may be seen in museums of ancient arms." Greener at 703. "During the seventeenth and eighteenth centuries, breech-loading arms were very numerous and of greatly diversified mechanism." *Id.* at 103-10 (quote at 105); *see also* George at 47. Among the most famous, at least to Americans,

was the Ferguson rifle, which was used by the British in the American War of Independence and was "the first breech-loading carbine ever used by a regularly organized British corps." Greener at 108. The user could hit a 200 yard target with six shots per minute while stationary, or four shots per minute while walking and reloading — reloading on the move having hitherto been impossible. George at 149-50.

From an American perspective, the first highly popular breechloader was the 1848 Sharps single-shot rifle. It used percussion ignition, plus old-fashioned paper cartridges that contained the bullet and powder charge, but not the primer. A novice could fire and reload 9 shots per minute. *Sharps' Breech-loading Patent Rifle*, Scientific American, Mar. 9, 1850. The Sharps were especially popular with pioneer families heading West. Nine shots per minute by a novice was a big change from the flintlock's rate of five shots per minute by an experienced user.

But the biggest breakthrough for breechloaders was the invention of the modern metallic cartridge in 1853. As described above, it contains the bullet, powder charge, and primer in a single metal casing. A predecessor had been invented around 1810 by Samuel Johannes Pauly of Switzerland. Building on the invention of percussion ignition, Pauly put the fulminate inside a pan in the center of a short metal case. The Pauly case attached to the rear of a traditional paper cartridge (which contained the gunpowder and the bullet). The fulminate would be detonated when struck by a firing pin. (As opposed to the standard percussion cap, which was detonated when struck by a hammer.)

You might not be surprised to learn that Henry VIII also had guns that used metallic cartridges. For all breechloaders in every century, there was one fundamental problem that needed to be solved. Unlike with a muzzleloader, the breech of the breechloader must be opened every time new ammunition is inserted. Unless a perfect seal is created at the breech, some of the gas from the burning gunpowder will escape rearward. Whatever gas escapes rearward will be wasted, since it not used to impart forward energy to the bullet. The rear gas could be annoying to the user.

The solution was the metallic cartridge. If the case were precisely as wide as the bore of the barrel, then the case itself would create a gas seal — as Henry VIII's engineers well understood. It took a lot of trial and error to build a metal case that was precisely the size of the bore on the king's breechloaders. George at 17-18. A king could afford the very high labor cost of handcrafted ammunition built for a particular firearm, but few other people could. Even after machine tools greatly reduced variations in bore sizes in a given caliber, bore sizes still varied within a range of tolerance. Some breechloaders were designed with breechblocks that made a perfect gas seal, but over repeated use, the friction of metal moving against metal might eventually thin the metal and allow some gas to escape.

The metallic cartridge of 1853 was the answer. Unlike Henry VIII's ammunition, the 1853 cartridge used an *expansive* shell. This thin-walled shell could readily be dropped into the barrel breech. Then, when the gunpowder ignited, the pressure would expand the wall of the shell to release the bullet, and to form a perfect seal behind the expanding gas. "Probably no invention connected with fire-arms has wrought such changes in gun construction as the invention of the expansive cartridge case." Greener at 133.

The expansive metallic cartridge was greatly beneficial for repeating firearms. First, the mechanics of a repeater are simpler if the primer is contained in the cartridge, rather than having to be loaded separately.

Secondly, for repeating arms, especially if not correctly loaded, there was a risk of "chain fire." That is, the flame that was igniting one round might escape and ignite another round. At the least this could severely damage the gun, and at worst the explosion might injure the user. Today, if you have a reproduction of a 6-shot cap and ball revolver, the safety instructions may encourage you to load only every other round in the cylinder during target practice, to reduce the risk of a chain fire. People who carried fully loaded cap and ball revolvers for defense presumably decided that the small risk of a chain fire was outweighed by the risk of running out of ammunition while under attack. With the metallic cartridge, the risk of chain fire was greatly reduced.

Even on a single-shot rifle, the expansive metallic cartridge was a game-changer because it sped up reloading. As stated in the 1859 annual report by U.S. War Department Chief of Ordnance Henry Craig, "With the best breech-loading arm, one skillful man would be equal to two, probably three, armed with an ordinary muzzle-loading gun." Carl Davis, *Arming the Union* 117 (1979).

Undoubtedly the Union could have won the Civil War much faster if it had been able to equip all its soldiers with breechloaders. But that was logistically impossible. With production lines running as fast as possible, it took until 1863 — two years into the war — before the Union could supply every infantry soldier with the Army's then-standard arm, the muzzleloading Springfield Model 1848 rifle. Retooling all the muzzleloading production lines to convert them into breechloading was not possible, given the Army's immediate need for huge quantities of rifles. The Union had to make do with whatever breechloaders it could obtain from private companies and from imports. The Union's deficiency in very large-scale firearm production at hitherto unknown quantities was one reason so many Union soldiers brought their personal firearms to service.

Later, when the Army had reverted to its small peacetime size, the single-shot 1873 Springfield rifle was adopted as the standard service arm. According to tests by the Ordnance Department, "A practiced person can fire this arm from 12 to 13 times per minute, loading from the cartridge-box. (It has been fired from the shoulder at the rate of 25 times per minute from the cartridge-

box)." Springfield Armory, *Description and Rules for the Management of the Springfield Rifle, Carbine, and Army Revolvers, Caliber* 45 (1887).

Conclusion

During the nineteenth century, firearms that could be reloaded quickly after being emptied became widespread and affordable to a broad market. Many of the developments involved ideas that had been worked out centuries before, but had not become available to average consumers due to the high labor costs of artisanal manufacture before the industrial revolution.