No. 25-24

IN THE

# Supreme Court of the United States

JOSHUA CLAY MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS A CLASS, *et al.*,

*Petitioners,*

*v.*

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *et al.*,

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

# BRIEF OF NATIONAL ASSOCIATION FOR GUN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICUS

The right to keep and bear arms is a fundamental right that existed prior to the Constitution. The right is not in any sense granted by the Constitution. Nor does it depend on the Constitution for its existence. Rather, the Second Amendment declares that the pre-existing "right of the people to keep and bear Arms shall not be infringed." The National Association for Gun Rights ("NAGR")[1] is a nonprofit membership and donor-supported organization with hundreds of thousands of members nationwide. The sole reason for NAGR's existence is to defend citizens' right to keep and bear arms. NAGR has a strong interest in this case because the guidance the Court will provide in its resolution of this matter will have a major impact on its ongoing litigation efforts in support of citizens' fundamental right to keep and bear arms.

## SUMMARY OF ARGUMENT

The circuit court's contractual capacity argument proves too much. Yes, 18-to-20-year-olds lacked contractual capacity in the Founding era. But that cannot possibly be a valid reason for concluding they do not have Second Amendment rights today. Otherwise, one would have to conclude that married women do not have Second Amendment rights.

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1. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae provided timely notice to the parties of their intention to file this brief.

There were absolutely zero regulations in the Founding era that are remotely analogous to the challenged statute. It does no good to address this deficit by pointing to late nineteenth-century laws, because such late-in-time contrary evidence cannot be used to establish a Founding-era tradition when there was none. Finally, it is unconstitutional for the government to single out disfavored demographic groups and deprive them of their Second Amendment rights based merely on statistical disparities.

## ARGUMENT

### A. The Circuit Court's Contractual Incapacity Argument Proves Too Much

The circuit court held that 18-to-20-year-olds do not have Second Amendment rights because they lacked the contractual capacity to purchase firearms in the Founding era. *McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 F.4th 568, 575 (4th Cir. 2025). That argument proves way too much, because it also proves that married women have no Second Amendment rights.

As Professor Cornell explains, in the Founding era, married women did not have contractual capacity:

> In many respects, the situation of minors under twenty-one resembled that of married women under coverture. Under the doctrine of coverture, a married woman ceased to exist as a legal entity, and her entire legal persona was subsumed within her husband's authority. Sir William Blackstone described the legal meaning of coverture as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a *feme-covert*. . . . [1 William Blackstone, *Commentaries*, 442]
>
> An influential eighteenth-century English treatise on the law of domestic relations noted that the comparison between a *feme covert* and a minor was frequently made by writers on the law: "*Feme Covert* in our Books is often compared to an Infant, *both being persons being disabled in the Law*." Given the irrefutable fact that minors were legally "disabled" in the eyes of the law, the claim that they might assert a Second Amendment right against government interference is just false.

Saul Cornell, "*Infants*" *and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, 40 Yale L. & Pol'y Rev. inter Alia 1, 9 (2021) (emphasis added).

Consider the last sentence of this block quotation. Substitute "married women" for "minors" in that sentence and one gets: "Given the irrefutable fact that married women were legally 'disabled' in the eyes of the law, the claim that they might assert a Second Amendment

right against government interference is just false." The statement is now manifestly absurd.

Under the common law doctrine of coverture in effect at the Founding, a married woman did not have the right to contract for herself. 41 Am. Jur. 2d Husband and Wife § 2; accord *Townsend v. Townsend*, 708 S.W.2d 646, 647 (Mo. 1986). This Court recognized that contractual disability for married women crumbled under the principles embodied in the fight for women's suffrage that culminated in the adoption of the Nineteenth Amendment:

> But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* Case (208 U. S. 421, 28 Sup. Ct. 327, 52 L. Ed. 551, 13 Ann. Cas. 957) has continued 'with diminishing intensity.' In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the *contractual*, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.

*Adkins v. Children's Hosp. of the D.C.*, 261 U.S. 525, 553 (1923), overruled on other grounds by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (emphasis added).

Under common law contract doctrine in effect at the time of the Founding, an 18-to-20-year-old person also did not have the right to contract for himself or herself.

1 William Blackstone, *Commentaries*, *453.[2] In contract matters, the Twenty-Sixth Amendment had the same effect for young adults that the Nineteenth Amendment had for married women. Professor Murray describes this effect as follows: "The twenty-sixth amendment to the U.S. Constitution lowered the voting age to 18. This prompted almost all of the states to enact statutes reducing the age of majority for contracting to 18." Murray, John Edward, Jr., *Murray on Contracts*, Loc. 2502, n. 216 LexisNexis, (5th ed. 2011), Kindle Edition.[3]

In summary, if contractual capacity in the Founding era is the touchstone for determining whether a class of people has Second Amendment rights, then married women do not have Second Amendment rights. That is obviously not the case. Therefore, an elementary modus tollens deduction ineluctably leads to the conclusion that contractual capacity in the Founding era cannot be the touchstone for determining whether a class of people has Second Amendment rights.

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2. The common law now recognizes 18 as the age of contractual capacity. *Restatement (Second) of Contracts* § 14 (Am. Law Inst. 1981) ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

3. Professor Murray cites Pennsylvania law, specifically, 23 Pa. Stat. and Cons. Stat. Ann. § 5101(a), to illustrate this point. That statute states: "Any individual 18 years of age and older shall have the right to enter into binding and legally enforceable contracts and the defense of minority shall not be available to such individuals."

### B. There Were Zero Founding-Era Laws Prohibiting 18-to-20-Year-Olds From Purchasing Firearms

Prior to 1791, there were zero laws prohibiting the possession or purchase of firearms by 18-to-20-year-olds. *See* Robert J. Spitzer, *The Second Generation of Second Amendment Law & Policy: Gun Law History in The United States and Second Amendment Rights*, 80 Law & Contemp. Prob. 55, 59 (2017). In stark contrast to the complete absence of laws prohibiting 18-to-20-year-olds from purchasing or possessing firearms in the Founding era, stand the early militia laws that required men 18 years of age and older to obtain firearms. Congress passed the Second Militia Act on May 8, 1792, a mere five months after the Second Amendment was ratified on December 15, 1791. The Second Militia Act stated 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) (emphasis added). The Act also required each of these 18-year-old militia members to "provide himself with a good musket or firelock . . . or with a good rifle[.]" *Id.* § 1. Shortly thereafter, every state revised its existing militia laws to conform with the federal statute, adopted a militia age of 18, and required militia members to arm themselves.[4]

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4. The state militia statutes are collected at *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 672 F. Supp. 3d 118, 140 n. 31 (E.D. Va. 2023), rev'd and remanded sub nom. *McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 F.4th 568 (4th Cir. 2025).

The Founders specifically intended for 18-to-20-year-olds to be armed. In 1790, Secretary of War Henry Knox submitted a militia plan to Congress providing that "all men of the legal military age should be armed," and that "[t]he period of life in which military service shall be required of the citizens of the United States [was] to commence at eighteen." 1 Annals of Cong. app. 2145-46 (Joseph Gales ed., 1834).

There is no evidence that the Founders had qualms about arming 18-to-20-year-olds. Indeed, just the opposite is true. Representative James Jackson asserted "that from eighteen to twenty-one was found to be *the best age* to make soldiers of." *Id.* at 1860 (emphasis added).

In an enclosure to a 1783 letter to Alexander Hamilton, George Washington (who later signed the Milita Act into law) wrote that "the Citizens of America . . . from *18 to 50 Years of Age* should be borne on the Militia Rolls" and "so far accustomed to the use of [Arms] that the Total strength of the Country might be called forth at Short Notice on any very interesting Emergency." Sentiments on a Peace Establishment (May 2, 1783), reprinted in 26 *The Writings of George Washington* 389 (John C. Fitzpatrick, ed. 1938) (emphasis added).

In summary, there is simply no Founding-era tradition of regulations prohibiting 18-to-20-year-olds from acquiring firearms. The exact opposite is true. The laws of the time unanimously imposed on them an affirmative duty to do exactly that.

### C. Later History Can Liquidate an Understanding of the Text; it Cannot Change the Text

The circuit court notes that in the second half of the nineteenth century several states adopted statutes prohibiting 18-to-20-year-olds from acquiring certain firearms. *McCoy*, 140 F.4th at 578. But these later laws are irrelevant to the Constitutional analysis as demonstrated by *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020). In that case, the Court noted that 30 states adopted no-aid provisions in the second half of the nineteenth century. *Id.* at 482. The Court held that these late-adopted laws were simply irrelevant to the meaning of the First Amendment. *Id.* This is consistent with *Bruen's* approach to post-ratification history. Nineteenth-century evidence may be relevant to determining the public understanding of a provision of the Bill of Rights as of the time it was ratified. *Bruen*, 597 U.S. at 35. Also, evidence that a governmental practice has been open, widespread, and unchallenged since the early days of the Republic can serve to "liquidate" the meaning of a phrase in the Constitution. *Id.* at 35-36. Nevertheless, as in *Espinoza*, late nineteenth-century evidence cannot provide much insight into the meaning of a provision of the Bill of Rights "when it contradicts earlier evidence." *Id.* at 66.

In summary, if the text is vague and Founding-era history is elusive or inconclusive, post-ratification history may be important in interpreting the constitutional text. *United States v. Rahimi*, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring). By the same token, if the Founding-era history supporting a particular interpretation of an enumerated right is robust, post-ratification history that contradicts that interpretation

is simply irrelevant. *Bruen*, 597 U.S. at 66, n. 28 (Late evidence "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."). See also *Rahimi*, 602 U.S. at 738 ("evidence of 'tradition' unmoored from original meaning is not binding law.") (Barrett, J., concurring).

Justice Barrett's concurrence in *Rahimi* should be emphasized, because, as Judge Newsom recently observed, the Court should be wary of attempts to change the text by means of an ersatz "traditionalism." He wrote:

> My first fear is that traditionalism gives off an originalist "vibe" without having any legitimate claim to the originalist mantle. It seems old and dusty—and thus objective and reliable. And maybe it is indeed all those things. But let's be clear: it's not originalism. Remember, originalism is fundamentally a text-based interpretive method. We originalists say that any particular constitutional provision should be interpreted in accordance with its common, ordinary meaning *at the time it was adopted and ratified*. If we really mean that, then by definition, it seems to me, evidence that significantly *post*-dates that provision's adoption isn't just second-best—it's positively *irrelevant*.

Hon. Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of Traditionalism in Constitutional Interpretation*, 47 Harv. J.L. & Pub. Pol'y 745, 754 (2024) (emphasis in the original).

### D. The Government May Not Strip Disfavored Demographic Groups of their Constitutional Rights

The circuit court held that the "why" of the subject statute is to impose burdens on the Second Amendment rights of individuals who lack "judgment and discretion." *McCoy*, 140 F.4th at 577. In other words, the court upheld the statute because it makes it more difficult for people who are not responsible to acquire handguns. But in *Rahimi*, this Court held that the government may not disarm a person simply because it believes he is not responsible. 602 U.S. at 701.

To be sure, *Rahimi* did not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse. 602 U.S. at 698. But surely the Court meant that the government has the power to disarm groups of people all of whom pose a special danger of misuse (e.g., people who have been convicted of felonies involving gun violence). *Rahimi* did not mean that the government may disarm any demographic group that is statistically overrepresented among those who commit gun violence even if there is no evidence that the overwhelming majority of people in that group are a special risk. Indeed, as Judge Quattlebaum noted, this is a constitutionally fraught road down which to trek. *McCoy*, 140 F.4th at 587 (Quattlebaum, J., dissenting). By the same logic, the government could place discriminatory limitations on African Americans hoping to purchase firearms.[5] *Id*. Such limitations would be

5. Department of Justice statistics indicate that African Americans are overrepresented among persons arrested for

obviously unconstitutional regardless of how effective the government claims they might be in stopping irresponsible people from acquiring handguns. Any argument that entails such a facially absurd result cannot be correct.

## CONCLUSION

For the reasons set forth herein, NAGR respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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violent crimes. Bureau of Justice Statistics, Race and Ethnicity of Violent Crime Offenders and Arrestees, 2018 (available at https://bit.ly/48PyzjN).