COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

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August 8, 2022

RE: *Lara, et al. v. Comm'r Pa. State Police*, No. 21-1832
Appellee's Reply to Appellants' Letter Brief

Appellee, the Commissioner of the Pennsylvania State Police, respectfully submits this reply to Appellants' letter brief addressing the impact of *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111 (2022). Although *Bruen* did not address, let alone resolve, the validity of firearms restrictions on 18-to-20-year-olds, Appellants nonetheless insist that *Bruen* is dispositive of the issue and requires reversal of the District Court's judgment. Their arguments reveal their fundamental misapprehension of *Bruen*. That misapprehension is outmatched only by their misunderstanding of how the public-carry restrictions in the Uniform Firearms Act (UFA) actually impact 18-to-20-year-olds.

Even if the plain text of the Second Amendment covered 18-to-20-year-olds—and it does not—the Commissioner nonetheless satisfied his burden of demonstrating that the UFA's modest public-carry restrictions are "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126.

I. The UFA places modest restrictions on 18-to-20-year-olds, who may still possess firearms, carry firearms openly in public, and transport firearms to-and-from various places.

As the District Court noted in its opinion, *see* J.A.9 (dist. ct. op), and as the Commissioner emphasized in his response brief, *see* 3d Cir. Dkt. No. 23 (response br. at

38-41), the UFA is not nearly as restrictive as Appellants contend. But in a contrived effort to save this case from being dismissed as moot, Appellants nonetheless persist in advancing their strained reading of the UFA, arguing that it effectuates an outright prohibition on 18-to-20-year-olds carrying and transporting firearms. That insistence reveals their misapprehension of the challenged provisions.

Under the UFA, Pennsylvanians 18 years-of-age and older can possess handguns and other firearms in their homes and places of business, and can carry firearms openly in public (so long as the Commonwealth is not in a proclaimed state of emergency). *See* 18 Pa.C.S. § 6110.1; 18 Pa.C.S. § 6106(a); 18 Pa.C.S. § 6107. Although the UFA makes it a crime for a person to carry a firearm "in any vehicle," or to carry a concealed firearm "on or about his person" without a valid license, *see* 18 Pa.C.S. § 1606(a), and 18-to-20-year-olds cannot obtain concealed carry licenses, *see* 18 Pa.C.S. § 6109, the UFA enumerates 15 exceptions to that requirement, *see* 18 Pa.C.S. § 1606(b). Those exceptions have no age limits, and allow 18-to-20-year-olds to carry concealed firearms if they are in law enforcement, the military, or National Guard, and to transport firearms to and from places of purchase, to and from places where they desire to hunt, and to and from places where they engage in target shooting. *See* 18 Pa.C.S. § 6106(b).

This Court must interpret the relevant provisions of UFA based on what they actually say, and not as Appellants misconstrue them. Appellants' assertion that the UFA effectuates a comprehensive ban on 18-to-20-year-olds' ability to transport and carry firearms simply has no grounding in the text of the UFA.

II. None of Appellants' arguments undermine the District Court's analysis.

As the Commissioner has argued throughout these proceedings, the challenged provisions do not implicate the Second Amendment. *See* 3d Cir. Dkt. No. 23 (response br. 20-35). For this reason, the District Court ended its analysis at "step-one" after it determined that 18-to-20-year-olds "fall outside the scope of the Second Amendment." J.A.24 (dist. ct. op.). The District Court reached that conclusion based the understanding at the time of the Founding and through most of the Nation's history that 18-to-20-year-olds were considered "minors," and it looked to analogous firearms restrictions throughout history for affirmation of that understanding. J.A.16 (dist. ct. op.). *Bruen* confirmed that the District Court's approach was "broadly consistent" with the core right to keep and bear arms that the High Court first identified in *District of Columbia v. Heller*, 554 U.S. 570 (2008).[1]

As set forth in the Commissioner's letter brief, recent scholarship has reinforced the District Court's analysis. Given that 18-to-20-year-olds were considered minors both in 1791 when the Second Amendment was enacted and in 1868 when the Fourteenth

[1] Contrary to Appellants' letter brief, their own advocacy centered on step-two of the pre-*Bruen* framework. *See, e.g.*, 3d Cir. Dkt. No. 14 (br. at 42) ("[w]hile the district court elected not to proceed to an examination of the restrictions under a scrutiny analysis, [] this Court can and should conduct that analysis . . .") (citation and internal quotation marks omitted); 3d Cir. Dkt. No. 48 (reply br. at 21) ("[a]lthough the district court dismissed the case without deciding whether the challenged laws satisfy any heightened scrutiny, this Court should undertake that analysis in the first instance . . ."). Appellants' assertions that they have argued "since the beginning of this case" and "maintained throughout these proceedings" that means-ends scrutiny is inconsistent with the Second Amendment are belied by their prior filings. *See* 3d Cir. Dkt. No. 56 (letter br. at 1-4).

Appellants' assertion that the Commissioner encouraged this Court to adopt the two-step framework, but that *Bruen* rejected the "*Commissioner's* two-step inquiry" is also inaccurate. 3d Cir. Dkt. No. 56 (letter br. at 3) (emphasis added). The Commissioner did not invent the two-step inquiry or press this Court to adopt it, as it had already been adopted by this Court, and indeed every Court of Appeals in the country, before *Bruen*. When the Commissioner discussed means-ends scrutiny at all, it was to emphasize that the District Court should be given the opportunity to perform that analysis in the first instance. 3d Cir. Dkt. No. 23 (response br. at 50-51).

Amendment was enacted, there was "no credible legal argument that" they could have made "regarding a Second Amendment right to purchase or use a gun without the permission of a legal guardian." Saul Cornell, *"Infants" and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, Yale L. & Pol'y Rev., Inter Alia (Oct. 26, 2021). It is thus unsurprising that State and Federal laws restricting the ability of 18-to-20-year-olds to purchase, possess, and carry firearms are of considerable vintage. *See* 3d Cir. Dkt. No. 23 (response br. at 29-34).

In their effort to undermine the historical tradition of firearms regulations pertaining to 18-to-20-year-olds, Appellants advance a series of erroneous (and inconsistent) arguments. First, Appellants double-down on their incorrect assumption that certain Founding militia statutes established an unqualified right for 18-to-20-year-olds to keep and bear arms. Second, Appellants attempt to dismiss the dozens of 19th century laws restricting 18-to-20-year-olds, arguing that such laws came "far too late in time" to have any relevance. Third, Appellants argue (with no sense of irony) that contemporary laws giving 18-to-20-year-olds certain rights and privileges—which did not exist before the 1970s—requires this Court to expand the scope of the right to keep and bear arms well beyond the understanding of the generations that adopted the Second and Fourteenth Amendments. Each of these arguments will be discussed in turn.

A. Militia laws from the 18th century lend no support to Appellants' claim.

The Commissioner has already outlined the many flaws in Appellants' argument that certain Founding era militia statutes established an unqualified right to keep and bear

arms for 18-to-20-year-olds. Neither their reply brief nor their letter brief meaningfully addressed those flaws.

Appellants continue to muddle the distinction between duty and a right. The fact that the Federal government and certain States established *policy preferences* for including 18-to-20-year-olds in the militia at certain times did not automatically give those individuals unfettered Second Amendment rights that they could claim against the government. On the contrary, these laws often assumed that militiamen younger than 21 did not have the independent ability to acquire firearms, and therefore required their parents to provide them with arms. *See* Cornell, "*Infants," supra* at Table 1 (collecting statutes).

Appellants' argument is also undermined by the fact that there was no uniform minimum age for militia service, and that these laws frequently imposed a maximum age for militia service. *See NRA v. Swearingen*, 545 F.Supp.3d 1247, 1256-59 (N.D. Fla. 2021). When the Second Amendment was ratified in 1791—the period in time Appellants suggest is most relevant for determining the scope of the Second Amendment—nine states set the threshold for militia service at sixteen and seven states set the maximum age at fifty. *Id.* at 1257. The logical extension of Appellants' argument that militia laws in 1791 determine the scope of the Second Amendment would also require the invalidation of any contemporary law restricting 16-year-olds from purchasing, possessing, and carrying firearms, but would allow laws stripping 51-year-olds of the right to keep and bear arms.

Recognizing that absurdity, Appellants address it in passing by asserting that "shortly after" the Second Amendment was ratified the minimum age for militia service in every state "*became* eighteen." 3d Cir. Dkt No. 38 (reply br. at 17); 3d Cir. Dkt. No. 56

(letter br. at 8). Appellants do not indicate how "shortly" after 1791 the minimum age "became" eighteen: Vermont, for example, did not raise the minimum age from 16 to 18 until 1797. *See Jones v. Bonta*, 34 F.4th 704, 738 (9th Cir. 2022) (chart of post-ratification militia laws). But Appellants' emphasis on this post-ratification trend cannot be reconciled with their insistence that 1791 is the only relevant year when determining the scope of the Second Amendment, and it is difficult to square with their assertion that laws enacted on the heels of the Fourteenth Amendment cannot be considered at all.

Appellants also place a heavy reliance on the Federal Militia Act of 1792. That Act was limited to "every free able-bodied white male citizen . . . who is or shall be of the age of eighteen years, and under the age of forty-five years" and required those serving to "provide himself with a good musket or firelock." *See* Militia Act, 1 Stat. 271. § (1792). Importantly, however, that very same statute gave States inherent discretion to impose their own age qualifications. *See* Militia Act, 1 Stat. 271, § 2 (1792) ("all persons who are now or who may hereafter be exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty, notwithstanding their being above the age of 18"). Many states, like Pennsylvania, quickly availed themselves of this discretion and raised the minimum age to 21. *See, e.g.*, *An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania*, Act No. 1696 of March 30, 1793 (14 St.L., Ch. 1667).

The fact that the minimum age for militia service was in a constant state of flux both before and after the ratification of the Second Amendment is just one of the many reasons that Founding era militia laws are a problematic yardstick for determining the scope of the right to keep and bear arms. Indeed, for this reason, the High Court clarified that the scope

of the right is "unconnected with militia service." *Heller*, 554 U.S. at 582. Nonetheless, to the extent 1791 militia laws have any relevance, the UFA contains an exception for members of the Military and National Guard, and is thus entirely consistent with them. *See* 18 Pa.C.S. § 6106(b)(2).[2]

B. Appellants' effort to disregard 19th century age-based restrictions is inconsistent with *Bruen* and *Heller*.

Next, Appellants attempt to side-step the dozens of 19th century laws restricting 18-to-20-year-olds' ability to purchase, possess, and carry firearms by arguing that *Bruen* "forecloses" any reliance on those laws. That argument misconstrues the Court's opinion considerably.

Although the Court did clarify that "to the extent later history contradicts what the text says, the text controls[,]" *Bruen*, 142 S.Ct. at 2138, there is no contradiction here. At the time of the Founding and the enactment of the Fourteenth Amendment, 18-to-20-year-olds were considered minors and thus were not among "the people" covered by the right. *See* 3d Cir. Dkt. No. 57 (Commissioner's letter br. at 7-10). Founding era militia statutes—which presupposed parental oversight—and 19th century firearms laws—which often prohibited 18-to-20-year-olds from purchasing concealable handguns altogether—are entirely consistent with the understanding that 18-to-20-year-olds fell outside the scope of the Second Amendment.

[2] Contrary to Appellants' assertion, drawing a parallel between militia service during the Founding era, and service in the armed forces or National Guard in modern times is not mere "wordplay." 3d Cir Dkt. No. 38 (reply br. at 17-18). Although the Founding generation had a deep skepticism of standing armies and was "devoted to the idea of state control of the militia," modern statutes "essentially nationalized the function and control of the militia" and reorganized it "into the modern National Guard." Saul Cornell, *A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America*, pp. 37, 196 (2006).

Far from foreclosing all reliance on 19th century authorities, in both *Bruen* and *Heller* the Court looked to 19th century sources to confirm its analysis, finding Reconstruction era views about the scope of the Second Amendment particularly "instructive." *Heller*, 554 U.S. at 614; *Bruen*, 142 S.Ct. at 2146-47. In *Bruen*, the Court relied on 19th century statutes and court decisions as evidence that "concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry." 142 S.Ct. at 2146-47 (emphasis in original). And in *Heller*, the Court relied on Thomas M. Cooley's "massively popular" legal treatise written in 1868 as evidence that the Second Amendment's conferred a right unconnected to militia service. 554 U.S. at 616-17.That very same treatise also confirms that States have inherent police powers to "prohibit the sale of arms to minors." Thomas M. Cooley, *Treatise on Constitutional Limitations* (5th ed. 1883).

Further, the Court expressly stated that it was not resolving whether courts should primarily rely on the prevailing understanding of the right to keep and bear arms when the Fourteenth Amendment was ratified in 1868, or in 1791 when the Second Amendment was ratified. 142 S.Ct. at 2138 (citing A.Amar, *The Bill of Rights: Creation and Reconstruction*, xix, 223, 243 (1998) and K.Lash, *Re-Speaking the Bill of Rights: A new Doctrine of Incorporation* (Jan. 15, 2021), (manuscript, at 2)). It was unnecessary for the Court to definitively resolve that issue in *Bruen* because 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." *Ibid.* The same is true here: in both 1791 and 1868 18-to-20-year-olds were not considered among "the people" whom the Second Amendment protects.

Compare Zephaniah Swift, 1 *A System of the Laws of the State Of Connecticut* 213 (1795), *with* John Indermaur, *Principles of the Common Law*, 195 (Edmund H. Bennett ed., 1st Am. Ed. 1878).[3]

Appellants' effort to dismiss all 19th century evidence that is inconvenient for their historical narrative by focusing on dictum from the Court's opinion ignores how the Court actually utilized history from this era in both *Heller* and *Bruen*.

C. Appellants' attempt to use modern notions of young adulthood to interpret the scope of the Second Amendment is at war with *Bruen*.

Appellants maintain that it is improper to rely on the age of majority at the time of the Founding, and that this Court should instead look to the "modern standard of 18," 3d Cir. Dkt. No, 56 (letter br. 6-7.), which did not exist until the 1970s when the voting age was lowered. In addition to being inconsistent with their own arguments, this argument is inconsistent with *Bruen's* mandate that 20th century history be disregarded when it contradicts earlier history. 142 S.Ct. at 2154 n.28.

"[T]he Founders understood that not everyone possessed Second Amendment rights." *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 257 (3d Cir. 2016) (Hardiman, J., concurring in part); *see also Kanter v. Barr*, 919 F.3d 437, 451-52 (7th Cir.) (Barrett, J., dissenting) (quoting *Binderup*, supra). Both *Bruen* and *Heller* made clear that "Constitutional rights are enshrined with the scope they were understood to have when the

[3] Nonetheless, as the Commissioner noted in his letter brief, both of the scholars the High Court cited agree that the "[a]n originalist interpretation of the Fourteenth Amendment not only calls for an 1868 understanding of provisions in the Bill of Rights incorporated against the states . . ., it also requires an updated 1868 understanding of the Bill of Rights itself." Lash, *supra*, manuscript at 1-2 (citing, *inter alia*, Amar, *supra*); Amar, *supra* (the Fourteenth Amendment "transformed the nature of the original Bill of Rights, leaving us with something much closer to the Bill as conventionally understood today"); *see also Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021) (". . . the question is if the Second and Fourteenth Amendments' ratifiers approved [the challenged] regulations . . ..").

people adopted them." *Bruen*, 142 S.Ct. at 2136 (quoting *Heller*, 554 U.S at 634-35). Whatever future generations "or (yes) even future judges" think of that scope is irrelevant. *Binderup*, supra (quoting *Heller*, 554 U.S at 634-35).[4]

The fact that 18-to-20-year-olds are considered adults for certain purposes now has no bearing on whether the generations that adopted the Second and Fourteenth Amendments believed that they had the unfettered right to keep and bear arms. Appellants invite this Court to do precisely what *Bruen* and *Heller* instructed not to do: ascribe modern ideas about what the scope of the right ought to be to the generations that adopted the Second and Fourteenth Amendments. This Court should reject that invitation.

Respectfully,

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[4] This principle of course has its limits: *e.g.*, the fact blacks were not considered among "the people" in 1791 would obviously not justify contemporary laws that discriminate on the basis of race. *Drummond*, 9 F.4th at 228 n.8; *Kanter*, 919 F.3d at 458 n.7. But that is because of the enactment of the Fourteenth Amendment in 1868, not the Twenty-Sixth Amendment in 1971. And in contrast to the conscious effort by the Reconstruction era Congress to ensure that recently freed blacks would have the ability to secure arms in response to "systematic efforts" by Southern States to disarm them, *see Bruen*, 142 S.Ct. 2151-52, that same Reconstruction era Congress was unbothered by State laws disarming 18-to-20-year-olds. Laws restricting 18-to-20-year-olds have persisted since that time, even when voting rights were extended to that age group in the 1970s.

CERTIFICATE OF SERVICE

I, hereby certify that I have served the foregoing Reply to Appellants' Letter Brief, Commissioner Pennsylvania State Police, via CM/ECF, on the following:

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