IN THE SUPREME COURT OF THE UNITED STATES

No. ___A-___

CHRISTOPHER PARIS, COMMISSIONER, PENNSYLVANIA STATE POLICE,

Applicant

v.

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

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Samuel A. Alito, Jr., as Circuit Justice for the United States Court of Appeals for the Third Circuit:

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Pennsylvania Office of Attorney General—on behalf of applicant-petitioner the Christopher Paris, Commissioner of the Pennsylvania State Police—respectfully requests a 45-day extension of time, to and including July 11, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals from the Third Circuit in this case. The order of the Court of Appeals denying en banc review, and the dissent of Judge Krause from that order (App., *infra*, 1a-20a) is reported at 130 F.4th 65 (3d Cir. 2025). The opinion of the Court of Appeals panel and the dissent of Judge Restrepo (App., *infra*, 21a-72a) is reported at 125 F.4th 428 (3d

Cir. 2025). The memorandum of the district court (App., *infra*, 146a-168a) is reported at 534 F.Supp.3d 478 (W.D. Pa. 2021).

The Court of Appeals entered an order denying Commissioner Paris's request for en banc review on February 26, 2025. Unless extended, the current deadline to file a petition for a writ of certiorari is May 27, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case involves a Second Amendment challenge to provisions of Pennsylvania law which prohibit under-21-year-olds from openly carrying firearms when the Commonwealth is in a declared state of emergency. 18 Pa.C.S. §§ 6109(b) and 6107(a). In addition to Pennsylvania, 31 other states and the federal government restrict the gun rights of those under the age of 21. Whether the Second Amendment permits governments to regulate firearm use by under-21-year-olds is an important constitutional question that is currently dividing the circuits.[1]

2. In 2021, three individual plaintiffs (Madison Lara, Sophia Knepley, Logan Miller) and two institutional plaintiffs (the Firearms Policy Coalition, and the Second Amendment Foundation) brought suit against the Commissioner in his official capacity[2] in the United States District Court for the Western District of Pennsylvania, claiming that Pennsylvania's law violates the Second Amendment rights of 18-to-20-year-olds. The district court granted the Commissioner's motion to

[1] *Worth v. Jacobson*, 108 F.4th 677 (8th Cir. 2024), *petition for certiorari pending*, 24-782 (U.S.); *Nat'l Rifle Ass'n v. Bondi*, ___ F.4th ___, Dkt No. 21-12314, 2025 WL 815734 (11th Cir. Mar. 14, 2025) (en banc); *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 127 F.4th 583 (5th Cir. 2025); *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024); *see also Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 672 F.Supp.3d 118 (E.D. Va. 2023), *appeal pending sub. nom., McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 23-2085 (4th Cir.).

[2] When this case was initiated, Robert Evanchick was the Commissioner of the State Police.

dismiss and denied the plaintiffs' request for a preliminary injunction. App. 146a-168a. Plaintiffs appealed.

3. In 2024, a divided panel of the Third Circuit reversed the district court's judgment and held that Pennsylvania's law violates the Second Amendment. App. 97a-144a (panel opinion and dissent); App. 73a-96a (order denying en banc and dissent). This Court then granted certiorari, vacated the Court of Appeals' judgement, and remanded for reconsideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024). *Paris v. Lara*, 145 S.Ct. 369 (2024).

4. On remand, a divided panel once again reversed the district court's judgment and remanded with instructions to enjoin the challenged provisions. App. 59a. Despite this Court's GVR order, the Court of Appeals' post-remand opinion was largely a rehash of its vacated opinion App. 25a ("much" of the opinion is "repetitive of our earlier decision"). And, despite this Court's guidance in *Rahimi* that courts should focus on "the principles that underpin our regulatory tradition," *see* 602 U.S. at 692, the panel majority reiterated its prior holding that Pennsylvania's law is unconstitutional because there were not specific laws disarming 18-to-20-year-olds at the Founding. App. 55a ("the Commissioner cannot point to a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns").

Judge Restrepo dissented. App. 60a-72a. Judge Restrepo noted that at the Founding, anyone under the age of 21 was considered a "minor" with few independent legal rights. App. 63a-64a. Judge Restrepo also highlighted 17 state laws enacted between 1856 and 1893 which restricted firearms sales to under-21-year-olds as

evidence that Pennsylvania's law is consistent with the Nation's historical tradition of firearms regulation. App. 71a-72a.

5. Commissioner Paris filed a timely request for rehearing en banc. In a narrow 7-5 ruling, the Third Circuit denied that request. App. 1a-2a. Judge Krause dissented, and specifically urged this Court to review the case. App. 20a ("… I respectfully dissent from the Court's denial of en banc rehearing and, as we are declining to correct our own error, urge the Supreme Court to do so if presented the opportunity.").

6. The requested extension is necessary to afford the Pennsylvania Office of Attorney General sufficient time to consult within the Commonwealth's government and prepare a petition that can effectively aid the Court in its consideration of this matter.

7. Counsel for Respondents in this matter consents to this request for a 45-day extension.

Accordingly, Commissioner Paris respectfully requests that the time for filing a petition for a writ of certiorari be extended by 45-days, up to and including July 11, 2025.

By: /s/ Daniel B. Mullen

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DATE: April 16, 2025

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1832

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

v.

COMMISSIONER PENNSYLVANIA STATE POLICE

District Court no. 2:20-cv-01582

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and SMITH[*], Circuit Judges[†]

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Restrepo, Judge Shwartz, Judge Krause, Judge Montgomery-Reeves, and

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[*] The vote of the Honorable D. Brooks Smith, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing.
[†]The Honorable Kent A. Jordan was a member of the merits panel. Judge Jordan retired from the Court on January 15, 2025, and did not participate in the consideration of the petition for rehearing.

Judge Chung voted to grant the petition for rehearing. Judge Krause would have granted rehearing and files the attached dissent sur denial of rehearing en banc.

BY THE COURT,

s/D. Brooks Smith
Circuit Judge

Dated: February 26, 2025
Lmr/cc: All Counsel of Record

KRAUSE, *Circuit Judge*, dissenting sur denial of rehearing *en banc*.

When they ratified the Second Amendment, our Founders did not intend to bind the nation in a straitjacket of 18th-century legislation, nor did they mean to prevent future generations from protecting themselves against gun violence more rampant and destructive than the Founders could have possibly imagined. It thus stands to reason that the states' understanding of the Second Amendment at the time of the "Second Founding"[1]—the moment in 1868 when they incorporated the Bill of Rights against themselves—is part of "the Nation's historical tradition of firearms regulation"[2] informing the constitutionality of modern-day regulations. Today, we acknowledge as much, with both the panel majority and dissent recognizing that "laws 'through the end of the 19th century' . . . can be 'a critical tool of constitutional interpretation' because they can be evidence of a historical tradition and shed important light on the meaning of the Amendment as it was originally understood."[3]

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[1] *See, e.g.*, Eric Foner, *The Second Founding: How The Civil War and Reconstruction Remade The Constitution* (2019); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 220 (2023) (referring to the incorporation of the Bill of Rights as "a Second Founding").

[2] *United States v. Rahimi*, 602 U.S. 680, 692 n.1 (2024) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 37 (2022)).

[3] *Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 441 (3d Cir. 2025) (*Lara II*) (cleaned up) (quoting *Bruen*, 597 U.S. at 35); *accord id*. at 453–54 (Restrepo, J., dissenting).

Indeed, since the Supreme Court tethered the Second Amendment's meaning to historical precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), it has relied on 19th-century sources in each of its recent major opinions on the right to bear arms.[4] Accordingly, even as the Supreme Court has acknowledged the "ongoing scholarly debate" about their relevance,[5] we and the other Courts of Appeals have consistently looked to 19th-century, as well as Founding-era sources.[6]

Yet despite acknowledging that "postenactment history can be an important tool,"[7] the panel majority then held—based exclusively on a handful of 18th-century militia laws and without regard to the voluminous support the statutory scheme finds in 19th-century analogues—that Pennsylvania's prohibition on 18-to-20-year-old youth carrying firearms in public during statewide emergencies is unconstitutional.[8]

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[4] *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (plurality); *Bruen*, 597 U.S. at 50–70; *Rahimi*, 602 U.S. at 694–98.

[5] *Bruen*, 597 U.S. at 34.

[6] *See, e.g.*, *United States v. Quailes*, 126 F.4th 215, 222 & n.8 (3d Cir. 2025); *United States v. Moore*, 111 F.4th 266, 271 (3d Cir. 2024); *Wolford v. Lopez*, 116 F.4th 959, 980 (9th Cir. 2024); *Antonyuk v. James*, 120 F.4th 941, 947 (2d Cir. 2024); *Hanson v. District of Columbia*, 120 F.4th 223, 236–40 (D.C. Cir. 2024).

[7] *Rahimi*, 602 U.S. at 738 (Barrett, J., concurring).

[8] *Lara II*, 125 F.4th at 431–32 (discussing Sections 6106, 6107, and 6109 of Pennsylvania's Uniform Firearms Act of 1995, 18 Pa. Cons. Stat. §§ 6101–6128 (2024)).

The panel majority was incorrect, repeating the same error it made the last time around.[9] Under a correct reading of the extensive historical record and a faithful application of the Supreme Court's decisions in *Bruen* and *Rahimi*, Pennsylvania's statute passes constitutional muster. And instead of granting *en banc* rehearing, our Court compounds its error by denying Pennsylvania's petition outright once again.

I respectfully dissent from that denial for four reasons. First, *en banc* review is necessary to correct the panel majority's most basic error: Founding-era sources conclusively demonstrate that legislatures were authorized to categorically disarm groups they reasonably judged to pose a particular risk of danger, and Pennsylvania's modern-day judgment that youth under the age of 21 pose such a risk is well supported by evidence subject to judicial notice. Second, in light of this historical tradition at the Founding, *en banc* review would allow us to apply the proper historical methodology and consider the myriad laws throughout the 19th century that reflect a continuation of this Founding-era tradition, further bolstering the constitutionality of Pennsylvania's law. Third, even if this overwhelming historical evidence were not enough, *en banc* review would permit us to vacate and remand this case to give Pennsylvania the opportunity to marshal historical support before the District Court in light of recent developments in our Second Amendment jurisprudence. And fourth, the majority gives short shrift to the Supreme Court's admonition that "cases implicating unprecedented societal

[9] *See Lara v. Comm'r Pa. State Police*, 97 F.4th 156, 157–58 (3d Cir. 2024) (Krause, J., dissenting sur denial of rehearing en banc).

concerns or dramatic technological changes may require a more nuanced approach."[10] For each of these reasons, discussed in turn below, *en banc* review should be granted.

A. *En banc* Consideration Is Necessary to Correct the Panel Majority's Mistaken Interpretation of Founding-Era Evidence.

Pennsylvania's statutory scheme enjoys ample support in Founding-era history to which we look for a match "in principle, not with precision." *Range v. Att'y Gen.*, 124 F.4th 218, 250 (3d Cir. 2024) (*Range II*) (Krause, J., concurring in the judgment). The panel majority failed to recognize this history. That error alone warrants *en banc* review.

It is by now well established that, as then-Judge Barrett put it, "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety." *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 597 U.S. 1. And it was the legislatures of the Founding generation that determined—consistent with the Second Amendment—which groups posed sufficient risk to justify categorical disarmament. *See Range II*, 124 F.4th at 255–67 (Krause, J., concurring in the judgment) (cataloguing the historical disarmament of groups that legislatures judged untrustworthy to follow the law); *id.* at 293 (Shwartz, J., dissenting) ("[U]nder *Bruen*, the relevant inquiry is why a given regulation, such as a ban based on one's status, was enacted and how that regulation was implemented.").

[10] *Bruen*, 597 U.S. at 27.

Pennsylvania exercised such legislative judgment when it decided that those under 21 categorically pose a danger to public safety during times of emergency, and its judgment is entitled to deference—at least where, as here, it is supported by evidence. Modern crime statistics, of which we can take judicial notice,[11] confirm that youth under 21 commit violent gun crimes at a far disproportionate rate. In 2019, for example, although 18- to 20-year-olds made up less than 4% of the U.S. population, they accounted for more than 15% of all homicide and manslaughter arrests.[12] National data collected by the Federal Bureau of Investigation (FBI) also confirms that homicide rates peak between the ages of 18 and 20.[13] Indeed,

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[11] Several of the sources that follow are drawn from the District Court record, while others may be considered under Federal Rule of Evidence 201. *See, e.g.*, *Clark v. Governor of N.J.*, 53 F.4th 769, 774 (3d Cir. 2022) (taking judicial notice of publicly available statistics); *Stone v. High Mountain Mining Co., LLC*, 89 F.4th 1246, 1261 n.7 (10th Cir. 2024) (same); *United States v. United Bhd. of Carpenters and Joiners of America, Loc. 169*, 457 F.2d 210, 214 n.7 (7th Cir. 1972) (taking judicial notice of statistics from United States Bureau of Census Reports).

[12] *See* U.S. Dep't of Just., Crime in the United States, Arrests, by Age, 2019, at Table 38, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-38; U.S. Census Bureau, Age and Sex Composition in the United States: 2019, at Table 1, National Population by Characteristics: 2010- 2019, https://www.census.gov/data/tables/2019/demo/age-and-sex/2019-age-sex-composition.html.

[13] *See* Daniel W. Webster et al., *The Case for Gun Policy Reforms in America*, Johns Hopkins Ctr. for Gun Policy & Research 5 (last updated Feb. 5, 2014),

that age group commits gun homicides at a rate three times higher than adults aged 21 or older.[14] And "[a]dditional studies show that at least one in eight victims of mass shootings from 1992 to 2018 were killed by an 18 to 20-year-old[.]"[15]

Our understanding of *why* youth commit violent crimes has also evolved dramatically in recent decades, reinforcing Pennsylvania's legislative judgment that young people pose a

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http://web.archive.org/web/20160325061021/http:/www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper020514_CaseforGunPolicyReforms.pdf.

[14] Everytown Research & Policy, Everytown for Gun Safety (last updated Mar. 1, 2022), https://everytownresearch.org/stat/eighteen-to-20-year-olds-commit-gun-homicides-at-a-rate-triple-the-rate-of-those-21-and-years-older/; *see also Jones v. Bonta*, 34 F.4th 704, 760 (9th Cir. 2022) (Stein, J., dissenting in part) (noting that 18- to 20-year-olds "commit gun homicides at a rate three times higher than adults above the age of 21"), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 478 (4th Cir. 2021) (Wynn, J., dissenting) (noting that "from 2013 to 2017, young adults aged 18 to 20 committed gun homicides at a rate *nearly four times higher* than adults 21 and older" (cleaned up)), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

[15] *Jones*, 34 F.4th at 760 (Stein, J., dissenting in part) (citing Joshua D. Brown and Amie J. Goodin, *Mass Casualty Shooting Venues, Types of Firearms, and Age of Perpetrators in the United States, 1982–2018*, 108 Am. J. Pub. Health 1385, 1386 (2018)).

particular danger in carrying firearms during states of emergency. We now understand, for example, that those under 21 are uniquely predisposed to impulsive, reckless behavior because their brains have not yet fully developed.[16] Specifically, the prefrontal cortex, which is responsible for impulse control and judgment, is the last part of the brain to fully mature and continues to develop until a person is in their mid-20s.[17] By contrast, the limbic system, which controls emotions like fear, anger, and pleasure, develops far earlier, and young people generally rely heavily on this region of their brains to guide their decision-making.[18]

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[16] *See also Nat'l Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 135, 210 n. 21 (5th Cir. 2012) ("[M]odern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over."), *abrogated on other grounds by Bruen*, 597 U.S. 1; *Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015) ("The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.") (citation omitted).

[17] *See, e.g.*, Mariam Arain et al*., Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 453, 456 (2013); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859, 859–60 (1999).

[18] Arain, *supra* note 17, at 453.

As a result, young adults are both uniquely prone to negative emotional states[19] *and* uniquely unable to moderate their emotional impulses. Indeed, while "a 19-year-old might possess a brain that looks 'adult-like' and that supports mature cognitive performance under calm or 'neutral' conditions, that same brain tends to look much more like that of a younger kid when evocative emotions are triggered, resulting in significantly weaker cognitive performance."[20] Unsurprisingly, this combination makes young adults especially prone to reckless and violent behavior.[21]

While the scarcity and limited lethality of their weapons gave our Founding generation little reason to fear the danger of youth gun violence, today's legislatures have good reason to do so. And because that group is especially prone to impulsive,

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[19] Leah H. Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain & Cognition 124, 125 (2010).

[20] *Hirschfeld*, 5 F.4th at 476 (Wynn, J., dissenting) (quoting Jason Chein, *Adolescent Brain Immaturity Makes Pending Execution Inappropriate*, Bloomberg Law (Sept. 17, 2020, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBBCKGKK000000.

[21] Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 Developmental Neuroscience 220, 220 (2014) ("Adolescents commit more crimes per capita than children or adults in the United States and in nearly all industrialized cultures. Their proclivity toward . . . risk taking has been suggested to underlie the inflection in criminal activity observed during this time.").

violent behavior, Pennsylvania's legislature reasonably decided that allowing them to carry firearms in public during statewide emergencies, when emotions already run high and violence may be widespread, would pose a particular danger to public safety. That judgment reflects precisely the type of determination that led our Founders to categorically disarm other groups they deemed to be dangerous and puts Pennsylvania's statute comfortably within the Nation's historical tradition even at the "First Founding."

B. *En banc* Rehearing Is Necessary Because, Under the Proper Methodology, Pennsylvania's Statutory Scheme Is Constitutional.

In light of this Founding-era "tradition of disarming categories of persons thought by legislatures to present a 'special danger of [firearm] misuse,'" *Range II*, 124 F.4th at 266 (Krause, J., concurring in the judgment) (quoting *United States v. Rahimi*, 602 U.S. 680, 698 (2024)), we can look to "laws 'through the end of the 19th century[,]'" *Lara II*, 125 F.4th at 441 (quoting *Bruen*, 597 U.S. at 35), to both "shed important light on the meaning of the Amendment" and "confirm [our] understanding of [its] Founding-era public meaning," *id.* Taking account of this "critical tool of constitutional interpretation," *Heller*, 544 U.S. at 605, Judge Restrepo persuasively explained in his dissent, at *Bruen*'s second step, that Pennsylvania's statutory scheme is "consistent with the principles that underpin our regulatory tradition" and therefore is constitutional, *Rahimi*, 602 U.S. at 692. Among other reasons, he observed that "at least 17 states passed laws restricting the sale of firearms to people under 21"

between 1856 and 1893. *See Lara II*, 125 F.4th at 454 (Restrepo, J., dissenting).

I join that conclusion and offer here some concrete examples of ways that the "how" and "why" of those historical statutes map onto Pennsylvania's.[22]

By way of background, before the Fourteenth Amendment was ratified in 1868, a number of states treated 21 as the age of majority[23] and effectively prevented, or at least hindered, "minors" from even obtaining firearms. *See, e.g.*, 1856 Ala. Laws 17; 1859 Ky. Acts 245, § 23; 1856 Tenn. Pub. Acts 92. Other states adopted similar regulations in the years immediately after ratification, *see, e.g.*, 1875 Ind. Acts 59;

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[22] Although *Bruen* eschewed a free-standing "means-end scrutiny" or "interest-balancing inquiry" for modern-day regulations, 597 U.S. at 22, it embraced a comparative means-end analysis by directing us to look to "how" (the means) and "why" (the end) historical "regulations burden a law-abiding citizen's right to armed self-defense" and then to consider whether the "modern . . . regulation[] impose[s] a comparable burden . . . [that] is comparably justified," *id*. at 29.

[23] *See, e.g.*, *Vincent v. Rogers*, 30 Ala. 471, 473 (1857) (describing a minor as an individual "under twenty-one years of age"); *Warwick v. Cooper*, 37 Tenn. (5 Sneed) 659, 660–61 (1858) (referring to 21 as the age of majority); *Newland v. Gentry*, 57 Ky. (18 B. Mon.) 666, 671 (1857) (referring to 21 as the age of majority); 1879 Mo. Rev. Stat. § 2559 (explaining that a male is a minor until he turns 21, and a female is a minor until she turns 18).

1879 Mo. Rev. Stat. § 1274; 1878 Miss. Laws 175–76,[24] signaling that the generation that incorporated the Second Amendment against the states did not understand it to limit their ability to pass such regulations, *see Bruen*, 597 U.S. at 34–37 (acknowledging that historical examples from the years immediately following ratification can, in some cases, provide evidence about the public understanding of an Amendment). Indeed, a 19th-century treatise written by "the most famous" voice on the Second Amendment at the time, *Heller*, 554 U.S. at 616, explained that states "may prohibit the sale of arms to minors," Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883).

By broadly criminalizing any attempt to convey a firearm to those under the age of 21, these statutes effectively prevented young citizens not just from carrying publicly in times of emergency, but from possessing firearms at all. Thus, as to "how" these prohibitions burdened the right to bear arms, the 18th-century laws were far more onerous than Pennsylvania's, which prohibits such youth only from carrying publicly during statewide emergencies. *See* 18 Pa. Cons. Stat. §§ 6106, 6107, 6109. If the generation that incorporated the Bill of Rights against the states believed that states could constitutionally impose *more burdensome* gun regulations on this age group, *a fortiori* it would have viewed Pennsylvania's more limited prohibition as constitutional.

In terms of "why" the statutes were enacted, these Reconstruction-era laws again are comparable to

[24] *See also Jones v. Bonta*, 34 F.4th 704, 740 (9th Cir. 2022) (collecting statutes), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022).

Pennsylvania's statutory scheme—certainly more so than the Founding-era militia statutes on which the panel majority relied. As I discuss in greater detail in Section D, *infra*, interpersonal gun violence "was not a problem in the Founding era that warranted much attention," in large part because the firearms that our Founders possessed simply lacked the capacity of those today to inflict mass casualties in a matter of seconds.[25] By the late 19th century, however, "gun violence had emerged as a serious problem in American life."[26] This development was fueled by the mass production of firearms that began during the wave of American industrialization in the mid-19th century,[27] and it was accompanied by renewed efforts to market gun ownership to the average American consumer.[28]

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[25] Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1713 (2012).

[26] Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. Davis L. Rev. Online 65, 69 (2021).

[27] James B. Jacobs and Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 Law & Contemp. Probs. 129, 137–38 (2017); *see also* David Yamane, *The Sociology of U.S. Gun Culture*, 11 Sociology Compass 1, 2 (2017) ("The 19th century shift from craft to industrial production, from hand-made unique parts to machine-made interchangeable parts, dramatically increased manufacturing capacities, and gun manufacturing played a central role in this development.").

[28] *See* Pamela Haag, *The Gunning of America: Business and the Making of American Gun Culture* xvii–xxi (2016) (explaining how gun manufacturers employed new marketing

It was also driven by "the trauma of the [Civil War] and the enormous increase in the production of guns necessary to supply two opposing armies," which "intensified the problem posed by firearms violence and gave a new impetus to regulation."[29]

In this changed America, "interpersonal gun violence and the collective terrorist violence perpetuated by groups such as the Ku Klux Klan" replaced the "ancient fears of tyrannical Stuart monarchs and standing armies" that preoccupied the Founding generation.[30] Those same concerns about public safety apply to today's America, where increasingly deadly firearms are mass-produced at an unprecedented rate,[31] and have motivated states like Pennsylvania to regulate the ability of still-maturing young people to carry firearms.[32]

In short, both the "how" and the "why" of Pennsylvania's statute track those of its Reconstruction-era analogues in the context of "unprecedented societal concerns [and] dramatic technological changes," *Bruen*, 597 U.S. at 27;

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strategies to create a civilian market for firearms in the 19th century).

[29] Cornell, *supra* note 26, at 69.

[30] *Id.*

[31] Glenn Thrush, *U.S. Gun Production Triples Since 2000, Fueled by Handgun Purchases*, The N.Y. Times (updated June 8, 2022), https://www.nytimes.com/2022/05/17/us/politics/gun-manufacturing-atf.html.

[32] *See, e.g.*, Brief for Illinois, et al. as Amici Curiae Supporting Appellee's Petition for Rehearing, *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122 (3d Cir. 2024).

see infra Section D, so *en banc* rehearing would allow us not just to correct the panel's mistaken methodology, but also its mistaken result.

C. Rehearing Should Be Granted to Give Pennsylvania the Opportunity to Make a Sufficient Historical Showing on Remand in Light of *Bruen*, *Rahimi*, and *Range II*.

Even if this mountain of historical evidence were not enough to sustain Pennsylvania's statutory scheme, we should vacate the District Court's judgment and give Appellee the opportunity to build the necessary record to support its regulation on remand. After all, this case came to us in 2021. And as our Court has recently recognized in a similarly postured case, "much has changed since then." *Pitsilides v. Barr*, No. 21-3320, 2025 WL 441757, at *3 (3d Cir. Feb. 10, 2025).

Between the District Court's judgment and our decision in *Lara II*, the Second Amendment landscape has changed dramatically. First, the Supreme Court decided *Bruen*, abrogating our prior precedent and "effect[ing] a sea change in Second Amendment law." *Id.* Second, the Supreme Court decided *Rahimi*, which clarified that whether a firearm regulation is constitutional turns on whether it "is consistent with the principles that underpin our regulatory tradition." 602 U.S. at 692. And most recently, our *en banc* Court decided *Range II* and interpreted *Bruen* and *Rahimi* in addressing an

as-applied challenge to the federal felon-in-possession statute. *See Range II*, 124 F.4th at 226–32.

Those "intervening developments in our Second Amendment law," we concluded, warranted remand in *Pitsilides*, another case whose history straddled *Bruen*, *Rahimi*, and *Range II*. 2025 WL 441757, at *6. This case is materially indistinguishable. Like *Pitsilides*, *Lara II* was decided on a record developed both before *Bruen* reshaped our Second Amendment jurisprudence and before *Rahimi* clarified *Bruen*'s methodology. And now with our *en banc* Court having decided *Range II* in light of those decisions, Pennsylvania should be given the opportunity to litigate this case and build a record "probative to the prevailing Second Amendment analysis." *Id*. at *8. Rehearing is necessary to maintain uniformity in our cases that predate those seminal cases.

D. Without Rehearing, the Majority's Approach Will Leave States Powerless to Address One of Society's Most Pressing Social Concerns.

Rehearing is also needed because the panel majority failed to apply the "more nuanced approach" that *Bruen* prescribes where a statute responds to "unprecedented social concerns or dramatic technological changes" beyond our Founders' ken. 597 U.S. at 27. Pennsylvania's Uniform Firearms Act fits that bill.

Interpersonal gun violence, historians agree, was simply not a major concern for the Founding generation.[33] Because the "black powder, muzzle-loading weapons" in that era were

[33] Cornell, *supra* note 25, at 1713.

"too unreliable and took too long to load," firearms "were not the weapon of choice for those with evil intent[.]"[34] And when we consider that these were "tight-knit" rural communities where "[e]veryone knew everyone else," "word-of-mouth spread quickly," and the population "knew and agreed on what acts were . . . permitted and forbidden,"[35] it is not surprising that gun violence "simply was not a problem in the Founding era that warranted much attention and therefore produced no legislation."[36]

In today's America, by contrast—where firearms include automatic assault rifles and high-capacity magazines, and our population is mobile, diverse, and largely urban—nearly 50,000 people die from gun-related injuries each year, and over 80% of murders involve a firearm.[37] Horrific mass shootings have also become a daily occurrence, with over 500 such shootings in 2024 alone,[38] and 37 so far in less than two

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[34] *See* Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 Fordham Urb. L. J. 25, 38 (2023).

[35] *Range v. Att'y Gen.*, 69 F.4th 96, 117 (3d Cir. 2023) (Krause, J., dissenting).

[36] Cornell, *supra* note 25, at 1713.

[37] *See, e.g.*, John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW Rsch Ctr. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.

[38] *See Past Years*, Gun Violence Archive (last visited Feb. 21, 2025), https://www.gunviolencearchive.org/past-tolls.

months in 2025.[39] And as I have explained in Section A, *supra*, the phenomenon of gun violence among those between 18 and 20 presents a particularly troubling new social concern that our Founders had no reason to contemplate.

The Supreme Court anticipated this situation when it recognized in *Bruen* that "[t]he 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," and it directed that state laws "implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." 597 U.S. at 27. The panel majority did not heed that counsel, so considerations of federalism and comity also compel *en banc* rehearing.

* * *

The Second Amendment was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," *id.* at 28 (quoting *M'Culloch v. Maryland*, 17 U.S. (Wheat.) 316, 416 (1819)), not to force on modern-day legislatures the fiction that we live in 1791 or to preclude reasonable responses to problems of gun violence that were unfathomable when the Bill of Rights was ratified. And both we and the Supreme Court have held the states' understanding of the Second Amendment when they incorporated it through the Fourteenth Amendment to be relevant and part of "this Nation's historical tradition of firearm

[39] *See Mass Shootings in 2025*, Gun Violence Archive (last visited Feb. 26, 2025), https://www.gunviolencearchive.org/reports/mass-shooting.

regulation." *Bruen*, 597 U.S. at 37. The panel majority ignored this history, and our refusal to grant rehearing *en banc* and correct that error is all the more perplexing in light of our and the Supreme Court's consistent and continued reliance on it.

For all of these reasons, I respectfully dissent from the Court's denial of *en banc* rehearing and, as we are declining to correct our own error, urge the Supreme Court to do so if presented the opportunity.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 21-1832

_____

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

v.

COMMISSIONER PENNSYLVANIA STATE POLICE

_____

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 2-20-cv-01582)
District Judge: Honorable William S. Stickman, IV

_____

Submitted on the Briefs After Remand from the Supreme Court of the United States
December 2, 2024

Before: JORDAN, RESTREPO and SMITH, *Circuit Judges*

(Filed January 13, 2025)

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

Through the combined operation of three statutes, the Commonwealth of Pennsylvania effectively bans 18-to-20-year-olds from carrying firearms outside their homes during a state of emergency. Madison Lara, Sophia Knepley, and Logan Miller, who were in that age range when they filed this suit, wanted to carry firearms outside their homes for lawful purposes, including self-defense. Relying on the Second Amendment to the U.S. Constitution, they, along with two gun-rights organizations, sued the Commissioner of the Pennsylvania State Police (the "Commissioner") to stop enforcement of the statutes, but the District Court ruled against them.

They appealed the District Court's order denying them preliminary injunctive relief and dismissing their case. In January 2024, we reversed and remanded for the District Court to enjoin the Commissioner from arresting 18-to-20-year-olds who violated the statutes. *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 140 (3d Cir. 2024), *cert. granted, judgment vacated sub nom. Paris v. Lara*, No. 24-93, 2024 WL 4486348 (U.S. Oct. 15, 2024). The Commissioner petitioned the Supreme Court for certiorari review. In the meantime, the Supreme Court decided *United States v. Rahimi*, 602 U.S. 680 (2024), which upheld the constitutionality of a federal firearms regulation. The Supreme Court then granted the Commissioner's petition in this matter, summarily vacated our judgment, and remanded the case to us for further consideration in light of *Rahimi*.

According to the Supreme Court's directive, we have considered *Rahimi* and its clarification of the analysis outlined

in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). We conclude that our prior analysis reflects the approach taken in *Bruen* and clarified in *Rahimi*. We did indeed consider "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition[,]" not whether a "historical twin" of the regulation exists. *Rahimi*, 602 U.S. at 692. Having determined that *Rahimi* sustains our prior analysis, we will again reverse and remand the District Court's judgment. Much of what follows is repetitive of our earlier decision, but we provide it as background to the legal analysis and conclusions that follow.

I. BACKGROUND[1]

A. Pennsylvania's firearm statutes

Under §§ 6106(a) and 6109(b) of the Pennsylvania Uniform Firearms Act of 1995 ("UFA"), 18 Pa. Cons. Stat. §§ 6101-6128, an individual may not carry a concealed firearm without a license to do so and must be at least 21 years old to apply for such a license. A concealed-carry license permits the holder to carry a firearm even during a state of emergency. *Id.* § 6107(a)(2). Ordinarily, Pennsylvanians without a concealed-carry license may carry openly, but § 6107(a) of the UFA provides that "[n]o person shall carry a firearm upon public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive[.]" *Id.* § 6107(a). Besides the exception for those with a concealed-carry license, there are exceptions for those "actively engaged in a defense" and those who qualify for one

[1] The operative facts remain undisputed.

of fifteen other exceptions enumerated in § 6106(b).[2] *Id.* § 6107(a)(1)-(2).

Taken together, §§ 6106, 6107, and 6109 – when combined with a state or municipal emergency declaration – have the practical effect of preventing most 18-to-20-year-old adult Pennsylvanians from carrying firearms. When this suit was filed in October 2020, "Pennsylvania had been in an uninterrupted state of emergency for nearly three years" due to gubernatorial proclamations related to the COVID-19 pandemic, the opioid addiction crisis, and Hurricane Ida. (Comm'r Letter Br. at 4-5.) Perhaps out of weariness with the ongoing emergency declarations, Pennsylvania amended its constitution in 2021 to limit the governor's authority to issue such a declaration to twenty-one days, unless the General Assembly votes to extend it. Pa. Const. art. IV, § 20. Subsequently, all state-wide emergency declarations lapsed. Certain county-wide emergencies have since been declared.[3]

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[2] For example, the exceptions permit individuals to carry concealed firearms if they are in law enforcement, the National Guard, or the military, and to transport firearms to and from places of purchase and shooting ranges if the firearms are not loaded. 18 Pa. Cons. Stat. § 6106(b). They do not, however, provide the typical, law-abiding Pennsylvanian with the option of carrying a loaded and operable firearm for most lawful purposes, including self-defense.

[3] For example, the governor issued emergency proclamations when a portion of Interstate 95 collapsed in Philadelphia County in June 2023 and when Tropical Storm

B. Proceedings below

The Appellants sued the Commissioner in his official capacity,[4] challenging as unconstitutional under the Second Amendment the combined effect of §§ 6106, 6107, and 6109, which, together with the then-ongoing state of emergency, foreclosed them from carrying firearms in public places.[5]

They moved for a preliminary injunction in December 2020, and the Commissioner responded by moving to dismiss under Federal Rule of Civil Procedure 12(b)(6). The District Court denied the motion for a preliminary injunction and granted the Commissioner's motion to dismiss the case. Citing this Court's past decisions "giv[ing] broad construction to … 'longstanding' and 'presumptively valid regulatory measures' in the context of licensing requirements[,]" and the "broad consensus" of decisions from other federal courts "that

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Debby caused severe flooding in multiple Pennsylvania counties in August 2024.

[4] At the time the Appellants filed their complaint, the Commissioner was Robert Evanchick. He has since been replaced by Christopher Paris.

[5] Besides facially challenging those provisions of the UFA, the complaint also raised as-applied challenges. The Appellants, however, have not articulated any as-applied challenge in their briefs and have therefore forfeited those claims. *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is [forfeited] unless a party raises it in its opening brief[.]").

restrictions on firearm ownership, possession and use for people younger than 21 fall within the types of 'longstanding' and 'presumptively lawful' regulations envisioned by [the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008),]" the District Court concluded that Pennsylvania's restrictions "fall outside the scope of the Second Amendment." (J.A. at 5, 20.)

The Appellants timely appealed. While their appeal was pending, the Supreme Court decided *Bruen*. The parties submitted additional briefing on *Bruen*'s impact, and we held oral argument. As noted earlier, we reversed and remanded with instructions to the District Court to enter an injunction "forbidding the Commissioner from arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency declared by the Commonwealth." *Lara*, 91 F.4th at 140. The Commissioner then petitioned the Supreme Court for a writ of certiorari. After the Supreme Court decided *Rahimi*, it granted the Commissioner's petition, vacated our decision, and remanded for further consideration. *Lara*, 2024 WL 4486348, at *1. The parties have provided us supplemental briefing on the relevance of *Rahimi* to this dispute.[6]

[6] The Commissioner also filed a motion to remand the case to the District Court, which we denied.

II. DISCUSSION[7]

A. *Rahimi* clarifies and applies *Bruen*'s two-part test.

The Second Amendment, controversial in interpretation of late,[8] is simple in its text: "A well regulated Militia, being

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[7] When considering an appeal from the grant of a Rule 12(b)(6) motion, "we 'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 431 (3d Cir. 2017). When reviewing a district court's refusal to grant a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and its ultimate decision to deny the injunction for abuse of discretion. *Am. Express Travel Related Servs., Inc. v. Sidamon–Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). Whether the Second Amendment conflicts with the statutory scheme at issue here is a question of law that we review de novo. *Hernandez-Morales v. Att'y Gen.*, 977 F.3d 247, 249 (3d Cir. 2020).

[8] *Compare, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 105, 107 (2023) ("Although there is still time for courts to develop workable standards (as they did after [*Heller*]), post-*Bruen* cases reveal an erratic, unprincipled jurisprudence, leading courts to strike down gun laws on the basis of thin historical discussion and no meaningful explanation of historical analogy. … *Rahimi* is an

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. In its landmark *Heller* decision, the Supreme Court held that, regardless of militia service, the Second and Fourteenth Amendments guarantee to an individual the right to possess a handgun at home for self-defense. 554 U.S. at 584, 592. The opinion addressed a District of Columbia law that banned handguns and required other "firearms in the home be rendered and kept inoperable at all times." *Id.* at 630. Pertinent here, the Court observed that the challenged law would be unconstitutional "[u]nder any of the standards of scrutiny … applied to enumerated constitutional rights." *Id.* at 628-29. We and other courts interpreted that observation as endorsing a means-end scrutiny analysis in Second Amendment cases.[9]

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ideal chance to fix some attendant doctrinal problems before they spread further."), *with* Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 289 (2022) ("[T]he *Bruen* majority [saw] that the circuit courts were generally treating the Second Amendment with dismissive hostility, as if it were a second-class provision of the Bill of Rights.").

[9] *See, e.g.*, *Holloway v. Att'y Gen.*, 948 F.3d 164, 172 (3d Cir. 2020) ("If a challenger makes a 'strong' showing that the regulation burdens his Second Amendment rights … then 'the burden shifts to the Government to demonstrate that the regulation satisfies' intermediate scrutiny."); *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 128 (2d Cir. 2020) ("Laws that 'place substantial burdens on core rights are

We turned out to be wrong. In 2022, the Supreme Court decided *Bruen* and squarely rejected "means-end scrutiny in the Second Amendment context." 597 U.S. at 19. It instead announced a new two-step analytical approach. *Id.* at 17-19. At the first step, a court determines whether "the Second Amendment's plain text covers an individual's conduct[.]" *Id.* at 24; *see id.* at 20 (explaining that the "'textual analysis' focuse[s] on the 'normal and ordinary' meaning of the Second Amendment's language" (quoting *Heller*, 554 U.S. at 576-78)). If the text applies to the conduct at issue, "the Constitution presumptively protects that conduct." *Id.* at 24.

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examined using strict scrutiny'; but laws that 'place either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens [only] on conduct outside the core … can be examined using intermediate scrutiny.'") (alteration in original); *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) ("[A] 'regulation that threatens a right at the core of the Second Amendment'– i.e., the right to possess a firearm for self-defense in the home – 'triggers strict scrutiny,' while 'a regulation that does not encroach on the core of the Second Amendment' is evaluated under intermediate scrutiny."); *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) ("The appropriate level of scrutiny 'turn[s] on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.'"); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) ("[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end.").

At the second step, a court determines whether the law in question "is consistent with the Nation's historical tradition of firearm regulation." *Id.* If it is, the presumption made at the first step of *Bruen* is overcome, and the restriction in question can stand.

To aid the court in that second-step analysis, the government bears the burden of identifying a "founding-era" historical analogue to the modern firearm regulation. *Id.* at 24-27. We are to look to the founding because "[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). The question is "whether historical precedent from before, during, and even after the founding evinces a comparable tradition of regulation." *Id.* at 27 (quoting *Heller*, 554 U.S. at 631) (internal quotation marks omitted). In considering that precedent, however, we discount "[h]istorical evidence that long predates" 1791 and "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 34-35.

A few months ago, the Supreme Court applied *Bruen* in *Rahimi* and held that "an individual pos[ing] a credible threat to the physical safety of an intimate partner" may be disarmed while a restraining order is in effect. *Rahimi*, 602 U.S. at 690. The Court reiterated that *Bruen* lays out the "appropriate analysis" and requires a court to consider the principles behind our nation's history of firearm regulation. *Id.* at 692. That inquiry requires a court to "ascertain whether the new law is 'relevantly similar' to laws our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* (alteration in original) (quoting *Bruen*, 597 U.S. at 29). But the present-

day regulation need not be a "dead ringer" or "historical twin" of something from eighteenth-century America. *Id.* (quoting *Bruen*, 597 U.S. at 30). Rather, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* As in *Bruen*, examining why and how the regulation burdens the individual's Second Amendment right is central to the analysis. *Id.*

Bearing all that in mind, the Supreme Court held that the statute at issue in *Rahimi* – namely one disarming a person subject to a domestic violence restraining order – fit "comfortably" within the Nation's historical tradition of firearm regulation, which, since the founding, has "included provisions preventing individuals who threaten physical harm to others from misusing firearms."[10] *Id.* at 690; *see id.* at 695-98 (discussing founding-era surety and going armed laws). The Court also concluded that the statute did not go too far in regulating that conduct, as it disarms an individual only under specific circumstances and for a certain period. *Id.* at 699.

In sum and to reiterate, at a high level, the test outlined in *Bruen* and applied again in *Rahimi* requires two distinct analytical steps to determine the constitutionality of a firearm regulation. The court first decides whether "the Second Amendment's plain text covers an individual's conduct[.]" *Bruen*, 597 U.S. at 24. If it does, the government

[10] The first step of the *Bruen* test was not at issue in *Rahimi*. *See United States v. Rahimi*, 602 U.S. 680, 708 (2024) (Gorsuch, J., concurring) ("[N]o one questions that the law [the appellant] challenges addresses individual conduct covered by the text of the Second Amendment.").

must demonstrate that the challenged regulation is consistent with the principles behind our Nation's historical tradition of firearm regulation. *Rahimi*, 602 U.S. at 691-92; *Bruen*, 597 U.S. at 24.

B. The Second Amendment's reference to "the people" covers all adult Americans.

In defense of the Pennsylvania statutes, the Commissioner begins by arguing that 18-to-20-year-olds are not among "the people" protected by the Second Amendment, and so the Appellants' challenge fails the first step of the *Bruen* test. We considered this issue as a matter of first impression during our first go-round in this case. *Lara*, 91 F.4th at 130-32. Because the Supreme Court in *Rahimi* had no reason to question whether the text of the Second Amendment covered the individual disarmed in that case, 602 U.S. at 708 (Gorsuch, J., concurring), and the Court otherwise preserved the first step of the *Bruen* analytical approach, *id.* at 691, our analysis remains the same.

To succeed on this point, the Commissioner must overcome the strong presumption that the Second Amendment applies to "all Americans." *Heller*, 554 U.S. at 581. In *Heller*, the Supreme Court reiterated that "the people … 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.* at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The Court also explained that, like other references to "the people" in the Constitution, "the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* Accordingly, there

is "a strong presumption that the Second Amendment right … belongs to all Americans."[11] *Id.* at 581.

Bruen affirmed the broad scope of the Second Amendment, stating that the "Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to reasonable, well-defined restrictions." 597 U.S. at 70 (quoting *Heller*, 554 U.S. at 581).[12] And in *Rahimi*, the Supreme Court clarified that, although it used the term "responsible" in *Heller* and *Bruen* "to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right[,]" it said nothing about the rights of those not "responsible." *Rahimi*, 602 U.S. at 701-02. The Court went on to note that it is unclear what a rule based on so vague an adjective as "responsible" would even entail. *Id.* at 701.

Taking our cue from the Supreme Court, we have construed the term "the people" to cast a wide net. In *Range v. Attorney General*, No. 21-2835, 2024 WL 5199447 (3d Cir. Dec. 23, 2024), we recently considered an as-applied challenge to the constitutionality of a federal statute that barred the plaintiff-appellant from purchasing firearms because of a state-level conviction for having made a false statement to obtain food stamps. We held that the Supreme Court's past references

[11] *Heller* identified Second Amendment rightsholders at various points as "Americans," "all Americans," "citizens," and "law-abiding citizens." 554 U.S. 570, 580-81, 625 (2008).

[12] *Bruen* also stated that the protections of the Second Amendment extend to "ordinary, law-abiding, adult citizens." 597 U.S. 1, 31 (2022).

to "law-abiding citizens" did not mean that a criminal conviction removes an American citizen from "the people," especially in light of *Rahimi*'s caution against using a vague and ambiguous concept to dictate the Second Amendment's applicability. *Range*, 2024 WL 5199447, at *4. Because other constitutional provisions referring to "the people" do not categorically exclude felons, we saw "no reason to adopt a reading of 'the people' that excludes Americans from the scope of the Second Amendment while they retain their constitutional rights in other contexts."[13] *Id.*

The Commissioner endeavors to sidestep that conclusion by saying that, "[a]t the time of the Founding – and, indeed, for most of the Nation's history – those who were under

[13] Our dissenting colleague categorizes any reference to the definition of "the people" in *Heller*, *Bruen*, and *Range* as dictum. Dissent at I.A. Dictum or not, we take the use of the words "all Americans" in all three cases to mean that *all* Americans are indeed guaranteed the right to bear arms under the Second Amendment. As discussed more fully herein, the question then becomes whether those who have not reached the age of legal adulthood can, consistent with historical precedent, be disabled from exercising that right, and we agree with our colleague that the answer to that is certainly yes. But that does not mean the definition of legal adulthood at the time of the founding is the definition that should control today. Using that earlier and more restrictive definition makes no more logical sense than would restricting voting rights to those who would have had such rights at the founding, thus excluding from the franchise all but white, land-owning men who are 21-years-of-age or older.

the age of 21 were considered 'infants' or 'minors' in the eyes of the law[,]" "mean[ing] that they had few independent legal rights." (Comm'r Letter Br. at 8-9.) True enough. From before the founding and through Reconstruction, those under the age of 21 were considered minors. *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 451 (Oxford, Clarendon Press 1765) ("So that full age in male or female, is twenty one years … who till that time is an infant, and so styled in law."); 1 Zephaniah Swift, *A System of the Laws of the State Of Connecticut* 213 (Windham, John Byrne pub. 1795) ("Persons within the age of 21, are, in the language of the law denominated infants, but in common speech – minors."); *Infant*, *Black's Law Dictionary* (11th ed. 2019) ("An infant in the eyes of the law is a person under the age of twenty-one years[.]") (quoting John Indermaur, *Principles of the Common Law* 195 (Edmund H. Bennett ed., 1st Am. ed. 1878)). Notwithstanding the legal status of 18-to-20-year-olds during that period, however, the Commissioner's position is untenable for three reasons.

First, it supposes that the initial step in a *Bruen* analysis requires excluding individuals from "the people" if they were so excluded at the founding. That argument conflates *Bruen*'s two distinct analytical steps. Although the government is tasked with identifying a historical analogue at the second step of the analysis, *Rahimi*, 602 U.S. at 691-92, we are not limited to looking through that same retrospective lens at the first step. If, at step one, we were rigidly limited by eighteenth-century conceptual boundaries, "the people" would consist solely of white, landed men, and that is obviously not the state of the

law.[14] *Cf.*, *id.* at 691 (explaining that the Court's Second Amendment precedents "were not meant to suggest a law trapped in amber"); *Range*, 2024 WL 5199447, at *6 (observing that founding-era gun restrictions based on "race and religion" such as those on "Loyalists, Native Americans, Quakers, Catholics, and Blacks" would now be "unconstitutional under the First and Fourteenth Amendments").

Second, it does not follow that, just because individuals under the age of 21 could not exercise certain legal rights at the founding, they were excluded ex ante from the scope of "the people." One can be included as a member of that class and still not be allowed to carry a gun. For example, as then-Judge Barrett explained before *Bruen*, "[n]either felons nor the mentally ill are categorically excluded from our national community." *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). But "[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).

Third, consistency has a claim on us. It is undisputed that 18-to-20-year-olds are among "the people" for other constitutional rights such as the right to vote (U.S. Const. art. I, § 2; *id.* amend. XVII), freedom of speech, the freedom to peaceably assemble and to petition the government (*id.* amend.

[14] *See* Note, *The Meaning(s) of 'The People' in the Constitution*, 126 HARV. L. REV. 1078, 1085 (2013) ("'[T]he people' largely meant property-owning white adult males, at least initially.").

I), and the right against unreasonable searches and seizures (*id.* amend. IV).[15] *Heller* cautions against the adoption of an inconsistent reading of "the people" across the Constitution. 554 U.S. at 580. Indeed, wholesale exclusion of 18-to-20-year-olds from the scope of the Second Amendment would impermissibly render "the constitutional right to bear arms in public for self-defense … 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 597 U.S. at 70 (quoting *McDonald v. Chicago*, 561 U.S. 742, 780 (2010)).

We therefore reiterate our holding that 18-to-20-year-olds are, like other subsets of the American public, presumptively among "the people" to whom Second Amendment rights extend.[16]

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[15] The three other provisions in the Constitution that explicitly refer to "the people" are the preamble ("We the People"), the Ninth Amendment (providing that no enumerated constitutional right "shall … be construed to deny or disparage others retained by the people"), and the Tenth Amendment (providing "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[16] Four other federal appellate courts have determined that 18-to-20-year-olds are among "the people" protected by the Second Amendment. *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 116 (10th Cir. 2024); *Worth v. Jacobson*, 108 F.4th 677, 692 (8th Cir. 2024); *Hirschfeld v. ATF*, 5 F.4th 407, 418-34 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322 (4th

Cir. 2021); *Jones v. Bonta*, 34 F.4th 704, 717-21 (9th Cir. 2022), *opinion vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022).

Polis and *Worth* were decided after *Rahimi*. In *Polis*, the Tenth Circuit held that a citizen under the age of 21 is part of "the people" as defined by the Second Amendment for similar reasons as we do here, including that "'the people' does not seem to vary" across the Constitution. 121 F.4th at 116. The Tenth Circuit rejected the argument that "the people" excludes those without "full legal rights" at the founding by comparing them to felons, who have "consistently been disenfranchised from the Founding through modern day" but are included in "the people." *Id.* (citing *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting)). The Eighth Circuit in *Worth* trod similar ground. 108 F.4th at 689-91. It also rejected reading the Second Amendment beyond its plain text to exclude those considered "irresponsible" or below a certain age limit. *Id.* at 691-92.

Hirschfeld and *Bonta* were decided before *Bruen*. *Hirschfeld* was vacated as moot because the plaintiff turned 21 while the case was on appeal, 14 F.4th at 326-27, and *Bonta* was vacated and remanded to the district court for consideration in light of *Bruen*, 47 F.4th at 1125. Their analyses are nevertheless instructive.

In *Hirschfeld*, the Fourth Circuit, after reviewing the use of "the people" in the rights enumerated in the First and Fourth Amendments, expressed its view that "it is hard to conclude that 18-to-20-year-olds have no Second Amendment rights where almost every other constitutional right affords them that protection." 5 F.4th at 424. In a variant on a familiar canon of construction, the Fourth Circuit also explained that when the

C. The relevant historical timeframe

If there is any argument to be made under *Rahimi* that the Commonwealth can restrict the rights of 18-to-20-year-olds with respect to firearms, the Commissioner must make that

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drafters of the Constitution and its amendments wanted to set an age restriction, they did so explicitly:

> [W]hile various parts of the Constitution include age requirements, the Second Amendment does not. The Founders set age requirements for Congress and the Presidency, but they did not limit any rights protected by the Bill of Rights to those of a certain age. *See* U.S. Const. art. I, § 2 (age 25 for the House); *id.* art. I, § 3 (age 30 for the Senate); *id.* art. II, § 1 (age 35 for the President); *cf. id.* amend. XXVI (setting voting age at 18). In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment.

Id. at 421.

The Ninth Circuit in *Bonta* reached the same conclusion about age limits, but on a different basis. It determined that 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.'" *Bonta*, 34 F.4th at 724 (citing *Heller*, 544 U.S. at 580).

argument by showing that such a restriction is consistent with the principles that underpin the Nation's historical tradition of gun regulation. *Rahimi*, 602 U.S. at 692. The Commissioner sought to shoulder that burden, but, to determine whether he succeeded in his task, we first must understand which time period – the Second Amendment's ratification in 1791 or the Fourteenth Amendment's ratification in 1868 – is the proper historical reference point for evaluating the contours of the Second Amendment as incorporated against the Commonwealth. Again, we addressed this issue the first time we considered this case.

The *Bruen* Court declined to resolve this timeframe question because, in that case, the public understanding of the Second Amendment right at issue was the same in 1791 and 1868 "for all relevant purposes." 597 U.S. at 38. For the same reason, it was also unnecessary to resolve the timeframe question in *Rahimi*. 602 U.S. at 692 n.1. We, however, are situated differently. While the Commissioner has not pointed to an eighteenth-century regulation barring 18-to-20-year-olds from carrying firearms, he says that there are "dozens of 19th century laws restricting 18-to-20-year-olds' ability to purchase, possess and carry firearms[.]" (Comm'r Letter Br. Reply at 7.) He has thus asserted, at least by implication, that there is a conflict between regulatory burdens as they existed in 1791 and 1868, respectively. We thus are obligated to confront the choice of timeframe.[17]

[17] The Supreme Court was able to avoid resolving this question in *Bruen* and *Rahimi* because it could say that the answer did not matter: the laws relevant to the Second Amendment issue in each case were roughly the same in 1791

As in our earlier decision in this case, we begin with the premise that 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." *Bruen*, 597 U.S. at 37; s*ee also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."); *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("Incorporated 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.'") (quoting *McDonald*, 561 U.S. at 765); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) ("We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that

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and 1868. *Bruen*, 597 U.S. at 38; *Rahimi*, 602 U.S. at 692 n.1. But the Commissioner has forced the issue here by insisting that the laws at the time Americans adopted the Fourteenth Amendment would have allowed states to forbid people in the Appellants' position from having firearms, while at the same time providing no evidence of a tradition of disarming 18-to-20-year-olds at the time of the founding. By maintaining that there is ample evidence from 1868 to support the Appellants' disarmament, but offering none from the founding era, the Commissioner is claiming that there is a difference between how each generation understood the right, so we must pick between the two timeframes.

protect those personal rights against federal encroachment.") (internal citations omitted).

Accordingly, the Commissioner must establish that the Second Amendment – whether applied against a state or federal regulation – is best construed according to its public meaning at the time of the Fourteenth Amendment's ratification as opposed to the public meaning of the right when the Second Amendment was ratified. Although neither *Bruen* nor *Rahimi* definitively decided this issue, *Bruen* gave a strong hint when it observed that there has been a general assumption "that the scope of the protection applicable to the Federal Government and States [under the Bill of Rights] is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 597 U.S. at 37. In support, it cited *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004); *Virginia v. Moore*, 553 U.S. 164, 168-69 (2008); and *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011).

In those cases, the Court interpreted the bounds of the Sixth, Fourth, and First Amendments, respectively, according to their public meaning at the founding. In *Crawford*, which considered the scope of the Confrontation Clause, the Court observed that "[t]he right to confront one's accusers is a concept that dates back to Roman times," but the emphasis in the opinion was on "English common law" because it was "[t]he founding generation's immediate source of the concept[.]" 541 U.S. at 43. Then in *Moore*, the Court explained that, "[i]n determining whether a search or seizure is unreasonable, we begin with history." 553 U.S. at 168. That history includes "the statutes and common law of the founding era" and the understanding "of those who ratified the Fourth

Amendment." *Id.* Finally, in *Nevada Commission on Ethics*, the Court held that a Nevada statute requiring public officials to recuse themselves from voting on certain matters did not violate the First Amendment, and founding-era evidence was "dispositive" in the analysis.[18] 564 U.S. at 122; *see also id.* at 121 ("Laws punishing libel and obscenity are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since.").

While the Supreme Court has not held that all constitutional rights that have been made applicable to the states must be construed according to their public meaning in 1791, the Commissioner has still not articulated a theory for defining some rights according to their public meaning in 1791 and others according to their public meaning in 1868. All that the Commissioner has managed to muster is the observation that "[i]n *Rahimi*, the Court clearly stated that the question of 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' remains unresolved." (Comm'r Post-Rem. Supp. Br. at 21 (quoting *Rahimi*, 602 U.S. at 692 n.1)). A more complete characterization of *Rahimi* would have been to fully quote the Supreme Court's statement that, just as in *Bruen*, there was no reason for the Court to take up the question. This is how the

[18] *See also Printz v. United States*, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning.'") (quoting *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986)).

Court put it: "We explained [in *Bruen*] that under the circumstances, resolving the dispute [over 1791 versus 1868 as the proper time to gauge the scope of the Second Amendment] was unnecessary to decide the case. *The same is true here*." *Rahimi*, 602 U.S. at 692 n.1 (emphasis added) (citation omitted). In other words, the Supreme Court hasn't had to opine on the question yet, but we have, in the earlier appeal in this very case.

Nothing in *Rahimi* undermines the reasoning there. We reiterate, for the reasons stated in our earlier opinion, *Lara*, 91 F.4th at 133-34, that the constitutional right to keep and bear arms should be understood according to its public meaning in 1791, as that "meaning is fixed according to the understandings of those who ratified it[.]" *Bruen*, 597 U.S. at 28; *see also id.* at 37 ("[The Court has] generally assumed that the scope of the protection[s] 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.").

That said, *Rahimi* teaches that public meaning is not just "those regulations … that could be found in 1791[,]" but rather "the principles underlying the Second Amendment," with historical regulations providing evidence of those principles. *Rahimi*, 602 U.S. at 692. That evidence can include laws "through the end of the 19th century[,]" which the Supreme Court has recognized can be "a 'critical tool of constitutional interpretation'" because they can be evidence of a historical tradition and shed important light on the meaning of the Amendment as it was originally understood. *Bruen*, 597 U.S. at 35 (quoting *Heller*, 554 U.S. at 605). It offered two such examples in *Bruen*: First, evidence of "'a regular course of practice' can 'liquidate & settle the meaning'" of constitutional

terms and phrases. *Id.* at 35-36 (quoting *Chiafalo v. Washington*, 591 U.S. 578, 593 (2020)). And second, post-ratification history can confirm a court's understanding of Founding-era public meaning. *Id.* at 37. Although the Court "d[id] not undertake an exhaustive historical analysis … of the full scope of the Second Amendment[,]" *id.* at 31 (quoting *Heller*, 554 U.S. at 626), or "conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution[,]" *id.* at 81 (Barrett, J., concurring), it drew a firm line where later evidence "contradicts earlier evidence[,]" *id.* at 66. In that circumstance, "later history contradicts what the text says, [so] the text controls." *Id.* at 36.

Bruen thus reminds us that laws enacted in the late-19th century "do not provide as much insight into" the original meaning of the right to keep and bear arms as do earlier sources. *Id.* (quoting *Heller*, 554 U.S. at 614). And "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the [Second Amendment] obviously cannot overcome or alter that text." *Id.*

That is precisely the problem here: Founding-era laws reflect the principle that 18-to-20-year-olds are "able-bodied men" entitled to exercise the right to bear arms, *Heller*, 554 U.S. at 596, while the Commissioner relies on laws enacted at least 50 years after the ratification of the Second Amendment to argue the exact opposite.[19] The Supreme Court has

[19] Again, unlike *Bruen* and *Rahimi*, the case before us is one in which history that long postdates the ratification of the Second Amendment is incompatible with the public

counseled "against giving postenactment history more weight than it can rightly bear," *Bruen*, 597 U.S. at 35, and given its irreconcilable conflict with the Founding-era laws, the Commissioner's catalogue of statutes from the mid-to-late nineteenth century can bear none.[20] What is left is an early

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understanding in 1791, and, of course, we decide today only the case before us.

[20] 1856 Ala. Acts 17 (banning gun sales to minors under 21); 16 Del. Laws 716 (1881) (banning concealed-carry, and banning the sale of deadly weapons to minors under 21); Wash. D.C. 27 Stat. 116 (1892) (criminalizing concealed-carry for all persons, and banning the sale of guns and dangerous weapons to minors under 21); 1876 Ga. Laws 112 (banning gun sales to minors under 21); 1881 Ill. Laws 73 (banning the sale of guns and other dangerous weapons to minors under 21); 1875 Ind. Acts 86 (banning the sale of pistols, cartridges, and other concealable deadly weapons to anyone under 21); 1884 Iowa Acts 86 (banning the sale of pistols to minors under 21); 1883 Kan. Sess. Laws 159; (banning the purchase and possession of guns and other dangerous weapons by minors under 21); 1873 Ky. Stat. art. 29, at 359 (criminalizing concealed carry for all persons, and banning the sale of all deadly weapons to minors under 21); 1890 La. Acts 39 (banning the sale of concealable deadly weapons to anyone under 21); 1882 Md. Laws 656 (banning the sale of firearms and deadly weapons other than rifles and shotguns to minors under 21); 1878 Miss. Laws 175 (criminalizing concealed-carry for all persons, and prohibiting the sale of firearms and deadly weapons to intoxicated persons or to minors under 21); 1883 Mo. Laws 76 (criminalizing concealed carry for all persons, and prohibiting the sale of such

eighteenth-century statute that supposedly supports the contention that Pennsylvania's current restriction on 18-to-20-year-olds is a "longstanding, presumptively lawful regulation[.]" (Answering Br. at 27.) Specifically, the Commissioner directs us to Pennsylvania's Act of August 26, 1721, which prohibited "carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any plantation other than his own[.]"[21]

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weapons to minors under 21 without parental consent); 1885 Nev. Stat. 51 (prohibiting minors under 21 from carrying concealed pistols and other dangerous weapons); 1893 N.C. Sess. 468-69 (banning the sale of pistols and other dangerous weapons to minors under 21); 1856 Tenn. Pub. Acts 92 (prohibiting the sale of pistols and other dangerous weapons to minors under 21); 1897 Tex. Gen. Laws 221-22 (banning the sale of pistols and other dangerous weapons to minors under 21); 1882 W.Va. Acts 421-22 (criminalizing carrying guns and other dangerous weapons about one's person and prohibiting the sale of such weapons to minors under 21); 1883 Wis. Sess. Laws 290 (making it unlawful for "any minor . . . to go armed with any pistol or revolver" and for any person to sell firearms to minors under 21); 1890 Wyo. Sess. Laws 1253 (banning the sale of pistols and other dangerous weapons to anyone under 21).

Full texts of these laws are available at the *Repository of Historical Gun Laws*, Duke Univ. School of Law, https://firearmslaw.duke.edu/repository/search-the-repository/ (last visited Dec. 17, 2024).

[21] In full, the Act provided:

> Be it enacted by the authority aforesaid, That if any person or persons shall presume, at any time after the sixteenth day of November, in this present year one thousand seven hundred and twenty one, to carry any gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation, and shall thereof convicted ether upon view of any justice of the peace within this province, or by the oath or affirmation of any one or more witnesses, before any justice of the peace, he shall for every such offense forfeit the sum of ten shillings. And if any person whatsoever, who is not owner of fifty acres of land and otherwise qualified in the same manners as persons are or ought to be by the laws of this province for electing of members to serve in assembly, shall at any time, after the said Sixteenth day of November, carry any gun, or hunt in the woods or inclosed lands, without license or permission obtained from the owner or owners of such lands, and shall be thereof convicted in manner aforesaid, such offender shall forfeit and pay the sum of five shillings.

Act of Aug. 26, 1721, ch. 246, 3 Statutes at Large of Pa. 254, 255-56, *repealed by* Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46. Text available at the *Repository of Historical Gun Laws*, https://firearmslaw.duke.edu/laws/the-statutes-at-large-of-pennsylvania-c-142-p-254-an-act-to-prevent-the-

In our prior opinion, we compared the burdens imposed by that 1721 statute with those at issue here, discerning no near equivalence or significant analogue between them. *Lara*, 91 F.4th at 135. That type of comparison comports with *Rahimi*'s methodology, which calls for us to consider "why and how" founding-era laws and present-day ones burden the Second Amendment right so we can determine whether the modern law is "analogous enough" to historical precursors. *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30). Our prior analysis and conclusions, therefore, remain wholly consistent with Supreme Court precedent.

The 1721 statute appears to be primarily focused on preventing Pennsylvanians from hunting on their neighbors' land, not on restricting the right to publicly carry a gun. When the statute was later repealed and replaced in 1760, that subsequent statute included another provision that prevented "fir[ing] a gun on or near any of the King's highways," which indicates that carrying a firearm in public places was generally not restricted.[22] Act of Apr. 9, 1760, ch. 456, 6 Statutes at

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killing-of-deer-out-of-season-and-against-carrying-of-guns-or-hunting-by-persons-not-qualified/ (last visited Dec. 17, 2024).

[22] In full, the relevant portion of the 1760 Act provided:

> Be it enacted by the authority aforesaid, That if any person or persons shall presume at any time after the publication of this act[,] to carry any gun or hunt on any [e]nclosed or improved lands of

Large of Pa. 46, 48. More to the point, however, to the extent the statute did burden the right to carry a gun in public, it did so without singling out 18-to-20-year-olds, or, for that matter, any other subset of the Pennsylvania population. Although the Commissioner is not tasked with identifying a precise match between the present-day regulation and historical precursors, *Rahimi*, 602 U.S. at 692, he fails to establish that the Pennsylvania statutory scheme disarming Appellants is at all analogous to the founding-era statute he leans on. In making this observation, we are not, as he complains, demanding that he produce a historical twin (Comm'r Post-Rem. Supp. Br. at 20); we are insisting only that he provide something that in principle is genuinely analogous, and the 1721 Pennsylvania statute falls conspicuously short.

> any of the inhabitants of this province other than his own unless he shall have license or permission from the owner of such lands, or shall presume to fire a gun on or near any of the King's highways and shall be thereof convicted, either upon view of any [J]ustice of the [P]eace within this province or by the oath or affirmation of any one or more witnesses before any [J]ustice of the [P]eace, he shall for every such offense forfeit the sum of forty shillings.

Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46, 48. Text available at the Legislative Reference Bureau of Pennsylvania, https://palrb.gov/Preservation/Statutes-at-Large/View-Document/17001799/1760/0/act/0456.pdf (last visited Dec. 17, 2024).

Against the sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification, we can juxtapose the Second Militia Act, passed by Congress on May 8, 1792, a mere five months after the Second Amendment was ratified on December 15, 1791. The Act required all able-bodied men to enroll in the militia and to arm themselves upon turning 18.[23] Second Militia Act of 1792 § 1, 1 Stat. 271 (1792). That young adults had to serve in the militia indicates that founding-era lawmakers believed those youth could, and indeed should, keep and bear arms.

The Commissioner contests the relevancy of the Second Militia Act on three grounds. First, he notes that, "to the extent 1791 militia laws have any relevance, the UFA contains an exception for members of the Military and National Guard, and

[23] The Second Militia Act required that "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 herein exempted) shall severally and respectively be enrolled in the militia[.]" Second Militia Act of 1792 § 1, 1 Stat. 271 (1792). The Second Militia Act further required every member of the militia to "provide himself with a good musket or firelock ... or with a good rifle[.]" *Id.*

The First Militia Act, which Congress passed shortly before, on May 2, 1792, gave the president authority to call out the militias of the several states, "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." First Militia Act of 1792 § 1, 1 Stat. 264 (1792).

is thus entirely consistent with them."[24] (Comm'r Letter Br. Reply at 7 (citing 18 Pa. Cons. Stat. § 6106(b)(2)).) Second, he objects that, when the Second Amendment was ratified, nine states set the threshold for militia service at 16 and seven states set the maximum age at 50. According to the Commissioner, 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." (Comm'r Letter Br. Reply at 5.) And third, he asserts that the Second Militia Act – as well as similar state statutes that required 18-to-20-year-olds to participate in the militia – "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."[25] (Comm'r Letter Br. Reply at 5.)

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[24] Although the founding generation was "devoted to the idea of state control of the militia," modern statutes "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 37, 196 (2006).

[25] The Commissioner also notes that Pennsylvania's 1755 Militia Act provided that "no Youth, under the Age of Twenty-one Years, . . . shall be admitted to enroll himself . . . without the Consent of his or their Parents or Guardians[.]" The text of that statute is available at *Militia Act, [25 November 1755]*, Nat'l Archives, https://founders.archives.gov/documents/Franklin/01-06-02-

No doubt, the Commissioner is correct that a duty to possess guns in a militia or National Guard setting is distinguishable from a right to bear arms unconnected to such service. *See Nat'l Rifle Assoc. v. Bondi*, 61 F.4th 1317, 1331 (11th Cir. 2023) (cautioning against the conflation of the obligation to perform militia service with the right to bear arms). Still, the Second Militia Act is good circumstantial evidence of the public understanding at the Second Amendment's ratification as to whether 18-to-20-year-olds could be armed, especially considering that the Commissioner cannot point to a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns.[26] The Commissioner's contention that any reliance on militia laws would force us to invalidate laws prohibiting 16-to-17-year-olds from possessing firearms is simply not persuasive. Although the age of militia service dipped to 16 in some states during the colonial and revolutionary periods – a development perhaps attributable to necessities created by ongoing armed conflicts – the Appellants rightly observe that,

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0116#BNFN-01-06-02-0116-fn- 0001 (last visited Dec. 17, 2024).

[26] *See Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 342 (5th Cir. 2013) (Jones, J., dissenting from the denial of rehearing) ("[T]hose minors were in the militia and, as such, they were required to own their own weapons. What is inconceivable is any argument that 18-to-20-year-olds were not considered, at the time of the founding, to have full rights regarding firearms.") (emphasis removed).

"[a]t the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia service in *every state* became eighteen." (Reply Br. at 17 (citing *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 340 (5th Cir. 2013) (Jones, J., dissenting)).) Finally, even though there were founding-era militia laws that required parents or guardians to supply arms to their minor sons, nothing in those statutes says that 18-to-20-year-olds could not purchase or otherwise acquire their own guns.

We understand that a reasonable debate can be had over allowing young adults to be armed, but the issue before us continues to be a narrow one. Our question is whether the Commissioner has borne his burden of proving that Pennsylvania's restriction on 18-to-20-year-olds' Second Amendment rights is consistent with the principles that underpin founding-era firearm regulations, and the answer to that is no.

D. Mootness

The Commissioner advanced a number of other arguments in his original appeal, only one of which bears any further comment here.[27] He contended that the case was moot

[27] In addition to the mootness argument addressed here, the Commissioner asserted that the Eleventh Amendment and Article III of the Constitution barred Appellants' claim and that Appellants forfeited their request for injunctive relief and failed to adequately describe that relief. The Commissioner has provided no further argument on those points in this revived appeal. We thus refer to the relevant portions of our

because the Appellants no longer faced any restrictions on their ability to carry publicly, which eliminated any injury for which they could obtain relief. He pointed to the amendment to Pennsylvania's constitution that limits the governor's authority to issue an emergency declaration to 21 days, *see* Pa. Const. art. IV, § 20(c), and he noted that the emergency proclamations in place when this suit began have lapsed. He also argued that the claims of the individual Appellants were moot because they reached the age of 21 and became eligible to apply for concealed-carry licenses.[28]

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prior opinion, *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 138-40 (3d Cir. 2024), *cert. granted, judgment vacated sub nom. Paris v. Lara*, No. 24-93, 2024 WL 4486348 (U.S. Oct. 15, 2024), to which we have nothing to add.

[28] During the original appeal, the organizational Appellants acknowledged that their standing "depend[ed] upon at least one of their members having standing in their own right." (3d Cir. D.I. 71-1 at 1 (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).) At that time, they made the Court aware of at least one individual, George Pershall, who was a 19-year-old Pennsylvania resident and U.S. citizen, who belonged to both organizations, and who remained subject to the UFA's restrictions. The record was supplemented to acknowledge him, but we are now told that he turned 21 in December of 2024. Consequently, the organizational Appellants again moved to supplement the record, this time to make us aware of Keegan Gaston, an 18-year-old resident of Indiana County, Pennsylvania, who is a member of both organizations and will remain subject to the UFA. Although the Commissioner complained that the facts

Generally, a case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Virgin Islands*, 842 F.3d 201, 208 (3d Cir. 2016). "[A]n appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it impossible for the court to grant any effectual relief whatsoever." *In re World Imports Ltd.*, 820 F.3d 576, 582 (3d Cir. 2016).

The Appellants have invoked the "capable of repetition yet evading review" exception to the mootness rule, which applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). A plaintiff bears the burden to show that there is "more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability." *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 231 (3d Cir. 2021) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

This case presents such a circumstance because Pennsylvania continues to declare emergencies, and it is reasonably likely that other 18-to-20-year-olds, including members of the organizational Appellants here, namely the

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asserted about Mr. Gaston are untested by the adversarial process, nothing has been provided calling those simple facts into question. We therefore granted the motion.

Second Amendment Foundation and the Firearms Policy Coalition, will be banned from carrying guns in public yet again. The Appellants persuasively argue that, while lengthy emergencies may now be less likely because of the recent constitutional amendment, the risk of regulated persons being unable to fully litigate this Second Amendment issue has increased since the adoption of the new constitutional amendment. Because emergencies may last for only twenty-one days, absent intervention from the General Assembly, it is highly unlikely that there will be enough time to fully litigate a claim. The "capable of repetition yet evading review" exception to mootness thus applies.[29]

III. CONCLUSION

For the foregoing reasons, and having considered the Supreme Court's analysis in *Rahimi*, we maintain our decision to reverse the District Court's judgment and remand with instructions to enter an injunction forbidding the Commissioner from arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency declared by the Commonwealth.

[29] In any event, as noted earlier (*see supra* n.28), we have been informed of at least one individual who falls within the appropriate age range and holds membership in the organizational Appellants.

RESTREPO, *Circuit Judge*, dissenting.

Because Pennsylvania's statutory scheme does not violate the Second Amendment of the Constitution, I respectfully dissent. The challenged statutory scheme here is "consistent with the Second Amendment's test and historical understanding," *see N.Y. State Pistol & Rifle Ass'n v. Bruen*, 597 U.S. 1, 26 (2022), and "consistent with the principles that underpin our [Nation's] regulatory tradition," *see United States v. Rahimi*, 602 U.S. 680, 692 (2024) (citing *Bruen*, 597 U.S. at 26-31).

In deciding whether a firearm regulation is constitutional under the Second Amendment, a court must decide whether the plain text of the Second Amendment covers the individual challenger or conduct at issue, and *if so*, whether the Government has presented sufficient historical analogues to justify the restriction. *See Bruen*, 597 U.S. at 24.

District of Columbia v. Heller, 554 U.S. 570 (2008), recognized that the Second Amendment protects the right of an "ordinary, law-abiding citizen to possess a handgun in the home for self-defense," *see Bruen*, 597 U.S. at 9 (citing *Heller*, 554 U.S. at 581), and *Bruen* held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," *id.* at 10. *Rahimi* more recently held that an "individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 602 U.S. at 702. However, there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply.

The more acute question in this case, then, is where does that age threshold lie? A "textual analysis focused on the normal and ordinary meaning of the Second Amendment's language," *see Bruen*, 597 U.S. at 20 (citing *Heller*, 554 U.S. at 576–77, 578) (quotation marks omitted), and an "examination of a variety of legal and other sources," *see id.* (quoting *Heller*, 554 U.S. at 605), leads to the conclusion that the scope of the right, as understood during the Founding era, excludes those under the age of 21. Thus, there is no need to proceed to the second step of the *Bruen* analysis.

I. The plain text of the Second Amendment does not cover 18-to-20-year-olds freely carrying guns in public during a state of emergency.

Bruen and *Rahimi* affirm the historical-textualist methodology established in *Heller*. *Rahimi*, 602 U.S. at 691 (citing *Bruen*, 597 U.S. at 22). To interpret the language of the Second Amendment, one must look to historical sources evidencing how the public would have understood its text near the time of its ratification. *Bruen*, 597 U.S. at 19–21; *Heller*, 554 U.S. at 576. The Supreme Court has "clarified that 'examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after [the Second Amendment's] enactment or ratification' was 'a critical tool of constitutional interpretation.'" *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 605). This principle presumes that constitutional rights do not change over time but "are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34 (quoting *Heller*, 554 U.S. at 634–35) (emph. added in *Bruen*). When later history or understanding contradicts the original public meaning of the text, the original understanding controls. *Id.* at 36.

Under *Bruen*, "[w]hen the Second Amendment's plain text *covers an individual's conduct*, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17, 24 (emph. added). This presumption would apply only if the plain text of the Second Amendment covers the *Appellants'* conduct. However, because the text does not protect the Appellants here, it doesn't protect their conduct.

A. The public in 1791 did not understand those under 21 to be part of "the people" protected by the Second Amendment.

While my colleagues in the Majority acknowledge that "[f]rom before the founding and through Reconstruction, those under the age of 21 were considered *minors*," and my colleagues conclude that "'the people' covers all *adult* Americans," *see* Majority Op. at II.B (emph. added), the Majority also holds that "18-to-20-year-olds are . . .

presumptively among 'the people' to whom Second Amendment rights extend," *id.* It is worth reiterating that there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply.

The age threshold was not an issue in *Bruen*. It was "undisputed that [the petitioners] – two ordinary, law-abiding, *adult* citizens – [were] part of 'the people' whom the Second Amendment protects." *Bruen*, 597 U.S. at 31–32 (emph. added). The Supreme Court "therefore turn[ed] to whether the plain text of the Second Amendment protects [the petitioners'] proposed *course of conduct.*" *Id.* at 32 (emph. added). Similarly, whether individuals under 21 were part of "the people" in the Second Amendment was not at issue before the Supreme Court in *Heller* or *Rahimi*, or before this Court in *Range v. Attorney General*, 2024 WL 5199447 (3d Cir. Dec. 23, 2024) (en banc).

The Majority acknowledges that the Commissioner's argument that 18-to-20-year-olds are not among "the people" protected by the Second Amendment is a challenge to "the *first* step of the *Bruen* test," *see* Majority Op. at II.B (emph. added). However, the Majority then concludes that "[t]o succeed on this point, the Commissioner must overcome the strong presumption that the Second Amendment applies to 'all Americans.'" *Id.* (citing *Heller*, 554 U.S. at 581). It stands to reason that any reference to a definition of "the people" as it relates to 18-to-20-year-olds in *Heller*, *Bruen*, and *Range* is dictum.

Nevertheless, even if in the first step we assume a need to overcome the "presumption that the Second Amendment applies to 'all Americans,'" *see id.* at II.B (citing *Heller*, 554 U.S. at 581), there is ample evidence that the Founding-era public would not have understood the text of the Second Amendment to extend its protection to those under 21. At the Founding, people under 21 lacked full legal personhood. Indeed, there is no disagreement that at the time of the Founding, people under 21 were considered "infants" in the eyes of the law. *See id.*; *see also* 1 William Blackstone, *Commentaries* *453; 4 James Kent, *Commentaries on American Law* 266 (W.M. Hardcastle Brown ed. 1894) (1826); 1 John Bouvier, *Institutes of American Law* 87 (New ed., The Lawbook Exchange, Ltd. 1999) (1851) ("The rule that a man

attains his majority at age twenty-one years accomplished, is perhaps universal in the United States. . . . He is released from all legal personal ties whatever, which he owed to others on account of his infancy . . . .”). Nor is there serious debate that the conception of adulthood beginning at age 18 is relatively new to American law.[1] But to understand the significance of the historical-legal conception of infant status, one must understand its predicate presumption of incapacity.

The Founding-era generation inherited the common-law presumption that persons who lacked rationality or moral responsibility could not exercise a full suite of rights. Abrams, *supra* note 1, at 20. This idea has its roots in the Enlightenment conception of rights as being endowed only to those “with discernment to know good from evil, and with power of choosing those measures which appear . . . to be more desirable.” 1 William Blackstone, *Commentaries* *125; *see* Abrams, *supra* note 1, at 20. In other words, those whom society considered to be rational.

Both at English common law and in eighteenth-century American law, infants were universally believed to lack such rationality. Infants were viewed as requiring the protection of a guardian in the management of their affairs. 3 William Blackstone, *Commentaries* *48; 1 *Commentaries* *463; *see also* Bouvier, *Institutes of American Law* *81 (“It is [] of the utmost importance, to his own interest, that man in his infancy, and until he has attained a sufficient maturity to manage his affairs, should be confided to the care, direction, and advice of guardians capable of protecting him.”).

James Kent, a respected contemporary scholar of American constitutional law, said, “[t]he necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years.”

[1] *See* Douglas E. Abrams, Susan V. Mangold, & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy, and Practice* 19 (2020). Of course, the drinking age is still 21, and federal law currently prohibits tobacco sales to persons under 21. *Id.* The tradition of limiting the rights of those under 21 continues into the present.

Saul Cornell, "*Infants" and Arms Bearing in the Era of the Second Amendment*, Yale L. & Pol'y Rev. (Oct. 26, 2021) (hereinafter "*Infants*") (quoting 2 James Kent, *Commentaries on American Law* 191 (O. Halsted ed., 1827)). Moreover, Blackstone referred to infancy as "a defect of the understanding." 4 William Blackstone, *Commentaries* *15–18. Indeed, Justice Clarence Thomas acknowledged this founding-era belief: *"*Children lacked reason and decisionmaking ability. They 'have not Judgment or Will of their own,' John Adams noted." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 826–27 (2011) (Thomas, J., dissenting) (citing Letter from John Adams to James Sullivan (May 26, 1776), in 4 Papers of John Adams 210 (Robert Taylor ed. 1979)).

A consequence of this legal presumption was that at the Founding, infants had few independent rights. Blackstone explains that, because of infants' inherent incapacity, parents had the power to limit their children's rights of association, to control their estates during infancy, and to profit from their labor. 1 William Blackstone, *Commentaries* *452–53. Infants could not marry without their father's consent. *Id.* at *437, *452. Fathers had a right to the profits of their infants' labor. *Id.* Even the right to contract, which the Framers thought to enshrine in the body of the Constitution, was greatly abridged for infants. *Id.* at *465; *Infants*; Eugene Volokh, *Symposium: The Second Amendment and the Right to Keep and Bear Arms After Heller*, 56 UCLA L. Rev. 1443, 1508–13 (2009) (noting restrictions on minors' exercise of fundamental rights and freedoms, including the right to contract). Blackstone went so far as to say that it was "generally true, that an infant [could] do no legal act." 1 William Blackstone, *Commentaries* *465. It was not until the infant reached the age of 21 that "they [were] then enfranchised by arriving at the years of discretion . . . when the empire of the father, or other guardian, gives place to the empire of *reason.*" 1 William Blackstone, *Commentaries* *463 (emph. added).

In England and the United States, infants could not sue or be sued except by joining their guardians. *Id.* at *464. For example, infants had "no legal standing to assert a claim in court to vindicate their rights, including Second Amendment-type claims." *Infants.* Because they could only access courts through their guardians, infants necessarily lacked redress against their parents except in cases of extreme neglect or

abuse. 1 William Blackstone, *Commentaries* 168 n.9 (George Chase ed.).[2]

There is substantial evidence that this legal incapacity controls in the context of the Second Amendment. An important element of Justice Scalia's reasoning in *Heller* was that the Second Amendment did not create a new right, but rather "codified a pre-existing right." *Heller*, 554 U.S. at 592, 599–600, 605, 652. Accordingly, common-law principles are crucial to answering whether the right in question extends to people under the age of 21.

At the Founding, there was an important connection between property law and the right to keep arms. Some state constitutions expressly discussed both arms and militia service in the context of property law. *See, e.g.*, Saul Cornell, *History and Tradition or Fantasy and Fiction*, 39 Hastings Const. L.Q. 145, 153 (2022) (hereinafter "*History and Tradition*"). Several states exempted arms used in the militia from seizure during debt proceedings. *Id.* Some colonies required single men who could not afford to arm themselves, to work as servants until they could pay off the cost of a weapon. Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 243 (2022). And all colonies required certain persons to arm themselves at their own expense and without just compensation, often mandating that militia members purchase specific equipment and that dependents be armed by their guardians. *Id.* at 177–88, 242–54. There was thus an important relationship between property law and gun law at the Founding. Infants' common-law lack of independent property rights suggests that they were similarly disabled in keeping and bearing arms.

One might infer additional context from another source: the eighteenth-century college. At the Founding, "[c]ollege was one of the very few circumstances where minors lived outside of their parents' or a guardian's direct authority."

[2] Reason reemerges as a central justification of the delegation of rights on the question of estates: a child could only attack divestment from his father's estate if he could demonstrate a lack or deficiency of reason in doing so. 1 William Blackstone, *Commentaries* *448.

Infants. But students were not liberated by their attendance; rather, the representatives of the college stood *in loco parentis*, a status based on parental consent which allowed them to exercise full legal power over the infants as though they were in fact the youths' parents.[3]

Importantly, as with the parents themselves, the person standing *in loco parentis* could not excessively punish or abuse a child, suggesting that fundamental rights remained intact under this relationship. 1 William Blackstone, *Commentaries* *168 n.9 (George Chase ed.). Yet colleges at the Founding could and did prohibit possession of firearms by students. *Infants*. This was true of Yale (founded 1701), the University of Georgia (founded 1785), the University of North Carolina (founded 1776), and Thomas Jefferson's University of Virginia (founded in 1819). *Id.* Among these schools, such prohibitions were unambiguous: students were not permitted to possess arms while on campus. *Id.* The University of Georgia even prohibited possessing weapons *off*-campus, strongly suggesting that this authority was not predicated on or justified by the student's presence at a sensitive location, but rather stemmed from the inherent power of the authority standing *in loco parentis* to dictate all but the most fundamental rights of the infants under its charge.[4]

The totality of this evidence demonstrates that the public during the Founding era understood the plain text of the

[3] 1 William Blackstone, *Commentaries* *453 ("[A father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is the *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

[4] "[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever." *Infants* (quoting The Minutes of the Senate Academicus 1799–1842, Univ. of Ga. Librs. (2008) [https://perma.cc/VVT2-KFDB]).

Second Amendment did not cover individuals under the age of 21. At the Founding, those under 21 were considered infants, a status that was a result of the presumption that people under the age of 21 lacked sufficient cognitive and moral faculties to govern themselves. The consequences of this presumption were profound: infants had very little independent ability to exercise fundamental rights, including those of contract and property. They also had no power to independently exercise almost any rights of speech, association, conscience, marriage, suffrage, and petition. Indeed, except in a few narrow circumstances, infants could not seek redress in the courts except through their parents. Stated bluntly, the same generation from whom Appellants may have begged relief would not have permitted them to bring their claim. Moreover, in one historical context, history suggests that any right an infant may have had to bear arms could be abrogated in its entirety at the pleasure of the infant's parent or an authority standing *in loco parentis.*

In light of such evidence, the conclusion that infants during the Founding era were not meant to be protected under the Second Amendment seems clear. Accordingly, I respectfully disagree with my colleagues in the Majority, and conclude that during the Founding era, the plain text of the Second Amendment was understood to mean that persons under 21 were not part of "the people" protected by the Second Amendment.

B. Military statutes do not establish that minors had an independent right to carry a gun.

The Majority points out that the Second Militia Act of 1792 required every able-bodied white, male citizen of age 18 or older and under age 45 to enroll in their local militia, equip themselves with certain accoutrements (including "a good musket or firelock . . . or with a good rifle"), and appear when called out to exercise or into service. 1 Stat. 271; *see* Majority Op. at II.C n.22. But the fact that infants had a *duty* under the Second Militia Act to enroll in the militia and thus to equip themselves with arms for that purpose should not be confused with such individuals otherwise having an independent *right* under the Second Amendment.

Some states enacted statutes placing the burden of arming infants on their guardians.[5] Indeed, infants only rendered militia service under the supervision of peace officers who, like teachers, stood *in loco parentis. See* Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 188, 243, 251 (2022). As noted above, at the Founding, infants exercised and sought redress of rights, including property rights, at the pleasure of their legal guardians. *See, e.g.*, 1 William Blackstone, *Commentaries* *452–53; *Infants.* That individuals under 21 were required to bear arms in the militia is not evidence that such individuals otherwise consistently owned arms in their individual capacities, much less that they had a right to own such property.

Further analysis of founding-era military statutes suggests that minors lacked the agency required to enlist, and thus would lack any associated rights that come with the enlistment. As of 1813, minors under 21 required parental consent to enlist in the Army. Act of Jan. 20, 1813, ch. 13, § 5, 2 Stat. 792 ("[N]o person under the age of twenty-one years, shall be enlisted by any officer, or held in the service of the United States, without the consent, in writing, of his parent, guardian, or master."). Even before the 1813 federal law, infants under the age of twenty-one could be discharged against their will at their parents' request. *United States v. Anderson*, 24 F. Cas. 813, 814 (C.C.D. Tenn. 1812) ("[I]t is obvious that Congress did not intend the minor should have

[5] *See, e.g.*, 3 Laws of New Hampshire, Province Period 83 (Henry Harrison Metcalf ed., 1915) (1754); An Act for Forming and Regulating the Militia Within The State of New Hampshire, in New-England, and For Repealing All the Laws Heretofore Made for That Purpose, 1776 Acts & Laws of the Colony of N.H. 36, 39; An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, c. 1, § XIX, 1793 Mass Acts & Laws May Sess. 289, 297; An Act, for Regulating and Governing the Militia of This State 1797, c. LXXXI, No. 1, § 15, 2 The Laws of the State of Vermont, Digested & Compiled 122, 131-32 (Randolph, Sereno Wright 1808); 2 William T. Dortch, John Manning & John S. Henderson, The Code of North Carolina § 3168, 346–47 (New York, Banks & Bros. 1883).

any discretion, either as to enlistment or discharge. The whole matter is entirely a concern of the [guardian].").

All of this is superfluous in any event, as *Heller* made clear that the Second Amendment codifies an individual right to keep and bear arms that is unconnected to militia service: "[A]part from [a] clarifying function, [the] prefatory clause does not limit or expand the scope of the operative clause." *Heller*, 554 U.S. at 578. Militia service cannot properly be disconnected from the right for the purpose of limiting its scope but connected for the purpose of expanding it; the two are independent. Again, *Bruen* affirmed this historical-textual analysis. *Bruen*, 597 U.S. at 19.

Heller explains at length that the militia and "the people" are distinct. *Heller*, 554 U.S. at 650–51. Although the militia may overlap with "the people," this does not mean that every member of the militia is by extension part of "the people" covered by the Second Amendment. At the time of the Founding, the age of militia service varied by state, with some states requiring children as young as 15 to serve.[6] And, there appears to be no claim that 15-year-olds are part of "the people" in the Second Amendment.

Then-Judge Amy Coney Barrett's discussion of felons and the mentally ill, *see* Majority Op. at II.B (citing *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting)), concerns classes distinct from infants. At the Founding, felons and the mentally ill were extended greater rights than infants, and their legal disability resulted from legal findings, not *a priori* legal classifications. Felons and the mentally ill lost their rights only after they were found untrustworthy, whereas persons under 21 were classified as infants because as a class of persons they were considered untrustworthy. While insanity and criminality test the capacities and character of the individual, respectively, the age

[6] Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 188 (2022). Massachusetts had a typical conscription law which required male residents between ages 16 and 60 to serve. *Id.* at 242, 244. New Hampshire and Maine had similar requirements. *Id.* at 247.

of majority as a concept suppresses individual differentiation.[7] *See* Abrams, *supra* note 1, at 19.

At the Founding, people under 21 bore arms at the pleasure of their superiors. Were they to find this condition violative of their rights, they would have no right to petition the courts for redress.

II. Because Appellants' conduct is not covered by the Second Amendment, there is no need to proceed to the second step of the analysis.

As mentioned above, under *Bruen*, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 24. But, the ordinary understanding of the plain text of the Second Amendment during the Founding era was that individuals under the age of 21 were not part of "the people" whom the Second Amendment protects. Thus, the Second Amendment's plain text does not cover these Appellants' conduct, and the Constitution does not presumptively protect the conduct regulated by the challenged statutory scheme.

The Majority points out that, under *Bruen*: "The court first decides whether 'the Second Amendment's plain text covers an individual's conduct.' *Bruen*, 597 U.S. at 24. *If it does*, the government must demonstrate that the challenged regulation is consistent with the principles behind our Nation's historical tradition of firearm regulation." *See* Majority Op. at II.A (citing *Rahimi*, 602 U.S. at 691–92; *Bruen*, 597 U.S. at 24) (emph. added). Here, because the plain text of the Amendment does *not* protect the conduct of these Appellants, the government does not have a burden to

[7] Of course, there are some exceptions to this general rule. For example, some criminal penalties can accrue to individuals below the age of majority, a court may find that a minor is properly developed to make certain medical decisions for themselves, and a court may find a minor sufficiently mature to warrant emancipation. *See*, Abrams *supra* note 1, at 19.

"identify[ ] a 'founding-era' historical analogue to the modern firearm regulation." *See id.* (citing *Bruen*, 597 U.S. at 24–27).

In that the ordinary Founding-era meaning of the Second Amendment's plain text does not cover these Appellants' conduct, it should not be surprising that the challenged statutory scheme "is consistent with this Nation's historical tradition," *see Bruen*, 597 U.S. at 17, and "consistent with the principles that underpin our [Nation's] regulatory tradition," *see Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 26-31). Whether there are any known Founding-era statutes that barred independent firearm ownership or possession by people under 21 would not seem to be determinative of whether the challenged regulation is "consistent" with our Nation's historical tradition. Legislatures tend not to enact laws to address problems that do not exist, and the absence of such laws does not speak to an inconsistency with the Nation's historical tradition or the undisputed Founding-era understanding of the limited rights of infants. As explained above, young people at the Founding bore arms only at the pleasure of their guardians, and they had no independent right to petition courts for redress.

Under *Bruen* and *Rahimi*, it is appropriate to consider the evidence from the Founding and determine if later evidence offers greater proof and context. Between 1856 and 1893, at least 17 states passed laws restricting the sale of firearms to people under 21. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Leg. 1, 192-93. Some restricted non-sale transfers. *Id.* Many included provisions expressly putting the gun rights of minors at the discretion of authority figures. *Id.*; *see also Repository of Historical Gun Laws*, Duke Center for Firearms Law, https://firearmslaw.duke.edu/repository/search-the-repository/. These laws demonstrate that, at least as early as the mid-nineteenth century, legislatures believed they could qualify and, in some cases, abrogate the arms privileges of infants. While these laws cannot independently prove the constitutionality of the challenged laws, they certainly seem to be consistent with the challenged statutory scheme here in that they regulate arms privileges of "infants." But again, assuming the 1791 meaning of the Second Amendment controls, it appears that the challenged statutory scheme is not inconsistent

(and thus is consistent) with this Nation's historical tradition and the principles that underpin our regulatory tradition.

III. Conclusion

A review of historical sources reveals that the Second Amendment's plain text does not cover Appellants' conduct because it would have been understood during the Founding era that Appellants are not "part of 'the people' whom the Second Amendment protects." *See Bruen*, 597 U.S. at 31–32; *see also id.* at 20 (quoting *Heller*, 554 U.S. at 605) (referring to "*the public understanding* of a legal text" as "a critical tool of constitutional interpretation"). Further, the challenged statutory scheme here is "consistent with this Nation's historical tradition," *id.* at 17, and "consistent with the principles that underpin our regulatory tradition," *see Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 26-31). Because Pennsylvania's challenged statutory scheme does not violate the Second Amendment of the Constitution, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1832

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

v.

COMMISSIONER PENNSYLVANIA STATE POLICE

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 2-20-cv-01582)
District Judge: Honorable William S. Stickman, IV

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and SMITH,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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*Judge Smith's vote is limited to panel rehearing only.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED. Judges Shwartz, Krause, Restrepo, Freeman, Montgomery-Reeves and Chung voted to grant the petition. Judge Krause files the attached dissent.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

Date: March 27, 2024

cc: All counsel of record

KRAUSE, *Circuit Judge*, dissenting sur denial of rehearing *en banc*.

When they ratified the Second Amendment, our Founders did not intend to bind the nation in a straitjacket of 18th-century legislation, nor did they mean to prevent future generations from protecting themselves against gun violence more rampant and destructive than the Founders could have possibly imagined. At a minimum, one would think that the states' understanding of the Second Amendment at the time of the "Second Founding"[1]—the moment in 1868 when they incorporated the Bill of Rights against themselves—is part of "the Nation's historical tradition of firearms regulation"[2] informing the constitutionality of modern-day regulations.

Indeed, since the Supreme Court tethered their constitutionality to the existence of historical precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), we and the other Courts of Appeals have consistently looked to Reconstruction-era, as well as Founding-era sources, and, even as the Supreme Court has acknowledged the "ongoing scholarly debate" about their relevance,[3] it too has relied on Reconstruction-era sources in each of its recent major opinions on the right to bear arms. Notably, the Supreme Court is expected within the next few months, if not weeks, to issue its

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[1] *See, e.g.*, Eric Foner, *The Second Founding: How The Civil War and Reconstruction Remade The Constitution* (2019); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023) (referring to the incorporation of the Bill of Rights as "a Second Founding").
[2] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).
[3] *Id.* at 2138.

next seminal opinion, clarifying its historical methodology in the absence of Founding-era analogues.

Yet despite our own precedent acknowledging the relevance of Reconstruction-era sources, our recognition in an *en banc* opinion just last year that the Supreme Court relies on *both* Founding-era *and* Reconstruction-era sources,[4] and an imminent decision from the Supreme Court that may prove dispositive to this case, the panel majority here announced—over Judge Restrepo's compelling dissent—that all historical sources after 1791 are irrelevant to our Nation's historical tradition and must be "set aside" when seeking out the "historical analogues" required to uphold a modern-day gun regulations.[5] The panel majority then held—based exclusively on 18th-century militia laws and without regard to the voluminous support the statutory scheme finds in 19th-century analogues—that Pennsylvania's prohibition on 18-to-20-year-old youth carrying firearms in public during statewide emergencies is unconstitutional.[6]

The panel majority was incorrect, but more importantly, it erred profoundly in the methodology to which it purports to bind this entire Court and with far-reaching consequences. Against this backdrop, we should be granting Pennsylvania's

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[4] *Range v. Att'y Gen.*, 69 F.4th 96, 104 (3d Cir. 2023) (*en banc*), *petition for cert. filed sub nom. Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023).

[5] *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 134 (3d Cir. 2024).

[6] *Id.* (discussing Sections 6106, 6107, and 6109 of Pennsylvania's Uniform Firearms Act of 1995, 18 Pa. Cons. Stat. §§ 6101–6128 (2024)).

petition for *en banc* review,[7] supported by 17 other states and the District of Columbia as *amici*, or at least holding it *c.a.v.* pending the Supreme Court's decision in *United States v. Rahimi*.[8] But instead, over the objection of nearly half our Court, we are denying it outright.

I respectfully dissent from that denial for four reasons. First, without *en banc* review, the panel majority's pronouncement cannot bind future panels of this Court. We have held Reconstruction-era sources to be relevant in decisions both before and after *Bruen* so, under our case law and our Internal Operating Procedures, *en banc* rehearing is necessary before any subsequent panel can bind our Court to a contrary position.[9] Second, *en banc* review would allow us to apply the proper historical methodology, which would compel a different outcome in this case. Third, *en banc* review is necessary for error correction: Even if we limit ourselves to Founding-era sources, the panel failed to recognize that legislatures in that era were authorized to categorically disarm groups they reasonably judged to pose a particular risk of danger, and Pennsylvania's modern-day judgment that youth under the age of 21 pose such a risk is well supported by

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[7] *See generally* Commissioner's Petition for Rehearing, or, Alternatively, Rehearing *En banc*, *Lara*, 91 F.4th 122 (No. 21-1832), ECF No. 81.

[8] No. 22-915 (U.S. argued Nov. 7, 2023); *see* Brief of Amici Curiae Illinois et al. in Support of Defendant-Appellee's Petition for Rehearing or Rehearing *En banc*, *Lara*, 91 F.4th 122 (No. 23-1832), ECF No. 82 (explaining the wide-ranging impact of the divided panel's majority opinion for states across the country).

[9] *See* 3d Cir. I.O.P. 9.1.

evidence subject to judicial notice. And fourth, the majority's narrow focus on the Founding era demands rehearing because it ignores the Supreme Court's recognition that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[10] For each of these reasons, discussed in turn below, *en banc* review should be granted.

A. *En banc* Consideration Is Necessary Before Our Court Can Adopt the Panel Majority's Novel Methodology.

Confronted with 19th-century regulations supporting the constitutionality of Pennsylvania's statutory scheme, the panel majority took the position that it could simply "set aside" that evidence based on its pronouncement that "the Second Amendment should be understood according to its public meaning in 1791," rather than "according to [its] public meaning in 1868." *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 134 (3d Cir. 2024). But that novel methodology, which the majority attempted to ground in a "hint" in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and inferences from cases *outside* the Second Amendment context, *see Lara*, 941 F.4th at 133, not only contravened *Bruen* and other Supreme Court precedent within the Second Amendment context, *see infra*, but also violated our Internal Operating Procedures by purporting to overrule the holdings of prior panels without either *en banc* review or clear abrogation of our prior precedent by the Supreme Court, *see* 3d Cir. I.O.P. 9.1.

[10] *Bruen*, 142 S. Ct. at 2131, 2132.

For its part, the Supreme Court has cited to and relied upon Reconstruction-era sources, in addition to Founding-era sources in all of its recent Second Amendment cases—*Bruen* included. Whatever "hint[s]" the panel majority may take from *Bruen*, *Lara*, 91 F.4th at 133, the Supreme Court there recognized that states are "bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second," and proceeded to consider not just 18th-century analogues but also "[e]vidence from around the adoption of the Fourteenth Amendment," *Bruen*, 142 S. Ct. at 2137, 2150. The Supreme Court has also cited Reconstruction-era sources as relevant historical evidence in its other Second Amendment cases. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010) (Alito, J.) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *Heller*, 554 U.S. at 605 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.").

Until the underlying panel opinion here, our Court, too, has followed the Supreme Court's instruction and consistently relied upon Reconstruction-era sources, alongside Founding-era sources, as relevant historic analogues in defining "the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126; *see, e.g.*, *Frein v. Pa. State Police*, 47 F.4th 247, 255 (3d Cir. 2022) ("Plus, the Fourteenth Amendment's ratifiers understood that it would stop gun seizures."); *Drummond v. Robinson Township*, 9 F.4th 217, 228 (3d Cir. 2021) ("Some Colonial and Reconstruction Era governments made it illegal to sell guns to enslaved or formerly enslaved people and members of Native American tribes."), *abrogated*

on other grounds by Bruen, 142 S. Ct. 2111; *Folajtar v. Att'y Gen.*, 980 F.3d 897, 905 (3d Cir. 2020) (considering statutes from "the turn of the nineteenth century"), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111.

Most recently, our *en banc* opinion in *Range* likewise acknowledged that Reconstruction-era sources are relevant. We acknowledged *Bruen*'s "emphasis on Founding *and* Reconstruction-era sources" and rejected only the notion that a statute enacted "nearly a century after the Fourteenth Amendment's ratification" could be considered "longstanding." *Range v. Att'y Gen.*, 69 F.4th 96, 104 (3d Cir. 2023) (*en banc*) (emphasis added), *petition for cert. filed sub nom. Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023). Thus, both pre- and post-*Bruen*, we—along with other Courts of Appeals[11]—have held Reconstruction-era sources to be both relevant and informative.

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[11] As the First Circuit recently observed, while *Bruen* "indeed indicated that founding-era historical precedent is of primary importance for identifying a tradition of comparable regulation," it also "relied upon how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" and "likewise left open the possibility that late-19th-century evidence and 20th-century historical evidence may have probative value if it does not contradict[] earlier evidence." *Ocean State Tactical, LLC v. Rhode Island*, --- F.4th ---, No. 23-1072, 2024 WL 980633, at *10 (1st Cir. Mar. 7, 2024) (internal citations and quotation marks omitted)). *See also Antonyuk v. Chiumento*, 89 F.4th 271, 305 (2d Cir. 2023) ("We therefore agree with the decisions of our sister circuits—emphasizing the understanding that prevailed when the States adopted the Fourteenth

In view of this precedent, *en banc* rehearing is required before *any* subsequent panel has authority to hold—let alone to bind this Court to a holding—that Reconstruction-era sources must henceforth be "set aside," *Lara*, 91 F.4th at 134, when interpreting the Second Amendment. *See* 3d Cir. I.O.P. 9.1 (providing that prior panels' holdings are "binding on subsequent panels" and "no subsequent panel overrules the holding . . . of a previous panel" because "Court *en banc* consideration is required to do so.").

The only exception to this well-established rule arises when the "prior panel's holding is in conflict with Supreme Court precedent." *Karns v. Shanahan*, 879 F.3d 504, 514–15 (3d Cir. 2018) (quotation marks omitted). But that is not the case here. Even the *Lara* panel acknowledged it was acting on

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Amendment—is, along with the understanding of that right held by the founders in 1791, a relevant consideration." (internal citations and quotation marks omitted)), *petition for cert. filed sub nom. Antonyuk v. James*, No. 23-910 (U.S. Feb. 20, 2024); *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011) ("[T]he most relevant historical period for questions about the scope of the Second Amendment as applied to the States is the period leading up to and surrounding the ratification of the Fourteenth Amendment."), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (similar), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) (discussing a "comprehensive survey of the historical record," which included laws from the 19th century), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *see also* Brief of Amici Curiae Illinois et al., *supra* note 7, 12 (collecting cases).

what it perceived as a "hint" the Supreme Court dropped in *Bruen*, not a holding. *Lara*, 91 F.4th at 133. *Bruen*, in fact, reiterated the "methodological approach to the Second Amendment" that the Court adopted in *Heller*, including its rejection of the notion that Reconstruction-era sources were "illegitimate postenactment legislative history." 142 S. Ct. at 2127 (quotation marks omitted). It also confirmed that examination of sources from that era—including "19th-century cases," congressional and public "discourse after the Civil War," and the understanding of post-Civil War commentators—"was a critical tool of constitutional interpretation" in understanding the Second Amendment. *Id.* at 2127–28 (quotation marks omitted). And although the Court cautioned against giving postenactment history "more weight than it can rightly bear" and noted that it 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," the Court was explicit that it was not resolving the "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." *Id.* at 2137–38.

Ironically, the Court appears poised to sway, if not resolve, that debate in its forthcoming decision in *United States v. Rahimi*, No. 22-915 (U.S. argued Nov. 7, 2023). The question presented there is whether prohibiting a domestic abuser from possessing a firearm, under 18 U.S.C. § 922(g)(8), violates the Second Amendment in the absence of comparable Founding-era precedent. Thus, *Rahimi* seems likely to address whether courts evaluating the constitutionality of modern-day legislation may consider developments in the law post-

ratification or are indeed constrained to Founding-era sources.[12] Why, then, are we denying Pennsylvania's petition for review, declining even to hold it *c.a.v*. for *Rahimi*'s forthcoming guidance, and ruling instead based on a supposed "hint" in *Bruen*? Hints and assumptions by the Supreme Court are not holdings, *see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), and neither can justify our denial of rehearing *en banc* when the novel approach of a divided panel purports to overturn our precedent.

In sum, our failure to grant *en banc* rehearing not only creates a circuit split and allows an opinion resting on an invalid premise to stand; it also means the panel majority's holding concerning Reconstruction-era sources will not bind this Court going forward. To the contrary, "where our cases conflict, the earlier is the controlling authority and the latter is ineffective as precedent." *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 290 n.14 (3d Cr. 2021) (cleaned up) (citing 3d Cir. I.O.P. 9.1). The petition for rehearing thus should be granted to secure the uniformity of our Second Amendment

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[12] This petition should be held *c.a.v.* for the additional reason that *Rahimi* appears likely to address one or more other dispositive issues, including who counts among "the People" protected by the Second Amendment; the contours of *Bruen*'s "history and tradition" test; the level of deference we should give legislatures in making categorical, predictive judgments about groups that pose particular risks; what, if any, findings legislatures must make to justify those judgments; and whether evidence of legislative authority to make those judgments includes consensus among the states today. *See generally* Brief for the United States, *Rahimi*, No. 22-915 (U.S. Aug. 14, 2023).

case law, or if not granted, at least held *c.a.v.* for the forthcoming opinion in *Rahimi*.

B. *En banc* Rehearing Is Necessary Because Under the Proper Methodology, Pennsylvania's Statutory Scheme is Constitutional.

Because Reconstruction-era sources are relevant and the panel majority disregarded them, *en banc* rehearing is the only way to conduct the comparative analysis *Bruen* requires. That analysis compels a different outcome. Judge Restrepo catalogued the historical evidence that "[a]t the Founding, people under 21 lacked full legal personhood," so, at the first step of the *Bruen* test, those youth are not among "the people" protected by the text of the Second Amendment. *Lara*, 91 F.4th at 142 (Restrepo, J., dissenting). He also persuasively explained why, even if we reach *Bruen*'s second step and determine whether the regulation is "consistent with the Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2126, Pennsylvania's statutory scheme is constitutional. Among other reasons, he observed that "at least 17 states passed laws restricting the sale of firearms to people under 21" between 1856 and 1893. *See Lara*, 91 F.4th at 147 (Restrepo, J., dissenting) (citing *Bruen*, 142 S. Ct. at 2129–30).

I join that conclusion and offer here some concrete examples of ways that the "how" and "why" of those historical statutes map onto Pennsylvania's.[13]

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[13] Although *Bruen* eschewed a free-standing "means-end scrutiny" or "interest-balancing inquiry" for modern-day regulations, 142 S. Ct. at 2129, it embraced a comparative

By way of background, before the Fourteenth Amendment was ratified in 1868, a number of states treated 21 as the age of majority[14] and effectively prevented, or at least hindered, "minors" from even obtaining firearms. *See, e.g.*, 1856 Ala. Laws 17; 1859 Ky. Acts 245, § 23; 1856 Tenn. Pub. Acts 92. Other states adopted similar regulations in the years immediately after ratification, *see, e.g.*, 1875 Ind. Acts 59; 1879 Mo. Rev. Stat. § 1274; 1878 Miss. Laws 175–76,[15] signaling that the generation that incorporated the Second Amendment against the states did not understand it to limit their ability to pass such regulations, *see Bruen*, 142 S. Ct. at 2136–37 (acknowledging that historical examples from the years immediately following ratification can, in some cases, provide evidence about the public understanding of an Amendment). Indeed, a 19th century treatise written by "the

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means-end analysis by directing us to look to "how" (the means) and "why" (the end) historical "regulations burden a law-abiding citizen's right to armed self-defense" and then to consider whether the "modern . . . regulation[] impose[s] a comparable burden . . . [that] is comparably justified," *id*. at 2133.

[14] *See, e.g.*, *Vincent v. Rogers*, 30 Ala. 471, 473 (1857) (describing a minor as an individual "under twenty-one years of age"); *Warwick v. Cooper*, 37 Tenn. (5 Sneed) 659, 660–61 (1858) (referring to 21 as the age of majority); *Newland v. Gentry*, 57 Ky. (18 B. Mon.) 666, 671 (1857) (referring to 21 as the age of majority); 1879 Mo. Rev. Stat. § 2559 (explaining that a male is a minor until he turns 21, and a female is a minor until she turns 18).

[15] *See also Jones v. Bonta*, 34 F.4th 704, 740 (9th Cir. 2022) (collecting statutes), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022).

most famous" voice on the Second Amendment at the time, *Heller*, 554 U.S. at 616, explained that states "may prohibit the sale of arms to minors," Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883).

By broadly criminalizing any attempt to convey a firearm to those under the age of 21, these statutes effectively prevented young citizens not just from carrying publicly in times of emergency, but from possessing firearms at all. Thus, as to "how" these prohibitions burdened the right to bear arms, the 18th-century laws were far more onerous than Pennsylvania's, which prohibits such youth only from carrying publicly during statewide emergencies, *see* 18 Pa. Cons. Stat. §§ 6106, 6107, 6109. If the generation that incorporated the Bill of Rights against the states believed that states could constitutionally impose *more burdensome* gun regulations on this age group, *a fortiori* it would have viewed Pennsylvania's more limited prohibition as constitutional.

In terms of "why" the statutes were enacted, these Reconstruction-era laws again are comparable to Pennsylvania's statutory scheme—certainly more so than the Founding-era militia statutes on which the panel majority relied. As I discuss in greater detail in Section D, *infra*, interpersonal gun violence "was not a problem in the Founding era that warranted much attention," in large part because the firearms that our Founders possessed simply lacked the capacity of those today to inflict mass casualties in a matter of seconds.[16] By the late 19th century, however, "gun violence

[16] Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L. J. 1695, 1713 (2012).

had emerged as a serious problem in American life."[17] This development was fueled by the mass production of firearms that began during the wave of American industrialization in the mid-19th century,[18] and it was accompanied by renewed efforts to market gun ownership to the average American consumer.[19] It was also driven by "the trauma of the [Civil War] and the enormous increase in the production of guns necessary to supply two opposing armies," which "intensified the problem posed by firearms violence and gave a new impetus to regulation."[20]

In this changed America, "interpersonal gun violence and the collective terrorist violence perpetuated by groups such

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[17] Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. Davis L. Rev. Online 65, 69 (2021).

[18] James B. Jacobs and Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 Law & Contemp. Probs. 129, 137–38 (2017); *see also* David Yamane, *The Sociology of U.S. Gun Culture*, 11 Sociology Compass 1, 2 (2017) ("The 19th century shift from craft to industrial production, from hand-made unique parts to machine-made interchangeable parts, dramatically increased manufacturing capacities, and gun manufacturing played a central role in this development.").

[19] *See* Pamela Haag, *The Gunning of America: Business and the Making of American Gun Culture* xvii–xxi (2016) (explaining how gun manufacturers employed new marketing strategies to create a civilian market for firearms in the 19th century).

[20] Cornell (2021), *supra* note 17, at 69.

as the Ku Klux Klan" replaced the "ancient fears of tyrannical Stuart monarchs and standing armies" that preoccupied the Founding generation.[21] Those same concerns about public safety apply to today's America, where increasingly deadly firearms are mass-produced at an unprecedented rate,[22] and have motivated states like Pennsylvania to regulate the ability of still-maturing young people to carry firearms.[23]

In short, both the "how" and the "why" of Pennsylvania's statute track those of its Reconstruction-era analogues, so *en banc* rehearing would allow us not just to correct the panel's mistaken methodology, but also its mistaken result.

C. *En banc* Rehearing Is Also Necessary for Proper Consideration of Founding-Era Sources.

Even if we were to follow the majority's approach and "set aside the Commissioner's catalogue of statutes from the mid-to-late nineteenth century," *Lara*, 91 F.4th at 134, *en banc* rehearing is warranted because Pennsylvania's statutory scheme has support in Founding-era history to which we look

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[21] *Id.*

[22] Glenn Thrush, *U.S. Gun Production Triples Since 2000, Fueled by Handgun Purchases*, The N.Y. Times (Updated June 8, 2022), https://www.nytimes.com/2022/05/17/us/politics/gun-manufacturing-atf.html.

[23] *See, e.g.*, Brief for Illinois, et al. as Amici Curiae Supporting Appellee's Petition for Rehearing, *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122 (3d Cir. 2024).

for a "match . . . in principle, not with precision." *Range*, 69 F.4th at 117 (Krause, J., dissenting).

It is by now well established that, as then-Judge Barrett put it, "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety." *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 142 S. Ct. 2111 (2022). And it was the legislatures of the Founding generation that determined—consistent with the Second Amendment—which groups posed sufficient risk to justify categorical disarmament. *See Range*, 69 F.4th at 115 (Shwartz, J., dissenting) ("[U]nder *Bruen*, the relevant inquiry is why a given regulation, such as a ban based on one's status, was enacted and how that regulation was implemented."); *id*. at 119–128 (Krause, J., dissenting) (cataloguing the historical disarmament of groups that legislatures judged untrustworthy to follow the law).

Pennsylvania exercised such legislative judgment when it decided that those under 21 categorically pose a danger to public safety during times of emergency, and its judgment is entitled to deference—at least where, as here, it is supported by evidence. Modern crime statistics, of which we can take judicial notice,[24] confirm that youth under 21 commit violent

[24] Several of the sources that follow are drawn from the District Court record, while others may be considered under Federal Rule of Evidence 201. *See, e.g.*, *Clark v. Governor of N.J.*, 53 F.4th 769, 774 (3d Cir. 2022) (taking judicial notice of publicly available statistics); *Stone v. High Mountain Mining Co., LLC*, 89 F.4th 1246, 1261 n.7 (10th Cir. 2024) (same); *United States v. United Bhd. of Carpenters and Joiners of America, Loc. 169*,

gun crimes at a far disproportionate rate. In 2019, for example, although 18- to 20-year-olds made up less than 4% of the U.S. population, they accounted for more than 15% of all homicide and manslaughter arrests.[25] National data collected by the Federal Bureau of Investigation (FBI) also confirms that homicide rates peak between the ages of 18 and 20.[26] Indeed, that age group commits gun homicides at a rate three times higher than adults aged 21 or older.[27] And "[a]dditional studies

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457 F.2d 210, 214 n.7 (7th Cir. 1972) (taking judicial notice of statistics from United States Bureau of Census Reports).

[25] *See* U.S. Dep't of Just., Crime in the United States, Arrests, by Age, 2019, at Table 38, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-38; U.S. Census Bureau, Age and Sex Composition in the United States: 2019, at Table 1, National Population by Characteristics: 2010- 2019, https://www.census.gov/data/tables/2019/demo/age-and-sex/2019-age-sex-composition.html.

[26] *See* Daniel W. Webster et al., *The Case for Gun Policy Reforms in America*, Johns Hopkins Ctr. for Gun Policy & Research 5 (last updated Feb. 5, 2014), http://web.archive.org/web/20160325061021/http:/www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper020514_CaseforGunPolicyReforms.pdf.

[27] Everytown Research & Policy, Everytown for Gun Safety (last updated Mar. 1, 2022), https://everytownresearch.org/stat/eighteen-to-20-year-olds-commit-gun-homicides-at-a-rate-triple-the-rate-of-those-21-and-years-older/; *see also Jones v. Bonta*, 34 F.4th 704, 760 (9th Cir. 2022) (Stein, J., dissenting in part) (noting that 18- to

show that at least one in eight victims of mass shootings from 1992 to 2018 were killed by an 18 to 20-year-old[.]"[28]

Our understanding of *why* youth commit violent crimes has also evolved dramatically in recent decades, further reinforcing Pennsylvania's legislative judgment that young people pose a particular danger in carrying firearms during states of emergency. We now understand, for example, that those under 21 are uniquely predisposed to impulsive, reckless behavior because their brains have not yet fully developed.[29]

20-year-olds "commit gun homicides at a rate three times higher than adults above the age of 21"), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 478 (4th Cir. 2021) (Wynn, J., dissenting) (noting that "from 2013 to 2017, young adults aged 18 to 20 committed gun homicides at a rate *nearly four times higher* than adults 21 and older") (alteration in original) (internal citations and quotation marks omitted), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

[28] *Jones*, 34 F.4th at 760 (Stein, J., dissenting in part) (citing Joshua D. Brown and Amie J. Goodin, *Mass Casualty Shooting Venues, Types of Firearms, and Age of Perpetrators in the United States, 1982–2018*, 108 Am. J. Pub. Health 1385, 1386 (2018)).

[29] *See also Nat'l Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 135, 210 n. 21 (5th Cir. 2012) ("[M]odern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over."), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015) ("The evidence now is strong that the brain does not cease to mature until the

Specifically, the prefrontal cortex, which is responsible for impulse control and judgment, is the last part of the brain to fully mature and continues to develop until a person is in their mid-20s.[30] By contrast, the limbic system, which controls emotions like fear, anger, and pleasure, develops far earlier, and young people generally rely heavily on this region of their brains to guide their decision-making.[31]

As a result, young adults are both uniquely prone to negative emotional states[32] *and* uniquely unable to moderate their emotional impulses. Indeed, while "a 19-year-old might possess a brain that looks 'adult-like' and that supports mature cognitive performance under calm or 'neutral' conditions, that same brain tends to look much more like that of a younger kid when evocative emotions are triggered, resulting in significantly weaker cognitive performance."[33]

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early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.") (citation omitted).

[30] *See, e.g.*, Mariam Arain et al*., Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 453, 456 (2013); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859, 859–60 (1999).

[31] Arain, *supra* note 30, at 453.

[32] Leah H. Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain and Cognition 124, 125 (2010).

[33] *Hirschfeld*, 5 F.4th at 476 (Wynn, J., dissenting) (quoting Jason Chein, *Adolescent Brain Immaturity Makes Pending*

Unsurprisingly, this combination makes young adults especially prone to reckless and violent behavior.[34]

While the scarcity and limited lethality of their weapons gave our Founding generation little reason to fear the danger of youth gun violence, today's legislatures have good reason to do so. And because that group is especially prone to impulsive, violent behavior, Pennsylvania's legislature reasonably decided that allowing them to carry firearms in public during statewide emergencies, when emotions already run high and violence may be widespread, would pose a particular danger to public safety. That judgment reflects precisely the type of determination that led our Founders to categorically disarm other groups they deemed to be dangerous and puts Pennsylvania's statute comfortably within the Nation's historical tradition even at the "First Founding."

Execution Inappropriate, Bloomberg Law (Sept. 17, 2020 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBBCKGKK000000).

[34] Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 Developmental Neuroscience 220, 220 (2014) ("Adolescents commit more crimes per capita than children or adults in the United States and in nearly all industrialized cultures. Their proclivity toward . . . risk taking has been suggested to underlie the inflection in criminal activity observed during this time.").

D. Without Rehearing, The Majority's Approach Will Leave States Powerless to Address One of Society's Most Pressing Social Concerns.

Rehearing is also needed because the panel majority failed to apply the "more nuanced approach" that *Bruen* prescribes where a statute responds to "unprecedented social concerns or dramatic technological changes" beyond our Founders' ken. 142 S. Ct. at 2132. Pennsylvania's Uniform Firearms Act fits that bill.

Interpersonal gun violence, historians agree, was simply not a major concern for the Founding generation.[35] Because the "black powder, muzzle-loading weapons" in that era were "too unreliable and took too long to load," firearms "were not the weapon of choice for those with evil intent[.]"[36] And when we consider that these were "tight-knit" rural communities where "[e]veryone knew everyone else," "word-of-mouth spread quickly," and the population "knew and agreed on what acts were . . . permitted and forbidden,"[37] it is not surprising that gun violence "simply was not a problem in the Founding era that warranted much attention and therefore produced no legislation."[38]

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[35] Cornell (2012), *supra* note 16, at 1713.

[36] *See* Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 Fordham Urb. L. J. 25, 38 (2023).

[37] *Range v. Att'y Gen.*, 69 F.4th 96, 117 (3d Cir. 2023) (Krause, J., dissenting).

[38] Cornell (2012), *supra* note 16, at 1713.

In today's America, by contrast—where firearms include automatic assault rifles and high-capacity magazines and our population is mobile, diverse, and largely urban—nearly 50,000 people die from gun-related injuries each year, and over 80% of murders involve a firearm.[39] Horrific mass shootings have also become a daily occurrence, with over 600 such shootings in 2023 alone,[40] and 82 so far in the first three months of 2024.[41] And as I have explained in Section C, *supra*, the phenomenon of gun violence among those between 18 and 20 presents a particularly troubling new social concern that our Founders had no reason to contemplate.

The Supreme Court anticipated this situation when it recognized in *Bruen* that "[t]he 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," and it directed that state laws "implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." 142 S. Ct. at

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[39] *See, e.g.*, John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW Research Ctr. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.

[40] *See* Molly Bohannon and Ana Faguy, *U.S. Faces Second-Worst Year On Record for Mass Shootings—Nearly 650 Incidents*, Forbes (Dec. 25, 2023 9:22 AM), https://www.forbes.com/sites/mollybohannon/2023/12/25/us-mass-shootings-near-650-this-year-second-worst-total-on-record/?sh=1ef8729669e8.

[41] *See Mass Shootings in 2024*, Gun Violence Archive (last viewed Mar. 22, 2024), https://www.gunviolencearchive.org/reports/mass-shooting.

2132. The panel majority did not heed that counsel, so considerations of federalism and comity also compel *en banc* rehearing.

* * *

The Second Amendment was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," *id.* at 2132 (citation omitted), not to force on modern-day legislatures the fiction that we live in 1791 or to preclude reasonable responses to problems of gun violence that were unfathomable when the Bill of Rights was ratified. And both we and the Supreme Court have held the states' understanding of the Second Amendment when they incorporated it through the Fourteenth Amendment to be relevant and part of "the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. The panel majority decreed the opposite in a decision that violated 3d Cir. I.O.P. 9.1, created a split with our sister circuits, and contravened Supreme Court precedent. Our refusal to grant rehearing *en banc* in this circumstance is all the more perplexing in light of the Supreme Court's imminent opinion in *Rahimi*, which will necessarily bear on the panel's reasoning and may well abrogate it even as the panel's mandate issues.

For all of these reasons, I respectfully dissent from the Court's denial of *en banc* rehearing and, as we are declining to correct our own error, urge the Supreme Court to do so if presented the opportunity.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 21-1832

_____

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

v.

COMMISSIONER PENNSYLVANIA STATE POLICE

_____

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. No. 2-20-cv-01582)
District Judge: Honorable William S. Stickman, IV

_____

Argued
June 28, 2023

Before: JORDAN, RESTREPO and SMITH, *Circuit Judges*

(Filed January 18, 2024)

_____

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

Through the combined operation of three statutes, the Commonwealth of Pennsylvania effectively bans 18-to-20-year-olds from carrying firearms outside their homes during a state of emergency. Madison Lara, Sophia Knepley, and Logan Miller, who were in that age range when they filed this suit, want to carry firearms outside their homes for lawful purposes, including self-defense. They, along with two gun rights organizations, sued the Commissioner of the Pennsylvania State Police (the "Commissioner") to stop enforcement of the statutes, but the District Court ruled against them. They now appeal the District Court's order dismissing their case and denying them preliminary injunctive relief. They assert that the Commonwealth's statutory scheme

violates the Second Amendment of the United States Constitution.

In response, the Commissioner contends that the Appellants[1] are not among "the people" to whom the Second Amendment applies, and that the Nation's history and tradition of firearm regulation support the statutory status quo. We disagree. The words "the people" in the Second Amendment presumptively encompass all adult Americans, including 18-to-20-year-olds, and we are aware of no founding-era law that supports disarming people in that age group. Accordingly, we will reverse and remand.

I. BACKGROUND[2]

A. Pennsylvania's firearm statutes

Under §§ 6106(a) and 6109(b) of the Pennsylvania Uniform Firearms Act of 1995 ("UFA"), 18 Pa. Cons. Stat.

[1] Lara, Knepley, and Miller are U.S. citizens and residents of Pennsylvania. Were it not for the challenged statutory provisions, they would have carried firearms outside of their homes. The two organizational Appellants are the Second Amendment Foundation and the Firearms Policy Coalition, both of which have at least one active 18-to-20-year-old member who is a U.S. citizen and Pennsylvania resident and who wishes to carry firearms in public for lawful purposes. For simplicity, we will speak of the "Appellants" in terms of the three named individuals, unless otherwise specified.

[2] The operative facts are not in dispute. We are bound, at this stage of the proceedings, to "accept all factual

§§ 6101-6128, an individual may not carry a concealed firearm without a license and must be at least 21 years old to apply for a license. A concealed-carry license permits the holder to carry a firearm even during a state of emergency. *Id.* § 6107(a)(2). Ordinarily, Pennsylvanians without a concealed-carry license may carry openly, but § 6107(a) of the UFA provides that "[n]o person shall carry a firearm upon public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive[.]" *Id.* § 6107(a). Besides the exception for those with a concealed-carry license, there are exceptions for those "actively engaged in a defense" and those who qualify for one of fifteen other exceptions enumerated in § 6106(b).[3] *Id.* § 6107(a)(1)-(2).

Taken together, §§ 6106, 6107, and 6109 – when combined with a state or municipal emergency declaration – have the practical effect of preventing most 18-to-20-year-old adult Pennsylvanians from carrying firearms. When this suit was filed in October 2020, "Pennsylvania had been in an

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allegations as true, [and] construe the complaint in the light most favorable to the [Appellants]." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

[3] For example, the exceptions permit individuals to carry concealed firearms if they are in law enforcement, the National Guard, or the military, and to transport firearms to and from places of purchase and shooting ranges if the firearms are not loaded. 18 Pa. Cons. Stat. § 6106(b). They do not, however, provide the typical, law-abiding Pennsylvanian with the option of carrying a loaded and operable firearm for most lawful purposes, including self-defense.

uninterrupted state of emergency for nearly three years" due to gubernatorial proclamations related to the COVID-19 pandemic, the opioid addiction crisis, and Hurricane Ida. (Comm'r Letter Br. at 4-5.) Perhaps out of weariness with the ongoing emergency declarations, Pennsylvania recently amended its constitution to limit the governor's authority to issue such emergency declarations to twenty-one days, unless the General Assembly votes to extend it. Pa. Const. art. IV, § 20. Subsequently, all state-wide emergency declarations lapsed.

B. Proceedings below

The Appellants sued the Commissioner, Robert Evanchick, in his official capacity, challenging as unconstitutional under the Second Amendment the combined effect of §§ 6106, 6107, and 6109, which, together with the then-ongoing state of emergency, foreclosed them from carrying firearms in public places.[4]

They moved for a preliminary injunction in December 2020, and the Commissioner responded by moving to dismiss under Federal Rule of Civil Procedure 12(b)(6). The District Court denied the motion for a preliminary injunction and

[4] Besides facially challenging the UFA, the complaint also raised as-applied challenges in the alternative. The Appellants, however, have not articulated any as-applied challenge in their briefs and have therefore forfeited those claims. *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is [forfeited] unless a party raises it in its opening brief[.]").

granted the Commissioner's motion to dismiss the case. Citing this Court's past decisions "giv[ing] broad construction to … 'longstanding' and 'presumptively valid regulatory measures' in the context of licensing requirements," and the "broad consensus" of decisions from other federal courts "that restrictions on firearm ownership, possession and use for people younger than 21 fall within the types of 'longstanding' and 'presumptively lawful' regulations envisioned by [*District of Columbia v. Heller*, 554 U.S. 570 (2008)]," the District Court concluded that Pennsylvania's restrictions "fall outside the scope of the Second Amendment." (J.A. at 5, 20.)

The Appellants timely appealed.

II. DISCUSSION[5]

A. The Supreme Court's new, two-part test

The Second Amendment, controversial in interpretation of late,[6] is simple in its text: "A well regulated Militia, being

[5] "When considering a Rule 12(b)(6) motion, we 'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 431 (3d Cir. 2017). When reviewing a district court's refusal to grant a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and its ultimate decision to deny the injunction for abuse of discretion. *Am. Express Travel Related Servs., Inc. v. Sidamon–Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). Whether the Second Amendment conflicts with the statutory scheme at issue here is a question of law that we review de novo. *Hernandez-Morales v. Att'y Gen.*, 977 F.3d 247, 249 (3d Cir. 2020).

[6] *Compare, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 105 (2023) ("Although there is still time for courts to develop workable standards (as they did after []*Heller*), post-*Bruen* cases reveal an erratic, unprincipled jurisprudence, leading courts to strike down gun laws on the basis of thin historical discussion and no meaningful explanation of historical analogy."), *with* Nelson Lund, Bruen's *Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 289 (2022)

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.

In *Heller*, the Supreme Court held that, regardless of militia service, the Second and Fourteenth Amendments guarantee to an individual the right to possess a handgun in his home for self-defense. 554 U.S. at 584, 592. In that opinion, which addressed a District of Columbia law that banned handguns and required other "firearms in the home be rendered and kept inoperable at all times," the Court observed that the challenged law would be unconstitutional "[u]nder any of the standards of scrutiny … applied to enumerated constitutional rights." *Id.* at 628-30. We and other courts had interpreted that observation as endorsing a means-end scrutiny analysis in Second Amendment cases.[7]

("[T]he *Bruen* majority [saw] that the circuit courts were generally treating the Second Amendment with dismissive hostility, as if it were a second-class provision of the Bill of Rights.").

[7] *See, e.g.*, *Holloway v. Att'y Gen.*, 948 F.3d 164, 172 (3d Cir. 2020) ("If a challenger makes a 'strong' showing that the regulation burdens his Second Amendment rights … then 'the burden shifts to the Government to demonstrate that the regulation satisfies' intermediate scrutiny."); *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 128 (2d Cir. 2020) ("Laws that 'place substantial burdens on core rights are examined using strict scrutiny'; but laws that 'place either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens [only] on conduct outside

Then, last year, in *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, the Supreme Court held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun … outside the home." 142 S. Ct. 2111, 2122 (2022). The Court rejected "means-end scrutiny in the Second Amendment context" and announced a new two-step analytical approach. *Id.* at 2122, 2126-27. At the first step, a court determines whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129-30. That "'textual analysis' focuse[s] on the 'normal and ordinary' meaning of the Second Amendment's language." *Id.* at 2127 (quoting *Heller*, 554 U.S. at 576-78). If the text applies to the conduct at issue, "the Constitution presumptively protects that conduct." *Id.* at 2130.

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the core … can be examined using intermediate scrutiny.'") (alteration in original); *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) ("[A] 'regulation that threatens a right at the core of the Second Amendment'– i.e., the right to possess a firearm for self-defense in the home – 'triggers strict scrutiny,' while 'a regulation that does not encroach on the core of the Second Amendment' is evaluated under intermediate scrutiny."); *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) ("The appropriate level of scrutiny 'turn[s] on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.'"); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) ("[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end.").

At the second step, a court determines whether the regulation in question "is consistent with the Nation's historical tradition of firearm regulation." *Id.* If it is, the presumption made at the first step of *Bruen* is overcome, and the regulation in question can stand.

To aid the court in that second-step analysis, the government bears the burden of identifying a "founding-era" historical analogue to the modern firearm regulation. *Id.* at 2130-33. We are to look to the founding because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* at 2130, 2136 (quoting *Heller*, 554 U.S. at 634-35). The question is "whether historical precedent from before, during, and even after the founding evinces a comparable tradition of regulation." *Id.* at 2131-32 (quoting *Heller*, 554 U.S. at 631 (internal quotation marks omitted)). In considering that precedent, however, we discount "[h]istorical evidence that long predates" 1791 and "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 2136-37.

Assessing the similarity of current regulations to those of the founding era calls on us to consider both "how and why the regulations [being compared] burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133; *see also id.* ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.") (internal quotation marks omitted). We must be wary of a modern law that only "remotely resembles a historical analogue," because to uphold such a law risks "endorsing outliers that our ancestors would never have accepted." *Id.*

(quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)). "On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

In sum, at a high level, *Bruen* requires two distinct analytical steps to determine the constitutionality of a firearm regulation. The court first decides whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If it does, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

B. The Second Amendment's reference to "the people" covers all adult Americans.

In defense of the Pennsylvania statutes, the Commissioner first argues that 18-to-20-year-olds are not among "the people" protected by the Second Amendment, and the Appellants' challenge therefore fails the first step of the *Bruen* test. This is an issue of first impression for us.

To succeed on this argument, the Commissioner must overcome the strong presumption that the Second Amendment applies to "all Americans." *Heller*, 554 U.S. at 581. In *Heller*, the Supreme Court reiterated that "the people … 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.* at 580 (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259,

265 (1990)). The Court also explained that, like other references to "the people" in the Constitution, "the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* Accordingly, there is "a strong presumption that the Second Amendment right … belongs to all Americans."[8] *Id.* at 581.

Bruen once again affirmed the broad scope of the Second Amendment, stating that the "Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to reasonable, well-defined restrictions." 142 S. Ct. at 2156 (quoting *Heller*, 554 U.S. at 581).[9] Taking our cue from the Supreme Court, we have construed the term "the people" to cast a wide net. In *Range v. Attorney General*, we considered an as-applied challenge to the constitutionality of a federal statute that barred the defendant from purchasing firearms because of a state-level conviction for having made a false statement to obtain food stamps. 69 F.4th 96, 98 (3d Cir. 2023) (en banc). We held that the Supreme Court's past references to "law-abiding citizens" did not mean that a criminal conviction removes an American citizen from "the people." *Id.* at 101-02. We reasoned that "[u]nless the meaning of the phrase 'the people' [in the Constitution] varies from provision to provision – and the Supreme Court in *Heller*

[8] *Heller* identified Second Amendment rightsholders at various points as "Americans," "all Americans," "citizens," and "law-abiding citizens." 554 U.S. at 580-81, 625.

[9] *Bruen* also stated that the protections of the Second Amendment extend to "ordinary, law-abiding, adult citizens." 142 S. Ct. at 2134.

suggested it does not – to conclude that [the defendant] is not among 'the people' for Second Amendment purposes would exclude him from those rights as well." *Id.* at 102.

The Commissioner endeavors to argue around that conclusion by saying that, "[a]t the time of the Founding – and, indeed, for most of the Nation's history – those who were under the age of 21 were considered 'infants' or 'minors' in the eyes of the law[,]" "mean[ing] that they had few independent legal rights." (Comm'r Letter Br. at 8-9.) True enough, from before the founding and through Reconstruction, those under the age of 21 were considered minors. *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 451 (Oxford, Clarendon Press 1765) ("So that full age in male or female, is twenty one years … who till that time is an infant, and so styled in law."); 1 Zephaniah Swift, *A System of the Laws of the State Of Connecticut* 213 (Windham, John Byrne pub. 1795) ("Persons within the age of 21, are, in the language of the law denominated infants, but in common speech – minors."); *Infant*, *Black's Law Dictionary* (11th ed. 2019) ("An infant in the eyes of the law is a person under the age of twenty-one years") (quoting John Indermaur, *Principles of the Common Law* 195 (Edmund H. Bennett ed., 1st Am. ed. 1878)).

Notwithstanding the legal status of 18-to-21-year-olds during that period, however, the Commissioner's position is untenable for three reasons. First, it supposes that the first step of a *Bruen* analysis requires excluding individuals from "the people" if they were so excluded at the founding. That argument conflates *Bruen*'s two distinct analytical steps. Although the government is tasked with identifying a historical analogue at the second step of the *Bruen* analysis, we are not limited to looking through that same retrospective lens at the

first step. If, at step one, we were rigidly limited by eighteenth century conceptual boundaries, "the people" would consist of white, landed men, and that is obviously not the state of the law.[10] *Cf., Bruen*, 142 S. Ct. at 2132 (noting that the Second Amendment's "reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century'"); *Range*, 69 F.4th at 104-05 (observing that founding-era gun restrictions based on "race and religion" such as those on "Loyalists, Native Americans, Quakers, Catholics, and Blacks" would now be "unconstitutional under the First and Fourteenth Amendments").

Second, it does not follow that, just because individuals under the age of 21 lacked certain legal rights at the founding, they were ex ante excluded from the scope of "the people." As then-Judge Barrett explained, "[n]either felons nor the mentally ill are categorically excluded from our national community." *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). But "[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).

Third, consistency has a claim on us. It is undisputed that 18-to-20-year-olds are among "the people" for other constitutional rights such as the right to vote (U.S. Const. art. I, § 2; *id.* amend. XVII), freedom of speech, peaceable

[10] *See* Note, *The Meaning(s) of 'The People' in the Constitution*, 126 Harv. L. Rev. 1078, 1085 (2013) ("'[T]he people' largely meant property-owning white adult males, at least initially.").

assembly, government petitions (*id.* amend. I), and the right against unreasonable government searches and seizures (*id.* amend. IV).[11] As we recently observed in *Range*, there is "no reason to adopt an inconsistent reading of 'the people.'" 69 F.4th at 102. Indeed, wholesale exclusion of 18-to-20-year-olds from the scope of the Second Amendment would impermissibly render "the constitutional right to bear arms in public for self-defense … 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 142 S. Ct. at 2156 (quoting *McDonald v. Chicago*, 561 U.S. 742, 780 (2010)).

We therefore hold that 18-to-20-year-olds are, like other subsets of the American public, presumptively among "the people" to whom Second Amendment rights extend.[12] If

[11] The three other provisions in the Constitution that explicitly refer to "the people" are the preamble ("We the People"), the Ninth Amendment (providing that no enumerated constitutional right "shall … be construed to deny or disparage others retained by the people"), and the Tenth Amendment (providing "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[12] Two other federal appellate courts have determined that 18-to-20-year-olds are among "the people" protected by the Second Amendment. *Hirschfeld v. ATF*, 5 F.4th 407, 418-34 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021); *Jones v. Bonta*, 34 F.4th 704, 717-21 (9th Cir. 2022), *opinion vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022). *Hirschfeld* and *Bonta* were decided before *Bruen*. *Hirschfeld* was vacated as moot because the plaintiff turned 21 while the

case was on appeal, 14 F.4th at 326-27, and *Bonta* was vacated and remanded to the district court for consideration in light of *Bruen*, 47 F.4th at 1125. Their analyses are nevertheless instructive.

In *Hirschfeld*, the Fourth Circuit, after reviewing the use of "the people" in the rights enumerated in the First and Fourth Amendments, expressed its view that "it is hard to conclude that 18-to-20-year-olds have no Second Amendment rights where almost every other constitutional right affords them that protection." 5 F.4th at 424. In a variant on a familiar canon of construction, the Fourth Circuit also explained that when the drafters of the Constitution and its amendments wanted to set an age restriction, they did so explicitly:

> [W]hile various parts of the Constitution include age requirements, the Second Amendment does not. The Founders set age requirements for Congress and the Presidency, but they did not limit any rights protected by the Bill of Rights to those of a certain age. *See* U.S. Const. art. I, § 2 (age 25 for the House); *id.* art. I, § 3 (age 30 for the Senate); *id.* art. II, § 1 (age 35 for the President); *cf. id.* amend. XXVI (setting voting age at 18). In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment.

Id. at 421.

The Ninth Circuit in *Bonta* reached the same conclusion about age limits, but on a different basis. It determined that the Second Amendment "protects the right of the people to keep and bear arms and refers to the militia. Young adults were part

there is any argument to be made that the Commonwealth can restrict the rights of 18-to-20-year-olds with respect to firearms, *Bruen* teaches that the Commissioner must make that argument by showing that such restrictions are part of the nation's historical tradition of gun regulation. 142 S. Ct. at 2130.

C. The relevant historical timeframe

The Commissioner does seek to shoulder that burden, but, before considering whether he has succeeded in his task, we must establish which period – the Second Amendment's ratification in 1791 or the Fourteenth Amendment's ratification in 1868 – is the proper historical reference point for evaluating the contours of the Second Amendment as incorporated against the Commonwealth. The Appellants direct us to 1791, but the Commissioner insists that 1868 is the correct temporal reference point.

Bruen declined to resolve this timeframe question because, in that case, the public understanding of the Second Amendment right at issue was the same in 1791 and 1868 "for all relevant purposes." 142 S. Ct. at 2138. We are situated

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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.'" *Bonta*, 34 F.4th at 724 (citing *Heller*, 544 U.S. at 580).

We acknowledge that our dissenting colleague sees things differently. He shares the Commissioner's view that 18-to-21-year-olds are not under the protection of the Second Amendment. Our understanding, however, for the reasons already described is to the contrary.

differently, however, because, while the Commissioner has not pointed to an eighteenth century regulation barring 18-to-20-year-olds from carrying firearms, he says that there are "dozens of 19th century laws restricting 18-to-20-year-olds' ability to purchase, possess and carry firearms[.]" (Comm'r Letter Br. Reply at 7.)

A premise we begin with is that 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." *Bruen*, 142 S. Ct. at 2137; s*ee also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."); *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("Incorporated 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.'") (quoting *McDonald*, 561 U.S. at 765); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) ("We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.") (internal citations omitted).

Accordingly, the Commissioner must establish that the Second Amendment – whether applied against a state or federal regulation – is best construed according to its public meaning at the time of the Fourteenth Amendment's ratification as opposed to the public meaning of the right when

the Second Amendment was ratified. Although *Bruen* did not definitively decide this issue, it gave a strong hint when it observed that there has been a general assumption "that the scope of the protection applicable to the Federal Government and States [under the Bill of Rights] is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 142 S. Ct. at 2137. In support, it cited *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004); *Virginia v. Moore*, 553 U.S. 164, 168-69 (2008); and *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011).

In those cases, the Court interpreted the bounds of the Sixth, Fourth, and First Amendments, respectively, according to their public meaning at the founding. In *Crawford*, which considered the scope of the Confrontation Clause, the Court observed that "[t]he right to confront one's accusers is a concept that dates back to Roman times," but the emphasis in the opinion was on "English common law" because it was "[t]he founding generation's immediate source of the concept[.]" 541 U.S. at 43. Then in *Moore*, the Court explained that, "[i]n determining whether a search or seizure is unreasonable, we begin with history." 553 U.S. at 168. That history includes "the statutes and common law of the founding era" and the understanding "of those who ratified the Fourth Amendment." *Id.* Finally, in *Nevada Commission on Ethics*, the Court held that a Nevada statute requiring public officials to recuse themselves from voting on certain matters did not violate the First Amendment, and founding-era evidence was "dispositive" in the analysis.[13] 564 U.S. at 122; *see also id.* at

[13] *See also Printz v. United States*, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments 'provid[e]

121 ("Laws punishing libel and obscenity are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since.").

While the Supreme Court has not held that all constitutional rights that have been made applicable to the states must be construed according to their public meaning in 1791, the Commissioner has not articulated a theory for defining some rights according to their public meaning in 1791 and others according to their public meaning in 1868. Moreover, *Bruen* has already instructed that historical evidence from 1791 is relevant to understanding the scope of the Second Amendment as incorporated against the states. *Bruen*, 142 S. Ct. at 2139, 2145. Accordingly, to maintain consistency in our interpretation of constitutional provisions, we hold that the Second Amendment should be understood according to its public meaning in 1791.[14]

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contemporaneous and weighty evidence of the Constitution's meaning.'") (quoting *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986)).

[14] We thus part ways with the Eleventh Circuit, which held in *National Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir.), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir. 2023), 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." *Id.* at 1323. According to *Bondi*, "[t]his is necessarily so if we are to be faithful to the principle that 'constitutional rights are enshrined with the scope that they were understood to have *when the people adopted them*.'" *Id.* at 1323 (quoting *Bruen*,

We thus set aside the Commissioner's catalogue of statutes from the mid-to-late nineteenth century, as each was enacted at least 50 years after the ratification of the Second Amendment.[15] What is left is an eighteenth-century statute that

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142 S. Ct. at 2136) (cleaned up). *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.

[15] 1856 Ala. Acts 17 (banning gun sales to minors under 21); 16 Del. Laws 716 (1881) (banning concealed-carry, and banning the sale of deadly weapons to minors under 21); Wash. D.C. 27 Stat. 116 (1892) (criminalizing concealed-carry for all persons, and banning the sale of guns and dangerous weapons to minors under 21); 1876 Ga. Laws 112 (banning gun sales to minors under 21); 1881 Ill. Laws 73 (banning the sale of guns and other dangerous weapons to minors under 21); 1875 Ind. Acts 86 (banning the sale of pistols, cartridges, and other concealable deadly weapons to anyone under 21); 1884 Iowa Acts 86 (banning the sale of pistols to minors under 21); 1883 Kan. Sess. Laws 159; (banning the purchase and possession of guns and other dangerous weapons by minors under 21); 1873 Ky. Stat. art. 29, at 359 (criminalizing concealed-carry for all persons, and banning the sale of all deadly weapons to minors under 21); 1890 La. Acts 39 (banning the sale of concealable deadly weapons to anyone under 21); 1882 Md. Laws 656 (banning the sale of firearms and deadly weapons other than rifles and shotguns to minors under 21); 1878 Miss. Laws 175

supposedly supports the contention that Pennsylvania's current restriction on 18-to-20-year-olds is a "longstanding, presumptively lawful regulation[.]" (Answering Br. at 27.) Specifically, the Commissioner directs us to Pennsylvania's Act of August 26, 1721, which prohibited "carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any

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(criminalizing concealed-carry for all persons, and prohibiting the sale of firearms and deadly weapons to intoxicated persons or to minors under 21); 1883 Mo. Laws 76 (criminalizing concealed-carry for all persons, and prohibiting the sale of such weapons to minors under 21 without parental consent); 1885 Nev. Stat. 51 (prohibiting minors under 21 from carrying concealed pistols and other dangerous weapons); 1893 N.C. Sess. 468-69 (banning the sale of pistols and other dangerous weapons to minors under 21); 1856 Tenn. Pub. Acts 92 (prohibiting the sale of pistols and other dangerous weapons to minors under 21); 1897 Tex. Gen. Laws 221-22 (banning the sale of pistols and other dangerous weapons to minors under 21); 1882 W.Va. Acts 421-22 (criminalizing carrying guns and other dangerous weapons about one's person and prohibiting the sale of such weapons to minors under 21); 1883 Wis. Sess. Laws 290 (making it unlawful for "any minor . . . to go armed with any pistol or revolver" and for any person to sell firearms to minors under 21); 1890 Wyo. Sess. Laws 1253 (banning the sale of pistols and other dangerous weapons to anyone under 21).

Full texts of these laws are available at the *Repository of Historical Gun Laws*, Duke Univ. School of Law, https://firearmslaw.duke.edu/repository/search-the-repository/ (last visited Sept. 26, 2023).

plantation other than his own[.]"[16] But we can discern no near equivalence or significant analogue between the burdens

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[16] In full, the Act provided:

> Be it enacted by the authority aforesaid, That if any person or persons shall presume, at any time after the sixteenth day of November, in this present year one thousand seven hundred and twenty one, to carry any gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation, and shall thereof convicted ether upon view of any justice of the peace within this province, or by the oath or affirmation of any one or more witnesses, before any justice of the peace, he shall for every such offense forfeit the sum of ten shillings. And if any person whatsoever, who is not owner of fifty acres of land and otherwise qualified in the same manners as persons are or ought to be by the laws of this province for electing of members to serve in assembly, shall at any time, after the said Sixteenth day of November, carry any gun, or hunt in the woods or inclosed lands, without license or permission obtained from the owner or owners of such lands, and shall be thereof convicted in manner aforesaid, such offender shall forfeit and pay the sum of five shillings.

Act of Aug. 26, 1721, ch. 246, 3 Statutes at Large of Pa. 254, 255-56, *repealed by* Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46. Text available at the *Repository of Historical*

imposed by that statute and those at issue here. For one thing, the 1721 statute appears to be primarily focused on preventing Pennsylvanians from hunting on their neighbors' land, not on restricting the right to publicly carry a gun. When the statute was later repealed and replaced in 1760, that subsequent statute included another provision that prevented "fir[ing] a gun on or near any of the King's highways," which indicates that carrying a firearm in public places was generally not restricted.[17] Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large

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Gun Laws, https://firearmslaw.duke.edu/laws/the-statutes-at-large-of-pennsylvania-c-142-p-254-an-act-to-prevent-the-killing-of-deer-out-of-season-and-against-carrying-of-guns-or-hunting-by-persons-not-qualified/ (last visited Sept. 26, 2023).

[17] In full, the relevant portion of the 1760 Act provided:

> Be it enacted, That if any person or persons shall presume, at any time after the publication of this act[,] to carry any gun or hunt on any enclosed or improved lands of any of the inhabitants of this province[,] other than his own[,] unless he shall have license or permission from the owner of such lands, or shall presume to fire a gun on or near any of the King's highways and shall be thereof convicted, either upon view of any [J]ustice of the [P]eace within this province or by the oath or affirmation of any one or more witnesses before any [J]ustice of the [P]eace, he shall for every such offence forfeit the sum of forty shillings.

of Pa. 46, 48. More to the point, however, to the extent the statute did burden the right to carry a gun in public, it did so without singling out 18-to-20-year-olds, or any other subset of the Pennsylvania population for that matter.

Against that conspicuously sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification, we can juxtapose the Second Militia Act, passed by Congress on May 8, 1792, a mere five months after the Second Amendment was ratified on December 15, 1791. The Act required all able-bodied men to enroll in the militia and to arm themselves upon turning 18.[18] Second

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Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46, 48. Text available at the Repository of Historical Gun Laws, https://firearmslaw.duke.edu/laws/laws-of-the-commonwealth-of-pennsylvania-from-the-fourteenth-day-of-october-one-thousand-seven-hundred-to-the-twentieth-day-of-march-one-thousand-eight-hundred-and-ten-page-229-image-288-vol-1/ (last visited Sept. 26, 2023).

[18] The Second Militia Act required that "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 herein exempted) shall severally and respectively be enrolled in the militia[.]" Second Militia Act of 1792 § 1, 1 Stat. 271 (1792). The Second Militia Act further required every member of the militia to "provide himself with a good musket or firelock ... or with a good rifle[.]" *Id*. § 1.

The First Militia Act, which Congress passed shortly before, on May 2, 1792, gave the president authority to call out the militias of the several states, "whenever the United States

Militia Act of 1792 § 1, 1 Stat. 271 (1792). That young adults had to serve in the militia indicates that founding-era lawmakers believed those youth could, and indeed should, keep and bear arms.

The Commissioner contests the relevancy of the Second Militia Act on three grounds. First, he notes that, "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."[19] (Comm'r Letter Br. Reply at 7 (citing 18 Pa. Cons. Stat. § 6106(b)(2)).) Second, he objects that, when the Second Amendment was ratified, nine states set the threshold for militia service at 16 and seven states set the maximum age at 50. According to the Commissioner, 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." (Comm'r Letter Br. Reply at 5.) And third, he asserts that the Second Militia Act of 1792

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shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." First Militia Act of 1792 § 1, 1 Stat. 264 (1792).

[19] Although the founding generation was "devoted to the idea of state control of the militia," modern statutes "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 37, 196 (2006).

– as well as similar state statutes that required 18-to-20-year-olds to participate in the militia – "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."[20] (Comm'r Letter Br. Reply at 5.)

No doubt, the Commissioner is correct that a duty to possess guns in a militia or National Guard setting is distinguishable from a right to bear arms unconnected to such service. *See Nat'l Rifle Assoc. v. Bondi*, 61 F.4th 1317, 1331 (11th Cir. 2023) (cautioning against the conflation of the obligation to perform militia service with the right to bear arms). Still, the Second Militia Act is good circumstantial evidence of the public understanding at the Second Amendment's ratification as to whether 18-to-20-year-olds could be armed, especially considering that the Commissioner cannot point us to a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns.[21] The Commissioner's contention that any reliance on

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[20] The Commissioner also notes that Pennsylvania's 1755 Militia Act provided that "no Youth, under the Age of Twenty-one Years, . . . shall be admitted to enroll himself . . . without the Consent of his or their Parents or Guardians[.]" The text of that statute is available at *Militia Act, [25 November 1755]*, Nat'l Archives, https://founders.archives.gov/documents/Franklin/01-06-02-0116#BNFN-01-06-02-0116-fn- 0001 (last visited Sept. 20, 2023).

[21] *See Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 342 (5th Cir. 2013) (Jones, J., dissenting from the denial of rehearing)

1789 militia laws would force us to invalidate laws prohibiting 16-to-17-year-old from possessing firearms is simply not persuasive. Although the age of militia service dipped to 16 in some states during the colonial and revolutionary periods – a development that likely can be attributed to necessities created by ongoing armed conflicts – the Appellants rightly observe that, "[a]t the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia service in *every state* became eighteen." (Reply Br. at 17 (citing *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 340 (5th Cir. 2013) (Jones, J., dissenting)).) Finally, even though there were founding-era militia laws that required parents or guardians to supply arms to their minor sons, nothing in those statutes says that 18-to-20-year-olds could not purchase or otherwise acquire their own guns.

We understand that a reasonable debate can be had over allowing young adults to be armed, but the issue before us is a narrow one. Our question is whether the Commissioner has borne his burden of proving that evidence of founding-era regulations supports Pennsylvania's restriction on 18-to-20-year-olds' Second Amendment rights, and the answer to that is no.

("[T]hose minors were in the militia and, as such, they were required to own their own weapons. What is inconceivable is any argument that 18-to-20-year-olds were not considered, at the time of the founding, to have full rights regarding firearms.") (emphasis removed).

D. This case is not moot

The Commissioner next argues that none of the foregoing matters because the Appellants no longer face any restrictions on their ability to carry publicly, which eliminates any injury for which they could obtain relief. In other words, he says the case is moot. He points to the amendment to Pennsylvania's constitution that now limits the governor's authority to issue an emergency declaration to 21 days, unless the General Assembly votes to extend it. *See* PA. Const. art. IV, § 20(c). And he notes that the emergency proclamations in place when this suit began have all lapsed. Accordingly, the Commissioner says, there is no longer any restriction on the Appellants' ability to openly carry firearms. He also argues that the claims of the individual Appellants are moot because they have reached the age of 21 and are now eligible to apply for a concealed-carry license.

Generally, a case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Virgin Islands*, 842 F.3d 201, 208 (3d Cir. 2016). "[A]n appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it impossible for the court to grant any effectual relief whatsoever." *In re World Imports Ltd.*, 820 F.3d 576, 582 (3d Cir. 2016).

Here, the Appellants invoke the "capable of repetition yet evading review" exception to the mootness rule, which applies "only in exceptional circumstances" when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable

expectation that the same complaining party will be subject to the same action again." *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). A plaintiff need not show that future injury is certain, only that there is "more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability." *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 231 (3d Cir. 2021) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The plaintiff has the burden of making that showing. *New Jersey Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 31-33 (3d Cir. 1985).

This is one such exceptional circumstance because, as the record shows, Pennsylvania has a recent history of declaring multiple emergencies, and it is reasonably likely that other 18-to-21-year-olds, including members of the organizational Appellants here, the Second Amendment Foundation and the Firearms Policy Coalition, will be banned from carrying guns in public yet again.[22] The Appellants

[22] As the organizational Appellants acknowledge, their standing "depends upon at least one of their members having standing in their own right." (3d Cir. D.I. 71-1 at 1 (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).) Although the three named individual Appellants have reached the age of 21, the Court has been made aware of at least one individual, George Pershall, a 19-year-old resident of Chester County, Pennsylvania and U.S. citizen, who is a member of both the Second Amendment Foundation and the Firearms Policy Coalition, and will remain subject to the UFA's restrictions.

persuasively argue that, while lengthy emergencies may now be less likely because of the recent constitutional amendment, the risk of regulated persons being unable to fully litigate this Second Amendment issue has increased since the adoption of the new constitutional amendment. Because emergencies may only last for twenty-one days, absent intervention from the General Assembly, there is not enough time to litigate a claim.

E. The Appellants' claim is not barred by the Eleventh Amendment or Article III standing[23]

The Commissioner's next salvo is, in essence, "they've got the wrong man." He says that the target of the Appellants' constitutional challenge is Pennsylvania's licensing scheme, not him, and that suing him is improper because he is powerless to issue licenses.[24] More specifically, he says that the *Ex parte Young* exception to the Eleventh Amendment, the exception that allows suits against an official who is a "representative of the state,"[25] 209 U.S. 123, 157 (1908), is properly invoked only

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[23] We may consider Eleventh Amendment issues for the first time on appeal, *In re Hetchinger Inv. Co. of Del., Inc.*, 335 F.3d 244, 251 (3d Cir. 2003), and may affirm the District Court's judgment on any ground supported by the record, *TD Bank N.A. v. Hill*, 928 F.3d 259, 276 n.9 (3d Cir. 2019).

[24] Only county sheriffs may grant concealed-carry licenses.

[25] The Eleventh Amendment generally bars suits against states in federal court without their consent. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). "[A] suit against a state official in his or her official capacity is not a suit against

if the named defendant has a sufficient connection to the enforcement of the challenged law, as distinct from a generalized duty to enforce, and if there is a real potential that the official will in fact enforce the law. *See 1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 114-15 (3d Cir. 1993) (holding that "Commonwealth Officials' general duty to enforce the laws of the Commonwealth of Pennsylvania," standing alone, was "not … a proper predicate for liability"). The Commissioner further argues that the Appellants lack standing under Article III of the Constitution because they cannot establish the requisite causation and redressability of their claim.[26]

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the official but rather is a suit against the official's office. As such, it is no different from suit against the State itself." *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010) (citing *Will*, 491 U.S. at 71) (cleaned up). A plaintiff can avoid that bar by naming a state official in a suit for prospective declaratory or injunctive relief to prevent a continuing violation of federal law. *Cf. Ex parte Young*, 209 U.S. 123, 157 (1908) (explaining that in bringing such an action, the "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party").

[26] To satisfy the Article III standing requirements of causation and redressability, a plaintiff must establish that his injury is causally connected to the government-defendant's challenged conduct, and that enjoining that conduct is likely to redress the plaintiff's injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). We agree with the Commissioner that, "[w]hen a plaintiff sues state officials to enjoin the

The Appellants have a ready and effective response. They say they are "agnostic" as to whether they get licenses to carry concealed weapons under §§ 6106 and 6109, or whether, despite § 6107, they can carry openly without a license during an emergency. (Reply Br. at 3-4.) In other words, the existence of a license is not what they are fighting about; it is the right to openly carry a gun regardless of a state of emergency. And they contend that enjoining the Commissioner from arresting 18-to-20-year-olds who openly carry firearms would in fact redress their constitutional injuries.

We agree that a bar on arrests would be a form of relief.[27] Accordingly, the Commissioner has an adequate

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enforcement of a state statute, the dictates of *Ex parte Young* overlap significantly with [the Article III requirements of] causation and redressability." (Answering Br. at 17-18.) If a plaintiff can show that the defendant's conduct causes an injury and that enjoining the conduct would redress the injury, that showing will satisfy the "sufficient connection" requirement under *Ex parte Young*. *See 1st Westco Corp. v. Sch. Dist. Of Phila.*, 6 F.3d 108, 114-15 (3d Cir. 1993) (requiring a "real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests").

[27] The Commissioner appears to implicitly acknowledge this as well. (*See* Answering Br. at 50 (asserting that a bar on arrests "would lead to a perverse result, which would give an unlicensed 18-year-old high school senior the ability to carry concealed firearms in public at any time, but would leave her unlicensed parents vulnerable to criminal sanction for the same conduct. That result cannot be consistent

connection to the enforcement of the challenged law, and neither the Eleventh Amendment nor Article III bars the Appellants' claim.

F. The Appellants have not waived their request for injunctive relief, and their request is sufficiently specific.[28]

Finally, the Commissioner asserts that the Appellants forfeited their request for injunctive relief and failed to adequately describe that relief as required under Federal Rule of Civil Procedure 65(d). That argument fails too.

The Appellants repeatedly referenced their request for injunctive relief throughout their opening brief, and they discussed each of the elements of the preliminary injunction test, citing caselaw in support. The issue of injunctive relief therefore should not be a surprise to anyone in this case. The Commissioner had a full opportunity to develop a response in his answering brief. *Cf. Wood v. Milyard*, 566 U.S. 463, 473 (2012) (holding that courts should exercise restraint in reaching issues that parties "would not have anticipated in developing their arguments on appeal").

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with the intent of the General Assembly when it enacted the UFA").)

[28] Arguments not raised in an opening brief are forfeited, *In re Wettach*, 811 F.3d 99, 115 (3d Cir. 2016), and "arguments raised in passing (such as in a footnote), but not squarely argued, are considered [forfeited]," *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) (alteration in original).

And contrary to the Commissioner's argument that "it is unclear" as to "how an injunction (preliminary or permanent) against Commissioner Evanchick would function" (Answering Br. at 48), we think it is abundantly clear. As an initial matter, Rule 65(d) governs the "contents and scope of every injunction and restraining order" issued by a court, not the way in which a party requests injunctive relief. For that reason alone, the Commissioner's Rule 65(d) argument is meritless. More to the point though, while Rule 65(d) requires that the enjoined party "receive fair and precisely drawn notice of what the injunction actually prohibits," *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 322 (3d Cir. 2020), and that the injunction be "phrased in terms of objective actions, not legal conclusions," *id.*, the Appellants' complaint did provide notice and specificity when it said, "Plaintiffs respectfully request[] that this Honorable Court ... [p]reliminarily, and thereafter permanently, enjoin Defendant, his officers, agents, [and] servants, employees, and all persons in active concert or participation with him from enforcing against Plaintiffs and those similarly situated, 18 PA. C.S. § 6107." (J.A. at 70-71.) There is nothing vague about that.

III. CONCLUSION

For the foregoing reasons, we will reverse the decision of the District Court and remand with instructions to enter an injunction forbidding the Commissioner from arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency declared by the Commonwealth.

RESTREPO, *Circuit Judge*, dissenting.

Because Pennsylvania's statutory scheme does not violate the Second Amendment of the Constitution, I respectfully dissent. The challenged statutory scheme here is "consistent with this Nation's historical tradition," as defined in *New York State Pistol & Rifle Association Inc. v. Bruen,* 142 S. Ct. 2111, 2126 (2022).

In deciding whether a firearm regulation is constitutional under the Second Amendment, courts must examine whether the "regulation [being reviewed] is part of the historical tradition that delimits the outer boundaries of the right to keep and bear arms." *Id.* at 2127. In making this determination, "a court must decide whether the *challenger* or conduct at issue is protected by the Second Amendment and, *if so*, whether the Government has presented sufficient historical analogues to justify the restriction." *Range v. Att'y Gen.*, 69 F.4th 96, 113 (3d Cir. 2023) (Shwartz, J., dissent) (emph. added); *see* Majority Op. at II.A (citing *Bruen*, 142 S. Ct. at 2126) (explaining that, under *Bruen*, the court first decides whether "the Second Amendment's plain text covers an individual's conduct," and *if it does*, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

District of Columbia v. Heller, 554 U.S. 570 (2008), recognized that the Second Amendment protects the right of an "ordinary, law-abiding citizen to possess a handgun in the home for self-defense," *see Bruen*, 142 S. Ct. at 2122 (citing *Heller*, 554 U.S. at 581), and *Bruen* held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," *id.* However, there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply.

The more acute question in this case, then, is where does that age threshold lie? A "textual analysis focused on the normal and ordinary meaning of the Second Amendment's language," *see Bruen*, 142 S. Ct. at 2127 (citing *Heller*, 554 U.S. at 576-77, 578) (quotation marks omitted), and an "examination of a variety of legal and other sources," *see id.* at 2127-28 (quoting *Heller*, 554 U.S. at 605), leads to the

conclusion that the scope of the right, as understood during the Founding-era, excludes those under the age of 21.

I. The public in 1791 did not understand those under 21 to be part of "the people" protected by the Second Amendment.

Bruen affirms the historical-textualist methodology established in *Heller*. *Bruen*, 141 S. Ct. at 2127. To interpret the language of the Second Amendment, one must look to historical sources evidencing how the public would have understood its text near the time of its ratification. *Bruen*, 141 S. Ct. at 2127-28; *Heller*, 554 U.S. at 576. This principle presumes that constitutional rights do not change over time, but "are enshrined with the scope they were understood to have when the people adopted them." *Bruen*, 141 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634-35). When later history or understanding contradicts the original public meaning of the text, the original understanding controls. *Id.* at 2137.

Under *Bruen*, "[w]hen the Second Amendment's plain text *covers an individual's conduct*, the Constitution presumptively protects that conduct." *Bruen*, 141 S. Ct. at 2126, 2129-30 (emph. added). Thus, here, it would appear a presumption would apply only if the plain text of the Second Amendment covers the *Appellants'* conduct. In other words, if the text doesn't protect the Appellants here, it doesn't protect their conduct, and a presumption would not apply.

While my colleagues in the Majority acknowledge that "from before the founding and through Reconstruction, those under the age of 21 were considered *minors*," *see* Majority Op. at II.B (emph. added), the Majority also holds that the "words 'the people' in the Second Amendment presumptively encompass all *adult* Americans, *including* 18-to-20-year-olds." *See* Majority Op. at intro. (emph. added). Thus, the Majority concludes that "all adult Americans" "include[es] 18-to-20-year-olds." *Id.* It is worth reiterating that there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply.

In *Bruen*, it was "undisputed that [the petitioners] – two ordinary, law-abiding, *adult* citizens – [were] part of 'the

people' whom the Second Amendment protects." *Bruen*, 142 S. Ct. at 2134 (emph. added). Whether the plain text of the Second Amendment covered the individual petitioners in *Bruen* was not at issue, and the Supreme Court "therefore turn[ed] to whether the plain text of the Second Amendment protects [the petitioners'] proposed *course of conduct.*" *Id.* (emph. added). There was no dispute in *Bruen* that the petitioners were part of "the people" in the Second Amendment. Similarly, whether individuals under 21 were part of "the people" in the Second Amendment was not at issue before the Supreme Court in *Heller* or before this Court in *Range*.

The Majority seems to acknowledge that the Commissioner's argument that 18-to-20-year-olds are not among "the people" protected by the Second Amendment is a challenge to "the *first* step of the *Bruen* test," *see* Majority Op. at II.B (emph. added). However, the Majority then concludes that "[t]o succeed on this argument, the Commissioner must overcome the strong presumption that the Second Amendment applies to 'all Americans.'" *Id.* (citing *Heller*, 554 U.S. at 581). It stands to reason that any reference to a definition of "the people" as it relates to 18-to-20-year-olds in *Heller, Bruen*, and *Range* is dictum.

It is only when the Second Amendment's plain text covers an "individual's conduct" (first step) that the presumption of constitutional protection applies, and "the government must *then* justify its regulation by demonstrating that it is consistent with the National historical tradition of firearm regulation" (second step). *Bruen*, 142 S. Ct. at 2129-30. Because the first step of the *Bruen* test for presumption of constitutional protection to apply is not met here, there is no burden to overcome such a presumption. *See* Majority Op. at II.B (citing *Heller*, 554 U.S. at 581).

Nevertheless, assuming a need to overcome a "presumption that the Second Amendment applies to 'all Americans'," *see id.* (citing *Heller*, 554 U.S. at 581), as the Majority appears to do, in order to conclude the plain text of the Second Amendment covers the conduct of individuals under 21 at the first step of the *Bruen* test, there is evidence that the Founding-era public would not have understood the

text of the Second Amendment to extend its protection to those under 21.

At the Founding, people under 21 lacked full legal personhood. Indeed, there is no disagreement that at the time of the Founding, people under 21 were considered "infants" in the eyes of the law. *See* Majority Op. at II.B; *see also* 1 William Blackstone, *Commentaries* *453; 4 James Kent, *Commentaries on American Law* 266 (W.M. Hardcastle Brown ed. 1894) (1826). Nor is there serious debate that the conception of adulthood beginning at age 18 is relatively new to American law.[1] But to understand the significance of the historical-legal conception of infant status, one must understand its predicate presumption of incapacity.

The Founding-era generation inherited the common-law presumption that persons who lacked rationality or moral responsibility could not exercise a full suite of rights. Abrams, *supra* note 1, at 20. This idea has its roots in the Enlightenment conception of rights as being endowed only to those "with discernment to know good from evil, and with power of choosing those measures which appear . . . to be more desirable." 1 William Blackstone, *Commentaries* *125; *see* Abrams, *supra* note 1, at 20. In other words, those whom society considered to be rational.

Both at English common law and in eighteenth-century American law, infants were universally believed to lack such rationality. Infants were viewed as requiring the protection of a guardian in the management of their affairs. 3 William Blackstone, *Commentaries* *48; 1 *Commentaries* *463. James Kent, a respected contemporary scholar of American constitutional law, said "[t]he necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years." Saul Cornell, "*Infants"*

[1] *See* Douglas E. Abrams, Susan V. Mangold, & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy, and Practice* 19 (2020). Of course, the drinking age is still 21, and federal law currently prohibits tobacco sales to persons under 21. *Id*. The tradition of limiting the rights of those under 21 continues into the present.

and Arms Bearing in the Era of the Second Amendment, Yale L. & Pol'y Rev. (Oct. 26, 2021) (hereinafter "*Infants*") (quoting 2 James Kent, *Commentaries on American Law* 191 (O. Halsted ed., 1827)). Moreover, Blackstone referred to infancy as "a defect of the understanding." 4 William Blackstone, *Commentaries* *15-18.

A consequence of this legal presumption was that at the Founding, infants had few independent rights. Blackstone explains that, because of infants' inherent incapacity, parents had the power to limit their children's rights of association, to control their estates during infancy, and to profit from their labor. 1 William Blackstone, *Commentaries* *452-53. Infants could not marry without their father's consent. *Id.* at *437, *452. Fathers had a right to the profits of their infants' labor. *Id.* Even the right to contract, which the Framers thought to enshrine in the body of the Constitution, was greatly abridged for infants. *Id.* at *465; *Infants*; Eugene Volokh, *Symposium: The Second Amendment and the Right to Keep and Bear Arms After Heller*, 56 UCLA L. Rev. 1443, 1508-13 (2009) (noting restrictions on minors' exercise of fundamental rights and freedoms, including the right to contract). Blackstone went so far as to say that it was "generally true, that an infant [could] do no legal act." 1 William Blackstone, *Commentaries* *465. It was not until the infant reached the age of 21 that "they [were] then enfranchised by arriving at the years of discretion . . . when the empire of the father, or other guardian, gives place to the empire of *reason*." 1 William Blackstone, *Commentaries* *463 (emph. added).

In England and the United States, infants could not sue or be sued except by joining their guardians. *Id.* at *464. For example, infants had "no legal standing to assert a claim in court to vindicate their rights, including Second Amendment-type claims." *Infants.* Because they could only access courts through their guardians, infants necessarily lacked redress against their parents except in cases of extreme neglect or abuse. 1 William Blackstone, *Commentaries* 168 n.9 (George Chase, ed.).[2]

[2] Reason reemerges as a central justification of the delegation of rights on the question of estates: a child could only attack divestment from his father's estate if he could

There is substantial evidence that this legal incapacity controls in the context of the Second Amendment. An important element of Justice Scalia's reasoning in *Heller* was that the Second Amendment did not create a new right, but rather "codified a pre-existing right." *Heller*, 554 U.S. at 592, 599-600, 605, 652. Accordingly, common-law principles are crucial to answering whether the right in question extends to people under the age of 21.

At the Founding, there was an important connection between property law and the right to keep arms. Some state constitutions expressly discussed both arms and militia service in the context of property law. *See, e.g.,* Saul Cornell, *History and Tradition or Fantasy and Fiction*, 39 Hastings Const. L.Q. 145, 153 (2022) (hereinafter "*History and Tradition*"). Several states exempted arms used in the militia from seizure during debt proceedings. *Id.* Some colonies required single men who could not afford to arm themselves, to work as servants until they could pay off the cost of a weapon. Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 243 (2022). And all colonies required certain persons to arm themselves at their own expense and without just compensation, often mandating that militia members purchase specific equipment and that dependents be armed by their guardians. *Id.* at 177-88, 242-54. There was thus an important relationship between property law and gun law at the Founding. Infants' common-law lack of independent property rights suggests that they were similarly disabled in keeping and bearing arms.

One might infer additional context from another source: the eighteenth-century college. At the Founding, "[c]ollege was one of the very few circumstances where minors lived outside of their parents' or a guardian's direct authority." *Infants.* But students were not liberated by their attendance; rather, the representatives of the college stood *in loco parentis*, a status based on parental consent which allowed them to

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demonstrate a lack or deficiency of reason in doing so. 1 William Blackstone, *Commentaries* *448.

exercise full legal power over the infants as though they were in fact the youths' parents.[3]

Importantly, as with the parents themselves, the person standing *in loco parentis* could not excessively punish or abuse a child, suggesting that fundamental rights remained intact under this relationship. 1 William Blackstone, *Commentaries* *168 n.9 (George Chase ed.). Yet colleges at the Founding could and did prohibit possession of firearms by students. *Infants.* This was true of Yale (founded 1701), the University of Georgia (founded 1785), the University of North Carolina (founded 1776), and Thomas Jefferson's University of Virginia (founded in 1819). *Id.* Among these schools, such prohibitions were unambiguous: students were not permitted to possess arms while on campus. *Id.* The University of Georgia even prohibited possessing weapons *off*-campus, strongly suggesting that this authority was not predicated on or justified by the student's presence at a sensitive location, but rather stemmed from the inherent power of the authority standing *in loco parentis* to dictate all but the most fundamental rights of the infants under its charge.[4]

The totality of this evidence demonstrates that the public during the Founding-era understood the plain text of the Second Amendment did not cover individuals under the age of 21. At the Founding, those under 21 were considered infants, a status that was a result of the presumption that people under

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[3] 1 William Blackstone, *Commentaries* *453 ("[A father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is the *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

[4] "[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever." *Infants* (quoting The Minutes of the Senate Academicus 1799–1842, Univ. of Ga. Librs. (2008) [https://perma.cc/VVT2-KFDB]).

the age of 21 lacked sufficient cognitive and moral faculties to govern themselves. The consequences of this presumption were profound: infants had very little independent ability to exercise fundamental rights, including those of contract and property. Indeed, except in a few narrow circumstances, infants could not seek redress in the courts except through their parents. Moreover, in one historical context, history suggests that any right that an infant may have had to bear arms could be abrogated in its entirety at the pleasure of the infant's parent or an authority standing *in loco parentis*. In light of such evidence, the conclusion that infants during the Founding-era were not meant to be protected under the Second Amendment seems clear.

The Majority points out that the Second Militia Act of 1792 required every white, male citizen between the ages of 18 and 45 to enroll in their local militia, equip themselves with certain accoutrements (including "a good musket or firelock"), and appear when called out to exercise or into service. 1 Stat. 271. In addition, the age of militia service varied by state, with some states requiring children as young as 15 to serve.[5] Notwithstanding an argument that the Second Militia Act supports Appellants' position, there appears to be no claim that 15-year-olds are part of "the people" in the Second Amendment. In any event, the fact that infants had a *duty* under the Second Militia Act to enroll in the militia and thus to equip themselves with arms for that purpose should not be confused with such individuals otherwise having an independent *right* under the Second Amendment. Some states enacted statutes placing the burden of arming infants on their guardians.[6] Indeed, infants only rendered militia service under

[5] Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 188 (2022). Massachusetts had a typical conscription law which required male residents between ages 16 and 60 to serve. *Id.* at 242, 244. New Hampshire and Maine had similar requirements. *Id*. at 247.

[6] *See, e.g.*, 3 Laws of New Hampshire, Province Period 83 (Henry Harrison Metcalf ed., 1915) (1754); An Act for Forming and Regulating the Militia Within The State of New Hampshire, in New-England, and For Repealing All the Laws Heretofore Made for That Purpose, 1776 Acts & Laws of the

the supervision of peace officers who, like teachers, stood *in loco parentis*. *See* Johnson, *supra* note 5, at 243, 251. As noted above, at the Founding, infants exercised and sought redress of rights, including property rights, at the pleasure of their legal guardians. *See, e.g.,* 1 William Blackstone, *Commentaries* *452-53; *Infants*. That individuals under 21 were required to bear arms in the militia is not evidence that such individuals otherwise consistently owned arms in their individual capacities, much less that they had a right to own such property.

Heller made clear that the Second Amendment codifies an individual right to keep and bear arms that is unconnected to militia service: "[A]part from [a] clarifying function, [the] prefatory clause does not limit or expand the scope of the operative clause." *Heller*, 554 U.S. at 578. Militia service cannot properly be disconnected from the right for the purpose of limiting its scope but connected for the purpose of expanding it; the two are independent. Again, *Bruen* affirmed this historical-textual analysis. *Bruen,* 141 S. Ct. at 2127.

Heller explains at length that the militia and "the people" are distinct. *Heller*, 554 U.S. at 650-51. Although the militia may overlap with "the people," this does not mean that every member of the militia is by extension part of "the people" covered by the Second Amendment.

As discussed above, infants during the Founding-era did not merely lack certain legal rights, but nearly all legal rights. The fact that this class of persons had no power to independently exercise almost any rights of speech, association, conscience, marriage, contract, suffrage, petition, or property, strongly suggests that they would not be

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Colony of N.H. 36, 39; An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, c. 1, § XIX, 1793 Mass Acts & Laws May Sess. 289, 297; An Act, for Regulating and Governing the Militia of This State 1797, c. LXXXI, No. 1, § 15, 2 The Laws of the State of Vermont, Digested & Compiled 122, 131-32 (Randolph, Sereno Wright 1808); 2 William T. Dortch, John Manning & John S. Henderson, The Code of North Carolina § 3168, 346-47 (New York, Banks & Bros. 1883).

understood as receiving constitutional protections as members of "the people" under the Second Amendment.

Then-Judge Amy Coney Barrett's discussion of felons and the mentally ill, *see* Majority Op. at II.B (citing *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting)), concerns classes distinct from infants. At the Founding, felons and the mentally ill were extended greater rights than infants, and their legal disability resulted from legal findings, not *a priori* legal classifications. Felons and the mentally ill lost their rights only after they were found untrustworthy, whereas persons under 21 were classified as infants because as a class of persons they were considered untrustworthy. While insanity and criminality test the capacities and character of the individual, respectively, the age of majority as a concept suppresses individual differentiation.[7] *See* Abrams, *supra* note 1, at 19.

At the Founding, people under 21 bore arms at the pleasure of their superiors. Were they to find this condition violative of their rights, they would have no right to petition the courts for redress. Stated bluntly, the same generation from whom Appellants may have begged relief would not have permitted them to bring their claim. Accordingly, I respectfully disagree with my colleagues in the Majority, and conclude that during the Founding-era, the plain text of the Second Amendment was understood to mean that persons under 21 were not part of "the people" protected by the Second Amendment.

II. The challenged statutes are consistent with this Nation's historical tradition.

Under *Bruen*, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution

[7] Of course, there are some exceptions to this general rule. For example, some criminal penalties can accrue to individuals below the age of majority, a court may find that a minor is properly developed to make certain medical decisions for themselves, and a court may find a minor sufficiently mature to warrant emancipation. *See*, Abrams *supra* note 1, at 19.

presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129-30. As explained above, the ordinary understanding of the plain text of the Second Amendment during the Founding-era was that individuals under the age of 21 were not part of "the people" whom the Second Amendment protects. Thus, the Second Amendment's plain text does not cover these Appellants' conduct, and the Constitution does not presumptively protect the conduct regulated by the challenged statutory scheme.

The Majority points out that, under *Bruen*: "The court first decides whether 'the Second Amendment's plain text covers an individual's conduct.' . . . *If it does*, 'the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.'" *See* Majority Op. at II.A (citing *Bruen*, 142 S. Ct. at 2126) (emph. added). Here, because the plain text of the Amendment does *not* protect the conduct of these Appellants, the government does not have a burden to "identify[] a 'founding-era' historical analogue to the modern firearm regulation." *See id.* (citing *Bruen*, 142, S. Ct. at 2130-33).

In that the ordinary Founding-era meaning of the Second Amendment's plain text does not cover these Appellants' conduct, it should not be surprising that the challenged statutory scheme "is consistent with this Nation's historical tradition," *see Bruen*, 142 S. Ct. at 2126. Whether there are any known Founding-era statutes that barred independent firearm ownership or possession by people under 21 would not seem to be determinative of whether the challenged regulation is "consistent" with our Nation's historical tradition. Legislatures tend not to enact laws to address problems that do not exist, and the absence of such laws does not speak to an inconsistency with the Nation's historical tradition or the undisputed Founding-era understanding of the limited rights of infants. As explained above, young people at the Founding bore arms only at the pleasure of their guardians, and they had no independent right to petition courts for redress.

Under *Bruen*, it is appropriate to consider the evidence from the Founding and determine if later evidence offers greater proof and context. Between 1856 and 1893, at least 17

states passed laws restricting the sale of firearms to people under 21. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Leg. 1, 192-93. Some restricted non-sale transfers. *Id.* Many included provisions expressly putting the gun rights of minors at the discretion of authority figures. *Id.*; *see also Repository of Historical Gun Laws*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/repository/search-the-repository/. These laws demonstrate that, at least as early as the mid-nineteenth century, legislatures believed they could qualify and, in some cases, abrogate the arms privileges of infants. While these laws cannot independently prove the constitutionality of the challenged laws, they certainly seem to be consistent with the challenged statutory scheme here in that they regulate arms privileges of "infants." But again, the 1791 meaning of the Second Amendment controls, and it appears that the challenged statutory scheme is not inconsistent (and thus is consistent) with this Nation's historical tradition.

III. Conclusion

A review of historical sources reveals that the Second Amendment's plain text does not cover Appellants' conduct because it would have been understood during the Founding-era that Appellants are not "part of 'the people' whom the Second Amendment protects." *See Bruen*, 142 S. Ct. at 2134. Further, the challenged statutory scheme here is "consistent with this Nation's historical tradition." *Id.* at 2126. Because Pennsylvania's statutory scheme does not violate the Second Amendment of the Constitution, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MADISON M. LARA, *et al*, *Plaintiffs*, v. COL. ROBERT EVANCHICK, *Defendant*.	Civil Action No. 2:20-cv-1582 Hon. William S. Stickman IV

ORDER OF COURT

AND NOW, this 16th day of April 2021, IT IS HEREBY ORDERED for the reasons set forth in the Opinion filed this day, the Motion for Preliminary Injunction (ECF No. 11) is DENIED and the Motion to Dismiss (ECF No. 23) is GRANTED. All counts against Defendants are hereby DISMISSED with prejudice. The Clerk of Court is directed to mark this CASE CLOSED.

BY THE COURT:

WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MADISON M. LARA, *et al.*, *Plaintiffs*, v. COL. ROBERT EVANCHICK, *Defendant*.	Civil Action No. 2:20-cv-1582 Hon. William S. Stickman IV

OPINION

WILLIAM S. STICKMAN IV, United States District Judge

The Pennsylvania Uniform Firearms Act of 1995, 18 Pa. C.S. §§ 6101–6128, makes it unlawful to carry a concealed firearm without a license unless the individual falls within one of the statutorily enumerated exceptions. 18 Pa. C.S. § 6106(b). Section 6109 of the Act provides that licenses may only be issued to individuals who are at least 21 years old. 18 Pa. C.S. § 6109(b). Generally, Pennsylvanians without a license to carry concealed are free to carry openly (that is, in an unconcealed manner). Their right to carry openly, however, is not unlimited because under Section 6107 of the Act, the right to do so on public streets and property is limited during a declared state of emergency:

> No person shall carry a firearm, rifle or shotgun upon the public streets or upon public property during an emergency proclaimed by a State or municipal governmental executive unless that person is:
>
> (1) Actively engaged in a defense of that person's life or property from peril or threat.
>
> (2) Licensed to carry firearms under section 6109 (related to licenses) or is exempt from licensing under section 6106(b) (relating to firearms not to be carried without a license).

18 Pa. C.S. § 6107(a)(1)–(2).

Pennsylvania has been in a state of emergency for over three years. Governor Thomas Wolf declared an emergency on January 10, 2018, arising out of the unprecedented level of opioid abuse in the Commonwealth. In March of 2020, a second state of emergency was declared because of the COVID-19 pandemic. Both emergency declarations have been renewed several times and remain in effect. Because of these two ongoing states of emergency, the limitations on open carry set forth in Section 6107 are and have been in place for over three years.

Plaintiffs in this case are three young adults, all of whom are over the age of 18 but not yet 21, and two Second Amendment advocacy groups. Plaintiffs are seeking declaratory, preliminary and permanent injunctive relief because they believe that the emergency declarations have created a situation in which Sections 6106, 6107 and 6109 work together to infringe upon their rights to keep and bear arms guaranteed by the Second Amendment. They contend that these provisions, taken together, "deprive 18-to-20-year-old Pennsylvanians of the right to bear arms in public *in any manner*." (ECF No. 36, p. 10).

The United States Court of Appeals for the Third Circuit's decision in *United States v. Marzzarella*, 614 F.3d 85 (3d. Cir. 2010), provides a two-step analysis for the examination of an alleged Second Amendment violation. *Id.* at 89. The first step asks whether the alleged violation burdens the Second Amendment or, alternatively, falls within one of the "longstanding" and "presumptively lawful" regulations recognized by *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Id.* at 89–93. If the violation falls within the purview of the Second Amendment, a court must proceed to the next step of the analysis and examine the alleged violation through the lens of, at least, intermediate level scrutiny. *Id.* at 89.

An examination of federal caselaw following *Heller* shows a broad consensus that restrictions on firearm ownership, possession and use for people younger than 21 fall within the types of "longstanding" and "presumptively lawful" regulations envisioned by *Heller* and, thus, fall outside the scope of the Second Amendment. The restrictions at issue in this case are far more limited than Plaintiffs portray and significantly less restrictive than measures upheld by other federal courts. Even absent direct Third Circuit precedent, the Court believes the cases addressing age-based restrictions—particularly with regard to licensing—embody a view of the Second Amendment's scope that will likely be found consistent with *Heller*. Thus, in light of the consensus on this issue, the Court is not able to proceed to the second balancing prong where it would examine whether there is any significant relationship between the two open-ended and ongoing emergency declarations and the restrictions imposed by Section 6107 (individually and in combination with Sections 6106 and 6109). The Court is compelled, therefore, to grant Defendant's Motion to Dismiss (ECF No. 23).

FACTS AND PROCEDURAL HISTORY

The pertinent facts of this case are narrow and not in dispute. Plaintiffs Madison Lara, Logan Miller and Sophia Knepley are citizens of the Commonwealth who are over the age of 18 but not yet 21.[1] Defendant, Colonel Robert Evanchick, is the Commissioner of the Pennsylvania

[1] In addition to the three individuals, Plaintiffs include two Second Amendment advocacy groups. Second Amendment Foundation "seeks to preserve the effectiveness of the Second Amendment through education, research, publishing, and legal action programs focused on the constitutional right to possess firearms and the consequences of gun control." (ECF No. 1, ¶ 23). It purports to represent the interest of its 650,000 members, which include thousands of Pennsylvanians, including individual Plaintiffs. (ECF No. 1, ¶ 23). Plaintiff Firearms Policy Coalition, Inc. is dedicated to "defending and promoting the People's rights—especially the fundamental, individual Second Amendment right to keep and bear arms—advancing liberty and restoring freedom." (ECF No. 1, ¶ 24). Individual Plaintiffs are members. These groups have standing to participate in this litigation in the interest of their members. *See Sierra Club v. U.S. Env't Prot. Agency*, 973 F.3d 290, 298–99 (3d Cir. 2020).

State Police ("PSP") and is alleged by Plaintiffs to be responsible for the "implementation, execution and administration of the laws, regulations, customs, practices, and policies of the PSP and the Commonwealth, *inter alia*, in relation to the Uniform Firearms Act." (ECF No. 1, ¶ 25).

Each Plaintiff alleges that he or she was never charged with or convicted of a misdemeanor or felony offense, and each asserts that he or she wants to "procure a license to carry firearms and to be able to lawfully transport firearms and/or carry a firearm, including for purposes of self-defense, without violating the law." (ECF No. 1, ¶¶ 20–22). Plaintiffs assert that they are barred from obtaining a license under Section 6109 only because they are not yet 21 years old. Likewise, they assert that their ability to carry a gun without a license has been curtailed under Sections 6106, 6107 and 6109 due to Governor Wolf's declarations of emergency on January 10, 2018 and March 6, 2020, and the continual subsequent and ongoing renewal of those emergency declarations.

On October 16, 2020, Plaintiffs filed their Complaint. (ECF No. 1). On December 1, 2020, they moved for Preliminary Injunction. (ECF No. 11). On January 8, 2021, Defendant responded to the Motion for Preliminary Injunction (ECF No. 25) along with a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) (ECF No. 23). The Motion to Dismiss argues that Plaintiffs' claims should be dismissed because the restrictions at issue are examples of the "longstanding" and "presumptively legal" measures that *Heller* recognized as consistent with the Second Amendment. In the alternative, they argue that the Court should hold that the restrictions pass scrutiny under the intermediate-level test. The Court conducted a status conference wherein the parties agreed that this case presents a fundamental legal issue and, as such, that both the Motion to Dismiss and the Motion for Preliminary Injunctive relief could be decided on the papers without a hearing or any other record development. (ECF No. 38).

STANDARD OF REVIEW

A motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A plaintiff must allege sufficient facts that, if accepted as true, state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must accept all well-pled factual allegations as true and view them in the light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

The "plausibility" standard required for a complaint to survive a motion to dismiss is not akin to a "probability" requirement but asks for more than sheer "possibility." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). In other words, the complaint's factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations are true even if doubtful in fact. *Twombly*, 550 U.S. at 555. Facial plausibility is present when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendants are liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Even if the complaint's well-pled facts give rise to a plausible inference, that inference alone will not entitle the plaintiff to relief. *Id.* at 682. The complaint must support the inference with facts to plausibly justify that inferential leap. *Id.*

"[A] motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011). Although the Court must accept the allegations in the Complaint as true, it is "not compelled to accept unsupported conclusions and unwarranted inferences, or a legal conclusion

couched as a factual allegation." *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citations omitted).

ANALYSIS

In *Heller*, the Supreme Court held that the Second Amendment protects the rights of citizens, as individuals, to keep and bear arms. Two years later, the Court held that the Second Amendment applies to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Since *Heller*, the focus of Second Amendment litigation has been the scope and extent of the right protected by the Amendment or, conversely, the permissible extent of gun regulations in light of the individual right to keep and bear arms.

The *Heller* Court recognized that the Second Amendment "confer[s] an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The focus of the Court's holding in *Heller* was that law-abiding citizens are free to "use arms in defense of hearth and home." *Id.* at 635. This has been described as the "core" of the Second Amendment by post-*Heller* cases and commentary. The *Heller* Court declined to explore fully the contours of the liberties enshrined in the Second Amendment and cautioned that it did not believe that the Amendment supported an absolutist view of the right to keep and bear arms. *Id.* at 625–27 ("Like most rights, the right secured by the Second Amendment is not unlimited . . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . ."). The Court recognized that certain "longstanding" prohibitions will not only pass muster, but can be viewed as falling outside the scope of the Second Amendment:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing 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.

Id. at 626–27. The Court was careful to highlight that the list of "presumptively lawful regulatory measures" was merely illustrative and not exhaustive. *Id.* at 627 n.26. The first challenge faced in post-*Heller* Second Amendment litigation is, therefore, determining whether a gun restriction falls within the class of "longstanding prohibitions" and "presumptively lawful" regulations that the Supreme Court recognized as falling outside the scope of the liberty protected by the Second Amendment. Only if a restriction implicates the Second Amendment does a court need to determine whether it satisfies the appropriate constitutional scrutiny.

In *Marzzarella*, the Third Circuit outlined a two-part framework for examining post-*Heller* Second Amendment claims. It explained the need for a two-step inquiry in examining Second Amendment challenges:

> We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated Second Amendment doctrine. 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. Both readings are reasonable interpretations, but we think the better reading, based on the text and structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms.

Marzzarella, 614 F.3d at 91 (citations and footnote omitted). The Court outlined the framework:

> As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

Id. at 89 (citations and footnote omitted). Thus, a court using the *Marzzarella* framework will first determine whether the restriction falls within the scope of the Second Amendment or, on the other hand, one of the "presumptively lawful regulatory measures" that is outside of the Amendment's

scope. If a restriction is found to be within the scope of the Second Amendment, the Court must apply the appropriate level of constitutional scrutiny. Similar two-step analyses have been adopted by other courts in addressing Second Amendment cases. *See, e.g.*, *Heller v. D.C.*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*) (recognizing that certain firearms regulations do not fall within the protection of the Second Amendment, and utilizing a two-step approach to determine constitutionality); *Nat'l Rifle Assoc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives* (*BATFE*), 700 F.3d 185, 194 (5th Cir. 2012) (applying two-step inquiry asking whether challenged conduct falls within the scope of the Second Amendment, and determining whether conduct survives scrutiny); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (applying same two-step inquiry).

The *Marzzarella* framework applies to both facial and as-applied Second Amendment challenges. *Binderup v. Att'y Gen. of the U.S.*, 836 F.3d 336, 339 (3d. Cir. 2016) ("In *United States v. Marzzarella* we adopted a framework for deciding facial and as-applied Second-Amendment challenges."). The Third Circuit has explained the difference between facial and as-applied challenges: "[u]nlike a facial challenge, an as-applied challenge 'does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.'" *Id.* at 345 (quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011)). *See also Ayotte v. Planned Parenthood of N. Eng.*, 546 U.S. 320, 329 (2006) (quoting *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)) ("It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'"). In *Binderup*, the Third Circuit set forth an analytical framework to address the first prong of the *Marzzarella* analysis in an as-applied challenge. Plaintiffs assert a facial challenge to Sections 6106, 6107 and 6109. They argue that these provisions conjunctively

result in a "categorically unconstitutional" Second Amendment restriction. (ECF No. 36, p. 25). As such, the Court will address Plaintiffs' challenge through the test as set forth in *Marzzarella.*

A. Sections 6106, 6107 and 6109 of the Pennsylvania Uniform Firearms Act of 1995 are "presumptively lawful regulatory measures" that fall outside the scope of the Second Amendment.

Under the first prong of the *Marzzarella* framework, the Court must determine whether the restrictions forming the basis of Plaintiffs' action fall within the scope of the Second Amendment or, on the contrary, fall within one of the "presumptively lawful regulatory measures" recognized by *Heller* and subsequent caselaw. To do so, the Court must first determine the nature and extent of the restrictions imposed upon Plaintiffs by the three statutory sections in question. While Plaintiffs suggest a near total deprivation of the right of 18-to-20-year-olds to keep and bear arms, a review of the statutory provisions dispels this characterization.

1) The Challenged Statutory Provisions.

Plaintiffs state that Sections 6106, 6107 and 6109, collectively and through their interaction, violate their rights under the Second Amendment. They are careful to point out, however, that they do not challenge any of the sections *individually*. (ECF No. 36, p. 10). Rather, they challenge "the enforcement of the three provisions together, which combine to deprive 18-to-20-year-old Pennsylvanians of the right to bear arms in public *in any manner*." (ECF No. 36, p. 10). They contend that the challenged provisions "bar virtually all 18-to-20-year-old adult Pennsylvanians from carrying loaded, operable firearms for lawful purposes, including the purpose of being prepared to defend themselves and their families from violent assault." (ECF No. 36, p. 10).

An examination of the challenged provisions, individually and read together, shows that the prohibitions effectuated are not as broad as have been characterized by Plaintiffs. There is no

question that Section 6109(b) requires that a person be at least 21 years old to obtain a license to carry a concealed firearm. *See* 18 Pa. C.S. § 6109(b) ("An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm concealed on or about his person or in a vehicle within this Commonwealth."). Pennsylvania generally permits the open (i.e., non-concealed) carrying of firearms without a license. However, that right is limited with respect to public streets and public property in times of declared emergencies by the provisions of Section 6107, which provides:

> No person shall carry a firearm upon the public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive unless that person is:
>
> > (1) Actively engaged in a defense of that person's life or property from peril or threat.
> >
> > (2) Licensed to carry firearms under section 6109 (relating to licenses) or is exempt from licensing under section 6106(b) (relating to firearms not to be carried without a license).

18 Pa. C.S. § 6107(a)(1)–(2). Section 6107's limitations are location-specific and apply only to public streets and property. Further, the plain language of Section 6107 carves out two classes of exceptions from its limitation on open-carry for: (1) "[those] actively engaged in a defense of that person's life or property from peril or threat; and (2) all of those exceptions in Section 6106(b) (permitting concealed carry without a license)." 18 Pa. C.S. § 6107(a)(1)–(2).

Section 6106(b) excepts a broad range of persons and activities from the licensure requirement:

> (1) Constables, sheriffs, prison or jail wardens, or their deputies, policemen of this Commonwealth or its political subdivisions, or other law-enforcement officers.
>
> (2) Members of the army, navy, marine corps, air force or coast guard of the United States or of the National Guard or organized reserves when on duty.

(3) The regularly enrolled members of any organization duly organized to purchase or receive such firearms from the United States or from this Commonwealth.

(4) Any persons engaged in target shooting with a firearm, if such persons are at or are going to or from their places of assembly or target practice and if, while going to or from their places of assembly or target practice, the firearm is not loaded.

(5) Officers or employees of the United States duly authorized to carry a concealed firearm.

(6) Agents, messengers and other employees of common carriers, banks, or business firms, whose duties require them to protect moneys, valuables and other property in the discharge of such duties.

(7) Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person, having in his possession, using or carrying a firearm in the usual or ordinary course of such business.

(8) Any person while carrying a firearm which is not loaded and is in a secure wrapper from the place of purchase to his home or place of business, or to a place of repair, sale or appraisal or back to his home or place of business, or in moving from one place of abode or business to another or from his home to a vacation or recreational home or dwelling or back, or to recover stolen property under section 6111.1(b)(4) (relating to Pennsylvania State Police), or to a place of instruction intended to teach the safe handling, use or maintenance of firearms or back or to a location to which the person has been directed to relinquish firearms under 23 Pa. C.S. § 6108 (relating to relief) or back upon return of the relinquished firearm or to a licensed dealer's place of business for relinquishment pursuant to 23 Pa. C.S. § 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or back upon return of the relinquished firearm or to a location for safekeeping pursuant to 23 Pa. C.S. § 6108.3 (relating to relinquishment to third party for safekeeping) or back upon return of the relinquished firearm.

(9) Persons licensed to hunt, take furbearers or fish in this Commonwealth, if such persons are actually hunting, taking furbearers or fishing as permitted by such license, or are going to the places where they desire to hunt, take furbearers or fish or returning from such places.

(10) Persons training dogs, if such persons are actually training dogs during the regular training season.

(11) Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

> (12) A person who has a lawfully issued license to carry a firearm pursuant to section 6109 (relating to licenses) and that said license expired within six months prior to the date of arrest and that the individual is otherwise eligible for renewal of the license.
>
> (13) Any person who is otherwise eligible to possess a firearm under this chapter and who is operating a motor vehicle which is registered in the person's name or the name of a spouse or parent and which contains a firearm for which a valid license has been issued pursuant to section 6109 to the spouse or parent owning the firearm.
>
> (14) A person lawfully engaged in the interstate transportation of a firearm as defined under 18 U.S.C. § 921(a)(3) (relating to definitions) in compliance with 18 U.S.C. § 926A (relating to interstate transportation of firearms).
>
> (15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:
>
> > (i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.
> >
> > (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.
>
> (16) Any person holding a license in accordance with section 6109(f)(3).

18 Pa. C.S. § 6106(b)(1)–(16).

An examination of the exceptions set forth in Sections 6106(b) and 6107 shows that the deprivation effectuated by the interaction of Sections 6106, 6107 and 6109 do not, as Plaintiffs argue, "bar virtually all 18-to-20-year-old adult Pennsylvanians from carrying loaded, operable firearms for lawful purposes, including the purpose of being prepared to defend themselves and their families from violent assault." (ECF No. 36, p. 10). Indeed, the language of Section 6107 specifically permits the use of firearms when "[a]ctively engaged in a defense of that person's life or property from peril or threat." 18 Pa. C.S. § 6107(a)(1). In addition, the exceptions of Section 6106(b) permit firearms to be kept, carried and used without regard to age, licensure or emergency

declaration by individuals engaged in a wide range of occupations (peace officers, the armed forces, common carriers, banks, etc.), as well as for recreational purposes, such as target shooting, hunting, furbearing or fishing. Therefore, the threshold question at bar is whether the relatively (compared to other cases discussed below) limited restrictions imposed by the interplay of Sections 6106, 6107 and 6109 facially implicate the Second Amendment.

2) Post-*Heller* cases have found age-based restrictions on the possession and use of firearms to be "presumptively lawful regulatory measures."

The operative question in examining the first prong of the *Marzzarella* framework is whether age-related restrictions on carrying firearms—which, nevertheless, permit carrying for a broad range of purposes including the defense of "life or property from peril or threat" and a range of other activities—are the kind of "presumptively lawful regulatory measures" recognized by *Heller* that fall outside the scope of the Second Amendment. The Third Circuit has not yet addressed age-related gun restrictions in light of *Heller*. However, federal courts from other circuits and districts recognize a broad range of age-related restrictions as falling within the class of "presumptively lawful regulatory measures" that are, therefore, outside the scope of the Second Amendment.

In *BATFE*, the United States Court of Appeals for the Fifth Circuit upheld a federal statute and regulations that prohibited firearms dealers from selling handguns to persons under the age of 21. *BATFE*, 700 F.3d at 200–11. As here, the challengers were law-abiding adults who were, nevertheless, not yet 21 years old. *Id.* at 188. The Fifth Circuit first explained that it would use the same two-step framework employed by the Third Circuit in *Marzzarella*. *Id.* at 194. In doing so, it determined that "the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right." *Id.*

The Fifth Circuit recognized that *Heller* did not provide a definitive analysis for what type of regulatory measures are considered "longstanding" or "presumptively lawful." *Id.* at 196. The Court explained that "*Heller* demonstrates that a regulation can been deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *Id.* at 196. The Fifth Circuit cited *Heller II*, in which the Court of Appeals for the District of Columbia explained that "longstanding" can be read to mean that a regulation has "long been accepted by the public [and] is not likely to burden a constitutional right." *Id.* (citing *Heller II*, 670 F.3d at 1253). In other words, under *Heller* and interpreting cases, a challenged restriction does not have to date from the time of the framing of the Second Amendment. Rather, when viewed as a whole and in context, a restriction will not implicate the Second Amendment if it is within the type of restriction that has long been accepted by the public.

The Fifth Circuit reviewed the history of age-related gun restrictions. It explained that in the early republic, "the term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21, not only to persons under the age of 18." *Id.* at 201. The Fifth Circuit explained that restrictions based on minority were well accepted. Thus, "[i]f a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20 year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20 year-old's right to keep and bear arms." *Id.* at 202. The Fifth Circuit further explained that restrictions on the purchase and use of firearms remained pervasive and accepted throughout the nineteenth and twentieth centuries. *Id.* at 202–03. The Fifth Circuit concluded that the ban on selling handguns to adults under 21 years old fell into the category of "longstanding presumptively valid regulatory measures" that *Heller* excepted from the scope of the Second Amendment. *Id.* at 203 (citation

omitted) ("[T]he present ban is consistent with a longstanding tradition of targeting select groups' ability to access and use arms for the sake of public safety. More specifically, the present ban appears consistent with a longstanding tradition of age and safety-based restrictions on the ability to access arms.").

The Fifth Circuit's subsequent decision in *National Rifle Association v. McCraw*, 719 F.3d 338 (5th Cir. 2013), decided only a year after *BATFE*, upheld a Texas law barring 18-to-20-year-olds from carrying handguns in public (either openly or concealed). The challengers argued that the licensing law at issue violated their rights under the Second Amendment because it completely divested them—legal adults—of the right to carry a handgun. *Id.* at 343. As in *BATFE*, the Court held that the age-based restrictions were "longstanding" and "presumptively lawful regulatory measures" that fall outside the scope of the Second Amendment. *Id.* at 347.

The United States District Court for the District of Massachusetts in *Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013), reached the same result as the Fifth Circuit did in *BATFE* and *McCraw*. At issue was a Massachusetts law precluding anyone from possessing a gun without a "firearm identification ("FID") card"[2] and from carrying a gun (in any manner) without a license.[3] *Id.* at 370. Neither could issue to those under 21. *Id.* at 383. The effect was to, generally, ban those under 21 from owning and carrying guns. The District Court explained that *Heller* does not support an "unlimited" reading of the Second Amendment and that "[t]he Supreme Court . . .

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[2] "Massachusetts General Laws chapter 140, section 129B, provides that an individual may not own or possess a firearm in her home or place of business without first obtaining an FID card from her local licensing authority." *Id.* at 373 (citing Mass. Gen. Laws ch. 140 §§ 129B(1), 129(c)).

[3] "Massachusetts General Laws chapter 269, section 10(a) subjects to criminal charges anyone who 'knowingly has in [her] possession . . . a firearm, loaded or unloaded . . . without . . . having in effect a license to carry firearms outside her home or place of business.'" *Id.* at 373 (citing Mass. Gen. Laws ch. 269 § 10(a)(2)).

has exhibited a rather favorable posture toward licensure, especially when the practice is used to moderate law and order." *Id.* at 379 (*Heller*, 554 U.S. at 626–27). The Court focused its prong-one *Heller* analysis less on the age issue than on the broad acceptance of licensing requirements of firearm ownership and use. Thus, it held, "[a]bsent evidence to the contrary, [it is] presume[d] that the Commonwealth's regulation of firearms by means of a comprehensive licensing scheme falls within the band of governmental action allowable under the Second Amendment." *Id.* at 380 (footnote omitted).

In *Mitchell v. Atkins*, 483 F. Supp. 3d 985 (W.D. Wash. 2020), the United States District Court for the Western District of Washington rejected a claim that a state law prohibiting the purchase of a semiautomatic assault rifle to people under 21 years old violated the Second Amendment rights of 18-to-20-year-olds.[4] *Id.* at 989–90. In holding that the restrictions were examples of "long-established" and "presumptively lawful regulatory measures," the court acknowledged that "U.S. law has long recognized that age can be decisive in determining rights and obligations. For most of our country's history, 18-to[-]20-year-olds were considered minors or 'infants' without the full legal rights of adulthood." *Id.* at 992. Thus:

> Against this historical backdrop, it is unsurprising that laws prohibiting those under 21 from purchasing firearms are longstanding. In the 19th century, 19 states and the District of Columbia enacted laws expressly restricting the ability of individuals under 21 to purchase or use particular firearms in jurisdictions where the age of majority was set at 21. By the early twentieth century, three more states had restricted the purchase or use of particular firearms by persons under 21. Thus by 1923, over half the states then in the union had set 21 as the minimum age for purchase or use of particular firearms.

[4] The law at issue did not preclude 18-to-20-year-olds from possessing and using semiautomatic assault rifles in certain enumerated exceptions, such as "(1) in their home or business; (2) on real property they control; (3) at competitions or shooting ranges; (4) hunting; (5) anywhere shooting is legal; (6) while on duty in the armed forces; or (7) traveling to or from a place they may legally possess such a weapon." *Id.* at 990 (citing RCW 9.41.240(2), 9.41.042, 9.41.060).

> This long-held tradition of restricting certain firearm rights of 18-to-20-year-olds continues today. Since 1968, federal law has prohibited [federal firearms licensees] from selling handguns to persons under 21. Currently, 17 states and the District of Columbia have parallel or more exacting laws prohibiting those under 21 from purchasing or possessing handguns. And five states also prohibit the sale of *all* long guns—not just [semiautomatic assault rifles or] SARs—to individuals under 21. Prohibiting SAR sales to 18-to-20-year-olds comports with these longstanding laws.

Id. at 992–93 (citations omitted). The district court then examined several post-*Heller* cases in which federal courts held that age-based firearm restrictions fell outside the scope of the Second Amendment. *Id.* at 993–94. It concluded, "[t]hese authorities demonstrate that reasonable age restrictions on the sale, possession, or use of firearms have an established history in this country." *Id.* at 993. As such, the district court held that the restrictions at issue did not violate the Second Amendment rights of 18-to-20-year-olds. *Id.* at 994.

Even more recently, the United States District Court for the Southern District of California upheld a state law that the challengers characterized as prohibiting 18-to-20-year-olds from purchasing, using, transferring, possessing or controlling any firearm. *Jones v. Becerra*, No. 19-1226, 2020 WL 6449198, at *1–2 (S.D. Cal. Nov. 3, 2020).[5] The district court reviewed the Fifth Circuit's decision in *BATFE* and other post-*Heller* cases and held that "age-based restrictions like the one in [the statute at issue] are longstanding and presumptively [c]onstitutional." *Id.* at *4–5.

Plaintiffs do not cite any federal case that holds that either age-based restrictions imposing limitations on the ability to own or carry firearms, or age-based limitations on the issuance of licenses, facially implicate the Second Amendment under the first step of the *Marzzarella* test and similar tests used in other circuits. Nor is the Court aware of any such case(s). Over twelve years

[5] The Court explained that California Penal Code § 27510 "imposed age-based restrictions on the sale, supply, delivery, possession, or control of a firearm." *Id.* at *2. The statute provided limited exceptions for those with a hunting license, active duty members of the military, active duty peace officers and honorably discharged members of the military. *Id.*

after the Supreme Court's decision in *Heller*, the established consensus of federal appellate and district courts from around the country is that age-based restrictions limiting the rights of 18-20-year-old adults to keep and bear arms fall under the "longstanding" and "presumptively lawful" measures recognized by the Supreme Court in *Heller* as evading Second Amendment scrutiny.

3) The Third Circuit gives broad construction to licensing regimens under *Heller*.

The Third Circuit has not yet addressed age-related restrictions on the possession and use of guns. It has, however, generally given broad construction to *Heller*'s recognition of "longstanding" and "presumptively valid regulatory measures" in the context of licensing requirements. In *Drake v. Filko*, 724 F.3d 426 (3d. Cir. 2013), for example, the Third Circuit examined and upheld a New Jersey statute limiting the issuance of handgun permits to those who could demonstrate a justifiable need.[6] In doing so, the Court observed that even after *Heller*, the law is unclear as to the scope of the Second Amendment outside of the home. *Id.* at 431 ("We reject Appellants' contention that a historical analysis leads *inevitably* to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense."). The Court observed:

> [W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the "core" of the right as identified by *Heller*. We do, however, recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home.

Id. at 431. The Third Circuit ultimately concluded that it was unnecessary to definitively address the scope of the Second Amendment outside the home because licensing requirements, including the challenged justifiable need requirement, "fit[] comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense." *Id.* at 433. Thus, "assuming that the

[6] Under the New Jersey licensing regime, individuals who wish to carry a handgun in public for self-defense must first obtain a license. *Id.* at 428 (citing N.J.S.A. § 2C:39-5(b)).

Second Amendment confers upon individuals some right to carry arms outside the home, we would nevertheless conclude that the 'justifiable need' standard of the Handgun Permit Law is a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller* and expanded upon in our Court's precedent." *Id.* at 434.

Plaintiffs' claims here relate, in their essence, to restrictions imposed upon them because of their inability to obtain a license to carry a concealed firearm due to their age. In light of the Circuit's position that *Heller* gives states wide latitude on license-based restrictions and the broad consensus of federal courts permitting age-related restrictions, it is not a far stretch of the Third Circuit's position on licensure requirements to predict that it will give wide latitude to the age-based licensing restrictions at issue here.

4) The challenged statutory regimen falls under the class of "longstanding" and "presumptively lawful" regulations permitted by *Heller*.

In analyzing Plaintiffs' claims in light of the caselaw examined above, it is important to restate that they do not challenge any of the relevant provisions of the Pennsylvania Uniform Firearms Act *individually*. They do not, for example, argue that Section 6107, standing alone, is unconstitutional, but only that it is to the extent that Section 6109 limits the issuance of a concealed carry permit to individuals over 21 years old and Section 6106 criminalizes concealed carry and transport without a license. (ECF No. 36, p. 10) ("Plaintiffs do not challenge the carry restrictions under 18 Pa. C.S. §§ 6106, 6109, or those under 18 Pa. C.S. § 6107 standing alone, but instead the enforcement of the three provisions together . . . ."). They argue that the interaction of these three provisions "combine to deprive 18-to-20-year-old Pennsylvanians of the right to bear arms in public *in any manner*." (ECF No. 36, p. 10).

The real essence of Plaintiffs' claims centers upon the fact that they cannot obtain a concealed-carry license because of their age under the limitations of Section 6109, and to some

extent, Section 6107 limits what they can do, vis-à-vis firearms, without a license. If they were able to obtain a license, the basis of their claims would fall away. Thus, the focus of the Court's examination of their claims under the first prong of the *Marzzarella* test must center primarily upon the age-based restriction on their ability to obtain a license more than the resultant restrictions caused by the emergency declarations.

The Third Circuit and many other post-*Heller* decisions have found that licensing requirements are generally viewed as longstanding and presumptively valid restrictions and generally do not implicate the Second Amendment. Further, there is broad consensus among federal courts that individuals under the age of 21 may face restrictions consistent with the Second Amendment. Indeed, age-based restrictions accepted by courts have included far broader restrictions than those at issue here. The confluence of these two considerations—license and age-centered restrictions—compels the Court to conclude that Pennsylvania's age-based limitation on the issuance of concealed carry licenses falls within the class of "longstanding" and "presumptively lawful regulatory measures" recognized by *Heller* as falling outside the scope of the Second Amendment. Indeed, even as amplified by the restrictions on open-carry imposed by Section 6107, the age-based restrictions are still consistent with, and in some cases significantly less stringent than, measures found to have passed muster in the cases above.

Plaintiffs argue that the restrictions at issue cannot be considered "longstanding" because they do not date to the founding period when the Second Amendment was framed. (ECF No. 36, p. 18). As the Fifth Circuit recognized in *BATFE*, that is not the standard. *See BATFE*, 700 F.3d at 196–97 ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."). None of the cases cited above addressed a statute that dated to the founding era. Indeed, most of the statutes at issue were only decades old, like the

provisions of the Pennsylvania Uniform Firearms Act of 1995 at issue here. The question is not whether the challenged laws themselves date to the founding, but rather, only whether they are the sort that have long been accepted as being consistent with the right to keep and bear arms. As the cases above illustrate, there is no question that age-based restrictions on the ownership, use and, especially, carrying of firearms have a long history in this Country. A strong consensus exists among federal courts that such restrictions fall outside the scope of the rights protected by the Second Amendment. The Court will adhere to that consensus and reach the same result.

Here, the restrictions imposed by Pennsylvania's statutes are much narrower than characterized by Plaintiffs. Plaintiffs (and all 18-to-20-year-olds) are not precluded from "the right to bear arms in public in any manner" as they argue. The limitations only apply to public streets and public property. Further, even there, Plaintiffs are permitted to keep and bear arms for a wide array of purposes, including the defense of their persons and property,[7] hunting, target shooting and a variety of occupation-based purposes. At its core, the Second Amendment protects

[7] Plaintiffs recognize that Section 6107 contains a specific exception but argue that it is merely "empty reassurance" because the general provisions of Sections 6106 and 6107 "utterly vitiate the '[a]ctively engaged' in self[-]defense proviso [of Section 6107]." (ECF No. 36, p. 27). The Court recognizes that the scope of the self-defense provision in Section 6107 is undefined by statute or caselaw. In interpreting a Pennsylvania statute, the Court is guided by the Pennsylvania Statutory Construction Act, 1 Pa. C.S. §§ 1501–1504, 1901–1991. Some fundamental principles of the Act are "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable[,]" and "the General Assembly intends the entire statute to be effective and certain." 1 Pa. C.S. § 1922(1)–(2). Indeed, a "bedrock principle of statutory construction requires that a statute 'be construed, if possible, to give effect to all its provisions, so that no provision is mere surplusage." *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003) (quoting 1 Pa. C.S. § 1921(a)). The Court will defer to Pennsylvania's courts to interpret that extent of the self-defense exception of Section 6107 in the context of actual cases exploring its scope and application. For the purposes of this case, the Court will take the language of Section 6107 as written and accept that the restrictions imposed on Plaintiffs by the Pennsylvania Uniform Firearms Act of 1995 include an exception permitting them to use guns in self-defense.

the right of a citizen to keep and bear arms for self-defense. Pennsylvania's statutes expressly preserve this right, along with other purposes, including sporting and recreational uses of firearms.

In *BATFE* and *McCraw*, the Fifth Circuit held that statutes precluding the sale of handguns and forbidding individuals under 21 from carrying handguns (open or concealed) were examples of "longstanding" and "presumptively lawful regulatory measures." Likewise, the courts in *Powell* and *Jones* found that laws precluding those under 21 from obtaining a firearm identification card and purchasing, using, transferring, possessing or carrying a gun in any manner did not infringe upon the rights protected by the Second Amendment. In light of the consensus amongst federal courts that age-based restrictions—including restrictions more severe than imposed by the Pennsylvania statutes at issue—fall under the class of "longstanding" and "presumptively lawful" regulations recognized in *Heller*, the Court is compelled to find that the age-based restrictions at issue here fall outside the scope of the Second Amendment.[8]

CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Complaint. Although not formally styled as such, each of the Counts in Plaintiffs' Complaint invoke 42 U.S.C. § 1983 (ECF No. 1. ¶¶ 93, 106, 119). Although leave to amend is

[8] Because the Court holds that the regulations at issue are the type of "longstanding" and "presumptively valid" restrictions that do not implicate the Second Amendment under the first prong of the *Marzzarella* analysis, it is unnecessary for the Court to proceed to an examination of the restrictions under intermediate scrutiny. While respecting that some courts, having found that the first prong was not satisfied, will nevertheless undertake a belt-and-suspenders approach and analyze the second prong, this Court declines to do so. The *Marzzarella* test is sufficiently well established that the Court does not believe there is any question that its disposition under the first prong is, alone, sufficient to decide all of the issues at bar. Thus, proceeding to the second prong for an "even-if" analysis would be an exercise in dicta. To the extent that an appellate court would disagree with the Court's prong-one determination, the Court will address the second prong with the benefit of a more developed record addressing the specific relationship between the restrictions at issue and, for example, states of emergency arising out of opioid addiction and communicable disease.

generally to be afforded in cases asserting claims under § 1983, it is not necessary if the Court finds that amendment would be inequitable or futile. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 246 (3d. Cir. 2008). Plaintiffs' claims here fail as a matter of law and cannot be cured by amendment. It would, indeed, be futile. As such, their Complaint is dismissed with prejudice. With the failure of the substantive claims in the Complaint, Plaintiffs' Motion for Preliminary Injunction (ECF No. 11) is DENIED as moot.

BY THE COURT:

WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

4/16/2021
Dated