No. 21-1832

In The United States Court of Appeals
For the Third Circuit

MADISON M. LARA, SOPHIA KNEPLEY, LOGAN D. MILLER, SECOND AMENDMENT FOUNDATION, INC., AND FIREARMS POLICY COALITION, INC.,

Plaintiffs-Appellants,

v.

COMMISSIONER PENNSYLVANIA STATE POLICE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (20-cv-1582)
(Hon. William S. Stickman, IV, Presiding)

REPLY LETTER BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The plain text of the Second Amendment provides that "[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. Plaintiffs, like presumptively "all Americans," are part of "the people" to whom the Second Amendment right extends. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). Under the Supreme Court's precedents in *Heller* and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), it thus becomes the obligation of the government, here the Commissioner, to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. Then and "[*o*]*nly then* may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id*. (internal quotation marks omitted) (emphasis added). Nothing in the Commissioner's Letter Brief, prior briefing, or submissions to the court below summons the requisite historical evidence to justify the carry ban on Plaintiffs and other law-abiding 18-to-20-year-olds. Accordingly, this Court should reverse and remand for entry of an injunction in Plaintiffs' favor.

I. The burden is on the Commissioner to justify his infringement of Plaintiffs' Second Amendment rights.

Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. To counter this presumptive protection, the government must "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to

keep and bear arms." *Id.* at 2127. In fact, *Bruen* could not be clearer in its holding that it is *the government* that bears the burden of justifying its firearm regulations. *See id.* at 2130 ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."); *id.* at 2135 (explaining "the burden falls on respondents"); *id.* at 2138 (holding that "respondents have failed to meet *their burden* to identify an American tradition" (emphasis added)). Here, the Commissioner is unable to meet his burden under *Heller* and *Bruen* to justify Pennsylvania's restrictions, so the Commissioner initially seeks to flip the burden, claiming that law-abiding 18-20-year-olds are not part of "the People" for whom the Second Amendment's protection applies. *See* Letter Br. of Def.-Appellee at 7–10, Doc. 57 (July 25, 2022) ("Comm'r Letter Br."). The Commissioner's argument is flatly contradicted by *Heller*.

In *Heller*, the Supreme Court carefully explained who are "the people" referred to by the Second Amendment's "plain text." *Bruen*, 142 S. Ct. at 2126. "[T]he people" is a "term" that "unambiguously refers to *all members* of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. After all, the Constitution refers to "the people" in "six other provisions." *Id*. It is thus a

> term of art employed in select parts of the Constitution . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990)). Accordingly, *Heller* held that the use of the term "the people" created a "strong presumption that the

Second Amendment right is exercised individually and belongs to *all Americans*." *Id*. at 581 (emphasis added).

Heller thus leaves no doubt that the Second Amendment's plain text covers law-abiding 18-to-20-year-olds. And, if there were any doubt, the Second Amendment's reference to the "militia" is added evidence that the right fully vests by age 18. Just months after ratification of the Second Amendment, Congress enacted the Militia Act of 1792, which required all able-bodied men to enroll in the militia and to arm themselves upon turning 18. *See* 1 Stat. 271 (1792). This Act reflected the widespread understanding from the Founding era that citizens reached the age for militia membership by 18—an understanding that simply cannot be squared with the notion that these Plaintiffs, ordinary 18-to-20-year-olds, fall outside the Second Amendment's protective scope. *See Jones v. Bonta*, 34 F.4th 704, 719 (9th Cir. 2022); *Nat'l Rifle Ass'n, Inc. v. BATFE*, 714 F.3d 334, 342 (5th Cir. 2013) (Jones, J., dissenting from the denial of rehearing en banc); *Hirschfeld v. BATFE*, 5 F.4th 407, 453–57 (4th Cir. 2021) (collecting Founding-era militia laws), vacating as moot, 2021 WL 4301564 (4th Cir. Sept. 22, 2021).

The Commissioner argues that this conflates 18-to-20-year-olds' duty to serve in the militia with a right to publicly carry arms for self-defense. *See* Comm'r Letter Br. at 11. Yet the fact that 18-to-20-year-olds were members of the militia is direct evidence that they are among "the people" to whom the Second Amendment applies. As explained in *Heller*, one of the Second Amendment's purposes was "to prevent elimination of the militia . . . by taking away their arms." *Heller*, 554 U.S. at 599. This was the very "reason that [the] right [to keep and bear arms] was codified in a written Constitution." *Id.* Since 18-to-

20-year-olds were universally considered to be among the pool of "able-bodied" citizens in the militia, it would make no sense to conclude that those same individuals were not part of "the people." It would be an empty safeguard indeed if a significant class of the militia were not actually guaranteed a Second Amendment right, and the government could simply take away their arms.

At bottom, the Commissioner asks this Court to reject *Heller*'s holding that "the people" refers to "all Americans" and instead craft a gerrymandered definition of "the people." Unless the Commissioner is arguing that this Court should throw overboard a whole host of constitutional rights that apply to 18-to-20-year-olds by categorically excluding them from "the people" under the Constitution, the Commissioner must be requesting that this Court craft a heretofore unknown exception to "the people." If this were correct, 18-to-20-year-olds would be part of "the people" for the First Amendment, but not part of "the people" for the Second Amendment. Yet *Bruen* counsels that this Court must look at the Second Amendment's "plain text," and the Commissioner has identified *zero* textually demonstrable evidence that "the people" means one group in one constitutional amendment and a different group in another. Moreover, the Supreme Court in *Bruen* counseled that the *Heller* standard "accords with how we protect *other* constitutional rights" like "the freedom of speech in the First Amendment." *Bruen*, 142 S. Ct. at 2130 (emphasis added). In other words, these rights (and the people to whom they apply) are not to be treated differently because to do so would treat "the constitutional right to bear arms in public for self-defense" as a "second-class right." *Id.* at 2156. But that is just what the Commissioner seeks to have this Court do.

In truth, as then-Judge Barrett explained, it would be "analytically awkward" to adopt the Commissioner's approach and divvy up the members of our national community as part of "the people" or not. *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). "That is an unusual way of thinking about rights." *Id.* at 452. For instance, "[n]either felons nor the mentally ill are categorically excluded from our national community." *Id.* at 453. Yet "[t]hat does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of a right that *they otherwise possess*." *Id.* (emphasis added). *Bruen* teaches that if the government seeks the power to disable or limit the exercise of the Second Amendment right, as the Commissioner has with respect to 18-to-20-year-olds, then the *government* bears the burden of proving its claimed power is part of historical tradition. In other words, because 18-to-20-year-olds are members of "the people," the government bears the burden to prove any limitation on their right to keep and bear arms on account of their age is "consistent with this Nation's historical tradition." *Id.*

II. The Commissioner fails to demonstrate that Pennsylvania's restrictions are consistent with the relevant historical tradition.

The Commissioner's letter brief fails to follow *Bruen*'s instructions regarding his burden to "justify [the] regulation[s] by demonstrating [they are] consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. In doing so, the Commissioner asks this Court to emphasize the wrong time period with evidence that, even if relevant, fails for the reasons that Plaintiffs have previously discussed.

First, *Bruen* is another case in the Supreme Court's long tradition of treating evidence surrounding 1791 and the founding as generally dispositive of the contours of incorporated Constitutional rights. "[W]hen it comes to interpreting the Constitution, not all history is created equal." *Bruen*, 142 S. Ct. at 2136. That is why courts "must . . . guard against giving postenactment history more weight than it can rightly bear." *Id.* "As [the Court] recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms came '75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Id.* at 2137 (quoting *Heller*, 554 U.S. at 614); *see also Sprint Communications Co. v. APCC Servs., Inc.,* 554 U.S. 269, 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]"). In fact, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Bruen*, 142 S. Ct. at 2137 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274, n. 6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

Bruen thus establishes that this court must prioritize Founding era evidence, while evidence from around the "mid- to late- 19th century" is at most "secondary." *Bruen*, 142 S. Ct. at 2137. "19th-century evidence [is] treated as mere confirmation of what the Court thought had *already been established*" in the Founding era. *Id.* (emphasis added). This makes sense because the "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." *Id.* (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397

(2020); *Timbs v. Indiana*, 139 S. Ct. 682, 686–687 (2019); *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)). And regardless of any other debate, there is no dispute that 1791 is when the Bill of Rights limited the Federal Government. Thus, in order to ensure uniformity of incorporated rights with respect to the Federal Government and the States, 1791 is the relevant time to "peg[] . . . the public understanding of the right." *Bruen*, 142 S. Ct. at 2137; *see also McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (noting the Court's "decisive[]" holding "that incorporated Bill of Rights protections 'are all to be enforced against the States . . . according to the same standards that protect those personal rights against federal encroachment'" (quoting *Malloy*, 378 U.S. at 10)).[1]

Second, the Commissioner's evidence from the Founding era is sparse and fails to justify the outright ban on public carry by 18-to-20-year-olds. The Commissioner again points to the fact that the age of majority was 21. This argument is severely flawed. To begin with, the Commissioner bases his argument, in part, on the greater "parental control" and "authority" that parents had over their 18-to-20-year-old children at the Founding. But the relevant inquiry is what *government* could restrict through enactment, not what parental prerogatives existed. *Cf. Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 795 n.3 (2011) (explaining that the bounds of permissible "parental authority" is a separate inquiry from the scope of "governmental authority"). But, perhaps more importantly, "the age of majority—even at the Founding—lacks meaning without reference to a particular right,"

[1] As the extensive historical analysis of the Reconstruction period in *McDonald* shows, the evidence around Reconstruction is most relevant to determining *whether* a right has been incorporated, 561 U.S. at 777, while the content of that right is the public understanding in 1791.

because, "[f]or example, a man could take an oath at age 12, be capitally punished in a criminal case at age 14, and serve as an executor at age 17." *Bonta*, 34 F.4th at 719. Thus, it is not enough to say that certain individuals were under the age of majority, rather the Commissioner must further demonstrate that the lack of majority had specific consequences when it came to the public carrying of firearms. Only then would this evidence be a "relevantly similar" historical analogue. *Bruen*, 142 S. Ct. at 1231. Yet the Commissioner points to no tradition at the Founding in which governments tied the age of majority to public carry of firearms for self-defense. *See* Reply Br. of Pls.-Appellants at 15–17, Doc. 38 (Oct. 13, 2021) ("Reply Br."). Since there have been 18-to-20-year-olds from time immemorial, the absence of any comparable *carry* regulation for 18-to-20-year-olds during the Founding era is dispositive of the Commissioner's arguments to justify the ban here. *See Bruen*, 142 S. Ct. at 2131.

Recognizing the absence of "affirmative[]" Founding era evidence that *Bruen* requires, *id.* at 2127, the Commissioner turns to the mid- to late-19th century and early 20th century laws. As explained in Plaintiffs' prior briefing, this evidence comes too late, is not "relevantly similar" under *Bruen*, and typifies a "freewheeling reliance" on postenactment history that the Supreme Court has repeatedly rejected. 142 S. Ct. at 2132; *id*. at 2163 (Barrett, J., concurring); *see* Opening Letter Br. of Pls.-Appellants at 10–13, Doc. 56 (July 25, 2022). At any rate, that evidence *at most* would support restrictions *on minors*. The Commissioner does not have any evidence from any relevant historical period of an age-based restriction on the right to arms of legal adults. What history shows, instead, is that constitutional rights were fully vested by the age of legal adulthood—an age that

now is 18. *See, e.g.*, JOHN BOUVIER, 1 INSTITUTES OF AMERICAN LAW 148 (1851) (by age of majority "every man is in full enjoyment of his civil and political rights").

III. The Commissioner's other arguments are unavailing.

In his letter brief, the Commissioner recycles other arguments in an attempt to persuade this Court not to reach the merits and vindicate the Second Amendment rights of Plaintiffs and law-abiding 18-to-20-year-olds. None has any merit.

First, the Commissioner argues that this case is moot "because of recent amendments to the Pennsylvania Constitution, there is no future possibility of a public health related emergency declaration lasting for years." Comm'r Letter Br. at 15. This is inaccurate. Under the Pennsylvania Constitution, as amended, "A disaster emergency declaration . . . shall be in effect for no more than twenty-one (21) days, *unless otherwise extended* in whole or part by concurrent resolution of the General Assembly." PA. CONST. art. IV, § 20 (emphasis added). Thus, while the Governor can no longer independently establish an indefinite emergency, the Governor in conjunction with the General Assembly *can*. At any rate, a 21-day emergency declaration would infringe Second Amendment rights while in effect as much as a longer declaration would. Thus, for the reasons explained in Plaintiffs' earlier briefing, this case is not moot and the injuries related to the emergency declarations are "capable of repetition yet evading review." *See* Supp. Resp. Br. of Pls-Appellants at 4–7, Doc. 44 (Nov. 18, 2021).

Second, the Commissioner argues that Plaintiffs can "transport firearms to-and-from various places . . . Pennsylvania law affords [Plaintiffs] the ability to do everything that they requested in their complaint." Comm'r Letter Br. at 2. Here too, this is another

inaccurate statement of what Plaintiffs seek. Plaintiffs were quite explicit in seeking to exercise their right to transport firearms in more than just shuttling between designated locations. Plaintiffs have alleged that Pennsylvania law would prevent them from even "stop[ping] for a bathroom break[], food, coffee, or to pick up or drop off a friend, when going to or from: (i) A range, (ii) Target shooting, (iii) A place of purchase to [her] home or place of business, (iv) A place of repair, sale or appraisal; (v) A place of abode or business to another; and (vi) A place where she desires to hunt." J.A. 45–46. In other words, Plaintiffs still may not lawfully transport firearms in very basic situations of everyday life.

Third, the Commissioner argues that Plaintiffs "tacitly acknowledged in their reply brief that the Eleventh Amendment bars their ability to challenge the restriction on 18-to-20-year-olds from obtaining concealed-carry licenses in the context of this case." Comm'r Letter Br. at 14. But Plaintiffs have not conceded that the Court lacks ability to provide them with effective relief. In Plaintiffs' Reply Brief, Plaintiffs explicitly argued that this Court can provide Plaintiffs effective relief by enjoining the Commissioner "from arresting 18-to-20-year-olds for openly carrying firearms during an emergency in violation of Sections 6106 and 6107, [which] would also relieve Plaintiffs' injuries." Reply Br. at 4. The Commissioner also could be enjoined from arresting 18-to-20-year-olds for transporting firearms in ways that licensed carriers could lawfully transport them under Section 6106. There is no bar to effective relief by this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for entry of an injunction in Plaintiffs' favor.

Dated: August 8, 2022

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

Dated: August 8, 2022

s/ David H. Thompson
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume and type-style limitations of this Court's order, Doc. 55 (July 5, 2022), because this brief contains 10 pages, double-spaced, in 13-point font excluding the parts of the brief exempted by FED. R. APP. P. 32(f). This brief otherwise complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in Times New Roman font.

As required by L.A.R. 31.1(c), the text of the electronic brief is identical to the text in the paper copies.

The Portable Document Format version of the attached document has been scanned for viruses using VirusTotal Antivirus Software, and according to that program, the document is free of viruses.

Dated: August 8, 2022

s/ David H. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 8, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 8, 2022

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