No. 23-910

In The
Supreme Court of the United States

IVAN ANTONYUK, et al.,

Petitioners,

v.

STEVEN G. JAMES, in his official capacity as Acting Superintendent of the New York State Police, et al.,

Respondents.

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

BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Rifle Association of America ("NRA") is America's oldest civil rights organization and is widely recognized as America's foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their experiences in the Civil War, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA has approximately 4.2 million members, and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement.

The NRA has a significant interest in this case. Many NRA members wish to carry firearms for lawful purposes in the public places that the State now deems gun-free zones. Additionally, the NRA has a similar case challenging New York's "Concealed Carry Improvement Act" currently pending in the Northern District of New York. The outcome of the instant case will likely prove dispositive for some or all of the claims in that case.

[1] Pursuant to Supreme Court Rule 37.2, counsel has provided timely notice to the parties of the intent to file this brief. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in any part and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution for the preparation or submission or this brief.

SUMMARY OF ARGUMENT

The Second Circuit held that "1868 and 1791 are both focal points" of a Second Amendment analysis and that Reconstruction Era evidence is "at least as relevant as evidence from the Founding Era regarding the Second Amendment itself." *Antonyuk v. Chiumento*, 89 F.4th 271, 304, 318 n.27 (2d Cir. 2023). This decision added to a growing circuit split over which time period controls—a split that results in disparate outcomes in otherwise similar cases.

The Second Circuit's holding—like similar holdings by other courts—is contrary to this Court's precedents. This Court has strongly indicated that the original 1791 understanding of the Second Amendment controls. And that the significance of historical evidence depends on its proximity to the Founding. Even modern regulations that would have been unimaginable at the Founding require reasoning by analogy to the Founding generation's understanding of the right.

Three recent Supreme Court cases have considered Reconstruction Era evidence "secondary" to Founding Era evidence in Second Amendment analyses. These decisions align with this Court's jurisprudence regarding other provisions of the Bill of Rights, which are similarly pegged to their original Founding Era scope and understanding.

Nevertheless, lower courts continue to reach divergent conclusions on whether Founding Era or Reconstruction Era evidence controls. This Court should grant the Petition for Writ of Certiorari to

clarify that the Founding Era is the most relevant period in Second Amendment analyses.

ARGUMENT

I. Lower courts are divided over whether 1791 or 1868 is the most relevant period for a Second Amendment analysis.

Bruen left unresolved the question of "whether courts should primarily rely on the prevailing understanding of" the Second Amendment from when it was ratified in 1791 or "when the Fourteenth Amendment was ratified in 1868." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37 (2022). Lower courts have split over the question, taking several conflicting approaches.

A. Some courts have identified 1791 as the most relevant period.

Some courts have determined that the prevailing understanding of the Second Amendment in 1791 controls.

The Third Circuit recently held that "the Second Amendment should be understood according to its public meaning in 1791." *Lara v. Comm'r Pennsylvania State Police*, 91 F.4th 122, 134 (3d Cir. 2024). The court found no reason "for defining some rights according to their public meaning in 1791 and others according to their public meaning in 1868." *Id.* Moreover, the court noted, "*Bruen* has already instructed that historical evidence from 1791 is relevant to understanding the scope of the Second Amendment as incorporated against the states." *Id.*

Several other lower courts have concluded that 1791 is the most relevant period. "Because the Second Amendment was adopted in 1791," a West Virginia district court asserted, "only those regulations that would have been considered constitutional then can be constitutional now." *United States v. Price*, 635 F. Supp. 3d 455, 458 (S.D. W. Va. 2022). A California district court determined that "*Bruen* teaches the most significant historical evidence comes from 1791, and secondarily 1868." *Duncan v. Bonta*, No. 17-CV-1017-BEN (JLB), 2023 WL 6180472, at *20 (S.D. Cal. Sept. 22, 2023). An Oklahoma district court insisted that "the justification of modern restrictions still must be analogous to the justifications of Founding-era restrictions." *United States v. Harrison*, 654 F. Supp. 3d 1191, 1211 (W.D. Okla. 2023). And Minnesota's district court recognized "rather clear signs that the Supreme Court favors 1791." *Worth v. Harrington*, 666 F. Supp. 3d 902, 919 (D. Minn. 2023).

B. Some courts have identified 1868 as the most relevant period.

Some courts have determined that the prevailing understanding of the Second Amendment in 1868 controls.

The Second Circuit in this case asserted that "evidence from Reconstruction regarding the scope of the right to bear arms incorporated by the Fourteenth Amendment is at least as relevant as evidence from the Founding Era regarding the Second Amendment itself." *Antonyuk v. Chiumento*, 89 F.4th 271, 318 n.27 (2d Cir. 2023). Moreover, despite *Bruen* expressly declining to "address any of the 20th-century historical evidence," 571 U.S. at 66 n.28, and no such evidence

being considered in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Second Circuit embraced evidence from "the early-twentieth century and beyond," *Antonyuk*, 89 F.4th at 319.

Similarly, the Eleventh Circuit, in a case now being reheard *en banc*, held that the Second Amendment's "contours turn on the understanding that prevailed at the time of the later ratification–that is, when the Fourteenth Amendment was ratified." *National Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1323 (11th Cir.), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir. 2023).

Maryland's district court "agrees with the Eleventh Circuit's reasoning" and "conclud[ed] that historical sources from the time period of the ratification of the Fourteenth Amendment are equally if not more probative of the scope of the Second Amendment's right to bear arms as applied to the states by the Fourteenth Amendment." *Maryland Shall Issue, Inc. v. Montgomery Cnty., Maryland*, No. CV TDC-21-1736, 2023 WL 4373260, at *8 (D. Md. July 6, 2023). New Mexico's district court also "agrees with the Eleventh Circuit" and prioritizes Reconstruction Era evidence. *We the Patriots, Inc. v. Grisham*, No. 1:23-CV-00771-DHU-LF, 2023 WL 6622042, at *8 (D.N.M. Oct. 11, 2023).

The Third Circuit, however, took issue with the Eleventh Circuit's approach:

> *Bondi* overlooks that two generations of Americans ratified the Second and Fourteenth Amendments. If we are to

> construe the rights embodied in those amendments coextensively, as the Supreme Court has instructed we must, and if there is daylight between how each generation understood a particular right, we must pick between the two timeframes, and, as explained herein, we believe the better choice is the founding era.

Lara, 91 F.4th at 134 n.14. Minnesota's district court also rejected the Eleventh Circuit's approach: "*Bondi* does not mention the *Bruen* Court's warning to 'guard against giving postenactment history more weight than it can rightly bear.'" *Worth*, 666 F. Supp. 3d at 919 (quoting *Bruen*, 571 U.S. at 35). Moreover, "[t]he *Bruen* majority made no small effort to distance itself from even *Heller*'s reliance on postenactment history except to the extent that such history was consistent with the founding-era public meaning." *Id.* (citing *Bruen*, 571 U.S. at 35–36).

C. Some courts treat 1791 and 1868 evidence equally.

Some courts treat historical evidence from 1791 and 1868 as equally persuasive.

The Ninth Circuit, in a case now being reheard *en banc*, decided that the government could justify a ban on butterfly knives "by citing analogous regulations that were enacted close in time to the Second Amendment's adoption in 1791 *or* the Fourteenth Amendment's adoption in 1868." *Teter v. Lopez*, 76 F.4th 938, 950–51 (9th Cir. 2023), *reh'g en banc granted*, *opinion vacated*, 93 F.4th 1150 (9th Cir. 2024) (emphasis added); *see also id.* at 948 & n.7, 954.

Similarly, a New York district court deemed historical sources from both "around when the Second Amendment was adopted (1791) and when the Fourteenth Amendment was adopted (1868) a[s] particularly instructive." *Frey v. Nigrelli*, 661 F. Supp. 3d 176, 188 (S.D.N.Y. 2023). Hawaii's district court also gave equal weight to evidence from both periods, *Wolford v. Lopez*, No. CV 23-00265 LEK-WRP, 2023 WL 5043805, at *9, *22 (D. Haw. Aug. 8, 2023).

D. Some courts focus on 1791 for federal laws but 1868 for state laws, creating two different Second Amendments.

This Court has "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." *Bruen*, 597 U.S. at 37. Nevertheless, some courts have determined that 1791 is the most relevant period for federal laws while 1868 is the most relevant period for state laws. This approach effectively creates two different Second Amendments, depending on whether the federal government or a state or local government enacts a regulation.

Under the Seventh Circuit's pre-*Bruen* doctrine, the court determined that the 1791 understanding controls in challenges to federal laws but reasoned that "when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified." *Ezell v. City of Chicago*, 651

F.3d 684, 702 (7th Cir. 2011); *see also id.* at 705. It is unclear whether *Bruen* altered the court's approach. Dissenting from a decision to remand a case in light of *Bruen*, Judge Wood indicated that the court's pre-*Bruen* approach remained intact: "*Bruen* . . . adds that the most persuasive analogous regulations are those enacted or in place at the time the Second Amendment was ratified (1791) or those that date from the adoption of the Fourteenth Amendment (1868) (presumably if the regulation at issue comes from a state entity rather than the federal government)." *Atkinson v. Garland*, 70 F.4th 1018, 1029 (7th Cir. 2023). Drafting the majority opinion in *Bevis v. City of Naperville, Ill.*, Judge Wood noted "the Supreme Court's insistence that the relevant time to consult is 1791, or maybe 1868." 85 F.4th 1175, 1194 (7th Cir. 2023); *see also id.* at 1199.

The Sixth Circuit followed the Seventh Circuit's approach pre-*Bruen*. It considered whether "the challenged statute 'regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification].'" *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (quoting *Ezell*, 651 F. 3d at 702–03). Since *Bruen*, the court has indicated that it will continue to consider the different years for federal and state regulations, reasoning that "*Bruen* left in place the first step" of its prior test. *United States v. Burgess*, No. 22-1110, 2023 WL 179886, at *5 (6th Cir. Jan. 13, 2023).

A Florida district court adopted the same approach, explaining that "the pertinent time period

for a Second Amendment (compared to a Fourteenth Amendment) challenge is the founding—not 1868." *United States v. Ayala*, No. 8:22-CR-369-KKM-AAS, 2024 WL 132624, at *5 n.4 (M.D. Fla. Jan. 12, 2024); *see also id.* at *4 ("To decide the constitutionality of this *federal* statute, then, I must ascertain the scope of the Second Amendment right against the federal government in 1791.").

The Fifth Circuit appeared skeptical of this approach in *United States v. Daniels*, 77 F.4th 337, 348 n.21 (5th Cir. 2023), but it did not rule it out entirely. Rather, the court acknowledged the "'ongoing scholarly debate' about whether the right to bear arms acquired new meaning in 1868," *id.* at 348 (quoting *Bruen*, 571 U.S. at 37), and determined that "[e]ven if the public understanding of the right to bear arms *did* evolve, it could not change the meaning of the Second Amendment" in a challenge to a federal statute because *that* meaning "was fixed when it first applied to the federal government in 1791," *id.*

II. Whether courts focus on 1791 or 1868 has led to different results in similar cases.

Courts considering similar issues have reached different conclusions depending on whether the court considers 1791 or 1868 to be the most relevant historical period.

Despite this Court's assurance that "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," *Bruen*, 597 U.S. at 38, courts focusing on 1868 have reached different

holdings in carry challenges than courts focusing on 1791. For example, the Second Circuit in this case found most of New York's *Bruen*-response law restricting carry in 20 categories of public locations to be facially constitutional, while deeming "evidence from Reconstruction . . . at least as relevant as evidence from the Founding Era" and relying primarily on late-19th-century evidence. *Antonyuk*, 89 F.4th at 318 n.27. A Maryland district court similarly upheld carry restrictions in a wide range of public locations—including places of worship, public parks, recreational facilities, and public libraries, among others—while treating "historical sources from the time period of the ratification of the Fourteenth Amendment" as "equally if not more probative of the scope of the Second Amendment's right to bear arms." *Maryland Shall Issue, Inc*, 2023 WL 4373260, at *8. By contrast, a California district court enjoined California's *Bruen*-response bill, which designated 26 categories of public locations as "sensitive places," after determining that "[t]he most significant historical evidence comes from 1791." *May v. Bonta*, No. SACV2301696CJCADSX, 2023 WL 8946212, at *5 (C.D. Cal. Dec. 20, 2023).

A similar divide has developed in cases involving the rights of young adults aged 18-to-20. The Third Circuit enjoined laws prohibiting 18-to-20-year-olds from openly carrying firearms during a state of emergency after finding "no founding-era law that supports disarming people in that age group." *Lara*, 91 F.4th at 127. A Texas district court similarly held that "the plain text of the Second Amendment, as informed by Founding-Era history and tradition . . . permits law-abiding 18-to-20-year-olds to carry a handgun for self-

defense outside the home." *Firearms Pol'y Coal., Inc. v. McCraw*, 623 F. Supp. 3d 740, 751 (N.D. Tex. 2022), *appeal dismissed sub nom. Andrews v. McCraw*, No. 22-10898, 2022 WL 19730492 (5th Cir. Dec. 21, 2022). By contrast, the Eleventh Circuit upheld a statute prohibiting 18-to-20-year-olds from purchasing firearms while emphasizing that "historical sources from the Reconstruction Era are more probative of the Second Amendment's scope than those from the Founding Era." *Bondi*, 61 F.4th at 1322.

In sum, lower courts are not only split over whether 1791 or 1868 is the relevant period for a historical analysis, but the split is leading to conflicting holdings in similar cases.

III. This Court's precedents demonstrate that the original 1791 understanding of the right controls.

As discussed *supra*, the Second Circuit in the instant case asserted that Reconstruction Era evidence is "at least as relevant" as Founding Era evidence in determining the scope of the Second Amendment. *Antonyuk*, 89 F.4th at 318 n.27. But this Court has repeatedly established that the original 1791 understanding of the Second Amendment controls. The centrality of Founding Era evidence is further confirmed by this Court's decisions regarding the scope and understanding of other provisions of the Bill of Rights.

A. This Court already emphasized that the significance of historical evidence depends on its proximity to the Founding.

The *Bruen* Court considered evidence from five historical periods and emphasized that the significance of evidence from each period depended on its proximity to the Founding. *Bruen*, 597 U.S. at 34. *Bruen* "categorize[d] 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." *Id.* The Court's evaluation of evidence from each period demonstrates the centrality of the Founding Era.

(1) Medieval to early modern England.

Bruen deemed it acceptable to consider "English practices that 'prevailed up to the "period immediately before and after the framing of the Constitution,"'" *id.* (quoting *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting)), but not 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,'" *id.* at 35 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935)). Similarly, "English common-law practices and understandings" matter only if they reflect the understanding "at the time of the separation of the American Colonies." *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 529 (1884)).

Thus, "in interpreting our own Constitution, 'it [is] better not to go too far back into antiquity for the best

securities of our liberties,' unless evidence shows that medieval law survived to become our Founders' law." *Id*. (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)).

When it came to the "initially limited" English arms right, therefore, what mattered most was that "'by the time of the founding,'" it was "'understood to be an individual right protecting against both public and private violence.'" *Id.* at 44–45 (quoting *Heller*, 554 U.S. at 594); *see also Heller*, 554 U.S. at 593 ("By the time of the founding, the right to have arms had become fundamental for English subjects."). Likewise, when it came to the Statute of Northampton, what mattered most was that "it was no obstacle to public carry for self-defense in the decades leading to the founding." *Bruen*, 597 U.S. at 45.

Having repeatedly confirmed that the analytical baseline for English history is what the Founders thought of it, *Bruen's* analysis of English history concluded with the understanding of English law at "the time of the founding." *Id*.

(2) The American Colonies and the early Republic.

To conduct a textual analysis of the Second Amendment, the *Heller* Court consulted Timothy Cunningham's 1771 legal dictionary, Samuel Johnson's 1773 dictionary, Thomas Sheridan's 1796 dictionary, and Noah Webster's 1828 dictionary. 554 U.S. at 581, 582, 584, 587–88, 595, 597; *see also Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting) ("*Heller* examined the right to keep arms as it was understood in 1791 when the Second Amendment was ratified.").

Heller ultimately concluded with "our adoption of the original understanding of the Second Amendment." 554 U.S. at 625. And as the dissenting Justices acknowledged, the majority indicated that the constitutionality of modern-day laws depends on whether "similar restrictions existed in the late-18th century." *Id.* at 721 (Breyer, J., dissenting).

Bruen, reaffirming the centrality of 1791, consulted *Heller*'s plain text analysis—which defined the Second Amendment based on Founding Era understandings—to determine that the plaintiffs were part of "the people," 597 U.S. at 31–32 (citing *Heller*, 554 U.S. at 580), that the handguns they desired to carry were protected arms, *id.* at 32 (citing *Heller*, 554 U.S. at 627), and that the Second Amendment protects "carry[ing] weapons in case of confrontation," *id.* (citing *Heller*, 554 U.S. at 592). *Bruen* then mandated that every court begin every Second Amendment analysis by consulting *Heller*'s 1791-focused textual analysis. *Id.* at 24 (setting forth "the standard for applying the Second Amendment," which begins by determining whether "the Second Amendment's plain text covers an individual's conduct").

Hence, the *Bruen* Court emphasized that "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,'" *id.* at 34 (quoting *Heller*, 554 U.S. at 634–35) (emphasis *Bruen*'s), and that the Second Amendment's "meaning is fixed according to the understandings of those who ratified it," *id.* at 28; *see also id.* ("the Second Amendment's definition of 'arms' is fixed according to its historical understanding").

Accordingly, when it comes to colonial restrictions, their relevance depends on their proximity to the Founding. A law from "roughly a century before the founding sheds little light on how to properly interpret the Second Amendment." *Id*. at 49. Likewise, whether pocket pistols were uncommon in colonial America did not matter since they gained commonality "by the founding." *Id.* at 48 n.13.

Not one law, circumstance, or source from the Founding Era was disparaged in either *Heller* or *Bruen* based on the date it was produced—unlike those from every other period.

(3) Antebellum America.

The *Bruen* Court reiterated *Heller*'s assertion 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.'" 597 U.S. at 35 (quoting *Heller*, 554 U.S. at 605). But in the same breath, the *Bruen* Court warned that "[w]e must also guard against giving postenactment history more weight than it can rightly bear." *Id.* Specifically, "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." *Id.* at 36 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting)) (emphasis in *Heller II*). Notably, then-Judge Kavanaugh, whom the Court quoted, provided in *Heller II* the example of *Marbury v. Madison*, 5 U.S. 137 (1803), which "found unconstitutional a law passed by the First Congress"—further indicating that the "original meaning" *Bruen*

referred to is the original 1791 meaning. *Heller II*, 670 F.3d at 1274 n.6 (Kavanaugh J., dissenting).

Significantly, the *Bruen* Court dismissed an 1860 New Mexico law in part because it was enacted "nearly 70 years after the ratification of the Bill of Rights." 597 U.S. at 55 n.22. Due to its distance from 1791, this Court determined that "[i]ts value in discerning the original meaning of the Second Amendment is insubstantial." *Id.* How it impacted the understanding of the right when the Fourteenth Amendment was ratified eight years later was not a concern—the law's distance from the Founding determined its significance.

(4) Reconstruction.

This Court has expressly called Reconstruction Era evidence "secondary" and useful as "mere confirmation" of Founding Era evidence:

> 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, 128 S.Ct. 2783; cf. *Sprint Communications Co.*, 554 U.S. at 312, 128 S.Ct. 2531 (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* [*v. United States*, 587 U.S. 678, 702 (2019)] (majority opinion). In other words, this 19th-century evidence was "treated as mere confirmation of what the Court thought had already been established." *Ibid.*

Bruen, 597 U.S. 36–37 (brackets omitted).

Bruen, *Gamble*, and *Heller* all considered Reconstruction Era evidence "secondary" to Founding Era evidence. But in the decision below, the Second Circuit held that "evidence from Reconstruction . . . is *at least as relevant* as evidence from the Founding Era" in determining the scope of the Second Amendment. *Antonyuk*, 89 F.4th at 318 n.27 (emphasis added). That holding disregards these recent Supreme Court cases.

(5) The late-19th and early-20th centuries.

Bruen explained that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66. It is less insightful than earlier evidence due to its "temporal distance from the founding." *Id.* In other words, the closer to the Founding the greater the significance.

The *Bruen* Court thus refused to "stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption." *Id.* at 67–68. And the Court declined to consider 20th-century evidence for the same reason: "[a]s 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." *Id.* at 66 n.28.

Bruen repeated *Heller*'s statement that "'the public understanding of a legal text in the period after its enactment or ratification' was 'a critical tool of constitutional interpretation.'" *Id.* at 20 (quoting *Heller*, 554 U.S. at 605) (emphasis omitted). Given this Court's repeated rejection of late-19th-century evidence, this statement is irreconcilable with the Second Circuit's holding that Reconstruction Era evidence is "at least as relevant" as evidence from closer to the Second Amendment's ratification. *Antonyuk*, 89 F.4th at 318 n.27.

B. Other relevant considerations identified by the *Bruen* Court revolve around the Founding Era.

Other factors that the *Bruen* Court identified as relevant considerations in Second Amendment analyses revolve around the Founding Era.

First, the *Bruen* Court explained that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." 597 U.S. at 26. By requiring that the general societal problem be in existence "since the 18th century," this Court ensured that the problem be known to the Founders. A problem known to the ratifiers of the Fourteenth Amendment but unknown

to the Founders is irrelevant—which would not be the case if "1868 and 1791 [were] both focal points" of Second Amendment inquiries and thus entitled to equal weight. *Antonyuk*, 89 F.4th at 304.

As *Bruen* noted,

> *Heller* itself exemplifies this kind of straightforward historical inquiry. . . . 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, 128 S.Ct. 2783; see also *id.*, at 634, 128 S.Ct. 2783 (describing the claim that "there were somewhat similar restrictions in the founding period" a "false proposition").

597 U.S. at 27 (emphasis added). Likewise, in *Bruen*, this Court "consider[ed] whether 'historical precedent' from before, during, and even after *the founding* evinces a comparable tradition of regulation" as the carry restriction at issue. *Id.* (quoting *Heller*, 554 U.S. at 631) (emphasis added). After "find[ing] no such tradition," the Court held the law unconstitutional. *Id.*

Second, as for "modern regulations that were unimaginable *at the founding*," the "historical inquiry

that courts must conduct will often involve reasoning by analogy." *Id.* at 28 (emphasis added). This reasoning by analogy, like the rest of the test articulated in *Bruen*, must focus on the Founding Era. Because "the Second Amendment is the 'product of an interest balancing by the people'" of the Founding generation, *id.* at 29 n.7 (quoting *Heller*, 554 U.S. at 635) (emphasis omitted), "[a]nalogical reasoning requires judges to apply faithfully the balance struck *by the founding generation* to modern circumstances," *id.* at 29 n.7 (emphasis added).

C. This Court's interpretations of other Bill of Rights provisions confirm that the Founding Era understanding controls.

The *Bruen* Court "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." 597 U.S. at 37. Moreover, this Court has "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*." *Id.* (emphasis added). This Court has repeatedly asserted that provisions of the Bill of Rights incorporated against the states have the same scope as they do against the federal government, and that the scope is determined by the understanding of the relevant right during the Founding Era.

In *Ramos v. Louisiana*, for example, this Court held that the Sixth Amendment's jury unanimity requirement "applies to state and federal criminal trials equally" because "incorporated provisions of the

Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government." 140 S.Ct. 1390, 1397 (2020). Similarly, in *Timbs v. Indiana*, this Court held that the Eighth Amendment's Excessive Fines Clause is equally applicable to both states and the federal government because "[i]ncorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 139 S.Ct. 682, 687 (2019) (quoting *McDonald*, 561 U.S. at 765).

Indeed, this Court "has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (quotation omitted) (incorporating the Fifth Amendment's protection against self-incrimination). This is because "[i]t would be incongruous to have different standards determine the validity of a claim . . . depending on whether the claim was asserted in a state or federal court." *Id.* at 11. "Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs*, 139 S.Ct. at 687.

The scope of provisions of the Bill of Rights must be pinned to the original, Founding Era understanding. Neither the passage of the Fourteenth Amendment nor the resulting incorporation of Bill of Rights provisions changed the scope of those provisions as applied against the federal government. Thus, because the scope must be the same against

states as against the federal government, *Ramos*, 140 S.Ct. at 1397; *Timbs*, 139 S.Ct. at 687; *McDonald*, 561 U.S. at 765; *Malloy*, 378 U.S. at 11, the Founding Era scope must control in all circumstances.

Again, this Court's precedents confirm that conclusion. In *Crawford v. Washington*, the Court reviewed cases from 1794 through 1844 to determine "the original understanding of the common-law right" codified in the Sixth Amendment's Confrontation Clause. 541 U.S. 36, 49–50 (2004). It referenced treatises from the second half of the 19th century only to note that they "confirm" the earlier understanding. *Id.* at 50. Throughout the *Crawford* opinion, the Court repeatedly returned to how the Framers of the Constitution would have understood the right. *E.g.*, *id.* at 53–54, 56, 59, 61, 66, 67–68; *see also Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("We are aware of no historical indication that *those who ratified the Fourth Amendment* understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.") (emphasis added).

Similarly, in *Espinoza v. Montana Dep't of Revenue*, this Court considered "the founding era and the early 19th century" evidence to determine the relevant scope of the Establishment Clause of the First Amendment. 140 S.Ct. 2246, 2258 (2020). The Court rejected later 19th-century evidence that contradicted earlier sources because "such evidence may reinforce an early practice but cannot create one." *Id.* at 2259.

Time and again, this Court has pegged the scope of provisions of the Bill of Rights—against both federal and state governments—to how those provisions were understood by the Founding generation. Because the

right protected by the Second Amendment is "not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'" *Brue*n, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780), it too must be pegged to its Founding Era scope and understanding.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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