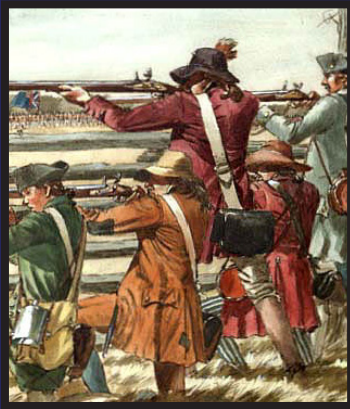


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2022 SUPPLEMENT FOR  
FIREARMS LAW AND  
THE SECOND AMENDMENT:  
Regulation, Rights, and Policy  
3rd Edition

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August 2022

**2022 Supplement**  
for  
**Firearms Law and the Second  
Amendment:**  
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by

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What an amazing time to study the Second Amendment! The Supreme Court's June 2022 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 of them had previously been using. Many issues that had previously been litigated under interest-balancing will be relitigated under THT. Many cases will end up with the same result, while some may not.

Whatever one's personal views on which test is better, *Bruen* makes the Second Amendment field wide open. The current state of the Fourth Amendment is very different. While important new cases are decided every year, there is an enormous body of case precedent. In the vast majority of Fourth Amendment 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 now making pro/con arguments about analogies for particular laws.

To even make an analogy, one must know the baseline legal history. We believe that *Firearms Law and the Second Amendment* is the single best source for that legal history. 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 2022 Supplement begins with *Bruen*—a short introduction setting up the case. All the *Bruen* opinions are reprinted in full. There are short sections on the four Second Amendment cases that the Court granted, vacated, and remanded after *Bruen*. And a summary of judicial opinions applying *Bruen*.

Chapter 12.A of the textbook provides a summary of “Rules from *Heller* and *McDonald*.” We do the same for *Bruen*. As post-*Bruen* cases are decided, you can observe how lower court opinions implement *Bruen*'s rules.

The *Bruen* material accounts for nearly a hundred pages. The Supplement then proceeds in the usual manner for supplements. For the sections of chapters about contemporary statutes and law (Chs. 8-16), a parallel section of the Supplement describes important new cases, statutes, regulations, or scholarship. Many of the new items could be good topics for class papers or law journals.

Of the statutory changes in the last year, the most important was amendments of the main national gun control law, the Gun Control Act, in June 2022. Prof. Robert Leider describes the amendments and also considers some possible practical or interpretive problems. The most important

regulatory change was the 364-page “Frame or Receiver” regulation from ATF. It is explained in legal education materials from the law firm Reeves & Dola.

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

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## 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. The strategy succeeded in 2021, with the Court granting certiorari in the case we now know 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.

Below is the entire *Bruen* case. As in all cases in the textbook, we have made various sub silento edits to citations, such as removing parallels cites to L.Ed.; for *Bruen*, we have not removed any substantive text. Within the *Bruen* opinion, 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

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142 S. Ct. 2111 (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. In 1905, New York made it a misdemeanor for anyone over the age of 16 to "have or carry concealed upon his person in any city or village of [New York], any pistol, revolver or other firearm without a written license . . . issued to him by a police magistrate." 1905 N.Y. Laws ch. 92, §2, pp. 129-130; see also 1908 N.Y. Laws ch. 93, §1, pp. 242-243 (allowing justices of the peace to issue licenses). In 1911, New York's "Sullivan Law" expanded the State's criminal prohibition to the possession of all handguns—concealed or otherwise—without a government-issued license. See 1911 N.Y. Laws ch. 195, §1, p.443. New York later amended the Sullivan Law to clarify the licensing standard: Magistrates could "issue to [a] person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon" only if that person proved "good moral character" and "proper cause." 1913 N.Y. Laws ch. 608, §1, p.1629.

Today's licensing scheme largely tracks that of the early 1900s. 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. See N.Y. Penal Law Ann. §§265.01-b, 261.01(1), 70.00(2)(e) and (3)(b), 80.00(1)(a), 70.15(1), 80.05(1). 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. §§265.03(3), 70.00(2)(c) and (3)(b), 80.00(1)(a).

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." §§400.00(1)(a)-(n). 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." §400.00(2)(f). To secure that license, the applicant must prove that "proper

cause exists” to issue it. *Ibid.* 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. See, e.g., *In re O’Brien*, 87 N.Y. 2d 436, 438-439(1996); *Babernitz v. Police Dept. of City of New York*, 411 N.Y.S.2d 309, 311 (1978); *In re O’Connor*, 585 N.Y.S.2d 1000, 1003 (Westchester Cty. 1992).

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.” *E.g.*, *In re Klenosky*, 428 N.Y.S.2d 256, 257 (1980). This “special need” standard is demanding. For example, living or working in an area “noted for criminal activity” does not suffice. *In re Bernstein*, 445 N.Y.S.2d 716, 717 (1981). Rather, New York courts generally require evidence “of particular threats, attacks or other extraordinary danger to personal safety.” *In re Martinek*, 743 N. Y. S. 2d 80, 81 (2002); see also *In re Kaplan*, 673 N.Y.S.2d 66, 68 (1998) (approving the New York City Police Department’s requirement of “extraordinary personal danger, documented by proof of recurrent threats to life or safety” (quoting 38 N.Y.C.R.R. §5-03(b))).

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 re Bando*, 735 N.Y.S.2d 660, 661 (2002). In other words, the decision “must be upheld if the record shows a rational basis for it.” *Kaplan*, 673 N.Y.S.2d at 68. The rule leaves applicants little recourse if their local licensing officer denies a permit.

New York is not alone in requiring a permit to carry a handgun in public. But the vast majority of States—43 by our count—are “shall issue” jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.<sup>1</sup> Meanwhile, only six States and the District of Columbia have “may

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<sup>1</sup> See Ala. Code §13A-11-75 (Cum. Supp. 2021); Alaska Stat. §18.65.700 (2020); Ariz. Rev. Stat. Ann. §13-3112 (Cum. Supp. 2021); Ark. Code Ann. §5-73-309 (Supp. 2021); Colo. Rev. Stat. §18-12-206 (2021); Fla. Stat. §790.06 (2021); Ga. Code Ann. §16-11-129 (Supp. 2021); Idaho Code Ann. §18-3302K (Cum. Supp. 2021); Ill. Comp. Stat., ch. 430, §66/10 (West Cum. Supp. 2021); Ind. Code §35-47-2-3 (2021); Iowa Code §724.7 (2022); Kan. Stat. Ann. §75-7c03 (2021); Ky. Rev. Stat. Ann. §237.110 (Lexis Cum. Supp. 2021); La. Rev. Stat. Ann. §40:1379.3 (West Cum. Supp. 2022); Me. Rev. Stat. Ann., Tit. 25, §2003 (Cum. Supp. 2022); Mich. Comp. Laws §28.425b (2020); Minn. Stat. §624.714 (2020); Miss. Code Ann. §45-9-101 (2022); Mo. Rev. Stat. §571.101 (2016); Mont. Code Ann. §45-8-321 (2021); Neb. Rev. Stat. §69-2430 (2019); Nev. Rev. Stat. §202.3657 (2021); N. H. Rev. Stat. Ann. §159:6 (Cum. Supp. 2021); N. M. Stat. Ann. §29-19-4 (2018); N.C. Gen. Stat. Ann. §14-415.11 (2021); N.D. Cent. Code Ann. §62.1-04-03 (Supp. 2021); Ohio Rev. Code Ann. §2923.125 (2020); Okla. Stat., Tit. 21, §1290.12 (2021); Ore. Rev. Stat. §166.291 (2021); 18 Pa. Cons. Stat. §6109 (Cum. Supp. 2016); S.C. Code Ann. §23-31-215(A) (Cum. Supp. 2021); S.D. Codified Laws §23-7-7 (Cum. Supp. 2021); Tenn. Code Ann.

issue” licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license. Aside from New York, then, only California, the District of Columbia, Hawaii, Maryland, Massachusetts, and New Jersey have analogues to the “proper cause” standard.<sup>2</sup> All of these “proper cause” analogues have been upheld by the Courts of Appeals, save for the District of Columbia’s, which has been permanently enjoined since 2017. Compare *Gould v. Morgan*, 907 F.3d 659, 677 (CA1 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (CA2 2012); *Drake v. Filko*, 724 F.3d 426, 440 (CA3 2013); *United States v. Masciandaro*, 638 F.3d 458, 460 (CA4 2011); *Young v. Hawaii*, 992 F.3d 765, 773 (CA9 2021) (en banc), with *Wrenn v. District of Columbia*, 864 F.3d 650, 668, (CADC 2017).

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§39-17-1366 (Supp. 2021); Tex. Govt. Code Ann. §411.177 (West Cum. Supp. 2021); Utah Code §53-5-704.5 (2022); Va. Code Ann. §18.2-308.04 (2021); Wash. Rev. Code §9.41.070 (2021); W. Va. Code Ann. §61-7-4 (2021); Wis. Stat. §175.60 (2021); Wyo. Stat. Ann. §6-8-104 (2021). Vermont has no permitting system for the concealed carry of handguns. Three States—Connecticut, Delaware, and Rhode Island—have discretionary criteria but appear to operate like “shall issue” jurisdictions. See Conn. Gen. Stat. §29-28(b) (2021); Del. Code, Tit. 11, §1441 (2022); R. I. Gen. Laws §11-47-11 (2002). Although Connecticut officials have discretion to deny a concealed-carry permit to anyone who is not a “suitable person,” see Conn. Gen. Stat. §29-28(b), the “suitable person” standard precludes permits only to those “individuals whose conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon.” *Dwyer v. Farrell*, 193 Conn. 7, 12, 475 A. 2d 257, 260 (1984) (internal quotation marks omitted). As for Delaware, the State has thus far processed 5,680 license applications and renewals in fiscal year 2022 and has denied only 112. See Del. Courts, Super. Ct., Carrying Concealed Deadly Weapon (June 9, 2022), <https://courts.delaware.gov/forms/download.aspx?ID=125408>. Moreover, Delaware appears to have no licensing requirement for open carry. Finally, Rhode Island has a suitability requirement, see R. I. Gen. Laws §11-47-11, but the Rhode Island Supreme Court has flatly denied that the “[d]emonstration of a proper showing of need” is a component of that requirement. *Gadomski v. Tavares*, 113 A. 3d 387, 392 (2015). Additionally, some “shall issue” jurisdictions have so-called “constitutional carry” protections that allow certain individuals to carry handguns in public within the State without *any* permit whatsoever. See, e.g., A. Sherman, More States Remove Permit Requirement To Carry a Concealed Gun, PolitiFact (Apr. 12, 2022), <https://www.politifact.com/article/2022/apr/12/more-states-remove-permit-requirement-carry-concea/> (“Twenty-five states now have permitless concealed carry laws . . . The states that have approved permitless carry laws are: Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Iowa, Georgia, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming”).

<sup>2</sup> See Cal. Penal Code Ann. §26150 (West 2021) (“Good cause”); D.C. Code §§7-2509.11(1) (2018), 22-4506(a) (Cum. Supp. 2021) (“proper reason,” *i.e.*, “special need for self-protection”); Haw. Rev. Stat. §§134-2 (Cum. Supp. 2018), 134-9(a) (2011) (“exceptional case”); Md. Pub. Saf. Code Ann. §5-306(a)(6)(ii) (2018) (“good and substantial reason”); Mass. Gen. Laws, ch. 140, §131(d) (2020) (“good reason”); N. J. Stat. Ann. §2C:58-4(c) (West Cum. Supp. 2021) (“justifiable need”).

## B

As set forth in the pleadings below, petitioners Brandon Koch and Robert Nash are law-abiding, adult citizens of Rensselaer County, New York. Koch lives in Troy, while Nash lives in Averill Park. Petitioner New York State Rifle & Pistol Association, Inc., is a public-interest group organized to defend the Second Amendment rights of New Yorkers. Both Koch and Nash are members.

In 2014, Nash applied for an unrestricted license to carry a handgun in public. Nash did not claim any unique danger to his personal safety; he simply wanted to carry a handgun for self-defense. In early 2015, the State denied Nash's application for an unrestricted license but granted him a restricted license for hunting and target shooting only. In late 2016, Nash asked a licensing officer to remove the restrictions, citing a string of recent robberies in his neighborhood. After an informal hearing, the licensing officer denied the request. The officer reiterated that Nash's existing license permitted him "to carry concealed for purposes of off road back country, outdoor activities similar to hunting," such as "fishing, hiking & camping etc." App. 41. But, at the same time, the officer emphasized that the restrictions were "intended to *prohibit* [Nash] from carrying concealed in ANY LOCATION typically open to and frequented by the general public." *Ibid.*

Between 2008 and 2017, Koch was in the same position as Nash: He faced no special dangers, wanted a handgun for general self-defense, and had only a restricted license permitting him to carry a handgun outside the home for hunting and target shooting. In late 2017, Koch applied to a licensing officer to remove the restrictions on his license, citing his extensive experience in safely handling firearms. Like Nash's application, Koch's was denied, except that the officer permitted Koch to "carry to and from work." *Id.* at 114.

## C

Respondents are the superintendent of the New York State Police, who oversees the enforcement of the State's licensing laws, and a New York Supreme Court justice, who oversees the processing of licensing applications in Rensselaer County. Petitioners sued respondents for declaratory and injunctive relief under Rev. Stat. 1979, 42 U.S.C. §1983, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications on the basis that they had failed to show "proper cause," *i.e.*, had failed to demonstrate a unique need for self-defense.

The District Court dismissed petitioners' complaint and the Court of Appeals affirmed. See 818 Fed. Appx. 99, 100 (CA2 2020). Both courts relied on the Court of Appeals' prior decision in *Kachalsky*, 701 F.3d 81, which had sustained New York's proper-cause standard, holding that the requirement was "substantially related to the achievement of an important governmental interest." *Id.* at 96.

We granted certiorari to decide whether New York’s denial of petitioners’ license applications violated the Constitution. 141 S. Ct. 2566 (2021).

## 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).<sup>3</sup>

## 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 (CA7 2019) (internal quotation marks omitted). But see *United States v. Boyd*, 999 F.3d 171, 185 (CA3 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 (CA11 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 (CA6 2012) (internal quotation marks omitted). But if the historical

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<sup>3</sup> Rather than begin with its view of the governing legal framework, the dissent chronicles, in painstaking detail, evidence of crimes committed by individuals with firearms. See *post*, at 1-9 (opinion of Breyer, J.). The dissent invokes all of these statistics presumably to justify granting States greater leeway in restricting firearm ownership and use. But, as Members of the Court have already explained, “[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications.” *McDonald v. Chicago*, 561 U.S. 742, (2010) (plurality opinion).

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 (CA4 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.<sup>4</sup> 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 576-577, 578. That analysis suggested that the Amendment’s operative clause—

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<sup>4</sup> See *Association of N. J. Rifle & Pistol Clubs, Inc. v. Attorney General N. J.*, 910 F.3d 106, 117 (CA3 2018); accord *Worman v. Healey*, 922 F.3d 26, 33, 36-39 (CA1 2019); *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 127-128 (CA2 2020); *Harley v. Wilkinson*, 988 F.3d 766, 769 (CA4 2021); *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194-195 (CA5 2012); *United States v. Greeno*, 679 F.3d 510, 518 (CA6 2012); *Kanter v. Barr*, 919 F.3d 437, 442 (CA7 2019); *Young v. Hawaii*, 992 F.3d 765, 783 (CA9 2021) (en banc); *United States v. Reese*, 627 F.3d 792, 800-801 (CA10 2010); *Georgia Carry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260, n. 34 (CA11 2012); *United States v. Class*, 930 F.3d 460, 463, 442 U.S. App. D.C. 257 (CADC 2019).

”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 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. See *id.* at 616-619.

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 demarcate 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 148-149 (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 628-629, 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 689-690, (BREYER, J., dissenting)); see also *McDonald*, 561 U.S. at 790-791, (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, 704-705, (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.<sup>5</sup>

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, 634-635. In that context, “[w]hen the Government restricts speech, the Government bears the burden of proving the

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<sup>5</sup> The dissent asserts that we misread *Heller* to eschew means-end scrutiny because *Heller* mentioned that the District of Columbia’s handgun ban “would fail constitutional muster” “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.” *Heller*, 554 U.S. at 628-629; see *post*, at 23 (opinion of Breyer, J.). But *Heller*’s passing observation that the District’s ban would fail under any heightened “standar[d] of scrutiny” did not supplant *Heller*’s focus on constitutional text and history. Rather, *Heller*’s comment “was more of a gilding-the-lily observation about the extreme nature of D.C.’s law,” *Heller v. District of Columbia*, 670 F.3d 1244, 1277 (CADC 2011) (Kavanaugh, J., dissenting), than a reflection of *Heller*’s methodology or holding.

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).<sup>6</sup>

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<sup>6</sup>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.

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 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. See Part III-B, *infra*.

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, 404-405 (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, 411-412 (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). And because “[e]verything is similar in infinite ways to everything else,” *id.* at 774, one needs “some metric enabling the analogizer to assess which similarities are important and which are not,” F. Schauer & B. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249, 254 (2017). For instance, a green truck and a green hat are relevantly similar if

one's metric is "things that are green." See *ibid.* They are not relevantly similar if the applicable metric is "things you can wear."

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).<sup>7</sup>

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 ancestors would never have accepted." *Drummond v. Robinson*, 9 F.4th 217, 226 (CA3 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, 229-236, 244-247 (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

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<sup>7</sup>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.

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 (CA DC 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

Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York’s proper-cause requirement.

#### 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. See Brief for Respondents 19. 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 (CA7 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, *contra*, *Young*, 992 F.3d at 813, 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).<sup>8</sup> To support that claim, the burden falls on respondents to show that

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<sup>8</sup> The dissent claims that we cannot answer the question presented without giving respondents the opportunity to develop an evidentiary record fleshing out “how New York’s law is

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 634-635 (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

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administered in practice, how much discretion licensing officers in New York possess, or whether the proper cause standard differs across counties." *Post*, at 20. We disagree. The dissent does not dispute that any applicant for an unrestricted concealed-carry license in New York can satisfy the proper-cause standard only if he has "a special need for self-protection distinguishable from that of the general community." *Post*, at 13 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (CA2 2012)). And in light of the text of the Second Amendment, along with the Nation's history of firearm regulation, we conclude below that a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense. See *infra*, at 62. That conclusion does not depend upon any of the factual questions raised by the dissent. Nash and Koch allege that they were denied unrestricted licenses because they had not "demonstrate[d] a special need for self-defense that distinguished [them] from the general public." App. 123, 125. If those allegations are proven true, then it simply does not matter whether licensing officers have applied the proper-cause standard differently to other concealed-carry license applicants; Nash's and Koch's constitutional rights to bear arms in public for self-defense were still violated.



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)); see also, e.g., *Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022) (slip op., at 5) (same); The Federalist No. 37, p.229 (C. Rossiter ed. 1961) (J. Madison); see generally C. Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 10-21 (2001); W. Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019). 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 (2020) (slip op., at 15).

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 (2019) (slip op., at 2-3); *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, 168-169 (2008) (Fourth Amendment); *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 122-125 (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](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.<sup>9</sup> 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); see also *Wheaton v. Peters*, 33 U.S. 591, (1834); *Funk*, 290 U.S. at 384. 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.

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<sup>9</sup>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 (CA3 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.

*Ex parte Grossman*, 267 U.S. 87, 108-109 (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 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 Steeleets, Pocket Daggers, Pocket Daggess 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.<sup>10</sup> 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

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<sup>10</sup> 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.

animo,” 1 Comb., at 39, 90 Eng. Rep., at 330, with evil intent or malice. Knight was ultimately acquitted by the jury.<sup>11</sup>

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. 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.” Schworer 156.<sup>12</sup> 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. Schworer 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.

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<sup>11</sup> 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. See *post*, at 37. 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. See *supra*, at 15. 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.

<sup>12</sup> Even Catholics, who fell beyond the protection of the right to have arms, and who were stripped of all “Arms, Weapons, Gunpowder, [and] Ammunition,” were at least allowed to keep “such necessary Weapons as shall be allowed . . . by Order of the Justices of the Peace . . . for the Defence of his House or Person.” 1 Wm. & Mary c.15, §4, in 3 Eng. Stat. at Large 399 (1688).

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. See Brief for Respondents 33. 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*, at 40-42 (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. See *supra*, at 34-37. 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.”<sup>13</sup> 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

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<sup>13</sup> 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* 150-151 (1967); see also H. Hendrick, P. Paradis, & R. Hornick, *Human Factors Issues in Handgun Safety and Forensics* 44 (2008).

the soil.” See W. Whitehead, *East Jersey Under the Proprietary Governments 150-151* (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 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).<sup>14</sup> 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. 260-261.

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. See *supra*, at 34-35. 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

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<sup>14</sup> 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”).

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 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 421-422. 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 422-423. 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).<sup>15</sup> 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 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<sup>16</sup>—and decisions upholding them<sup>17</sup>—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-

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<sup>15</sup> The dissent concedes that *Huntly*, 25 N.C. 418, recognized that citizens were “at perfect liberty’ to carry for ‘lawful purpose[s].” *Post*, at 42 (quoting *Huntly*, 25 N. C., at 423). 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 422-423. 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.]

<sup>16</sup> Beginning in 1813 with Kentucky, six States (five of which were in the South) enacted laws prohibiting the concealed carry of pistols by 1846. See 1813 Ky. Acts §1, p.100; 1813 La. Acts p.172; 1820 Ind. Acts p.39; Ark. Rev. Stat. §13, p.280 (1838); 1838 Va. Acts ch. 101, §1, p.76; 1839 Ala. Acts no. 77, §1. During this period, Georgia enacted a law that appeared to prohibit both concealed and open carry, see 1837 Ga. Acts §§1, 4, p.90, but the Georgia Supreme Court later held that the prohibition could not extend to open carry consistent with the Second Amendment. See *infra*, at 45-46. Between 1846 and 1859, only one other State, Ohio, joined this group. 1859 Ohio Laws §1, p.56. Tennessee, meanwhile, enacted in 1821 a broader law that prohibited carrying, among other things, “belt or pocket pistols, either public or private,” except while traveling. 1821 Tenn. Acts ch. 13, §1, p.15. And the Territory of Florida prohibited concealed carry during this same timeframe. See 1835 Terr. of Fla. Laws p.423.

<sup>17</sup> See *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *State v. Reid*, 1 Ala. 612, 616 (1840); *State v. Buzzard*, 4 Ark. 18 (1842); *Nunn v. State*, 1 Ga. 243 (1846); *State v. Chandler*, 5 La. 489 (1850); *State v. Smith*, 11 La. 633 (1856); *State v. Jumel*, 13 La. 399 (1858). But see *Bliss v. Commonwealth*, 12 Ky. 90 (1822). See generally 2 J. Kent, *Commentaries on American Law* \*340, n.b.

621 (1840).<sup>18</sup> It was also true in Louisiana. See *State v. Chandler*, 5 La. 489, 490 (1850).<sup>19</sup> Kentucky, meanwhile, went one step further—the State Supreme Court *invalidated* a concealed-carry prohibition. See *Bliss v. Commonwealth*, 12 Ky. 90 (1822).<sup>20</sup>

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 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*).<sup>21</sup>

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<sup>18</sup> See *Reid*, 1 Ala., at 619 (holding that “the Legislature cannot inhibit the citizen from bearing arms openly”); *id.* at 621 (noting that there was no evidence “tending to show that the defendant could not have defended himself as successfully, by carrying the pistol openly, as by secreting it about his person”).

<sup>19</sup> See, e.g., *Chandler*, 5 La., at 490 (Louisiana concealed-carry prohibition “interfered with no man’s right to carry arms (to use its words) ‘in full open view,’ which places men upon an equality”); *Smith*, 11 La., at 633 (The “arms” described in the Second Amendment “are such as are borne by a people in war, or at least carried openly”); *Jumel*, 13 La., at 399-400 (“The statute in question does not infringe the right of the people to keep or bear arms. It is a measure of police, prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society”).

<sup>20</sup> 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).

<sup>21</sup> Shortly after *Andrews*, 50 Tenn. 165, Tennessee codified an exception to the State’s handgun ban for “an[y] army pistol, or such as are commonly carried and used in the United States Army” so long as they were carried “openly in [one’s] hands.” 1871 Tenn. Pub. Acts ch. 90, §1;

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.<sup>22</sup>

*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. 1795 Mass. Acts and Laws ch. 2, at 436, in *Laws of the Commonwealth of Massachusetts*. 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.<sup>23</sup>

Contrary to respondents’ position, these “reasonable-cause laws” in no way represented the “direct precursor” to the proper-cause requirement. Brief for

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see also *State v. Wilburn*, 66 Tenn. 57, 61-63 (1872); *Porter v. State*, 66 Tenn. 106, 107-108 (1874).

<sup>22</sup> 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); see *infra*, at 61.

<sup>23</sup> See 1838 Terr. of Wis. Stat. §16, p.381; Me. Rev. Stat., ch. 169, §16 (1840); Mich. Rev. Stat., ch. 162, §16 (1846); 1847 Va. Acts ch. 14, §16; Terr. of Minn. Rev. Stat., ch. 112, §18 (1851); 1854 Ore. Stat. ch. 16, §17, p.220; D.C. Rev. Code ch. 141, §16 (1857); 1860 Pa. Laws p.432, §6; W. Va. Code, ch. 153, §8 (1868).

Respondents 27. 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 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.” Mass. Rev. Stat., ch. 134, §16 (1836).<sup>24</sup> 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 of posting a bond would have prevented anyone from carrying a firearm for self-defense in the 19th century.

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<sup>24</sup> 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).

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.<sup>25</sup>

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*. Brief for Respondents 27. 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,” Mass. Rev. Stat., ch. 134, §16, 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 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

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<sup>25</sup> The dissent speculates that the absence of recorded cases involving surety laws may simply “show that these laws were normally followed.” *Post*, at 45. Perhaps. But again, the burden rests with the government to establish the relevant tradition of regulation, see *supra*, at 15, 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.



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.

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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, 19 How. 393, 15 L. Ed. 691 (1857), Chief Justice Taney offered what he thought was a parade of horrors 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 845-847 (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 847-848 (opinion of THOMAS, J.).<sup>26</sup> 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 848-849 (opinion of THOMAS, J.).<sup>27</sup>

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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<sup>26</sup> Respondents invoke General Orders No. 10, which covered the Second Military District (North and South Carolina), and provided that “[t]he practice of carrying deadly weapons, except by officers and soldiers in the military service of the United States, is prohibited.” Headquarters Second Military Dist., Gen. Orders No. 10 (Charleston, S. C., Apr. 11, 1867), in S. Exec. Doc. No. 14, 40th Cong., 1st Sess., 64 (1867). We put little weight on this categorical restriction given that the order also specified that a violation of this prohibition would “render the offender amenable to trial and punishment by military commission,” *ibid.*, rather than a jury otherwise guaranteed by the Constitution. There is thus little indication that these military dictates were designed to align with the Constitution’s usual application during times of peace.

<sup>27</sup> 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. See *supra*, at 46.

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 474-475. 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 458-459. 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, 459-460. *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; *supra*, at 28.<sup>28</sup> 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.<sup>29</sup> 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 tolerated in a permanent setup." E. Pomeroy, *The Territories and the United*

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<sup>28</sup> 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.

<sup>29</sup> 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.

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; see *supra*, at 57-58. 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.<sup>30</sup> 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 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.”

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<sup>30</sup> 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*, 90 Mo. 302, 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”).

*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.<sup>31</sup> By 1890, the only cities meeting the population threshold were Kansas City, Topeka, and Wichita. See *Compendium of the Eleventh Census: 1890*, at 442-452. 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. *Ibid.* Although other Kansas cities may also have restricted public carry unilaterally,<sup>32</sup> 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 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.

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<sup>31</sup> 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.

<sup>32</sup> 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.

*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. See *post*, at 1-8 (opinion of BREYER, J.). Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years? *Post*, at 4-5. 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? See *post*, at 5-6. 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, see *post*, at 5, 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, see *post*, at 1, 4, 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).<sup>1</sup>

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. See *post*, at 3. 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,<sup>2</sup> 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

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<sup>1</sup> The dissent makes no effort to explain the relevance of most of the incidents and statistics cited in its introductory section (*post*, at 1-8) (opinion of Breyer, J.). 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”).

<sup>2</sup> NYPD statistics show approximately 6,000 illegal guns were seized in 2021. A. Southall, *This Police Captain’s Plan To Stop Gun Violence Uses More Than Handcuffs*, N. Y. Times, Feb. 4, 2022. According to recent remarks by New York City Mayor Eric Adams, the NYPD has confiscated 3,000 firearms in 2022 so far. City of New York, *Transcript: Mayor Eric Adams Makes Announcement About NYPD Gun Violence Suppression Division* (June 6, 2022), <https://www1.nyc.gov/office-of-the-mayor/news/369-22/transcript-mayor-eric-adams-makes-announcement-nypd-gun-violence-suppression-division>.

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 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 (footnote omitted).

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, *post*, at 11-21, 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. See *post*, at 20. 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*, 590 U.S. \_\_\_ (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 574-575. Even the respondent, who carried a gun on the job while protecting federal facilities, did not qualify. *Id.* at 575-576. 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.<sup>3</sup> That argument was rejected in *Heller*, and while the dissent protests that it is not rearguing *Heller*, it proceeds to do just that. See *post*, at 25-28.

*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.

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<sup>3</sup> 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.

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 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.” *Ante*, at 1; 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.” *Ante*, at 21. 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. See *ante*, at 24-29. Scholars have proposed competing and potentially conflicting frameworks for this analysis, including liquidation, tradition, and precedent. See, e.g., Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519 (2003); McConnell, Time, Institutions, and Interpretation, 95 B. U. L. Rev. 1745 (2015). 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. See *ante*, at 17-19.

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. *Ante*, at 29. 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*, 591 U.S. \_\_\_ (2020) (slip op., at 15-16) (a practice that “arose in the second half of the 19<sup>th</sup> 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 19<sup>th</sup> 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.” *Ante*, at 26.

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." See *ante*, at 15.

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. At a minimum, I would not strike down the law based only on the pleadings, as the Court does today—without first allowing for the development of an evidentiary record and without considering the State's compelling interest in preventing gun violence. I respectfully dissent.

## 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>. That is more guns per capita than in any other country in the world. *Ibid.* (By comparison, Yemen is second with about 52.8 firearms per 100 people—less than half the per capita rate in the United States—and some countries, like Indonesia and Japan, have fewer than one firearm per 100 people. *Id.* at 3-4.)

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.* As I mentioned above, gun violence has now become the leading cause of death in children and adolescents, surpassing car crashes, which had previously been the leading cause of death in that age group for over 60 years. Goldstick 1955; J. Bates, *Guns Became the Leading Cause of Death for American Children and Teens in 2020*, *Time*, Apr. 27, 2022, <https://www.time.com/6170864/cause-of-death-children-guns/>. 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); S. Kegler et al., CDC, *Vital Signs: Changes in Firearm Homicide and Suicide Rates—United States, 2019-2020*, at 656-658 (May 13, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7119e1-H.pdf>.

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. See, *e.g.*, R. Todt, 3 Dead, 11 Wounded in Philadelphia Shooting on Busy Street, *Washington Post*, June 5, 2022; A. Hernández, J. Slater, D. Barrett, & S. Foster-Frau, At Least 19 Children, 2 Teachers Killed at Texas Elementary School, *Washington Post*, May 25, 2022; A. Joly, J. Slater, D. Barrett, & A. Hernandez, 10 Killed in Racially Motivated Shooting at Buffalo Grocery Store, *Washington Post*, May 14, 2022; C. McWhirter & V. Bauerlein, Atlanta-Area Shootings at Spas Leave Eight Dead, *Wall Street Journal*, Mar. 17, 2021; A. Hassan, Dayton Gunman Shot 26 People in 32 Seconds, Police Timeline Reveals, *N.Y. Times*, Aug. 13, 2019; L. Alvarez & R. Pérez-Peña, Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead, *N.Y. Times*, June 12, 2016; J. Horowitz, N. Corasaniti, & A. Southall, Nine Killed in Shooting at Black Church in Charleston, *N.Y. Times*, June 17, 2015; R. Lin, Gunman Kills 12 at 'Dark Knight Rises' Screening in Colorado, *L. A. Times*, July 20, 2012; J. Barron, Nation Reels After Gunman Massacres 20 Children at School in Connecticut, *N.Y. Times*, Dec. 14, 2012. 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/>; see also J. Donohue, A. Aneja, & K. Weber, Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis, 16 *J. Empirical Legal Studies* 198, 204 (2019). 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*, at 8 (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. Cf. *ante*, at 4-6 (ALITO, J., concurring). 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, 36 J. Rural Health 255 (2020); see also Brief for Partnership for New York City as *Amicus Curiae* 10; Kaufman 237 (finding higher rates of fatal assault injuries from firearms in urban areas compared to rural areas); C. Branas, M. Nance, M. Elliott, T. Richmond, & C. Schwab, Urban-Rural Shifts in Intentional Firearm Death: Different Causes, Same Results, 94 Am. J. Pub. Health 1750, 1752 (2004) (finding higher rates of firearm homicide in urban counties compared to rural counties).

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. *Ante*, at 2-4 (concurring opinion). 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. See U.S. Census Bureau, Quick Facts: New York City (last updated July 1, 2021) (Quick Facts: New York City), <https://www.census.gov/quickfacts/newyorkcitynewyork/>; Brief for City of New

York as *Amicus Curiae* 8, 22. 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

### A

New York State requires individuals to obtain a license in order to carry a concealed handgun in public. N.Y. Penal Law Ann. §400.00(2). I address the specifics of that licensing regime in greater detail in Part II-B below. Because, at this stage in the proceedings, the parties have not had an opportunity to develop the evidentiary record, I refer to facts and representations made in petitioners' complaint and in *amicus* briefs filed before us.

Under New York's regime, petitioners Brandon Koch and Robert Nash have obtained restricted licenses that permit them to carry a concealed handgun for certain purposes and at certain times and places. They wish to expand the scope of their licenses so that they can carry a concealed handgun without restriction.

Koch and Nash are residents of Rensselaer County, New York. Koch lives in Troy, a town of about 50,000, located eight miles from New York's capital city of Albany, which has a population of about 98,000. See App. 100; U.S. Census Bureau, Quick Facts: Troy City, New York (last updated July 1, 2021), <https://www.census.gov/quickfacts/troycitynewyork>; *id.* Albany City, New York, <https://www.census.gov/quickfacts/albanycitynewyork>. Nash lives in Averill Park, a small town 12.5 miles from Albany. App. 100.

Koch and Nash each applied for a license to carry a concealed handgun. Both were issued restricted licenses that allowed them to carry handguns only for purposes of hunting and target shooting. *Id.* at 104, 106. But they wanted "unrestricted" licenses that would allow them to carry concealed handguns "for personal protection and all lawful purposes." *Id.* at 112; see also *id.* at 40. They wrote to the licensing officer in Rensselaer County—Justice Richard McNally, a justice of the New York Supreme Court [N.Y. trial court of general jurisdiction.—EDS.]—requesting that the hunting and target shooting restrictions on their licenses be removed. *Id.* at 40, 111-113. After holding individual hearings for each petitioner, Justice McNally denied their requests. *Id.* at 31, 41, 105, 107, 114. He clarified that, in addition to hunting and target

shooting, Koch and Nash could “carry concealed for purposes of off road back country, outdoor activities similar to hunting, for example fishing, hiking & camping.” *Id.* at 41, 114. He also permitted Koch, who was employed by the New York Court System’s Division of Technology, to “carry to and from work.” *Id.* at 111, 114. But he reaffirmed that Nash was prohibited from carrying a concealed handgun in locations “typically open to and frequented by the general public.” *Id.* at 41. Neither Koch nor Nash alleges that he appealed Justice McNally’s decision.

Instead, petitioners Koch and Nash, along with the New York State Rifle & Pistol Association, Inc., brought this lawsuit in federal court against Justice McNally and other State representatives responsible for enforcing New York’s firearms laws. Petitioners claimed that the State’s refusal to modify Koch’s and Nash’s licenses violated the Second Amendment. The District Court dismissed their complaint. It followed Second Circuit precedent holding that New York’s licensing regime was constitutional. See *Kachalsky*, 701 F.3d at 101. The Court of Appeals for the Second Circuit affirmed. We granted certiorari to review the constitutionality of “New York’s denial of petitioners’ license applications.” *Ante*, at 8 (majority opinion).

## 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. *Id.* at 86. This licensing requirement applies only to handguns (*i.e.*, “pistols and revolvers”) and short-barreled rifles and shotguns, not to all types of firearms. *Id.* at 85. For instance, the State does not require a license to carry a long gun (*i.e.*, a rifle or a shotgun over a certain length) in public. *Ibid.*; §265.00(3).

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.” *Id.* 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.* (quoting *In re O'Connor*, 154 Misc. 2d 694, 697, 585 N.Y.S. 2d 1000, 1003 (Westchester Cty. 1992)). 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 (quoting *In re Klenosky*, 428 N.Y.S. 2d 256, 257 (1980)). Whether an applicant meets these proper cause standards is determined in the first instance by a “licensing officer in the city or county . . . where the applicant resides.” §400.00(3). In most counties, the licensing officer is a local judge. *Kachalsky*, 701 F.3d at 87 n.6. For example, in Rensselaer County, the licensing officer who denied petitioners’ requests to remove the restrictions on their licenses was a justice of the New York Supreme Court. App. 31. 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, *ante*, at 4; that the proper cause standard is too “demanding,” *ante*, at 3; and that these features make New York an outlier compared to the “vast majority of States,” *ante*, at 4. 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. See App. 15-26. 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.

Consider each of the Court’s criticisms in turn. First, the Court says that New York gives licensing officers too much discretion and “leaves applicants little recourse if their local licensing officer denies a permit.” *Ante*, at 4. But there is nothing unusual about broad statutory language that can be given more specific content by judicial interpretation. Nor is there anything unusual or inadequate about subjecting licensing officers’ decisions to arbitrary-and-



capricious review. Judges routinely apply that standard, for example, to determine whether an agency action is lawful under both New York law and the Administrative Procedure Act. See, e.g., N.Y. Civ. Prac. Law Ann. §7803(3) (2021); 5 U.S. C. §706(2)(A). The arbitrary-and-capricious standard has thus been used to review important policies concerning health, safety, and immigration, to name just a few examples. See, e.g., *Biden v. Missouri*, 595 U.S. \_\_\_ (2022) (*per curiam*) (slip op., at 8); *Department of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. \_\_\_ (2020) (slip op., at 9, 17); *Department of Commerce v. New York*, 588 U.S. \_\_\_ (2019) (slip op., at 16); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 46 (1983).

Without an evidentiary record, there is no reason to assume that New York courts applying this standard fail to provide license applicants with meaningful review. And there is no evidentiary record to support the Court's assumption here. Based on the pleadings alone, we cannot know how often New York courts find the denial of a concealed-carry license to be arbitrary and capricious or on what basis. We do not even know how a court would have reviewed the licensing officer's decisions in Koch's and Nash's cases because they do not appear to have sought judicial review at all. See Brief for Respondents 13; App. 122-126.

Second, the Court characterizes New York's proper cause standard as substantively "demanding." *Ante*, at 3. But, again, the Court has before it no evidentiary record to demonstrate how the standard has actually been applied. How "demanding" is the proper cause standard in practice? Does that answer differ from county to county? How many license applications are granted and denied each year? At the pleading stage, we do not know the answers to these and other important questions, so the Court's characterization of New York's law may very well be wrong.

In support of its assertion that the law is "demanding," the Court cites only to cases originating in New York City. *Ibid.* (citing *In re Martinek*, 743 N.Y.S. 2d 80 (2002) (New York County, *i.e.*, Manhattan); *In re Kaplan*, 673 N.Y.S.2d 66 (1998) (same); *In re Klenosky*, 428 N.Y.S.2d 256 (same); *In re Bernstein*, 85 App. Div. 2d 574, 445 N.Y.S.2d 716 (1981) (Bronx County)). But cases from New York City may not accurately represent how the proper cause standard is applied in other parts of the State, including in Rensselaer County where petitioners reside.

To the contrary, *amici* tell us that New York's licensing regime is purposefully flexible: It allows counties and cities to respond to the particular needs and challenges of each area. See Brief for American Bar Association as *Amicus Curiae* 12; Brief for City of New York as *Amicus Curiae* 20-29. *Amici* suggest that some areas may interpret words such as "proper cause" or "special need" more or less strictly, depending upon each area's unique circumstances. See *ibid.* New York City, for example, reports that it "has applied the [proper cause] requirement relatively rigorously" because its densely populated urban

areas pose a heightened risk of gun violence. Brief for City of New York as *Amicus Curiae* 20. In comparison, other (perhaps more rural) counties “have tailored the requirement to their own circumstances, often issuing concealed-carry licenses more freely than the City.” *Ibid.*; see also *In re O’Connor*, 585 N.Y.S.2d, at 1004 (“The circumstances which exist in New York City are significantly different than those which exist in Oswego or Putnam Counties. . . . The licensing officers in each county are in the best position to determine whether any interest of the population of their county is furthered by the use of restrictions on pistol licenses”); Brief for Citizens Crime Commission of New York City as *Amicus Curiae* 18-19. Given the geographic variation across the State, it is too sweeping for the Court to suggest, without an evidentiary record, that the proper cause standard is “demanding” in Rensselaer County merely because it may be so in New York City.

Finally, the Court compares New York’s licensing regime to that of other States. *Ante*, at 4-6. It says that New York’s law is a “may issue” licensing regime, which the Court describes as a law that provides licensing officers greater discretion to grant or deny licenses than a “shall issue” licensing regime. *Ante*, at 4-5. Because the Court counts 43 “shall issue” jurisdictions and only 7 “may issue” jurisdictions it suggests that New York’s law is an outlier. *Ibid.*; see also *ante*, at 1-2 (KAVANAUGH, J., concurring). Implicitly, the Court appears to ask, if so many other States have adopted the more generous “shall issue” approach, why can New York not be required to do the same?

But the Court’s tabulation, and its implicit question, overlook important context. In drawing a line between “may issue” and “shall issue” licensing regimes, the Court ignores the degree of variation within and across these categories. Not all “may issue” regimes are necessarily alike, nor are all “shall issue” regimes. Conversely, not all “may issue” regimes are as different from the “shall issue” regimes as the Court assumes. For instance, the Court recognizes in a footnote that three States (Connecticut, Delaware, and Rhode Island) have statutes with discretionary criteria, like so-called “may issue” regimes do. *Ante*, at 5, n.1. But the Court nonetheless counts them among the 43 “shall issue” jurisdictions because, it says, these three States’ laws operate in practice more like “shall issue” regimes. *Ibid.*; see also Brief for American Bar Association as *Amicus Curiae* 10 (recognizing, conversely, that some “shall issue” States, *e.g.*, Alabama, Colorado, Georgia, Oregon, and Virginia, still grant some degree of discretion to licensing authorities).

As these three States demonstrate, the line between “may issue” and “shall issue” regimes is not as clear cut as the Court suggests, and that line depends at least in part on how statutory discretion is applied in practice. Here, because the Court strikes down New York’s law without affording the State an opportunity to develop an evidentiary record, we do not know how much discretion licensing officers in New York have in practice or how that discretion

is exercised, let alone how the licensing regimes in the other six “may issue” jurisdictions operate.

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. See *id.* at 9; R. Grossman & S. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960-2001*, 26 *Contemp. Econ. Pol’y* 198, 200 (2008) (Grossman). 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. *Ante*, at 5-6. Together, these seven jurisdictions comprise about 84.4 million people and account for over a quarter of the country’s population. U.S. Census Bureau, *2020 Population and Housing State Data* (Aug. 12, 2021) (2020 Population), <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html>. 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: the District of Columbia (with an average of 11,280.0 people/square mile in 2020), New Jersey (1,263.0), Massachusetts (901.2), Maryland (636.1), New York (428.7), California (253.7), and Hawaii (226.6). U.S. Census Bureau, *Historical Population Density (1910-2020)* (Apr. 26, 2001), <https://www.census.gov/data/tables/time-series/dec/density-data-text.html>. In comparison, the average population density of the United States as a whole is 93.8 people/square mile, and some States have population densities as low as 1.3 (Alaska), 5.9 (Wyoming), and 7.4 (Montana) people/square mile. *Ibid.* These numbers reflect in part the fact that these “may issue” jurisdictions contain some of the country’s densest and most populous

urban areas, *e.g.*, New York City, Los Angeles, San Francisco, the District of Columbia, Honolulu, and Boston. U.S. Census Bureau, Urban Area Facts (Oct. 8, 2021), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html>. New York City, for example, has a population of about 8.5 million people, making it more populous than 38 States, and it squeezes that population into just over 300 square miles. Quick Facts: New York City; 2020 Population; Brief for City of New York as *Amicus Curiae* 8, 22.

As I explained above, *supra*, at 8-9, 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. See Grossman 199 (“We find strong evidence that more urban states are less likely to shift to ‘shall issue’ than rural 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. *Ante*, at 3, n.1 (concurring opinion). 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.’” *Ante*, at 10. Beyond this historical inquiry, the Court refuses to employ what it calls “means-end scrutiny.” *Ibid*. 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. See *ante*, at 8. 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 (CA7 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 (CA5 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. See Brief for Second Amendment Law Professors as *Amici Curiae* 4, 13-15; see also this Court's Rule 10. The Court attempts to justify its deviation from our normal practice by claiming that the Courts of Appeals' approach is inconsistent with *Heller*. See *ante*, at 10. 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," *ante*, at 13 (majority opinion), but it did *not* "rejec[t] . . . means-end scrutiny," as the Court claims, *ante*, at 15. Consider what the *Heller* Court actually said. True, the Court spent many pages in *Heller* discussing the text and historical context of the Second Amendment. 554 U.S. at 579-619. But that is not surprising because the *Heller* Court was asked to answer the preliminary question whether the Second Amendment right to "bear Arms" encompasses an individual right to possess a firearm in the home for self-defense. *Id.* at 577. 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. *Id.* at 579-619. 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.

But the *Heller* Court did not end its opinion with that preliminary question. After concluding that the Second Amendment protects an individual right to possess a firearm for self-defense, the *Heller* Court added that that right is "not unlimited." *Id.* at 626. It thus had to determine whether the District of Columbia's law, which banned handgun possession in the home, was a permissible regulation of the right. *Id.* at 628-630. In answering that second question, it said: "Under *any of the standards of scrutiny that we have applied to enumerated constitutional rights*, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster." *Id.* at 628-629 (emphasis added; footnote and citation omitted). That language makes clear that the *Heller* Court understood some form of means-end scrutiny to apply. It did not need to specify whether that scrutiny should be intermediate or strict because, in its view, the District's handgun ban was so "severe" that it would have failed either level of scrutiny. *Id.* at 628-629; see also *id.* at 628, n.27 (clarifying that rational-basis review was not the proper level of scrutiny).

Despite *Heller's* express invocation of means-end scrutiny, the Court today claims that the majority in *Heller* rejected means-end scrutiny because it rejected my dissent in that case. But that argument misreads both my dissent and the majority opinion. My dissent in *Heller* proposed directly weighing "the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other." *Id.* at 689. I would have

asked “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.” *Id.* at 689-690. The majority rejected my dissent, not because I proposed using means-end scrutiny, but because, in its view, I had done the opposite. In its own words, the majority faulted my dissent for proposing “a *freestanding* ‘interest-balancing’ approach” that accorded with “*none of the traditionally expressed levels* [of scrutiny] (strict scrutiny, intermediate scrutiny, rational basis).” *Id.* at 634(emphasis added).

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.” *Ibid.* 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.” *Ante*, at 15. 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.” *Ibid.* 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, 564-566, (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? See S. Cornell, *Heller*, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,” 56 UCLA L. Rev. 1095, 1098 (2009) (describing “law office history” as “a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion”).

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 510-511 (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. *Ante*, at 30-62. 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 (CA9 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, see *supra*, at 24-25.

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. See, *e.g.*, *ante*, at 1 (BARRETT, J., concurring) ("highlight[ing] two methodological points that the Court does not resolve"). The Court declines to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment." *Ante*, at 20. 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. *Ante*, at 21. 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." *Ante*, at 20. 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. *Ante*, at 37, 57. But the Court does not say how many cases or laws would suffice "to show a tradition of public-carry regulation." *Ante*, at 37. Other laws are irrelevant, the Court claims, because they are too dissimilar from New York's concealed-carry licensing regime. See, *e.g.*, *ante*, at 48-49. But the Court does not say what "representative historical analogue," short of a "twin" or a "dead ringer," would suffice. See *ante*, at 21 (emphasis deleted). 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. See *ante*, at 25-28. 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”); see also *supra*, at 8-9.

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.” *Ante*, at 19-20. 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.” *Ante*, at 21-22. 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. *Ante*, at 21. 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.” *Ante*, at 22. 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.” *Ante*, at 18 (majority opinion) (internal quotation marks omitted).

## 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)); see also *ante*, at 30 (majority opinion). 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. See *infra*, at 40-42. I therefore begin, as the Court does, *ante*, at 30-31, 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.” *Ante*, at 20. 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. *Ante*, at 32. But why should that be? Pregon 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. See *ante*, at 19-20. 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." *Ante*, at 32. The statute, however, remained in force for hundreds of years, well into the 18th century. See 4 W. Blackstone, Commentaries 148-149 (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. *Ante*, at 34-38, 41. 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. *Ante*, at 34-37. 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 282-283 (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." *Ante*, at 34 (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. *Ante*, at 34-35. 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 Entering 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. *Ante*, at 37. But that does not mean that they may be dismissed as outliers. They were successors to several centuries of comparable laws in England, see *supra*, at 34-40, and predecessors to numerous similar (in some cases, materially identical) laws enacted by the States after the founding, see *infra*, at 41-42. And while it may be true that these laws applied only to “dangerous and unusual weapons,” see *ante*, at 38 (majority opinion), 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. *Ante*, at 39-40. 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. See *ante*, at 21 (majority opinion) (emphasis deleted).

### 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. *Ante*, at 42. 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) [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.] 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. 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. *Ante*, at 41. 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. See *supra*, at 37-39. 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, *ante*, at 42-44, 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 422-423. New York’s law similarly recognizes that hunting, target shooting, and certain professional activities are proper causes justifying lawful carriage of a firearm. See *supra*, at 12-13. 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); see also *ante*, at 42-43, 57 (majority opinion) (refusing to give “a pair of state-court decisions” “disproportionate weight”). 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. See *supra*, at 12. 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); see also *ante*, at 44.

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. *Ante*, at 44-46. (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. *Id.* at 90-93. *Bliss* was later overturned by constitutional amendment and was, as the Court appears to concede, an outlier. See *Peruta v. County of San Diego*, 824 F.3d 919, 935-936 (CA9 2016); *ante*, at 45.) 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 assault [*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. See, e.g., Me. Rev. Stat., ch. 169, §16 (1840); Mich. Rev. Stat., ch. 162, §16 (1846); Terr. of Minn. Rev. Stat., ch. 112, §18 (1851); 1854 Ore. Stat., ch. 16, §17; W. Va. Code, ch. 153, §8 (1868); 1862 Pa. Laws p.250, §6. 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. Compare *supra*, at 13, with Mass. Rev. Stat., ch. 134, §16.

The Court believes that the absence of recorded cases involving surety laws means that they were rarely enforced. *Ante*, at 49-50. 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.

What is more relevant for our purposes is the fact that, in the postbellum period, States continued to enact generally applicable restrictions on public carriage, many of which were even more restrictive than their predecessors. See S. Cornell & J. Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?* 50 Santa Clara L. Rev. 1043, 1066 (2010). 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. *Ante*, at 58-61. It notes that laws enacted in the Western Territories were “rarely subject to judicial scrutiny.” *Ante*, at 60. 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. See *ante*, 59-61. 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.” *Ante*, at 58, n.28. 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. See *supra*, at 12. 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 626-627 & 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 (CA7 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. *Ante*, at 3 (concurring opinion). 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. See *ante*, at 21 (disclaiming the necessity of a “historical *twin*”).

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*.

It bases its decision to strike down New York's law almost exclusively on its application of what it calls historical "analogical reasoning." *Ante*, at 19-20. As I have admitted above, I am not a historian, and neither is the Court. But the 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. See, e.g., *supra* at 19-20 (summarizing studies finding that "may issue" licensing regimes are associated with lower rates of violent crime than "shall issue" regimes). 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 office to begin issuing concealed carry permits. All procedural rules about permitting, such as fees, background checks, etc., still apply.<sup>1</sup> 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.<sup>2</sup>

### **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.”<sup>3</sup>

As with any constitutional issue, the first question to ask is whether the conduct implicates the constitutional text. If a Fourth Amendment litigant

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<sup>1</sup> 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.

<sup>2</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (quoting *McDonald*, 561 U.S. at 780).

<sup>3</sup> *Id.* at 2129-30 (quotation omitted).

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.

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.<sup>4</sup>

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.<sup>5</sup> 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.”<sup>6</sup>

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.”<sup>7</sup> “Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents’ burden.”<sup>8</sup>

### **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.”<sup>9</sup>

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<sup>4</sup> *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969).

<sup>5</sup> 554 U.S. at 627.

<sup>6</sup> *Bruen*, 142 S. Ct., at 2127.

<sup>7</sup> *Id.* at 2130 n.5.

<sup>8</sup> *Id.* at 2150.

<sup>9</sup> *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*.”<sup>10</sup> 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 to 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.<sup>11</sup>

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.<sup>12</sup>
- The colonial period is relevant to the extent that it informed the original understanding of the Second Amendment.<sup>13</sup>
- “[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.”<sup>14</sup>
- However, one must “guard against giving postenactment history more weight than it can rightly bear.”<sup>15</sup> “[T]o the extent later history contradicts what the text says, the text controls.”<sup>16</sup> “[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.”<sup>17</sup>

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<sup>10</sup> *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.

<sup>11</sup> *Id.* at 2138; see also *id.* at 2162-63 (Barrett, J., concurring).

<sup>12</sup> *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)).

<sup>13</sup> *Id.* at 2142-44.

<sup>14</sup> *Id.* at 2136 (quoting *Heller*, 554 U.S. at 605)

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2137.

<sup>17</sup> *Id.* (quoting *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d at 1274, n.6 (Kavanaugh, J., dissenting)).

- “[L]ate-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.”<sup>18</sup> The late 19<sup>th</sup> century is important insofar as it provides “confirmation of what . . . had already been established” by earlier history.<sup>19</sup>
- “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.”<sup>20</sup>
- “[A] regular course of practice’ can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution.”<sup>21</sup>
- “[L]iquidating’ indeterminacies in written laws is far removed from expanding or altering them.”<sup>22</sup>
- “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.’”<sup>23</sup>
- “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.”<sup>24</sup> 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.”<sup>25</sup>

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

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<sup>18</sup> *Id.* at 2154.

<sup>19</sup> *Id.* at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1976 (2019)).

<sup>20</sup> *Id.* at 2154 n.28.

<sup>21</sup> *Id.* at 2136 (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020)) (internal quotation marks omitted).

<sup>22</sup> *Id.* at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring)).

<sup>23</sup> *Id.* at 2137 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)).

<sup>24</sup> *Id.* at 2141 n.11.

<sup>25</sup> *Id.* at 2133.

- “[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.’”<sup>26</sup>
- 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.”<sup>27</sup>
- “[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.”<sup>28</sup>
- “[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.”<sup>29</sup>
- “[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.”<sup>30</sup>
- “[O]ther cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach.”<sup>31</sup>

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.”<sup>32</sup>

- “How” means: “whether modern and historical regulations impose a comparable burden on the right of armed self-defense.”<sup>33</sup>

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<sup>26</sup> *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

<sup>27</sup> *Id.* at 2133 n.7.

<sup>28</sup> *Id.* at 2131.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2131.

<sup>31</sup> *Id.* at 2132.

<sup>32</sup> *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).

<sup>33</sup> *Id.*

- “Why” means: “whether that burden is comparably justified.”<sup>34</sup>

### 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.<sup>35</sup>
- Firearms may be forbidden in certain “sensitive places.”<sup>36</sup>
- “[C]ourts can use analogies to those [19<sup>th</sup> 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.”<sup>37</sup>
- “[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.”<sup>38</sup>
- “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 prevent ‘law-abiding, responsible citizens’ from exercising their Second Amendment right to public carry.”<sup>39</sup>

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<sup>34</sup> *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.

<sup>35</sup> “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.

<sup>36</sup> *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.

<sup>37</sup> *Id.* at 2133.

<sup>38</sup> *Id.* at 2134.

<sup>39</sup> *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).

- “[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.’”<sup>40</sup>
- “[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.”<sup>41</sup>

### ***E. SOME OF THE FIRST POST-BRUEN CASES***

*Matter of Rounds*, 2022 WL 2965531 (Md. App. July 27, 2022). Applying *Bruen*, Maryland’s intermediate court of appeals held that the statutory “good and substantial reason” for concealed carry permits violates the Second Amendment.

*Rocky Mountain Gun Owners v. Superior*. A U.S. District Court issued a temporary restraining order against a recently-enacted municipal ordinance for confiscation of many types of firearms and of magazines over 10 rounds. Under *Bruen*, “the Court is unaware of historical precedent that would permit a governmental entity to entirely ban a type of weapon that is commonly used by law-abiding citizens for lawful purposes, whether in an individual’s home or in public.” The decision cited other cases affirming that the banned arms are in common use; these included the Colorado Attorney General’s stipulations in previous cases challenging the 2013 Colorado ban on magazines over 15 rounds.

The court cited *Judge Traxler’s dissent in Kolbe v. Hogan* (Ch. 15.A), as being a correct statement of the law post-*Bruen*. Plaintiffs and defendant stipulated to an extension of the TRO pending a two-day hearing for a motion for a preliminary injunctions on November 8-9, 2022.

As is common in high-profile Second Amendment cases, several lawyers from Everytown for Gun Safety entered appearances to represent the city of Superior.

*National Association for Gun Rights v. San Jose*. A U.S. District Judge in California declined to enter a preliminary injunction against the city’s ordinance that gun owners must obtain liability insurance and pay the city an

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<sup>40</sup> *Id.* (citations omitted).

<sup>41</sup> *Id.*



annual fee for owning guns. The court said that the \$25 annual fee was trivial, and that the insurance requirement could be analogized to nineteenth-century surety of the peace statutes. It should be noted that it is illegal to insure one's own intentional torts. It should also be noted, at least under the California Supreme Court's interpretation of bail bonds, that conditioning a liberty interest on payment of a bond violates principles of substantive and procedural due process, and may also violate equal protection, unless the fees paid are means tested.<sup>42</sup>

*People v. Rodriguez*, 2022 WL 2797784 (N.Y. Sup. July 15, 2022). A defendant who had never applied for a concealed carry permit lacked standing to raise *Bruen* as a defense. The court did not consider the fact that the application fee is a nonrefundable \$400 and that application pre-*Bruen* would have been futile.

Thus far, all challenges to prohibited persons laws post-*Bruen* have failed:

*Fooks v. State*, 2022 WL 2339412 (Md. App. June 29, 2022). Fooks had been convicted of common law contempt of court for failure to pay child support and was sentenced to four years in prison. This barred him from possession of a firearm. Later, he pled guilty to illegal possession of a firearm. Under *Heller*, the Maryland prohibition was "presumptively lawful." Serious crimes, even if nonviolent, indicate that the perpetrator is not a "law-abiding citizen." Hence, Fooks' claim fails the first "step" of *Bruen*: his conduct was outside the protection of the Second Amendment.

*United States v. Daniels*, 2022 WL 2654232 (S.D. Miss. July 08, 2022). Defendant challenged 18 U.S.C. § 922(g)(3), which prohibits illegal drug users from possessing firearms. Although "there is some doubt," the court assumed that Daniels' conduct was within the scope of the Second Amendment. Relying on *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010), the court pointed to historical traditions of disarming "intoxicated persons." These was close enough analogies to support prohibition for persons who used illegal intoxicants, even if they did not use firearms while intoxicated.

*Clifton v. Department of Justice*, 2022 WL 2791355 (E.D. Cal. July 15, 2022). In a case involving the federal prohibitor for persons "adjudicated" to be mentally ill, 18 U.S.C. § 922(g)(4), the court declined to dismiss Clifton's case, because he alleged that he had never been "committed." In dicta, the court doubted that a constitutional challenge to 922(g)(4), because *Heller* affirmed "the presumptive constitutionality of § 922(g)(4) due to the historical evidence supporting laws barring the mentally ill from owning firearms." As discussed

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<sup>42</sup> *In re Humphrey*, 482 P.3d 1008 (Cal. 2021).

in Chapter 13.\_\_, *Heller*'s language about "the mentally ill," appears to refer to persons who are presently mentally ill, rather than to persons who were once ill and have since made a complete recovery.

## 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) (judicial underenforcement would be more apparent if the Ruben & Blocher 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 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.<sup>43</sup> 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

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<sup>43</sup> Wash. RCW 9.41.070.

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?

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” (frontiersmen) 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.”<sup>44</sup>
- 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.”<sup>45</sup> 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 private,” except while traveling. 1821 Tenn. Acts ch. 13, §1, p.15.”<sup>46</sup> “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).”<sup>47</sup> 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.<sup>48</sup>
- 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.<sup>49</sup>
- 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

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<sup>44</sup> *Bruen* at 2143–44.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2146 n.16.

<sup>47</sup> *Id.* at 2147

<sup>48</sup> *Id.* (discussing *Nunn v. State*, 1 Ga. 243 (1846)).

<sup>49</sup> *Id.* at 2155 n.31.

his safety.<sup>50</sup> 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)."<sup>51</sup> 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."<sup>52</sup>

- 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 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).<sup>53</sup>
  - 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.<sup>54</sup>
  - 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."

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<sup>50</sup> *Id.* at 2153.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting *Heller*, 554 U. S., at 632).

<sup>53</sup> *Id.* at 2147 n.22.

<sup>54</sup> *Id.* at 2154.

- “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.”<sup>55</sup>

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.<sup>56</sup>

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.

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.”<sup>57</sup> 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.”<sup>58</sup>

Where will concealed carry permit holders be allowed to carry? “Probably some streets,” she explained.<sup>59</sup>

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.<sup>60</sup> 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

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<sup>55</sup> *Id.* at 2147 n.22, 2153-55.

<sup>56</sup> See Ch. 7.H.

<sup>57</sup> New York State Sheriffs’ Association, *Statement Concerning New York’s new Firearms Licensing Laws*, July 6, 2022.

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

<sup>59</sup> 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).

<sup>60</sup> N.Y. Penal Law §265.01-e.

in Colorado Springs in 2007.<sup>61</sup> 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.”<sup>62</sup> 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.

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.<sup>63</sup> Permit applicants must submit “a list of former and current social media accounts of the applicant from the past three years.”<sup>64</sup>

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[.]”<sup>65</sup> 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.<sup>66</sup>

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*

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<sup>61</sup> *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.

<sup>62</sup> N.Y. Penal Law §265.01-e(s).

<sup>63</sup> *Id.* at §265.01-d.

<sup>64</sup> *Id.* at §400 1.

<sup>65</sup> 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.

<sup>66</sup> *Id.*

*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).



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# A NEW AND DANGEROUS CENTURY

## ***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. (forthcoming). Here is the abstract:

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.

## ***E. NATIONAL FIREARMS ACT REGULATION TODAY***

### ***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 the AR) 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*, No. 6:21-CV-1245-CEM-GJK (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 and 5861) and the possession, transport, and transport of machinegun provisions of the GCA (18 USC §§ 922(o) and 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](#).

There is no similar ATF action against binary triggers.

### **c. Bump Stocks**

In 2021, a Fifth Circuit panel upheld ATF’s regulation to redefine “machinegun” to include bump stocks. *Cargill v. Garland*, 20 F.4th 1004 (5<sup>th</sup> Cir. 2021). In June 2022, the full Fifth Circuit voted to hear the case en banc and [vacated](#) the panel decision.

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# 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**

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. For example, ATF is investigating someone for armed robberies.

Additionally, state and local officials can freely comply with records requests from the federal government.

Missouri's 2021 Second Amendment Protection Act (SAPA) forbids state or local assistance in federal gun law enforcement *and* declares certain federal gun controls void within Missouri. 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. 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. *City of St. Louis v. State*, 643 S.W.3d 295 (Mo. 2022).

### ***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.

## 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> The committee can agree on a final text, which then must be approved by both houses.<sup>4</sup> Alternatively, the first house may accede to the changes made by the second house and pass that version of the bill.<sup>5</sup> 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 bill enjoy the support of a majority, but the majority cannot agree on the

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<sup>1</sup> U.S. Const. art. I, § 7, cl. 2.

<sup>2</sup> U.S. Const. art. I, § 7, cl. 3.

<sup>3</sup> 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).

<sup>4</sup> Elizabeth Rybicki, Cong. Rsch. Serv., R96-708, Conference Committee and Related Procedures: An Introduction 1 (2021).

<sup>5</sup> *Id.*

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.<sup>6</sup>

Gun control bills are among the hardest bills to pass through Congress. Gun control is divisive politically and socially.<sup>7</sup> Many people who favor gun rights are single issue voters, and in close elections, it does not pay candidates to alienate them.<sup>8</sup> Congress is also malapportioned toward smaller states, and these jurisdictions often do not support stricter gun laws.<sup>9</sup> 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.<sup>10</sup> Ten days later, a gunman killed nineteen children and two teachers at Robb Elementary School in Uvalde, Texas.<sup>11</sup> 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.<sup>12</sup>

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

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<sup>6</sup> 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).

<sup>7</sup> Pew Rsch. Ctr., *Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive* 10 (2021).

<sup>8</sup> R.J. Reinhart, *Gun Control Remains an Important Factor for U.S. Voters*, Gallup (Oct. 23, 2017).

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

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

<sup>11</sup> *The Names: 19 Children, 2 Teachers Killed in Uvalde School*, AP News (June 3, 2022).

<sup>12</sup> Farnoush Amiri, *Families of Uvalde, Buffalo victims to testify in Congress*, AP News, (June 3, 2022).

themselves.<sup>13</sup> Once the agreement was reached, the bill was jammed through Congress as quickly as possible. The usual hearings were not held.<sup>14</sup> No committee marked up the bill.<sup>15</sup> Amendments on the floor were beaten back, lest they scuttle the deal.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> And there were 77 cases brought for unlawfully selling firearms across state lines.<sup>21</sup>

As these numbers demonstrate, federal prosecutors lean heavily toward bringing prohibited person cases. It is not difficult to understand why. These

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<sup>13</sup> Annie Karni & Emily Cochrane, *Leaving Wish Lists at the Door, Senators Found Consensus on Guns*, N.Y. Times (June 24, 2022).

<sup>14</sup> *Actions Overview S.2938—117th Congress (2021-2022), S.2938 - Bipartisan Safer Communities Act*, Congress.gov, (last accessed Aug. 16, 2022).

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*; Karni & Cochrane, *supra* note 13.

<sup>17</sup> TRAC, [Federal Weapons Prosecutions Rise for Third Consecutive Year](#) (2017).

<sup>18</sup> *Id.* at tbl.2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



cases are cheap and easy to bring.<sup>22</sup> 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*<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> 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 under indictment for a felony (but not yet convicted).<sup>27</sup> But a person merely under indictment may continue to possess owned firearms until he is convicted.<sup>28</sup>

Strangely, the Bipartisan Safer Communities Act made changes to subsection (d) (sale or transfer) without making the corresponding changes to

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<sup>22</sup> 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).

<sup>23</sup> See 18 U.S.C. § 924(a)(1)(D) (setting a default *mens rea* of “willfully” for violations of the Gun Control Act).

<sup>24</sup> See 18 U.S.C. § 921(21)(C), § 922(a)(1).

<sup>25</sup> 18 U.S.C. § 922(d).

<sup>26</sup> 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).

<sup>27</sup> 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).

<sup>28</sup> See 18 U.S.C. § 922(g)(1).

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.”<sup>29</sup> Subsection (g), however, does not include this “including as a juvenile” language.<sup>30</sup>

1. The effect this omission will have is unclear. On a strict textual reading (and courts are moving in a textualist direction<sup>31</sup>), 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.<sup>32</sup>) 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).<sup>33</sup> But this approach is fraught with peril because it will result in the judiciary substantively expanding the scope of a felony.<sup>34</sup>

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.”<sup>35</sup> 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.”<sup>36</sup> But Congress never

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<sup>29</sup> Bipartisan Safer Communities Act, Pub. L. 117-159, § 12001(a)(1)(A)(1), 136 Stat. 1314, 1322 (2022).

<sup>30</sup> See 18 U.S.C. § 922(g)(1).

<sup>31</sup> 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).

<sup>32</sup> “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).

<sup>33</sup> 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).

<sup>34</sup> See *United States v. Bass*, 404 U.S. 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).

<sup>35</sup> Bipartisan Safer Communities Act § 12001(a)(1)(A)(ii), 136 Stat. 1322.

<sup>36</sup> [Bipartisan Safer Communities Act: Section-By-Section](#) at 2 (also on file with author).

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.”<sup>37</sup> This provision applies to adjudications under age 16.<sup>38</sup> 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).<sup>39</sup>

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).”<sup>40</sup> 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.<sup>41</sup> 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 juvenile court as civil matters, while others treat them as criminal ones.<sup>42</sup> 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.”<sup>43</sup> 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.<sup>44</sup> 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

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<sup>37</sup> 18 U.S.C. § 922(g)(4).

<sup>38</sup> *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).

<sup>39</sup> *See Bass*, 404 U.S. at 347-49 (discussing the rule of lenity).

<sup>40</sup> Bipartisan Safer Communities Act: Section-By-Section, *supra* note 36, at 2.

<sup>41</sup> *See Keyes*, 195 F. Supp. 3d at 714-15

<sup>42</sup> *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).

<sup>43</sup> 18 U.S.C. § 921(20).

<sup>44</sup> *See supra* note 42.

“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.<sup>45</sup> 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.”<sup>46</sup> 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.<sup>47</sup> Moreover, individuals are more likely to murder a spouse if they have a prior history of domestic violence.<sup>48</sup> 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.<sup>49</sup>

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.”<sup>50</sup> 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.”<sup>51</sup> 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

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<sup>45</sup> 1997 Consolidated Omnibus Appropriations Act, Pub. L. 104-208 § 658, 110 Stat. 3009, 3009-172 (1999).

<sup>46</sup> 18 U.S.C. § 921(a)(33)(ii) (2012).

<sup>47</sup> 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).

<sup>48</sup> *United States v. Skoien*, 614 F.3d 638, 642-44 (7th Cir. 2010) (en banc) (discussing studies).

<sup>49</sup> See [Boyfriend Loophole](#), Wikipedia.

<sup>50</sup> Bipartisan Safer Communities Act § 12005(a)(1)(B), 136 Stat. 1332.

<sup>51</sup> *Id.* § 12005(a)(2)(A).

relationship.”<sup>52</sup> The Act also disclaims that a “causal acquaintanceship or ordinary fraternalization in a business or social context” qualifies.<sup>53</sup>

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.<sup>54</sup> The Lautenberg Amendment was retroactive and did not exempt government employees acting within the scope of their duties.<sup>55</sup> 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.<sup>56</sup> 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).<sup>57</sup>

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?

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.<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup> A person may read this definition and believe in good faith that he or she is not prohibited.

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<sup>52</sup> *Id.* § 12005(a)(2)(B).

<sup>53</sup> *Id.* § 12005(a)(1)(C).

<sup>54</sup> *Id.* § 12005(b).

<sup>55</sup> *See Fraternal Order of Police v. United States*, 173 F.3d 898, 901 (D.C. Cir. 1999).

<sup>56</sup> *See* Roberto Suro & Philip P. Pan, *Law’s Omission Disarms Some Police*, Wash. Post (Dec. 27, 1996).

<sup>57</sup> Bipartisan Safer Communities Act § 12005(c)(2), 136 Stat. 1333 (codified at 18 U.S.C. § 921(a)(33)(C)).

<sup>58</sup> *Johnson v. United States*, 576 U.S. 591, 597 (2015).

<sup>59</sup> *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).

<sup>60</sup> *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

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).<sup>61</sup>

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.<sup>62</sup> At that point, the National Instant Check System “shall be updated to reflect the status of the person.”<sup>63</sup> 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 to 15 years.<sup>64</sup> 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.<sup>65</sup> 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

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<sup>61</sup> 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).

<sup>62</sup> Bipartisan Safer Communities Act § 12005(c)(2), 136 Stat. 1333 (codified at 18 U.S.C. § 921(a)(33)(C)).

<sup>63</sup> *Id.*

<sup>64</sup> Bipartisan Safer Communities Act § 12004(c), 136 Stat. 1329 (codified at 18 U.S.C. § 924(a)).

<sup>65</sup> Matthew J. Iaconetti et. al, U.S. Sent’g Comm’n, [What Do Federal Firearms Offenses Really Look Like?](#) 10 (2022).

received a sentence within the range of the U.S. Sentencing Guidelines.<sup>66</sup> On average, gun defendants were sentenced to 42 months in prison.<sup>67</sup> Another 23.5% received sentences of 5 to 10 years.<sup>68</sup> Only 3.4% received sentences greater than 10 years.<sup>69</sup> The Sentencing Commission found that, for gun defendants, the guidelines “ha[ve] a strong anchoring effect.”<sup>70</sup>

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 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.<sup>71</sup>

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.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> Or the courts may decide that there is no problem because no one is compelled to purchase a firearm.

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<sup>66</sup> *Id.* at 15.

<sup>67</sup> *Id.* at 14.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 17.

<sup>71</sup> 18 U.S.C. § 922(d)(10), (11).

<sup>72</sup> 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).

<sup>73</sup> *See* Stuntz, *supra* note 22, at 537-38 (explaining how legislatures draft criminal laws to benefit prosecutors).

<sup>74</sup> *Cf. Haynes v. United States*, 390 U.S. 85, 97-100 (1968).

## 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.<sup>75</sup> The transaction may proceed once the system gives its approval or, if no approval is forthcoming, three business days have elapsed.<sup>76</sup>

For young-adult transactions in which there is “a possibly disqualifying juvenile record,” the research period will now expand to 10 business days.<sup>77</sup> 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.”<sup>78</sup> 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.<sup>79</sup>

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<sup>75</sup> 18 U.S.C. § 922(t)(1), (3).

<sup>76</sup> *Id.* § 922(t)(1)(B)(ii).

<sup>77</sup> *Id.* § 922(t)(1)(C)(iii).

<sup>78</sup> 34 U.S.C. § 40901(l)(1).

<sup>79</sup> Bipartisan Safer Communities Act § 12001(a), 136 Stat. 1324 (setting sunset date of Sept. 30, 2032).



## **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.

## **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 or 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.<sup>80</sup> The maximum penalty is 15 years for ordinary offenses and 25 years if the crime involves drug trafficking or terrorism.<sup>81</sup> 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.<sup>82</sup> Usually,

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<sup>80</sup> 18 U.S.C. § 932(b).

<sup>81</sup> *Id.* § 932(c).

<sup>82</sup> *See supra* note 61.

the false statement is answering “yes” to the question on the Form 4473 asking whether the person is the actual buyer of the firearm.<sup>83</sup> 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.<sup>84</sup>

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 the recipient is a felon or that receipt of the firearm would constitute a felony.<sup>85</sup> The provision punishes both the shipper and the receiver.<sup>86</sup>

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.”<sup>87</sup> 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.<sup>88</sup> 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

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<sup>83</sup> *Abramski v. United States*, 573 U.S. 169, 173-74 (2014).

<sup>84</sup> *Id.* at 189.

<sup>85</sup> 18 U.S.C. § 933.

<sup>86</sup> *Id.* § 933(a)(1), (2).

<sup>87</sup> 18 U.S.C. § 932(a)(3); *id.* § 933 (a)(1) (incorporating the definition from § 932).

<sup>88</sup> 18 U.S.C. § 921(20).

livelihood and profit through the repetitive purchase of firearms.”<sup>89</sup> The new bill changed “with the principal objective of livelihood and profit” and inserts in its place “to predominantly earn a profit.”<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup> This section may be understood to confirm what has previously been the law: individuals who resell firearms for 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.<sup>93</sup> The status is usually temporary; most orders eventually expired unless renewed.<sup>94</sup> But the goal is to prevent someone in crisis, who may become suicidal or homicidal, from possessing a firearm while the crisis lasts.<sup>95</sup>

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

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<sup>89</sup> 18 U.S.C. § 921(a)(21)(C).

<sup>90</sup> Bipartisan Safer Communities Act § 12002, 136 Stat. 1324 (codified at 18 U.S.C. § 921(21)(C)).

<sup>91</sup> 18 U.S.C. § 921(C).

<sup>92</sup> 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).

<sup>93</sup> 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.

<sup>94</sup> Johnson, *supra* note 93, at 1528. A few states allow final orders to last indefinitely. *Id.*

<sup>95</sup> *Id.* at 1521.

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.<sup>96</sup> Those who are mentally ill are more likely to be victims of crime than to perpetrate it.<sup>97</sup> 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 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.<sup>98</sup> 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.<sup>99</sup> Many members of Congress wished to include a new federal red-flag law.<sup>100</sup> But as explained, gun groups remain opposed, and there were not sufficient votes to pass a federal law.<sup>101</sup>

Unable to reach agreement, Congress instead provided grants to states that have red-flag laws.<sup>102</sup> The law imposes many conditions to obtain the grants, including that there be adequate pre-deprivation and post-deprivation due process.<sup>103</sup> 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

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<sup>96</sup> Jeffrey S. Janofsky et. al, *Psychiatrists' Accuracy in Predicting Violent Behavior on an Inpatient Unit*, 39 Hosp. & Cmty. Psychiatry 1090, 1091-93 (1988).

<sup>97</sup> Sarah L. Desmarais, et al., *Community Violence Perpetration and Victimization Among Adults with Mental Illness*, 104 Am. J. Pub. Health 2342, 2346-47 (2014).

<sup>98</sup> Matt Vasilogambros, *Red Flag Laws Spur Debate Over Due Process*, Stateline, Pew Rsch. Ctr. (Sept. 4, 2019).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; Johnson, *supra* note 93, at 1525-26 (discussing proposed legislation).

<sup>101</sup> 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).

<sup>102</sup> Bipartisan Safer Communities Act § 12003, 136 Stat. 1325.

<sup>103</sup> *Id.* § 12003(a) (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(I)).

evidence, and the right to confront adverse witnesses.”<sup>104</sup> 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.”<sup>105</sup> Defendants must also have a right to a lawyer.<sup>106</sup>

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.

## 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.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(III)).

<sup>106</sup> *Id.* (codified at 34 U.S.C. § 10152(a)(1)(I)(iv)(II)).

## ***1. Overview of the Gun Control Act***

### **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. A U.S. District Court in New Jersey 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 Association v. Grewal*, 2022 WL 2236351 (D.N.J. June 21, 2022).

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. (forthcoming).

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.

## **7. GCA Penalties**

### **b. Statutory Penalties in § 924**

In another 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.

## ***D. LAYERS OF REGULATION: AGENCY RULES AND AGENCY GUIDANCE***

### **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.

(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 one 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...

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Reeves & Dola, LLP

[ATF's New “Frame or Receiver” Rule What You Should Know -- Part 2](#)

(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)....

## 2. [New Section] *Commerce Department Regulation*

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. The new rule requires notification to Congress for export of four million dollars or more of certain semiautomatic firearms.

### ***E. SUING THE GUN INDUSTRY AND THE LEGISLATIVE RESPONSE: THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT***

#### **NOTES & QUESTIONS**

8. [Sandy Hook] 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.*, 2022 PA Super. 140 (Aug. 12, 2022).

10. [New Note] *New York and California PLCAA Predicate Legislation*. California and New York have both enacted legislation to authorize lawsuits against firearms businesses based on PLCAA's predicate exception. The California law is the [Firearm Industry Responsibility Act, AB1594](#). The New York, enacted in June 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.

Neither the California nor the New York bill creates 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.

11. [New Note] *California Private Right of Action for Firearms Suits, Parallel to Texas Abortion Suit Law*. In 2022, the California legislature enacted [Senate Bill 1327](#). It creates a private right to action against the sale or import of

“assault weapons,” .50BMG caliber rifles, and unfinished frames for home manufacturing of firearms. All of these were already illegal under California law. The bill also raised the age for more firearms purchases from 18 to 21; this provision is discussed under Chapter 13.B.

The key language of the lawsuit provision amends the California Business and Professions Code as adds new sections 2949.60 et seq. Private litigants may be awarded \$10,000 per item for every item they prove was unlawfully brought into California. The lawsuit provision becomes inoperable if both of the following occur: the Texas abortion law is held unconstitutional by the U.S. or Texas Supreme Courts, *and* the Texas statute is then repealed.

Separately, the bill amends California Rules of Civil Procedure so that anyone who unsuccessfully challenges any California gun control law must pay the government’s attorneys fees and litigation expenses.

The statute is as follows, in relevant part:

**22949.62** (a) Notwithstanding any other law, no person within this state may manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed, transported, or imported into the state, keep for sale, offer or expose for sale, or give or lend, any assault weapon, .50 BMG rifle, or unserialized firearm, except as provided in subdivisions (e) and (f) and in Section 22949.63.[various exceptions are specified in the rest of this section, and of section 22949.63.]

2949.64 (a) Notwithstanding any other law, the requirements of this chapter shall be enforced exclusively through the private civil actions described in Section 22949.65. No enforcement of this chapter may be taken or threatened by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 22949.65.

(b) The fact that conduct violates this chapter shall not be an independent basis for enforcement of any other law of this state, or the denial, revocation, suspension, or withholding of any right or privilege conferred by the law of this state or a political subdivision, or a threat to do the same, by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision, or a board, commission, or similar body assigned authority to do so under law, against any person, except as provided in Section 22949.65. Nor shall any civil action predicated upon a violation of this chapter be brought by this state, a political subdivision, a district or county or city attorney, or an executive or administrative officer or employee of this state or a political subdivision. For avoidance of doubt, the rights and privileges described by this subdivision include, but are not limited to, any business licenses and permits issued pursuant to this code or any firearms, ammunition, or precursor parts dealer or vendor licenses issued pursuant to Title 4

(commencing with Section 23500) of Part 6 of the Penal Code. This subdivision shall not be construed to prevent or limit enforcement of any other law regulating conduct that also violates this chapter, including, but not limited to, Chapter 1.5 (commencing with Section 30400) and Chapter 2 (commencing with Section 30500) of Division 10 of Title 4 of Part 6 of the Penal Code.

(c) Subdivisions (a) and (b) shall not be construed to do any of the following:

(1) Legalize the conduct prohibited by this chapter or by Chapter 1.5 (commencing with Section 30400) and Chapter 2 (commencing with Section 30500) of Division 10 of Title 4 of Part 6 of the Penal Code.

(2) Waive any requirements prescribed in Chapter 3 (commencing with Section 29180) of Division 7 of Title 4 of Part 6 of the Penal Code.

(3) Limit or affect the availability of a remedy established by Section 22949.65.

(4) Limit the enforceability of any other laws that regulate or prohibit any conduct relating to firearms or firearm precursor parts.

**22949.65** (a) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who does any of the following:

(1) Knowingly violates Section 22949.62.

(2) Knowingly engages in conduct that aids or abets a violation of Section 22949.62, regardless of whether the person knew or should have known that the person aided or abetted would be violating Section 22949.62.

(3) Knowingly commits an act with the intent to engage in the conduct described by paragraph (1) or (2).

(b) If a claimant prevails in an action brought under this section, the court shall award all of the following:

(1) Injunctive relief sufficient to prevent the defendant from violating this chapter or engaging in acts that aid or abet violations of this chapter.

(2) (A) (i) Statutory damages in an amount of not less than ten thousand dollars (\$10,000) for each weapon or firearm precursor part as to which the defendant violated Section 22949.62, and for each weapon or firearm precursor part as to which the defendant aided or abetted a violation of Section 22949.62.

(ii) This subparagraph shall remain in effect unless found by a court to be invalid or unconstitutional, in which case this subparagraph is repealed and subparagraph (B) shall become operational.

(B) (i) A civil penalty in an appropriate amount to be determined by the court for each violation of this chapter. In making that determination, the court shall consider factors that include, but are not limited to, the number of firearms or precursor parts involved in the defendant's violation of this chapter, the duration of the prohibited conduct, whether the defendant has previously violated this chapter or any other federal, state, or local law concerning the regulation of

firearms, and any other factors tending to increase the risk to the public, such as proximity of the violations to sensitive places.

(ii) This subparagraph shall become effective only if a court finds subparagraph (A) to be invalid or unconstitutional.

(3) Attorney's fees and costs.

(c) Notwithstanding subdivision (b), a court shall not award relief under this section in response to a violation of subdivision (a) if the defendant demonstrates that the defendant previously paid the full amount of any monetary award under subdivision (b) in a previous action for each weapon or firearm precursor part as to which the defendant violated, or aided or abetted a violation of, Section 22949.62.

(d) Notwithstanding any other law, a cause of action under this section shall be extinguished unless the action is brought not later than four years after the cause of action accrues.

(e) An act or omission in violation of Section 22949.62 shall be deemed an injury in fact to all residents of, and visitors to, this state, and any such person shall have standing to bring a civil action pursuant to this section.

(f) Notwithstanding any other law, none of the following is a defense to an action brought under this section:

(1) A defendant's ignorance or mistake of law.

(2) A defendant's belief that the requirements of this chapter are unconstitutional or were unconstitutional.

(3) A defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this chapter.

(4) A defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought.

(5) Nonmutual issue preclusion or nonmutual claim preclusion.

(6) Any claim that the enforcement of this chapter or the imposition of civil liability against the defendant will violate a constitutional right of a third party.

(7) A defendant's assertion that this chapter proscribes conduct that is separately prohibited by the Penal Code or any other law of this state, or that this chapter proscribes conduct beyond that which is already prohibited by the Penal Code or any other law of this state.

(8) Any claim that the firearm or firearm precursor part at issue was not misused, or was not intended to be misused, in a criminal or unlawful manner.

(g) (1) Both of the following are affirmative defenses to an action brought under this section:

(A) A person sued under paragraph (2) of subdivision (a) reasonably believed, after conducting a reasonable investigation, that the person aided or abetted was complying with this chapter.

(B) A person sued under paragraph (3) of subdivision (a) reasonably believed, after conducting a reasonable investigation, that the person

was complying with this chapter or was aiding or abetting another who was complying with this chapter.

(2) The defendant has the burden of proving an affirmative defense under this subdivision by a preponderance of the evidence.

(h) This section shall not be construed to impose liability on any speech or conduct protected by the First Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment to the United States Constitution, or by Section 2 of Article I of the California Constitution.

(i) Notwithstanding any other law, this state, a state official, or a district, county, or city attorney shall not intervene in an action brought under this section. However, this subdivision does not prohibit a person described by this subdivision from filing an amicus curiae brief in the action.

(j) Notwithstanding any other law, a court shall not award attorney's fees or costs to a defendant in an action brought under this section.

(k) An action pursuant to this section shall not be brought against a federal government, state, political subdivision, or an employee of a federal government, state, or political subdivision on the basis of acts or omissions in the course of discharge of official duties.

**22949.66** (a) A defendant against whom an action is brought under Section 22949.65 does not have standing to assert the right of another individual to keep and bear arms under the Second Amendment to the United States Constitution as a defense to liability under that section unless either of the following is true:

(1) The United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of other individuals in state court as a matter of federal constitutional law.

(2) The defendant has standing to assert the rights of other individuals under the tests for third-party standing established by the United States Supreme Court.

(b) A defendant in an action brought under Section 22949.65 may assert an affirmative defense to liability under this section if both of the following are true:

(1) The defendant has standing to assert the third-party right of an individual to keep and bear arms in accordance with subdivision (a).

(2) The defendant demonstrates that the relief sought by the claimant will violate a third-party's rights under the Second Amendment to the United States Constitution right as defined by clearly established case law of the United States Supreme Court.

(c) Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 22949.65, and a court shall not award relief under Section 22949.65 if the conduct for which the

defendant has been sued was an exercise of a state or federal constitutional right that personally belongs to the defendant.

**22949.67** This chapter shall not be construed to do any of the following:

(a) Authorize the initiation of a cause of action under this chapter against a person purchasing, obtaining, or attempting to purchase or obtain an assault weapon, .50 BMG rifle, unserialized firearm, or firearm precursor part from a person acting in violation of this chapter.

(b) Wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits any conduct relating to firearms or firearm precursor parts, including, but not limited to, Chapters 1.5 and 2 (commencing with Sections 30400 and 30500, respectively) of Division 10 of Title 4 of Part 6 and Chapter 3 (commencing with Section 29180) of Division 7 of Title 4 of Part 6 of the Penal Code.

(c) Restrict a political subdivision from regulating or prohibiting conduct relating to assault weapons, .50 BMG rifles, unserialized firearms, or firearm precursor parts in a manner that is at least as stringent as the laws of this state.

**22949.69** (a) Notwithstanding any other law, this state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.

(b) A provision of state law shall not be construed to waive or abrogate an immunity described by subdivision (a) unless it expressly waives immunity under this section.

**22949.70** (a) It is the intent of the Legislature that every provision, section, subdivision, sentence, clause, phrase, and word in this chapter, and every application of the provisions in this chapter, are severable from each other.

(b) If any application of any provision in this chapter to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and shall not be affected. All constitutionally valid applications of this chapter shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the Legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this chapter to impose an unconstitutional burden in a large or substantial fraction of relevant cases, the applications that do not present an unconstitutional burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the Legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the



statute's application does not present an unconstitutional burden. If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and the California Constitution, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the Legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and the California Constitution.

(c) The Legislature further declares that it would have enacted this chapter, and each provision, section, subdivision, sentence, clause, phrase, and word, and all constitutional applications of this chapter, irrespective of the fact that any provision, section, subdivision, sentence, clause, phrase, or word, or application of this chapter, were to be declared unconstitutional or to represent an unconstitutional burden.

(d) If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(e) A court shall not decline to enforce the severability requirements of this section on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision of this chapter does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. Each of the following is true about a judicial injunction or declaration of unconstitutionality of a provision of this chapter:

(1) It is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the California Constitution or the United States Constitution.

(2) It is not a formal amendment of the language in a statute.

(3) It no more rewrites a statute than a decision by the executive not to enforce a duly-enacted statute in a limited and defined set of circumstances.

**22949.71** This chapter shall become inoperative upon invalidation of Subchapter H (commencing with Section 171.201) of Chapter 171 of the Texas Health and Safety Code in its entirety by a final decision of the United States Supreme Court or Texas Supreme Court, and is repealed on January 1 of the following year.

**SEC. 2** Section 1021.11 is added to the Code of Civil Procedure, to read:

1021.11 (a) Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive

relief to prevent this state, a political subdivision, a governmental entity or public official in this state, or a person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts firearms, or that represents any litigant seeking that relief, is jointly and severally liable to pay the attorney's fees and costs of the prevailing party.

(b) For purposes of this section, a party is considered a prevailing party if a court does either of the following:

(1) Dismisses any claim or cause of action brought by the party seeking the declaratory or injunctive relief described by subdivision (a), regardless of the reason for the dismissal.

(2) Enters judgment in favor of the party opposing the declaratory or injunctive relief described by subdivision (a), on any claim or cause of action.

(c) Regardless of whether a prevailing party sought to recover attorney's fees or costs in the underlying action, a prevailing party under this section may bring a civil action to recover attorney's fees and costs against a person, including an entity, attorney, or law firm, that sought declaratory or injunctive relief described by subdivision (a) not later than the third anniversary of the date on which, as applicable:

(1) The dismissal or judgment described by subdivision (b) becomes final upon the conclusion of appellate review.

(2) The time for seeking appellate review expires.

(d) None of the following are a defense to an action brought under subdivision (c):

(1) A prevailing party under this section failed to seek recovery of attorney's fees or costs in the underlying action.

(2) The court in the underlying action declined to recognize or enforce the requirements of this section.

(3) The court in the underlying action held that any provision of this section is invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

(e) Any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief as described in subdivision (a), shall not be deemed a prevailing party under this section or any other provision of this chapter.

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# WHO? BANS ON PERSONS AND CLASSES

## ***A. DOMESTIC VIOLENCE MISDEMEANANTS***

### NOTES & QUESTIONS

8. [New Note] A judge in the Southern District of New York upheld the New York Police Department's refusal to issue a long gun permit to a Bronx man who had been arrested for domestic violence in 2011, but not convicted. The complainant in the 2011 case had also obtained a restraining order, which later expired, against the man. The district court upheld the NYPD decision under intermediate scrutiny. The Second Circuit vacated and remanded for reconsideration in light of *Bruen. Tavares v. New York City*, No. 21-398 (July 12, 2022, 2d Cir.) (summary order, nonprecedential).

## ***B. PERSONS CONVICTED OF A CRIME PUNISHABLE BY A FELONY SENTENCE OF OVER ONE YEAR OR A MISDEMEANOR SENTENCE OF OVER TWO***

### NOTES & QUESTIONS

7. [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) and served several years in prison. 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 judgment because of an error of fact in the original proceeding.

### *C. PERSONS UNDER 21*

Jones v. Bonta

34 F.4th 704 (9th Cir. 2022)

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Before: Ryan D. Nelson and Kenneth K. Lee, Circuit Judges, and Sidney H. Stein, District Judge. Opinion by Judge R. Nelson; Concurrence by Judge Lee; Dissent by Judge Stein.

R. NELSON, Circuit Judge:

America would not exist without the heroism of the young adults who fought and died in our revolutionary army. Today we reaffirm that our Constitution still protects the right that enabled their sacrifice: the right of young adults to keep and bear arms.

California has restricted the sale of most firearms to anyone under 21. Plaintiffs challenged the bans on long guns and semiautomatic centerfire rifles under the Second Amendment. The district court declined to issue a preliminary injunction.

We hold that the district court did not abuse its discretion in declining to enjoin the requirement that young adults obtain a hunting license to purchase a long gun. But the district court erred in not enjoining an almost total ban on semiautomatic centerfire rifles. First, the Second Amendment protects the right of young adults to keep and bear arms, which includes the right to purchase them. The district court reasoned otherwise and held that the laws did not burden Second Amendment rights at all: that was legal error. Second, the district court properly applied intermediate scrutiny to the long gun hunting license regulation and did not abuse its discretion in finding it likely to survive. But third, the district court erred by applying intermediate scrutiny, rather than strict scrutiny, to the semiautomatic centerfire rifle ban. And even under intermediate scrutiny, this ban likely violates the Second Amendment because it fails the “reasonable fit” test. Finally, the district court also abused its discretion in finding that Plaintiffs would not likely be irreparably harmed. We thus affirm the district court’s denial of an injunction as to the long gun regulation, reverse its denial of an injunction as to the semiautomatic centerfire rifle ban, and remand for further proceedings consistent with this opinion.

I

A

California regulates the acquisition, possession, and ownership of firearms with a multifaceted scheme. *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc). To start, some general requirements apply to everyone, not just young adults.<sup>1</sup>...

California also regulates young adults' commerce in firearms. Specifically, after first banning only the sale of handguns, California then prohibited the sale to young adults of almost any kind of firearm. The only exception was for sales of long guns to young adults who (1) have a state hunting license, (2) are peace officers, active federal officers, or active federal law enforcement agents and are allowed to carry firearms for their work, or (3) are active or honorably discharged members of the military. 2017 California Senate Bill No. 1100, California 2017-2018 Regular Session.

...California again amended the law, banning sales of semiautomatic centerfire rifles to young adults, and excepting only law enforcement officers and active-duty military, but not hunting license holders...

## B

The district court declined to preliminarily enjoin the laws, holding that Plaintiffs had not shown that they were likely to succeed on the merits, both because the laws did not burden Second Amendment rights and would likely survive intermediate scrutiny. The district court also held that Plaintiffs had not shown irreparable harm and that the balance of interests did not favor enjoining the laws.

First, the district court observed that other courts had held that similar laws do not burden Second Amendment rights at all. *Jones v. Becerra*, 498 F. Supp. 3d 1317, 1326-27 (S.D. Cal. 2020). The district court noted that these courts found that similar laws were “longstanding, do not burden the Second Amendment, and are therefore presumptively constitutional.” *Id.* at 1327. The district court then reasoned that “[i]ndividuals under the age of 21 were considered minors or ‘infants’ for most of our country's history without the rights afforded adults” and therefore they are among those “believed unfit of responsible firearm possession and use.” *Id.* at 1327. It did address the tradition of militia members who were under 21 years old, but reasoned this tradition actually supported the constitutionality of the laws. *Id.* In the district court's view, “[m]ilitia members were required to possess their own firearms if they complied with accountability and maintenance regulations” and thus the “strict rules surrounding militia duty” show that the “right to firearm possession came with obligations to ensure public safety.” *Id.*

Because of other courts' holdings, the longstanding history of similar regulations, and its militia analysis, the district court reasoned that

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<sup>1</sup> We use “young adults” to refer to people who are 18 years old or older but not yet 21 years old.

California's laws “do[] not burden the Second Amendment.” *Id.* The district court thus held that Plaintiffs were not likely to succeed on the merits...

At the preliminary injunction stage, our “review of the district court's findings” is “restricted to the limited record available to the district court when it granted or denied the motion.” *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982). Ultimately, because denying a preliminary injunction lies within a district court’s discretion, we may reverse only when it abused its discretion by relying on an erroneous legal premise or clearly erroneous finding of fact. *See, e.g., Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1231 (9th Cir. 2020)...

### III

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. The Second Amendment “protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). This right is “applicable to the States” through the Due Process Clause of the Fourteenth Amendment. *Id.* at 750.

The “Second Amendment right is exercised individually and belongs to all Americans.” *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). The “people” protected by the Second Amendment “refers to a class of persons who are part of a national community.” *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

On the merits, for challenges to firearm laws under the Second and Fourteenth Amendments, we apply a “two-step framework.” *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). First, we ask “whether the challenged law burdens conduct protected by the Second Amendment.” *Fyock*, 779 F.3d at 996 (internal quotations omitted). In this step, we “explore the amendment's reach based on a historical understanding of the scope of the Second Amendment right.” *Mai v. United States*, 952 F.3d 1106, 1114 (9th Cir. 2020) (quoting *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019)). As we conduct this historical analysis, we must remain “well aware that we are jurists and not historians.” *Young*, 992 F.3d at 785. Still, if the challenged law regulates conduct historically outside the scope of the Second Amendment, then it does not burden Second Amendment rights. *Mai*, 952 F.3d at 1114. But if the challenged law “falls within the historical scope of the Second Amendment, we must then proceed to the second step of the Second Amendment inquiry to determine the appropriate level of scrutiny.” *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014).

In our historical analysis, the Framers’ understanding of the Second Amendment at and around the time of ratification has special significance. Laws from that time are particularly important because they are

“contemporaneous legislative exposition[s] of the Constitution” that took place “when the founders of our government and framers of our Constitution were actively participating in public affairs.” *Myers v. United States*, 272 U.S. 52, 175 (1926). If they were also “acquiesced in for a long term of years,” these legislative expositions “fix[] the construction” that we must give to the Constitution’s parameters. *Id.* Because the militias originated in the states, see *Heller*, 554 U.S. at 596, we also consider colonial and state laws. Since the Second Amendment was incorporated against the states through the Fourteenth Amendment, our historical analysis also must consider how the right to keep and bear arms was understood in 1868, when that amendment was ratified. See *McDonald*, 561 U.S. 742, 770-78 (analyzing Reconstruction-era history).

After the historical analysis, if we conclude that the law at issue burdens Second Amendment rights, then we proceed to the second step. In this step, we determine which level of scrutiny to apply and must decide both “how close [each] law comes to the core of the Second Amendment right” and “the severity of [each] law's burden on that right.” *Mai*, 952 F.3d at 1115. “Strict scrutiny applies only to laws that both implicate a core Second Amendment right and place a substantial burden on that right.” *Id.* (citing *Torres*, 911 F.3d at 1262). And “[i]n weighing the severity of the burden, we are guided by a longstanding distinction between laws that regulate the manner in which individuals may exercise their Second Amendment right, and laws that amount to a total prohibition of the right.” *Pena*, 898 F.3d at 977 (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). Laws that regulate how individuals can exercise the right are less severe; laws that amount to a total prohibition of the right are more severe...

We analyze the laws against this legal backdrop. First, because the Second Amendment historically protected the right of young adults to possess firearms, the district court abused its discretion in finding no burden on Second Amendment rights. As to the long gun regulation, the district court properly applied intermediate scrutiny, and did not abuse its discretion in finding the law likely to survive. But semiautomatic rifles are nearly totally banned. Thus, the district court erred in applying intermediate scrutiny, rather than strict scrutiny. And even under intermediate scrutiny, the district court erred in finding the law likely to survive. Finally, the district court also abused its discretion in finding that there was no irreparable harm and that the public interest favored declining to issue an injunction.

## IV

### A

Before engaging with the historical record, we first establish the parameters of our analysis. California regulates young adults’ commerce in firearms, not their possession. And we have avoided defining “the contours of

the commercial sales category because [we have] assumed the Second Amendment applied and upheld the restriction under the appropriate level of constitutional scrutiny.” *Pena*, 898 F.3d at 976 (collecting cases). Still, even though this is a commercial regulation, the district court’s historical analysis focused not on the history of commercial regulations specifically but on the history of young adults’ right to keep and bear arms generally. *See Jones*, 498 F. Supp. 3d at 1325-29. The district court was asking the right question.

“Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense.” *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017). We have assumed without deciding that the “right to possess a firearm includes the right to purchase one.” *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017). And we have already applied a similar concept to other facets of the Second Amendment. For example, “[t]he Second Amendment protects ‘arms,’ ‘weapons,’ and ‘firearms’; it does not explicitly protect ammunition.” *Jackson*, 746 F.3d at 967. Still, because “without bullets, the right to bear arms would be meaningless,” we held that “the right to possess firearms for protection implies a corresponding right” to obtain the bullets necessary to use them. *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)).

Similarly, without the right to obtain arms, the right to keep and bear arms would be meaningless. *Cf. Jackson*, 746 F.3d at 967 (right to obtain bullets). “There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself.” *Luis v. United States*, 578 U.S. 5 (Thomas, J., concurring in the judgment) (quoting *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting)). For this reason, the right to keep and bear arms includes the right to purchase them. And thus laws that burden the ability to purchase arms burden Second Amendment rights.

## B

Finally, before we dive into the history, we pause to clear up two last points. First, because the long gun regulation and the semiautomatic rifle ban regulate different categories of guns and have different exceptions, we analyze them separately. And second, the Second Amendment does not protect the right to carry “dangerous and unusual weapons.” *Heller*, 554 U.S. at 627. But that doesn't mean that weapons can be banned just because they're dangerous. Rather, “dangerous and unusual weapons” is a kind of historical term of art: *Heller* contrasted those arms with weapons “in common use at the time.” *Id.* Thus “the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.” *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring). Here, the district court held that “[b]oth long-guns and semi-automatic centerfire rifles are commonly used by law abiding citizens for lawful purposes such as hunting,



target practice, and self-defense,” and thus that they are not “dangerous and unusual weapons” under *Heller*, 554 U.S. at 627. *Jones*, 498 F. Supp. 3d at 1325. Similarly, semiautomatic weapons “traditionally have been widely accepted as lawful possessions.” *Staples v. United States*, 511 U.S. 600, 612 (1994). We agree: long guns and semiautomatic rifles are not dangerous and unusual weapons.

Having cleared these last preliminary hurdles, the question now is, “based on a historical understanding of the scope of the Second Amendment right,” whether the right of young adults to bear arms is “conduct [that is] protected by the Second Amendment.” *Mai*, 952 F.3d at 1114 (internal citation omitted).

## C

Our analysis of the historical record reveals several points which inform our exploration of the amendment’s reach. First, the tradition of young adults keeping and bearing arms is deep-rooted in English law and custom. Going back many centuries, able-bodied English men at least fifteen years old were compelled to possess personal arms and had to take part in both the militia and other institutions that required them to keep and bear personal arms. Second, the American colonists brought that tradition across the Atlantic: the colonial militias almost always included all men 18 and older, and other institutions involving keeping and bearing arms made it to our shores, too. Third, at the time of the founding, all states required young adults to serve in the militia, and all states required young adults to acquire and possess their own firearms. Just after the founding, Congress established a federal militia, which included young adults, and required them to acquire and possess their own weapons. Fourth, both at the founding and later, different states had different ages of majority, and the age of majority also varied depending on the conduct at issue. And finally, turning to the Reconstruction era, some states passed laws that regulated minors’ access to firearms, but most of them only regulated handguns, and only a few banned all sales of firearms to minors. We explore each of these points in turn.

## 1

The tradition of young adults keeping and bearing arms is deep-rooted in English law and custom. As far back as medieval times, able-bodied men aged fifteen and older were compelled to possess personal arms and had a duty, when asked, to use those personal arms to maintain the king’s peace and protect their communities and property.<sup>8</sup> “[T]he militia from its obscure origin in Saxon times has been composed of all subjects and citizens capable of bearing arms, regardless of age or parental authority.”<sup>9</sup>

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<sup>8</sup> See David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminology 761, 788 (2014).

<sup>9</sup> S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 Yale L.J. 471, 473 (1917).

And the militia was not the only institution imposing an obligation to acquire and possess arms: “[u]nder English law originating long before the Norman Conquest of 1066, all able-bodied men were obliged to join in the *hutesium et clamor* (hue and cry) to pursue fleeing criminals.”<sup>10</sup> More generally, sheriffs, coroners, and magistrates could “summon all able-bodied males to assist in keeping the peace,”<sup>11</sup> and the traditional minimum age for these law-enforcement duties was typically 15 or 16 years old. For example, at common law, the sheriff could command citizens—already armed—to help suppress riots, arrest criminals, and otherwise enforce civil processes.

2

This deep-rooted tradition was brought across the Atlantic by the American colonists. *Heller* confirmed that the “militia” in colonial America consisted of “a subset of ‘the people’—those who were male, able bodied, and within a certain age range.” 554 U.S. at 580. Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at 16. *See* Appendix 1. Every colony passed, at some point, laws identifying 18-year-olds as persons required to possess arms. *Id.* Throughout the colonial period, the minimum age fluctuated both below and above 18, and some colonies passed laws temporarily increasing the minimum age requirements for militia service to not include 18-to 20-year-olds. *Id.*

Militia members had to show up for militia duty with their own arms. When militia members were “called for service th[ey] . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *United States v. Miller*, 307 U.S. 174, 179, (1939). Colonial governments even supplied arms to citizens too poor to purchase them, requiring them, for example, to pay back the government or work off their debt.

Militia membership also included some of what we might now call regulation: “members of the militia were required to meet regularly for weapons inspection and registration.” *Jones*, 498 F. Supp. 3d at 1327 (citing Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early America Origins of Gun Control*, 73 *Fordham L. Rev.* 487, 509-11 (2004)).

Along with the militia, the colonists also brought over the practice of posse comitatus, which again required citizens to have their own arms.<sup>16</sup> “Prior to the advent of centralized police forces,” posse comitatus allowed “sheriffs and others [to] compel[] citizens to serve in the name of the state to execute arrests, level public nuisances, and keep the peace, upon pain of fine and

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<sup>10</sup> Kopel, *supra* n.8, at 771-72.

<sup>11</sup> *See* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 *S. Ill. U. L. J.* 495, 535 (2019).

<sup>16</sup> *See* Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 *Law & Hist. Rev.* 1, 10 (2008) (internal citation omitted).

imprisonment.”<sup>17</sup> And in fact, the colonists didn’t just continue the practice: posse comitatus was “a pillar of local self-governance” and “central to the broader project of protecting the public good.”<sup>18</sup> Colonial governments even punished citizens who would not join the posse.

3

The Second Amendment was ratified just a few months before Congress passed the Militia Act of 1792. The Militia Act required that young adults serve in the militia and acquire and possess their own weapons. The Act “purported to establish ‘an Uniform Militia throughout the United States.’” *Perpich v. Dep’t of Def.*, 496 U.S. 334, 341 (1990). The Act stated: “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia.” Act of May 8, 1792, 1 Stat. 271. The Act also required each militia member to “provide himself with a good musket or firelock . . . or with a good rifle.” *Id.* The Militia Act thus “command[ed] that every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the militia] and equip himself with appropriate weaponry.” *Perpich*, 496 U.S. at 341.

Thus, “[a]t the time of the Second Amendment’s passage, or shortly thereafter, the minimum age for militia service in every state became eighteen.” *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 340-44 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (“*NRA II*”). Several states adopted the exact language from the Federal Militia Act—obligating male persons 18 years old or older to acquire and provide their own firearms. *See* Appendix 2. Either at the same time as or right after the Act’s passage, every state’s militia law obliged young adults to acquire and possess firearms. *Id.* “[A]ny argument that 18-to 20-year olds were not considered, at the time of the founding, to have full rights regarding firearms” is “inconceivable.” *NRA II*, 714 F.3d at 342 (Jones, J., dissenting from denial of rehearing en banc).

4

Turning now to the age of majority, the common law age of majority at the time of the founding was 21 years old. “[I]t was not until the 1970s that States enacted legislation to lower the age of majority to 18.” *NRA I*, 700 F.3d at 201. But the relevant age of majority also depended on the capacity or activity. William Blackstone, *Commentaries* 463-64, 465 (1765). In other words, “the age of majority—even at the Founding—lacks meaning without reference to a particular right,” because, “[f]or example, a man could take an oath at age 12,

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<sup>17</sup> *See id.* at 2.

<sup>18</sup> *See id.* at 10.

be capitally punished in a criminal case at age 14, and serve as an executor at age 17.” *Id.* at 463.

5

Finally, we turn to the Reconstruction era. “By the 1850’s, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.” *McDonald*, 561 U.S. at 770. And even once the Fourteenth Amendment was ratified in 1868, it would of course still be many years before the Supreme Court incorporated the Second Amendment against the states. *McDonald*, 561 U.S. at 791. So, like in the colonial and founding eras, state laws were made against the backdrop of “Second Amendment analogues in their respective [state] constitutions.” *NRA I*, 700 F.3d at 202 n.16.

Within a few decades of Reconstruction, some states had enacted laws regulating access to firearms by minors. *Id.* at 202. We identify twenty-eight such state laws passed between 1856 and 1897. ... Of these laws, nineteen banned sales of only pistols to minors, and several had exceptions for hunting or parental consent. Of the non-pistol bans, three only applied to minors under fifteen years old, only required parental consent, or both. Eight states banned the sale of all firearms or deadly or dangerous weapons to minors. Four of these statutes were passed between 1881 and 1885.

There were also other Reconstruction-era restrictions on the right to acquire and bear arms. In particular, some statutes were designed to disarm formerly enslaved people and members of Native American tribes. *See Drummond v. Robinson Twp.*, 9 F.4th 217, 228 (3d Cir. 2021). Kentucky, for example, restricted firearm access by African Americans. 1860 Ky. Acts 245 § 23.

For the most part, cases from this time did not address the constitutionality of laws that regulated firearm ownership by young adults. Two cases touch on related issues, but neither addresses our question. One of them, *Coleman v. State*, 32 Ala. 581 (1858), summarily affirmed a lower court’s application of a state statute that prohibited selling or lending a pistol to a minor. But the court did not address the constitutionality of the law or say how old the minor was. In the second case, *State v. Callicutt*, 69 Tenn. 714 (1878), on top of not saying how old the minor was, that court also addressed concealed carry of dangerous weapons, not the right to keep and bear arms more generally.

Professor Cooley’s famous treatise from 1868, relied on by the Fifth Circuit panel in *NRA I*, also does not address the question: its sole reference to the issue, citing *Callicutt*, comes in a discussion of the states’ police powers, not of the right to keep and bear arms. *NRA I*, 700 F.3d at 202-03 (citing Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883)).

## D

We must decide what these historical facts tell us about the reach of the Second Amendment. *Fyock*, 779 F.3d at 996. According to Plaintiffs, these facts show that the Second Amendment protects young adults' right to bear arms, because young adults were expected to bear arms at the time of the founding.

Defendants have two main responses, both of which the district court adopted. First, it argues that the protected historical right is not a full right to bear arms, but rather only a right to bear arms that comes with some obligations of militia service, at the very least the inspection requirement. *Jones*, 498 F. Supp. 3d at 1327. In the district court's reading, because militia service came with some regulation, the Second Amendment does not protect the right to keep and bear arms, absent that regulation. *Id.*

Second, Defendants argue that the militia laws don't show anything about young adults' right to bear arms, because states in the 19th and 20th centuries also criminalized transferring firearms to young people, and because the age of majority during much of this country's history was 21 years old, not 18. *Id.* at 1326-27.

We agree with Plaintiffs: the historical record shows that the Second Amendment protects young adults' right to keep and bear arms. We address Plaintiffs' argument and then each of Defendants' counterarguments in turn.

### 1

“Sixteen was the minimum age for colonial militias almost exclusively for 150 years before the Constitution” and “[a]t the time of the Second Amendment’s passage, or shortly thereafter, the minimum age for militia service in every state became eighteen.” *NRA II*, 714 F.3d at 340 (Jones, J., dissenting from denial of rehearing en banc). This historical militia tradition supports Plaintiffs’ reading. Indeed, the historical evidence is so strong that even the dissenting judge in the vacated *Hirschfeld* opinion found it “persuasive,” did not dispute it, and simply assumed that the law did burden Second Amendment rights, disagreeing only at step two. 5 F.4th 407, 463 (4th Cir. 2021) (Wynn, J., dissenting), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021). The Second Amendment refers to the militia, and young adults had to be in the militia and bring their own firearms. This reference implies at least that young adults needed to have their own firearms.

### 2

Defendants’ first argument to the contrary is unpersuasive. Defendants agree that young adults needed to have firearms for the militia and that the Second Amendment refers to the militia. Even so, Defendants argue that the Second Amendment only protects older adults’ right to keep and bear arms, and not that of young adults. In other words, young adults could keep and bear arms and had to serve in the militia, but their ability to keep and bear arms

was not protected by the Second Amendment and could have been abridged at any time without posing any burden on the right. Because it strays from the most obvious historical interpretation, this reading would need to be supported by powerful evidence. It is not.

To begin, the district court's main premise has already been rejected. “[T]he Second Amendment conferred an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. The right is *not* conditioned on militia service. *Id.* at 599-600. Indeed, that was the position of the dissenters in *Heller*, and the Court rejected it. *Id.*

The district court’s position here is a variation on that same, already-rejected argument. Rather than argue that *all* citizens' right to bear arms is conditioned *entirely* on militia service, as the dissenters did in *Heller*, the district court held that *some* citizens’ right to bear arms is conditioned on *some aspects* of militia service. *Jones*, 498 F. Supp. 3d at 1327. And there is another problem with the district court’s analysis. At the first step, we just ask whether the regulations burden Second Amendment rights at all. Few, if any, of our constitutional rights are absolute, and asking if a right is burdened is different from asking if a particular burden is constitutional. That there were some firearm regulations associated with militia membership could show that some restrictions can be constitutional. But the regulations themselves cannot dispositively show that there is no burden.

The historical analysis controls the first step of the inquiry but not the second. In applying a tier of scrutiny in the second step, we focus not on the historical record (i.e., what kinds of regulations were present at the founding), but on the gravity of the state’s interest (compelling/significant/legitimate) and the degree of tailoring between the regulation and that interest (narrow tailoring/reasonable fit/rational relation). In finding no burden on Second Amendment rights, the district court improperly relied on founding-era regulations.

3

We now turn to Defendants’ second argument, which relies on laws passed in the 19th and 20th centuries.

First, Defendants fail to adequately address the founding-era militia tradition: “19th-century sources may be relevant to the extent they illuminate the Second Amendment's original meaning, but they cannot be used to construe the Second Amendment in a way that is inconsistent with that meaning.” *NRA II*, 714 F.3d at 339 n.5 (Jones, J., dissenting from denial of rehearing en banc). Defendants argue, citing *NRA I*, that “a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding era analog.” 700 F.3d at 196. But even if we were to agree, that would not save the argument. Here, there is not just a vacuum at the founding-era: instead, the

founding-era evidence of militia membership undermines Defendants' interpretation.

Even putting that aside, the Reconstruction-era laws themselves are not convincing. On top of the deeply offensive nature of many of them, nineteen out of twenty-eight banned only the sale of handguns, and California's handgun ban is not at issue. The Reconstruction-era laws show that long guns were far less regulated than handguns. Ruling out other state laws that are similarly inapplicable (laws only requiring parental consent, only banning dangerous and deadly weapons, and only applying to children under fifteen years old), we are left with only five complete bans on sales of firearms to minors. Of these five laws, three were passed in states without a Second Amendment analog in their state constitution. So only two states—Kentucky and Michigan—banned the sale of firearms to minors, *see* 1873 Ky. Acts 359, 1883 Mich. Pub. Acts 144, and had a Second Amendment analog, *see* Ky. Const. of 1850, Art. 13, § 25; Mich. Const. of 1850, Art. 17, § 7. These two laws—both passed over a decade after the ratification of the Fourteenth Amendment—cannot contravene the Second Amendment's original public meaning.

4

As to Defendants' argument relying on the age of majority being 21, rather than 18, we agree with the Fifth Circuit and the Fourth Circuit's vacated opinion in *Hirschfeld* that “majority or minority is a status that lacks content without reference to the right at issue.” 5 F.4th at 435; *NRA I*, 700 F.3d at 204 n.17. “As Blackstone's *Commentaries* makes clear, the relevant age of majority depended on the capacity or activity.” *Hirschfeld*, 5 F.4th at 435 (citing 1 William Blackstone, *Commentaries* at 463-65). We also agree that “constitutional rights were not generally tied to an age of majority, as the First and Fourth Amendments applied to minors at the Founding as they do today” and that “the age of majority Blackstone identifies for different activities tells us little about the scope of the Second Amendment's protections.” *Id.*

5

Finally, Defendants argue that California's laws are just “conditions and qualifications on the commercial sale of arms,” or “longstanding prohibitions on the possession of firearms” by certain groups. Because of the hunting license exception, the long gun regulation is more naturally considered a “condition or qualification,” while the semiautomatic rifle ban is more aptly categorized as a “prohibition.” *Heller* itself called such measures “presumptively lawful,” 554 U.S. at 626-27 n.26, so Defendants argue that California's laws pose no burden on Second Amendment rights. We disagree. These laws burden Second Amendment rights, notwithstanding this observation from *Heller*.

First, the “longstanding prohibitions” referred to in *Heller* were “prohibitions on the possession of firearms by felons and the mentally ill,” *id.*

at 626, not prohibitions on a broader set of groups. Young adults are neither felons nor mentally ill. The semiautomatic rifle law does not fall within the Supreme Court's enumerated categories.

Second, as to the long gun law, there is a more fundamental problem. In *Heller*, the Supreme Court noted just that “nothing in [its] opinion should be taken to cast doubt on” laws such as “conditions and qualifications on the commercial sale of arms,” and that such laws were “presumptively lawful.” *Id.* at 627, n.26. But this does not mean that all such laws pose no burden on Second Amendment rights at all. “On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny.” *Pena*, 898 F.3d at 976 (citing *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010)). The answer need not be the same for every regulation. Some presumptively lawful measures might burden conduct unprotected by the Second Amendment, while others might presumptively pass the applicable level of scrutiny.

Here, our historical analysis leads us to conclude that young adults have a Second Amendment right to keep and bear arms. Because that right includes the right to purchase arms, both California laws burden conduct within the scope of the Second Amendment. The long gun law is a “condition[] . . . on the commercial sale of arms,” *Heller*, 554 U.S. at 627, but it still burdens Second Amendment rights. The Supreme Court's observation in *Heller* is no obstacle to this holding.

Ultimately, the Second Amendment protects the right of the people to keep and bear arms and refers to the militia. Young adults were part of the militia and were expected to have their own arms. Thus, young adults have Second Amendment protections as “persons who are a part of a national community.” *Id.* at 580 (citing *Verdugo—Urquidez*, 494 U.S. at 265). Defendants point to contemporaneous regulations, arguing that some states banned young adults from having firearms later on, and that the age of majority was 21, not 18. But these observations do not prove their point: permissible regulations can still burden the right, later laws cannot contravene the original public meaning, and the age of majority depends on the conduct. The California laws burden Second Amendment rights and the district court erred in concluding otherwise...

ii

As to the semiautomatic rifle ban, we part company with the district court. Strict scrutiny applies. The main difference between this ban and the long gun regulation is the exceptions. The long gun regulation has a readily available exception, at least on its face—young adults can get hunting licenses.



The semiautomatic rifle ban has no such exception: the only young adults who can buy semiautomatic rifles are some law enforcement officers and active-duty military servicemembers.

It's one thing to say that young adults must take a course and purchase a hunting license before obtaining certain firearms. But to say that they must become police officers or join the military? For most young adults, that is no exception at all. In effect, this isn't an exception that young adults can avail themselves of by joining the police force or military; it is a blanket ban for everyone except police officers and servicemembers.

We have never held that intermediate scrutiny applied to a rule that banned the purchase of a major category of firearm...

Handguns are the quintessential self-defense weapon, *see Heller*, 554 U.S. at 629, but young adults already cannot purchase them, Cal. Penal Code § 27505, 18 U.S.C. § 922(b)(1). And under this ban, they also cannot purchase semiautomatic centerfire rifles. That leaves non-semiautomatic centerfire rifles, rimfire rifles, and shotguns. Non-semiautomatic rifles are not effective as self-defense weapons because they must be manually cycled between shots, a process which becomes infinitely more difficult in a life or death situation. Rimfire rifles generally aren't good for self-defense either, because rimfire ammunition has "poor stopping power" and are mostly used for things like hunting small game. David Steier, *Guns* 101, 13 (2011). So for self-defense in the home, young adults are left with shotguns.

Even acknowledging that shotguns are effective weapons for self-defense in the home, shotguns are outmatched by semiautomatic rifles in some situations.<sup>24</sup> Semiautomatic rifles are able to defeat modern body armor, have a much longer range than shotguns and are more effective in protecting roaming kids on large homesteads, are much more precise and capable at preventing collateral damage, and are typically easier for small young adults to use and handle.

Thus, we hold that California's ban is a severe burden on the core Second Amendment right of self-defense in the home. Young adults already cannot buy the quintessential self-defense weapon, *Heller*, 554 U.S. at 629, and this ban now stops them from buying semiautomatic rifles, leaving only shotguns. So handguns aside, this law takes away one of the two remaining practical options for self-defense in the home, and leaves young adults with a self-defense

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<sup>24</sup> Defendants argue that we may not consider Plaintiffs' facts about these categories of guns, because they were not submitted below. But these facts are legislative facts, "which have relevance to legal reasoning and the lawmaking process," rather than adjudicative facts, which "are simply the facts of the particular case." Advisory Comm. Note, Fed. R. Evid. 201. We have previously considered this kind of fact in a Second Amendment challenge, even over a defendant's challenge that it was not in the record below. *See Chovan*, 735 F.3d at 1140-41 (considering social science studies). In any case, Defendants did not contest Plaintiffs' evidence about rimfire semiautomatic rifles, and we agree with Defendants that semiautomatic shotguns likely are effective self-defense weapons.

weapon which is not ideal or even usable in many scenarios. That is a severe burden.

In arguing that the burden is not severe, the dissent points first to the intrafamily transfer and loan provisions. Dissent at 87. We disagree that these provisions sufficiently alleviate the burden. To start, young adults remain severely restricted in getting firearms through family transfers: Gifts from parents and grandparents are allowed but strawman purchases are not. *See* Cal. Penal Code §§ 27875 (family transfers), 27515 (strawman purchases). Moreover, allowing family transfers but not purchases makes young adults' Second Amendment rights conditional on the rights of others. The family transfer provision is unavailable to young adults whose parents or grandparents have passed away, do not have a gun to transfer, or are unable or unwilling to participate in a transfer. The first loan provision, which permits loans of up to thirty days from a slightly broader subset of family members, suffers from similar problems, and is temporally limited. Cal. Penal Code § 27880. And the remaining loan provisions are only available in even more limited circumstances: for only three days and only if the firearm is used in the presence of the loaner, Cal. Penal Code § 27885; if the firearm stays only at the loaner's residence, Cal. Penal Code § 27881; or if the loan is only for the hunting season, which is only part of the year, Cal. Penal Code § 27950. These provisions do not alleviate the sales ban's severe burden on the right of self-defense in the home.

The dissent's second rationale is that California's ban does not impose a severe burden because young adults can just wait to buy semiautomatic rifles until they are 21. Dissent at 87. It's true that we've applied intermediate scrutiny to a ten-day waiting period. *Silvester*, 843 F.3d at 827. But telling young adults to wait up to three years is a much more severe burden than having to wait a week and a half. We are not aware of any precedent that has adopted the dissent's rationale. Indeed, telling an 18-year-old that he can vote when he turns 21 would hardly minimize the existing constitutional deprivation.

Finally, the dissent argues that our reasoning is circular because any subset of guns can be considered a category. Dissent at 88; *see Worman v. Healey*, 922 F.3d 26, 32 n.2 (1st Cir. 2019). But we do not hold that a ban of any kind or subset of gun must necessarily receive strict scrutiny. We hold just that this ban of semiautomatic rifles requires strict scrutiny, because handguns are already banned, and semiautomatic rifles are now effectively banned. That means two of the three types of effective self-defense firearms are banned, leaving young adults with limited or ineffective alternatives in many self-defense scenarios, and severely burdens their Second Amendment rights...

Defendants will likely be able to show that California's long gun regulation is a reasonable fit for the stated objectives. The main effect of the rule is to

require young adults to take a hunter education class before they can get long guns. So whether the rule is a reasonable fit depends on what the law requires to happen in these hunter education classes.

Some context for the hunter education classes is helpful. Generally, before purchasing a gun, Californians must get an FSC. Cal. Penal Code §§ 31615, 27540(e). Getting the certificate requires passing a multiple-choice test and a safe handling demonstration, both of which can happen at the point of sale. *Id.* In enacting the regulation at issue, however, California changed the requirements for young adults. Rather than having to get an FSC, a young adult must instead get a hunting license, which requires them to first take and pass a hunter education class. California offers in-person and hybrid class options. The course takes approximately ten hours and costs less than \$30. After passing the course, a young adult may purchase a hunting license for \$54.

The class covers “firearm safety information” that is “more extensive” than what is covered by the FSC test and demonstration. The class also discusses other aspects of hunting that are less relevant to non-hunting uses of long guns (e.g., conservation). Cal. Fish & Game Code § 3051(a).

So, overall, California wants to “increase public safety through sensible firearm control.” *Jones*, 498 F. Supp. 3d at 1330. We agree with the district court that sensible firearm control includes things like “proper training and maintenance of firearms.” *Id.* California has pursued that end by requiring young adults to take a class which teaches them, among other things, “firearm safety information.” Because the hunting classes include other, unrelated information, the requirement is not a perfect fit. In other words, this requirement likely is neither narrowly tailored nor the least restrictive means for achieving California's goal. But it doesn't have to be: it only has to be a reasonable fit. And it likely is.

Before moving on to the semiautomatic rifle ban, we pause to make one last point. In their complaint, Plaintiffs have challenged the long gun regulation facially and as applied. But they appeal the denial of the preliminary injunction only on the basis that the law is facially invalid. And in evaluating a facial challenge, we consider only the text of the law—we judge the law on its face, not in its application. *See Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020). Nothing we have said forecloses the possibility that the regulation might still be unconstitutional as applied. For example, if the hunter education courses were prohibitively expensive or were only offered on a limited basis, then California might be applying the regulation unconstitutionally. Still, as to the facial challenge at issue, the district court did not abuse its discretion in finding that the regulation would survive intermediate scrutiny.

As to the semiautomatic rifle ban, because we have held that strict scrutiny applies, we reverse on that basis. Even so, we also hold in the alternative that, even if intermediate scrutiny were to apply, the district court still abused its discretion in finding that the ban was likely to survive, and reverse on this alternative basis as well. (Because we hold that the ban is unlikely to survive intermediate scrutiny, we also by implication hold that it is even less likely to survive strict scrutiny.) We first clarify the nature of the intermediate scrutiny test, and then discuss its application here...

California's stated objective for the semiautomatic rifle ban is the same as for the long gun regulation: to promote public safety and reduce gun violence and crime. *Jones*, 498 F. Supp. 3d at 1330. The question is whether the ban—prohibiting commerce in semiautomatic rifles for all young adults except those in the police or military—is a reasonable fit for that aim.

We agree with Defendants that the fit need only be reasonable, not perfect. *Jackson*, 746 F.3d at 969. But the fit here is likely not even reasonable. The district court abused its discretion in finding that Defendants could likely show a reasonable fit.

In *Craig v. Boren*, the Supreme Court considered a law that was a much better fit than this law and still found the fit unreasonable. 429 U.S. 190 (1976). The law in *Craig v. Boren* banned the sale of some beer to men between 18 and 21, but not to women in the same age range. *Id.* at 191-92. Intermediate scrutiny applied, and the objective of the law was to enhance traffic safety. *Id.* at 199. The state argued that its law was a reasonable fit for that objective because young men were more than ten times more likely to be arrested for driving under the influence than young women. *Id.* at 199-201. But the plaintiff argued that the law was overbroad: only 2% of young men were arrested for drunk driving, but the law regulated all young men. In other words, the law regulated fifty times more men than was ideal: it regulated 100% of them, even though only 2% would drive drunk.

The Supreme Court struck down the law. “While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device.” *Id.* at 201. In other words, a ten times increase in risk cannot justify regulating fifty times more people than is ideal: “if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous ‘fit.’” *Id.*

The fit here is far more tenuous than that. In adopting the ban at issue, the California legislature considered various statistics. In particular, it knew that young adults were less than 5% of the population but accounted for more than 15% of homicide and manslaughter arrests. In other words, young adults are more than three times more likely to be arrested for homicide and

manslaughter than other adults. But as Plaintiffs point out, only 0.25% of young adults are arrested for violent crimes. In other words, California's law sweeps in 400 times (100% divided by 0.25%) more young adults than would be ideal.<sup>25</sup> Because it regulates so much more conduct than necessary to achieve its goal, the law is unlikely to be a reasonable fit for California's objectives...

We pause here for an observation. The Second Amendment “does not demand ‘an individualized hearing’ to assess Plaintiff's own personal level of risk.” *Mai*, 952 F.3d at 1119 (citing *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 698 n.18 (6th Cir. 2016) (en banc)). But still, one way that states can improve regulations' fit is by having exceptions or more individualized assessment. *See, e.g., Singh*, 979 F.3d at 725 (reasonable fit because statute “carves out exceptions”); *Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015) (reasonable fit because “a person for whom a parent's signature is not available can appeal to the Director of the Illinois State Police”). There are only limited exceptions here, and no individualized assessment of any sort...

Ultimately, in applying intermediate scrutiny, the district court had to do two things: identify the proper legal test for “reasonable fit,” and measure the semiautomatic rifle ban against that test. Properly identifying the legal standard is a question of law that we review de novo; applying it is a mixed question that we review for abuse of discretion. The district court used the wrong legal rule. Because the district court misapprehended the intermediate scrutiny test, it abused its discretion by getting the law wrong...

The district court also erred in its analysis of the irreparable harm preliminary injunction factor. “[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (internal quotation marks omitted)...

## V

In conclusion, the district court erred by holding that the California laws did not burden Second Amendment rights. It properly applied intermediate scrutiny to the long gun regulation and did not abuse its discretion in finding it likely to survive. But it erred in applying intermediate scrutiny to the semiautomatic rifle ban. And even if intermediate scrutiny applied, the district court abused its discretion in finding the ban likely to survive. Finally, the district court erred in its application of the irreparable harm factor. Thus, as to the long gun regulation, the district court's order is **AFFIRMED**. And as to the semiautomatic centerfire rifle ban, the district court's order is **REVERSED**.

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<sup>25</sup> The law actually sweeps even more broadly that, because the 400 times over regulation figure does not account for repeat offenders. And the denominator is also inflated because it includes all violent crimes, not just homicide and manslaughter.

We **REMAND** the case to the district court for further proceedings consistent with this opinion.

LEE, Circuit Judge, concurring:

As explained in Judge Nelson's excellent opinion, California's law effectively banning the sale or transfer of semiautomatic firearms to young adults conflicts with the text, tradition, and history of the Second Amendment. I join the opinion in full but write separately to highlight how California's legal position has no logical stopping point and would ultimately erode fundamental rights enumerated in our Constitution. Simply put, we cannot jettison our constitutional rights, even if the goal behind a law is laudable.

California justifies its law by citing statistics showing that young adults constitute less than 5% of the population but represent more than 15% of homicide and manslaughter arrests. The state argues that intermediate scrutiny should apply and that it survives that test because the law is a “reasonable fit” for the state’s important public safety goal. But even assuming intermediate scrutiny applies, the state's assertion of a “reasonable fit” reduces that requirement to a malleable and meaningless limit on the government's power to restrict constitutional rights. As the majority opinion capably points out, only 0.25% of young adults commit violent crimes. So California limits the rights of 99.75% of young adults based on the bad acts of an incredibly small sliver of the young adult population. That is not a “reasonable fit.”

If we accept the state's argument, it redefines intermediate scrutiny as a rational basis review with a small sprinkle of skepticism in Second Amendment cases. And that would allow the government to trample over constitutional rights just by relying on anecdotal evidence and questionable statistics that loosely relate to a worthwhile government goal. If California can deny the Second Amendment right to young adults based on their group’s disproportionate involvement in violent crimes, then the government can deny that right—as well as other rights—to other groups. For example, California arguably has a more compelling case if it enacts a similar gun-control law that targets males of all ages instead of young adults. Statistics—and science—show that men almost exclusively commit violent crimes. Take mass shootings for instance. Men have been involved in *99%* of all mass shootings in America since 1966, according to a database maintained by the Violence Project.<sup>2</sup>

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<sup>2</sup>The Violence Project Database, <https://www.theviolenceproject.org/mass-shooter-database/> (last visited December 15, 2021). Of the 172 mass shootings since 1966, only four of them involved women. But of the four, two of them were assisting their male counterparts in the mass shooting. The organization used Congressional Research Service's definition of a mass shooting, *i.e.*, “a multiple homicide incident in which four or more victims are murdered with firearms . . . within one event, and at least some of the murders occurred in a public location

California can thus theoretically claim that if men cannot own firearms, it will eliminate 99% of mass shootings.

But as tempting as that solution may sound to some, such a law almost certainly would not pass constitutional muster. And the reason is obvious: its scope would not be remotely, let alone reasonably, tailored to the praiseworthy goal of curbing gun violence. *Cf. Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480, (1989) (requiring the “governmental goal to be substantial, and the cost to be carefully calculated” under intermediate scrutiny). While men constitute almost all mass shooters, 99.9999%<sup>4</sup> of men are not mass shooters. In other words, such a hypothetical law would strip all men of their Second Amendment rights based on the actions of 0.000001% of the male population.

The Supreme Court rejected such tenuous logic in *Craig v. Boren* when it struck down a state law banning the sale of some beer to young men, who overwhelmingly are much likelier than young women to drive under the influence and cause car accident deaths. 429 U.S. 190 (1976). Applying intermediate scrutiny for gender-based classifications, the Court acknowledged the statistical disparity but held that the state cannot use “a gender line as a classifying device.” *Id.* at 201. Even though that state law would have likely saved thousands of lives—almost certainly more so than California’s law—the Court invalidated it because good intentions alone cannot salvage a law.

So, too, here. To accept the state’s argument would mean allowing the government to restrict *individuals’* enumerated constitutional rights based solely on their *group* membership. Unlike other gun-control laws that target a person’s specific and individual characteristics or actions (*e.g.*, commission of felony, mental illness), California’s law strips individuals of their fundamental constitutional rights based solely on what other people in their group may have committed in the past. That is antithetical to the very nature of individual rights and leads us down a dark path. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656, (1972) (the Bill of Rights protects the “citizenry from overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.”).

We also do not typically limit constitutional rights based on the age of adults. Young adults have the same constitutional rights as the middle-aged or the elderly—even if some of them may not necessarily have the wisdom or

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or locations in close geographical proximity . . . and the murders are not attributable to any other underlying criminal activity or commonplace circumstance.”

<sup>4</sup> Since 1966, there have been 170 mass shootings involving men. According to the U.S. Census estimate, there were 163,073,046 males as of 2020. See <https://www.census.gov/quickfacts/fact/table/US/PST045219#PST045219> (last visited Dec. 15, 2021). That means that only 0.0001% of the male population committed a mass shooting. And even that miniscule percentage is still inflated because it assumes a static denominator based on the male population as of 2020 instead of all males alive since 1966.

judgment that age and experience can bring—for the same reason that we do not limit fundamental rights based on supposed intelligence, maturity, or other characteristics. We thus allow 18-year-olds to join the military and lay down their lives in defense of our freedoms. We even allow minors to take actions that their parents may strongly oppose: the Supreme Court has held that parents and the government must yield to the wishes of, say, a 14 or 15-year-old who wants an abortion. *Bellotti v. Baird*, 428 U.S. 132, (1976).

None of this is to downplay the tragedy of gun violence. Although we must remain impartial as judges, we are citizens, too. And whenever we hear of gun violence, our stomachs sink and our hearts break for those who have lost families or friends in these terrible and tragic events. But only a tiny number of people abuse their rights and wield guns for unlawful violence. Such cold numbers admittedly offer little solace to those who have lost loved ones because of gun violence, but it does provide a perspective on whether we should restrict a constitutional right for the larger population based on a minuscule percentage of the populace who abuses that right.

Our Constitution provides a guarantee of our rights and freedoms. For the most part, people exercise their rights in responsible and productive ways. A tiny percentage, however, does not. But we should not sanction restricting a constitutional right by solely focusing on the few who abuse it.

As judges and lawyers, we revere the First Amendment as a core fundamental right. And rightfully so: It has allowed Americans to protest unjust wars abroad as well as racism and other injustices on our soil, changing this country for the better. But in our paeans to the First Amendment, we sometimes forget that the right also allows the people to do horrendous things. The First Amendment thus empowers Nazis to march down Main Street in the predominantly Jewish suburb of Skokie. *See National Socialist Party v. Village of Skokie*, 432 U.S. 43, 43-44 (1977). It also allows amoral and perhaps immoral businesspeople to invoke the majesty of our Constitution to market despicable videogames to minors, even though they depict people being “dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces,” and encourage players to engage in “ethnic cleansing’ [of] . . . African-Americans, Latinos, or Jews” and to “rape a mother and her daughters” in the videogames. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 789-804 (2011) (invalidating law restricting violent videogames).

But we do not impinge on the First Amendment based on the outlier actions of a few who may abuse that right. Nor should we with the Second Amendment. *Cf. Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (the Second Amendment “inquiry bears strong analogies to the Supreme Court’s free-speech caselaw”); *Ezell v. City of Chicago*, 651 F.3d 684, 706-07 (7th Cir. 2011) (“*Heller* and *McDonald* suggest that First Amendment analogues are more appropriate, and . . . have already begun to adapt First Amendment doctrine to the Second Amendment context”).



In sum, we cannot allow good intentions to trump an enumerated and “fundamental right” deeply rooted in the history and tradition of this country. *See McDonald*, 561 U.S. at 778.

STEIN, District Judge, dissenting in part:...

Aside from the explicit exceptions contained in section 27510, California has preserved several avenues for young adults to possess and use long guns, including semiautomatic rifles. Contrary to plaintiffs’ contentions, section 27510 does not regulate possession or use; rather, it merely regulates the purchase of firearms through FFLs. California emphasizes that, as long as young adults follow otherwise applicable California laws, they may *use* long guns, including semiautomatic rifles for self-defense in the home or elsewhere and for a number of other lawful purposes.

Indeed, the challenged regulations permit acquisition and loan of long guns, including semiautomatic rifles, in several ways. For instance, young adults may receive long guns from immediate family “by gift, bequest, intestate succession, or other means from one individual to another[.]” Cal. Penal Code §§ 16720, 27505, 27585. Young adults may also be loaned firearms, including handguns, from a wide range of people for varying periods of time, *see* Cal. Penal Code §§ 27880, 27885, or for the entirety of a hunting season if they are licensed hunters. Cal. Penal Code § 2795...

Given the statute’s several qualifications and exemptions, I disagree with the majority’s conclusion that the semiautomatic rifle regulation constitutes a ban on commerce and conclude instead that the regulation is “consistent with a longstanding tradition of targeting select groups’ ability to access and to use arms for the sake of public safety.”...

I also take issue with the majority’s repeated reference to the historic age of militia service—around 16 years—to support the notion that young adults have a Second Amendment right to bear arms. Majority at 23. Despite its insistence that “[t]he right is not conditioned on militia service,” *id.* at 31 (emphasis removed), the majority makes the following syllogism: “[t]he Second Amendment refers to the militia, and young adults had to be in the militia and bring their own firearms. This reference implies at least that young adults needed to have their own firearms.” *Id.* at 30. In drawing this conclusion, the majority makes the same mistake as plaintiffs in confusing “the age for military service with the separate question of the age at which society can draw a line at the sale of firearms to minors.” Regardless, the district court reminds us that even “[m]ilitias were well regulated by each state in the Founding Era.” *Jones*, 498 F. Supp. 3d at 1327. For example, “members of the militia were required to meet regularly for weapons inspection and registration, and members who did not show up with the required equipment could be fined.” *Id.*

The lower court was correct to deduce that the regulations on militia duty “demonstrate that as far back as the Founding Era, firearm regulations were considered necessary and an individual's right to firearm possession came with obligations to ensure public safety.” *Id.* If young adults were historically members of the militia, then these regulations would have applied equally to them...

While I do not dispute that the semiautomatic rifle regulation places burdens on young adults who wish to purchase or otherwise receive semiautomatic centerfire rifles from FFLs, I do not find that it is a “severe burden” on young adults’ Second Amendment rights. Even if the regulation means most young adults are “unable to purchase a subset of semiautomatic weapons” from FFLs, this “does not significantly burden the right to self-defense in the home.” *Pena*, 898 F.3d at 978. As the majority acknowledges, young adults still have access to reasonable alternatives for self-defense in the home, including the shotgun and other forms of long gun. Moreover, the time-limited nature of the regulation and the various avenues it leaves open to young adult possession of semiautomatic centerfire rifles mitigate its severity...

In sum, the district court was correct to hold that both the long gun regulation and the semiautomatic rifle regulation do not impermissibly burden Second Amendment rights...

## 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 18-20 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).

## 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 Circuit Court of Appeals that has addressed the issue.

However, Judge Kevin Newsom, author of the panel opinion, also wrote a concurring opinion with 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 legal permanent residency) to affiliate with the American republic.

## ***F. PERSONS SUSPECTED OF BEING DANGEROUS***

### ***1. Red Flag Laws***

A new study of Red Flag laws finds no statistically significant changes in homicide or suicide rates from the enactment of red flag laws. K. Alexander Adams, *Are There Any Red Flags for ‘Red Flag Laws’?*, Duke Ctr. for Firearms L. (Aug. 4, 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).

Online Chapter 19.B provides a detailed explanation of statistical significance, and of other statistics issues. In short, statistical significance generally means that the data show it is at least 95% likely that observed changes in B were caused by A. A study that shows no statistically significant relationship between A and B does not prove that A never affects B (for good or ill). Rather, it simply means that any effects are so rare or small that it cannot be said with confidence that A influences B.

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# WHERE? RIGHT TO CARRY

## *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 (2022).

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# WHAT? LAWS ON TYPES OF ARMS

## A. “ASSAULT WEAPON” AND MAGAZINE BANS

The Suffolk County, N.Y., police ordered registered owners of the Delta Level Defense CT4-2A handgun to surrender them within 15 days or be criminally prosecuted. Plaintiffs sued, arguing that the handgun is lawful under New York State law. The Second Circuit held that the plaintiffs did not have standing, because the police had not arrested anyone yet nor had the police forcibly taken any guns from noncompliant owners. *John Does 1-10 v. Suffolk County*, No. 21-1658 (2d Cir. 2022) (nonprecedential summary order). The decision reflects the federal courts’ general reluctance to hear pre-enforcement challenges to criminal laws.

### NOTES & QUESTIONS

20. [New Note] *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 will doubtless result in reassessment of federal decisions upholding “assault weapon” bans (see Part II of *Bruen* for a discussion of the relevant standards for judicial review in Second Amendment cases).

*Kolbe*’s alternate holding is that Maryland’s ban is valid under intermediate scrutiny. *Bruen* specifically rejects the application of intermediate scrutiny analysis in Second Amendment cases. After *Bruen*, the Supreme Court granted review, vacated, and remanded (GVR’d) for reconsideration in light of *Bruen* the Fourth Circuit’s decision in *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), which relied on *Kolbe* to uphold Maryland’s “assault weapon” and LCM bans.

The first issue in such cases will be whether possessing “assault weapons” and LCMs is protected conduct under the Second Amendment. See Note 2, above. Assuming they are, the next issue will be whether the government can show that the ban is consistent with our historical tradition of firearm regulation. If there are few or no direct examples of such bans, the inquiry then will turn to whether there are relevant and well-established historical analogues. If there are no such analogues, then some courts may declare such

bans unconstitutional, while other courts may latch onto a passage in *Bruen*, viewed in isolation, to uphold the law. For example, a court may say that these bans do not address “a general societal problem that has persisted since the 18th century,” *Bruen*, 142 S. Ct. at 2131, but a novel modern problem—extraordinarily lethal firearms and mass shootings—and justify them on nonhistorical grounds. Thus, lower courts still may invoke “assault weapon” lethality or reducing mass shootings as proper justifications for upholding such bans. Would this reasoning be permissible after *Bruen*? How do you think lower courts will apply the *Bruen* test to “assault weapon” and LCM bans?

### ***C. NONFIREARM ARMS***

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*, 2022 WL 782547 (D.R.I. Mar. 15, 2022).

### ***D. NEW TECHNOLOGIES***

#### ***2. Homemade Guns, Computer Numerical Control (CNC), and 3D Printing***

According to the [Giffords Law Center](#), the District of Columbia, and ten states (California, Connecticut, Delaware, Hawaii, Nevada, New Jersey, New York, Rhode Island, Virginia, and Washington) have enacted laws to restrict homemade firearms, as have some cities. The Nevada provision has been held to violate the Second Amendment. *Polymer 80, Inc. v. Sisolak, et al.*, No. 21-CV-00690, Order on Motions for Summary Judgment (Nev. 3rd Dist. Dec. 10, 2021). The decision is being appealed.

Anonymous users of websites that disseminate instructions for 3D printing of firearms uploaded instructions for printing parts and accessories with marks belonging to Everytown for Gun Safety. Everytown sued, alleging trademark infringement; defendants argued that the marks were parody, which is an exception to trademark protection. The Second Circuit remanded the case to the district court to determine whether the defendants can proceed anonymously. *Everytown for Gun Safety Action Fund v. Defcad, Inc., et al.*, No. 22-1183 (2d Cir. July 12, 2022) (nonprecedential summary order).

For the ATF’s new regulation on homemade firearms, see 2022 Supplement Chapter 9.D.

### ***3. Improved Triggers and Other Modifications***

See 2022 Supplement Chapter 8.E.2.b for ATF's new enforcement actions against Forced Reset Triggers, with the Bureau expressly distinguishing from binary triggers.

## ***E. BANS BY OTHER MEANS: USING GENERAL LAWS OR APPROVED GUN LISTS TO BAN FIREARMS AND AMMUNITION***

### ***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 Prof. Donald Kilmer, coauthor of this textbook. See [Complaint](#), *Junior Sports Magazines v. Bonta*, No. 2:22-CV-04663 (C.D. Cal., July 8, 2022).

#### **b. [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 much longer than the 1996 version.

## ***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.

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# HOW AND WHY? OTHER RESTRICTIONS

## *C. WAITING PERIODS AND LICENSING*

In 2015 Wisconsin repeal its two-day waiting period in 2015, and in 2018 Florida enacted 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).

## *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 banc 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).

### ***E. GUN CONTROL BY NONSTATE ACTORS***

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).

### ***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.

#### **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.<sup>1</sup> 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 eastern Ukraine—just as Ukrainian partisans resisted Nazi and Soviet invaders in the twentieth century.

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<sup>1</sup> 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.

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](#), StrategyPage.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).