

In the
Supreme Court of the United States

JASON WOLFORD, ET AL.,

Petitioners,

v.

ANNE E. LOPEZ, ATTORNEY GENERAL OF HAWAII,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE CLAYTON
CRAMER, CALIFORNIA RIFLE & PISTOL
ASSOCIATION, AND SECOND AMENDMENT
LAW CENTER IN SUPPORT OF PETITIONERS**

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AMICI CURIAE STATEMENT OF INTEREST¹

Amicus Clayton Cramer teaches history at the College of Western Idaho. He has published books and scholarly articles on the history of weapon regulation and Second Amendment rights in the early republic. His work has been cited by this Court in *District of Columbia v. Heller*, 554 U.S. 570, 588 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 773 n.21, 776 n.25, 780, 933 (2010); *see also id.* at 773 n.21, 776 n.25, 780 (Breyer, Ginsburg & Sotomayor, JJ., dissenting).

Mr. Cramer's exposure of academic fraud related to Second Amendment research is recounted in his article, *Bellesiles' Arming America Redux: Does the Gunning of America Rewrite American History to Suit Modern Sensibilities?* 41 S. Ill. Univ. L. J. 403 (2017). His interest in this case is to ask that this Court clarify what kind of "expert" opinion evidence is admissible when adjudicating Second Amendment claims, to prevent the misuse of academically questionable expert opinion testimony by lower courts in Second Amendment cases.

Founded in 1875, California Rifle & Pistol Association, Incorporated (CRPA), is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA works to preserve the rights of gun ownership, including the right to self-

¹ No counsel for a party, nor any party, made a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. In service of these ends, CRPA regularly participates as a party or amicus in firearm-related litigation.

CRPA is a plaintiff in *May v. Bonta*, 709 F. Supp. 3d 940 (C.D. Cal. 2023), a case that was consolidated with the case at bar when both were before the Ninth Circuit. In *May*, however, the circuit court reached a different result on the question that was granted review by this Court. Now on remand, *May* is pending in the district court but has been consolidated with the related case *Carralero v. Bonta*, Case No. 8:23-cv-01798 (C.D. Cal.), and stayed pending the outcome of this case. Before the case was stayed, however, the parties were engaged in substantial expert discovery related to the *13 expert witnesses* disclosed by California. In response, and as a precaution to make a record for review, CRPA had to devote its limited resources to hiring Mr. Cramer as a rebuttal trial expert. This litigation tactic by government defendants with deep pockets adds unnecessary time and expense to Second Amendment litigation.

Second Amendment Law Center, Inc. (2ALC) is a nonprofit corporation in Henderson, Nevada. 2ALC defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Through this amicus brief, CRPA and 2ALC hope to encourage the Court to provide greater guidance to lower courts to prevent the misuse of expert opinion testimony in Second Amendment cases. They also ask the Court to seize the opportunity this case presents to reiterate that the constitutional inquiry in such cases should be based on the text of the amendment, its historical public meaning, and this Court's decisional law—and not the contemporary opinions of the academy and trial court judges.

SUMMARY OF ARGUMENT

This Court’s decision in *Heller* resolved a major substantive issue relating to the Second Amendment’s place in our constellation of rights. But it also sparked a backlash of procedural and analytical controversies in its place. The *Heller* court’s use of text and original public meaning, so clear to some, was a point of departure for others. During the post-*Heller* period, circuit courts invented two-step threshold tests, multi-tiered levels-of-scrutiny frameworks, and a curious new interest in en banc adjudications. This quasi-rebellion in the lower courts resulted in Second Amendment claims being treated like a second-class right, subject to the judicial interest-balancing tests that this Court said were verboten. *Heller*, 554 U.S. at 634-36.

There is a reason *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022) reads almost like a remedial lesson directed to the recalcitrant lower courts. The *Bruen* Court took great pains to point out that it was merely applying in 2022 what it had already decided in *Heller* in 2008 and in *McDonald* in 2010. *Bruen*, 597 U.S. at 18-25. Then, as a precaution to head off any more judicial mischief in the lower courts, the decision provided a crystal-clear methodology for future cases:

[If] the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must

demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 17 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

Alas, lawyers being lawyers (and judges being lawyers in robes), anyone who had been predisposed to creatively ignore the methodology announced in *Heller* and *McDonald* through legal sophistry might also be predisposed to read more into *Bruen* than is plainly there. Hence, the Court's insistence that the government prove its modern firearm "regulation is consistent with this Nation's historical tradition," *Bruen*, 597 U.S. at 17, is currently being treated as a license for retroactive Brandeis Briefs masquerading as government defendants' expert testimony. Furthermore, this Court's suggestion that a "more nuanced approach" to this inquiry may be necessary in "cases implicating unprecedented societal concerns or dramatic technological changes," *id.* at 27, has only had the effect of incentivizing government defendants to nudge all fact patterns into a "nuanced approach." This, in practice, has become just another label for the sort of judicial interest balancing the Court rejected in *Heller*.

Worse, such government expert testimony, if deemed more credible than the challengers' experts, risks obtaining the safe harbor of adjudicated facts

established by a trial court, entitled to only clear error review by any appellate court. *See* Fed. Rule Civ. Proc. 52(a)(6); *Silvester v. Becerra*, 583 U.S. 1139, 1140 (2018) (Thomas, J., dissenting). And if upheld on appeal, these “adjudicated facts” relating to historical interpretations of founding-era gun laws will have the effect of bootstrapping expert opinions (whether biased or not) into legal precedent and thus binding on subsequent inquiries.

An online search of the terms “expert” and “Second Amendment” yields more than 70 post-*Bruen* district- and circuit-court cases in the pipeline—all attempting to apply the doctrine articulated in that case. Certainly, not all of them warrant a battle of experts. The purpose of this brief is to ask that the Court address the problem before it gains (even more) momentum in other cases and circuits. Amici ask this Court to lay down a bright-line rule on when (if ever) it is appropriate for courts to consider expert testimony under the rules articulated in *Bruen*.

ARGUMENT

I. Post-*Bruen* Litigation Has Shifted Toward Battles of Expert Historians, Reviving the Very Interest Balancing that *Heller* Rejected and Enabling Judicial Manipulation

In *Heller*, this Court articulated a straightforward analytical approach for adjudicating Second Amendment claims. This Court’s instructions were fairly and clearly expressed and required fidelity to the constitutional text and original public meaning of that text. *Heller*, 554 U.S. at 576-78. The opinion also

authorized a historical analysis of non-controversial “facts” to ensure that the textual interpretation was congruent with how Americans understood and subsequently exercised their Second Amendment rights. *Id.* at 579-600. The *Heller* Court even countenanced a parallel analysis of state constitutions with Second Amendment analogues as part of a public meaning checksum on the “right to keep and bear arms.” *Id.* at 601-03. Nothing in *Heller* suggested that courts should weigh competing expert historical narratives or resort to interest balancing.

Lower courts, however, did just that. After incorporation was resolved in *McDonald*, many courts adopted a hybrid, tiered-scrutiny framework that departed sharply from *Heller*’s textual and historical approach. Under this framework, they would first examine whether the regulated conduct was within the scope of the Second Amendment—a threshold inquiry functionally equivalent to a separate standing analysis reserved for Second Amendment cases. If the claim survived this inquiry, courts would then select a level of scrutiny based on their own free-standing assessment of how severely the challenged law burdened what they deemed the “core” of the right to keep and bear arms. But the result was preordained: Courts almost always selected intermediate scrutiny and then subjected Second Amendment claims to the very interest-balancing approach rejected in *Heller*. 554 U.S. at 634-36.

In the Ninth Circuit, this evolved into the “meaningful constraint” test. This pre-*Bruen* test was first articulated in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied*, *Chovan v. United States*, 574 U.S. 979 (2014). It was extended in

Teixeira v. County of Alameda, 873 F.3d 670 (9th Cir. 2017) (en banc), *cert. denied*, *Teixeira v. Alameda Cnty.*, 584 U.S. 977 (2018). It was employed in *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied*, *Jackson v. City & Cnty. of San Francisco*, 576 U.S. 1013 (2015) (with a dissent by Justices Scalia and Thomas), and used again in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), *cert. denied*, *Silvester v. Becerra*, 583 U.S. 1139 (2018) (with a dissent by Justice Thomas). Even after *Bruen*, the Ninth Circuit has continued to invoke this framework to uphold firearm restrictions in cases like *B&L Productions, Inc. v. Newsom*, 104 F.4th 108 (9th Cir. 2024), *cert. denied*, *B&L Prods., Inc. v. Newsom*, 145 S. Ct. 1958 (2025).

The sheer complexity of the (unfavorable) special treatment meted out to Second Amendment claims between 2008 and 2022 practically invited judicial mischief. As Kilmer warned in *Navigating the Breyer Patch*, 14 Geo. J.L. & Pub. Pol’y 101 (2016), such an approach could effectively convert Second Amendment practice into complex litigation—requiring extensive discovery, motion practice, expert testimony, and trial work to present and impeach expert testimony. Attempting to adjudicate fundamental rights in this complex manner predictably favors the government, creating precisely the sort of government-empowered outcomes that Justice Breyer advocated for in his dissent in *Heller*.

As noted above regarding the *B&L Productions* case denied certiorari earlier this year, the sheer stubbornness that circuit courts will exert to retain judge-empowering procedures for adjudicating Second Amendment cases continues unabated. And it will

likely continue in any feigned attempt to clothe judicial interest balancing as a mere credibility contest between competing historians under a faux-*Bruen* analysis. In other words, the abuse of historical analysis under *Bruen* allows judges to select the historian whose theory aligns best with the outcome under an intermediate scrutiny analysis. Meet the new test, same as the old test.

Although *Bruen* was supposed to eliminate the opportunity for such judicial mischief, it has unintentionally spawned a new set of difficulties for plaintiffs in Second Amendment challenges. Now, rather than having to produce or rebut criminological studies, crime statistics, prosecution and conviction rates, firearm marketing data, and firearm sales data, plaintiffs must be prepared for deep-pocketed governments to marshal teams of historians. Each expert will offer an opinion on a range of topics—from historical analogues to modern libraries, museums, banks, zoos, and parks. They will assert that the absence of historical firearms regulations in a given setting is merely an artifact of historical anachronism—an argument used to funnel virtually any case into the “nuanced approach” that *Bruen* instructs is reserved for cases “implicating unprecedented societal concerns or dramatic technological changes.” 597 U.S. at 27. And when every case gets shoe-horned into that approach, every case becomes susceptible to a new briar patch of judicial interest-balancing tests cloaked as scholastic debate.

The Ninth Circuit’s decision below exemplifies the problem. The court held that “[f]or places that have existed since the Founding,” the government need

only “identify historical regulations similar in number and timeframe” to those this Court “cited as justification for designating other places as sensitive.” Petit.App.29a. “For places that are newer,” the Ninth Circuit held that courts must accept analogues even if the Founding generation never regulated such places because “it is illogical to expect a government to regulate a place before it existed in its modern form.” Petit.App.29a. Under the Ninth Circuit’s approach, “historical regulations need not be a close match”; they “need only evince a principle underpinning our Nation’s historical tradition of regulating firearms in places relevantly similar to those covered by the challenged law.” Petit.App.30a (citing *United States v. Rahimi*, 602 U.S. 680, 692 (2024)). This inquiry turns on whether the constitutionality of those historical laws was disputed—a factor that courts can manipulate with ease, given the sparse litigation records of the Founding era.

This is not *Bruen*’s text-and-history analysis. It is judicial interest balancing, wearing the carcass of *Bruen*’s text, history, and tradition analysis. And it is only made plausible by the government’s use of retroactive Brandeis Briefs masquerading as expert opinion testimony by competing historians.

II. The Government Strategies in *Wolford*, *May*, and *Carralero* Illustrate the Expert Witness Problem in Second Amendment Litigation

Amicus Clayton Cramer submitted rebuttal testimony in *Wolford*, *May*, and *Carralero*, addressing the extensive expert reports offered by the governments in opposition to the preliminary

injunction motions in those cases. Mr. Cramer's expert report in *Wolford* was a response to two experts called by the state of Hawaii, and is set forth in Joint Appendix I, starting at page 321a. The expert reports submitted as testimony through declarations that Mr. Cramer was tasked with rebutting in the *Wolford* case can be found in Joint Appendix G, starting at page 243a (Saul Cornell) and Joint Appendix H, starting at page 293a (Dr. Brennan Gardner Rivas). In the *May* and *Carralero* cases, now pending in the district court but stayed pending the outcome of this case, Mr. Cramer was similarly retained to rebut more than a dozen expert reports submitted by California in those cases.

Unless this Court establishes standards governing the admissibility of historical expert testimony in Second Amendment litigation, the dozen-plus opinions of these experts will likely become part of the evidentiary record in these cases. Even an evidentiary hearing under the federal rules, applying *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) resolves only the admissibility of opinion testimony, leaving the issue of credibility unresolved. Furthermore, the scientific framework of *Daubert* may not even lend itself very well to adjudicating the reliability of "facts" developed by "experts" from the humanities.

One final point bears examination. Traditionally, credibility determinations are left to the deliberation of juries. U.S. Const. amend. VII. *See also Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). The prospect of juries adjudicating fundamental constitutional rights based on dueling historians' narratives—each offering competing views about how

closely a modern gun law resembles a founding-era rule, regulation, or statute—should give the Court pause. The situation is not improved by having judges make the call based on such evidence.

While the Ninth Circuit relied on only two historical statutes to resolve the interlocutory issue now before this Court, the remaining issues in *Wolford*, *May*, and *Carralero* must still proceed to trial and final judgment. When they do, Hawaii and California will again rely not only on the text of historical laws but on extensive expert opinions attempting to compare modern public spaces—including banks, zoos, parking lots, public transit, taverns, playgrounds, museums, parks, libraries, beaches, and hospitals—to their supposed founding-era counterparts. Without clear limits, these expert-driven comparisons will convert *Bruen*’s text-and-history method into a sprawling contest of historical theories, with fundamental rights turning on whose historian seems more persuasive to a judge or jury.

A. Historians’ opinions on the legal interpretations of ancient laws should be inadmissible.

The government’s expert declarations in *Wolford* illustrate why courts should exclude historians’ opinions about what founding-era laws “really meant.” The most problematic parts of these declarations—those squarely subject to a motion to strike under the Federal Rules of Evidence—are the passages offering opinions on how to interpret English common law and American laws from the relevant periods. For instance, as Mr. Cramer’s rebuttal declaration shows, Hawaii’s experts were, in many places, effectively opining on whether this Court’s

holdings in *Heller*, *McDonald*, and *Bruen* were historically accurate. These are not “facts”; they are legal conclusions that fall outside the proper scope of expert testimony.

Rule 702 permits a witness with specialized “knowledge, skill, experience, training, or education” to offer opinion testimony if that witness’s knowledge “will help the trier of fact to understand the evidence or to determine a fact in issue.” The testimony offered by Hawaii, and addressed by Mr. Cramer, purports to instruct courts on how to interpret founding-era laws. To the extent that the State’s “experts” were offering legal arguments for or against particular interpretations of historical statutes, their testimony should be categorically excluded. Interpreting the law in a federal case is not a matter for expert witnesses; it is the constitutional duty of judges appointed by the President and confirmed by the Senate.

Indeed, statutory interpretation is a legal question for the court, not a factual issue for the trier of fact. *Commodores Entertainment Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir. 2018). A district court must thus take “adequate steps to protect against the danger that [an] expert’s opinion would be accepted as a legal conclusion.” *United States v. Herring*, 955 F.2d 703, 709 (11th Cir. 1992). That duty does not change just because the legal question involves some historical understanding of the history of firearm regulation in America.

On this point, the government should be limited to presenting historical *laws* from the relevant period that it claims are “well established and representative” analogues to the challenged modern

law. *Bruen*, 597 U.S. at 29-31. It is then the court's duty to determine: (1) whether those proposed analogues are indeed well-established and representative, and (2) whether they are relevantly similar enough to sustain the modern restriction. *Id.* at 28-31. Judges—not experts—are best equipped to compare modern laws to old ones without resort to extrinsic aids. This Court should ensure that lower courts are not tempted to abandon the task of interpreting historical laws to the competing testimony of academics and scholars.

After all, *Bruen* itself never advanced past pleadings in the district court. There was no discovery, no battle of the experts, and no diatribes from history professors speculating about why the Founders refrained from passing restrictions on public carry with the regularity or topographic scope coveted by modern legislatures. Still, this Court had no difficulty evaluating the historical laws the government presented without remanding the case for further development. It simply held that New York's modern carry law was not "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17, 70-71. It was Justice Breyer's dissent, not the majority, that proposed a briar patch of competing experts. *Id.* at 83-85.

B. The historical inquiry must be limited to actual laws and the societal problems they addressed.

The historical inquiry begins (and ends) with the laws of the relevant period and the societal problems they were enacted to address. Testimony from government experts claiming that "the world has changed since the founding era, therefore laws from

that period must be given a nuanced interpretation” should be declared inadmissible. The public spaces at issue when *Wolford*, *May*, and *Carralero* return to their respective district courts—banks, zoos, parking lots, public transit, taverns, liquor stores, casinos, stadiums, amusement parks, churches, playgrounds, museums, parks, libraries, beaches, and hospitals, as well as the private spaces open to the public at issue here—do not transform the inquiry into an architectural or sociological comparison of 1790s and 2025.

Yet Hawaii and California have already tipped their hand and revealed that their strategy will be just that: To argue that these spaces have “evolved” so dramatically from their founding era analogues that *Bruen* compels a “more nuanced approach.” And we all know that, in practice, “nuanced interpretation” is code for intermediate scrutiny.

Thankfully, *Bruen* provides a roadmap. None of it depends on “expert” narratives about how different colonial taverns were from modern sports bars. The Court held:

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar

historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Bruen, 597 U.S. at 26. Here, the Court instructs lower courts to analyze founding-era and modern regulations in the context of the *societal problems* these laws seek to address. The analysis is not—as suggested by the government’s experts—focused on contrived analogies or dissimilarities to colonial and modern public spaces. The above passage from *Bruen* essentially poses three questions in which historical analogies are to be employed.

First, does the modern regulation target a societal problem that has persisted into modern times since the 18th Century? The question turns not on how a modern library compares to an 18th-century library, but rather (1) whether the founding generation understood that assault, battery, mayhem, and murder were committed with firearms in public places? And (2) whether they responded by banning guns in those places? The answer is “no.”

Secondly, did the founding generation address this societal problem, which has persisted since the 18th century, in a materially different way from the modern regulation? If the founders addressed the same societal problem using different tools, that divergence may matter. But again, the societal problem is still public violence, while the remedy, via the Second Amendment, has consistently been upholding an individual's right to defend against that violence. The founders did not enact "gun-free zones" in public spaces in the hope that violent criminals would obey them. Modern attempts to do so cannot be justified by claiming that modern playgrounds and museums somehow pose new "societal problems."

Finally, were any analogous regulations from the founding rendered unconstitutional on other grounds? Some historical regulations—such as slave disarmament laws—were rooted in preventing the revolt of enslaved people and preserving an unconstitutional hierarchy. But no one would contend today that such a revolt would not constitute lawful self-defense, the *raison d'être* of the Second Amendment. The solution to the "societal problem" of the conflict between master and slave was not banning enslaved people from having guns, but banning slavery, and subsequently all race-based gun laws.

Nothing in *Bruen* gives legislatures (and judges) license to treat modern laws as though they are presumptively valid simply because modern libraries, museums, zoos, parks, taverns, hospitals, and sports venues look different today than they did during the founding era. Why? Because such an inquiry is exactly backward.

The historical inquiry is not to determine whether modern public spaces resemble their counterparts from the founding era. It is to determine whether the “societal problem” the modern law purports to target has persisted since the 18th century. And that inquiry is straightforward. Is there still a risk today of being unarmed in a confrontation with an armed criminal who will not obey laws against violence in public spaces? This is the penultimate test on whether banning firearms in public spaces is constitutional or not.

It is no surprise that, in a post-*Bruen* world, governments hope to steer the analysis to the “more nuanced approach.” That is where advocates of expansive gun restriction can make the most hay by threading the eye of the needle created by *Bruen*, obscuring the passage above and overwhelming the analysis with credentialed pablum. But *Bruen* bars this move. Historical analogy requires a comparison of laws enacted to address shared societal problems; it is not a license to reinvent intermediate scrutiny under the guise of historical inquiry.

III. The Court Should Reaffirm That Interpretation of Historical Law Is a Judicial Function, Not an Academic One

There is obviously a place for experts in the history of arms laws in America. Amicus like Mr. Cramer provide invaluable work by conducting archaeological research to uncover ancient laws that have not been indexed in modern search engines and legal databases. But these found statutes, regulations, and ordinances ultimately must be argued by lawyers and interpreted by judges. In this way, they are valuable

consulting experts and, on the rare occasion (e.g., interpreting an arcane term that has fallen out of common usage), as testimonial experts. Such historians should be encouraged to submit amicus briefs on any point of law that turns on a historical fact. But what the government defendants have sought to do in post-*Bruen* litigation is push past that limited role and have their historical experts commandeer the role reserved for judges—interpretation of founding era law.

It is a “false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 399 (2012). That text goes on:

“Lawyers are . . . necessarily historians . . . If they do not take this task seriously, they will not cease to be historians. They merely will be bad historians.” Max Radin, *The Law and You* 188-89 (1948).

Originalism admittedly requires lawyers and judges to engage in historical semantics. It is often charged that they are ill equipped for the task: “It is quite true that lawyers are for the most part extremely bad historians. They often make up an imaginary history and use curiously unhistorical methods.” The leveler of that charge, Max Radin, cited a British example of a 1939 judicial misinterpretation of sources dating back to 1215—in a different language altogether (medieval

Latin and Law French). The example serves as a useful admonition. But note that Radin was an originalist:

We have thus imposed a new burden on the lawyer on the bench. Besides all the other things asked of him, he is also to be a historian. But there is no help for it. There is simply no way by which the law can be made either simple or easy.

Nor is it a valid refutation of originalism that “no one can reconstruct original understanding precisely.” Our charge is to try.

Id. at 399-400 (footnotes omitted). To illustrate this point, *Reading Law* references *Heller*,

which upheld the individual right to possess firearms, one of the significant aspects of the Second Amendment was that it did not purport to confer a right to keep and bear arms. It did not say that “the people shall have the right to keep and bear arms,” or even that “the government shall not prevent the people from keeping and bearing arms,” but rather that “the right of the people to keep and bear arms” (implying a preexisting right) “shall not be infringed.” This triggered historical inquiry showing that the right to have

arms for personal use (including self-defense) was regarded at the time of the framing as one of the fundamental rights of Englishmen. Once the history was understood, it was difficult to regard the guarantee of the Second Amendment as no more than a guarantee of the right to join a militia. Moreover, the prefatory clause of the Second Amendment ("A well regulated militia being necessary for the defense of a free state") could not be logically reconciled with a personal right to keep and bear arms without the historical knowledge (possessed by the framing generation) that the Stuart kings had destroyed the people's militia by disarming those whom they disfavored. Here the opinion was dealing with history in a broad sense.

It is reasonable to ask whether lawyers and judges can adequately perform historical inquiry of this sort. Those who oppose originalism exaggerate the task. In some cases, to be sure, it is difficult, and originalists will differ among themselves on the correct answer. But that is the exception, not the rule. In most cases—and especially the most controversial ones—the originalist answer is entirely clear....

Today's lawyers and judges, when analyzing historical questions, have more tools than ever before. They can look to an evergrowing body of

scholarship produced by the legions of academic legal historians populating law and history faculties at our leading universities. No history faculty of any note would consider itself complete without legal experts; and no law faculty would consider itself complete without its share of expert historians.

Id. at 400-01. What cannot happen, and what this Court should make clear, is that expert historians may not usurp the role of judges. This Court should ensure that lower court judges seeking to masquerade a judicial interest-balancing test as a historical inquiry under *Bruen* are not defying this Court.

CONCLUSION

The Ninth Circuit’s effort to smuggle intermediate scrutiny back into Second Amendment doctrine must fail. *Bruen* requires courts to ground their analysis in text and history—not “expert” speculation. Adhering to that mandate is essential to preserving the right to keep and bear arms that the People enshrined.

For these reasons, Amici respectfully ask this Court to reverse the judgment below and, in so doing, clarify when, if ever, it is appropriate to rely on expert opinion in Second Amendment cases.

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Respectfully submitted,

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