

No. _____

In the Supreme Court of the United States

JACKSON W. HOLLOWAY,

Petitioner,

v.

NICHOLAS W. BROWN,
ATTORNEY GENERAL OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

Vitaliy Kertchen
Counsel of Record
KERTCHEN LAW, PLLC
917 S 10th St
Tacoma, WA 98405
(253) 905-8415
vitaliy@kertchenlaw.com

Attorney for Petitioner

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QUESTION PRESENTED

Does the State of Washington's total ban on the possession of a firearm following a second misdemeanor conviction within seven years for driving under the influence violate the Second Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner, and plaintiff-appellee-respondent below is Jackson W. Holloway.

Respondent, and defendant-appellant-petitioner below is Nicholas W. Brown, in his official capacity as the Attorney General for the State of Washington.

Other party below is plaintiff-appellee-petitioner Geoffrey G. McLellan. He is not a party to this petition.

RELATED PROCEEDINGS

Superior Court of Washington (Thurston Cty.):

Geoffrey G. McLellan and Jackson W. Holloway v. Nicholas W. Brown, Attorney General, Washington State, No. 24–2–02793–34 (Dec. 16, 2024) (order denying mandamus and dismissing the Spokane Police Department; denying petitioners’ motion for summary judgment and the Attorney General’s motion for judgment on the pleadings; granting the Attorney General’s alternative CR 56(f) request for further factual development)

Supreme Court of Washington:

Geoffrey G. McLellan and Jackson W. Holloway v. Nicholas W. Brown, Attorney General, Washington State, No. 103799–6 (Jun. 11, 2026) (judgment reversing the superior court and remanding for entry of judgment on the pleadings in favor of the State; judgment sought to be reviewed)

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OPINIONS BELOW

The Supreme Court of Washington’s opinion is reported at 590 P. 3d 1049, and is reproduced in the Appendix at App. 1–32.

JURISDICTION

The Supreme Court of Washington entered judgment on June 11, 2026. This Court has jurisdiction under 28 U. S. C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“A well regulated Militia, being 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., Amdt. II.

Wash. Rev. Code §9.41.040, in relevant part:

“(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of:

(D) Any of the following misdemeanor or gross misdemeanor crimes [. . .] committed on or after July 23, 2023 [. . .] any prior offense as defined in [Wash. Rev.

Code] 46.61.5055(14) if committed within seven years of a conviction for any other prior offense under [Wash. Rev. Code] 46.61.5055[.]

[. . .]

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 [Wash. Rev. Code].” Wash. Rev. Code §9.41.040(2)(a)(i)(D) and (2)(b).

STATEMENT OF THE CASE

In 2023, the Washington State Legislature enacted Substitute House Bill 1562. 2023 Wash. Sess. Laws, ch. 295. Among other things, this legislation imposed a total ban on the possession of a firearm for those convicted of a “prior offense” on two or more occasions within seven years. *Id.*, § 3, codified at Wash. Rev. Code §9.41.040(2)(a)(i)(D). A “prior offense” includes driving under the influence (DUI) and other DUI-related charges. Wash. Rev. Code §46.61.5055(14). This definition includes misdemeanor and gross misdemeanor level offenses. *Ibid.* Washington state law punishes a misdemeanor by a maximum of 90 days in jail and a gross misdemeanor by a maximum of 364 days in jail. Wash. Rev. Code §9A.20.021(2), (3).

Holloway has a DUI-related reckless driving conviction in Idaho in August 2022, a misdemeanor,¹ and a DUI conviction in Washington in May 2024, a gross

¹ Reckless driving is punishable under Idaho law by a maximum of six months imprisonment for a first offense (maximum 12 months for a subsequent offense). Idaho Code Ann. § 49–1401(2).

misdemeanor. In June 2024, he submitted an application to the Spokane Police Department for a concealed pistol license. Washington state law declares that an “applicant’s constitutional right to bear arms shall not be denied, unless . . . [h]e or she is ineligible to possess a firearm under federal law.”² Wash. Rev. Code §9.41.070(1)(a). Because Holloway met the criteria of the newly-enacted legislation, the Spokane Police Department denied his application.

Holloway then filed action in state court, challenging the constitutionality of the prohibition under the Second Amendment. The State filed a motion for judgment on the pleadings on the premise that the prohibition is constitutional as a matter of law. In the alternative, the State requested a continuance for further factual development. In December 2024, the trial court denied the State’s motion for judgment on the pleadings, but granted its motion for a continuance, finding that there were material issues of fact with respect to whether Holloway’s possession of firearms poses a credible threat to public safety. In doing so, the trial court cited this Court’s decision in *United States v. Rahimi*, 602 U. S. 680 (2024).

The State sought and received direct interlocutory review by the Supreme Court of Washington. The court reversed, holding that “[u]nder the Second Amendment, the temporary firearm prohibition for recidivist drunk drivers [. . .] is constitutional without

² These convictions do not trigger any prohibition under federal law.

an individualized assessment of [. . .] Holloway’s dangerousness.”³ App. 13.

REASONS FOR GRANTING THE PETITION

“A petition for a writ of certiorari will be granted only for compelling reasons.” S. Ct. R. 10. There are three compelling reasons to grant the petition in this matter.

First, the subject matter of this case has nationwide implications. Most states regulate the mixture of alcohol and firearms in some manner, with at least four other jurisdictions having similar firearm restrictions following a misdemeanor conviction for a DUI offense.

Second, this case asks an oft-repeated question that the Court has thus declined to answer: what is the correct historical analysis when evaluating conviction-based prohibitions under the Second Amendment?

Third, “a state court [. . .] has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). Specifically, the Supreme Court of Washington’s decision has chosen to apply categorical disarmament and legislative deference in stark contrast to this Court’s Second Amendment jurisprudence.

³ The opinion refers to the prohibition as “temporary” because Washington state law allows for the restoration of firearm rights after a minimum of five years following the disabling conviction. Wash. Rev. Code §9.41.041.

I. The subject matter of this case has nationwide implications.

The prohibition challenged in this case is not unique to Washington state. Maryland bans the possession of a firearm while on supervised probation following a DUI conviction, even after the first offense. Md. Code Ann., Pub. Safety § 5–133(b)(4)(ii). Massachusetts requires denial of a gun permit for five years after just one DUI conviction.⁴ Mass. Gen. Laws ch. 140, § 121F(j)(i)(B). Likewise, the District of Columbia requires denial of a registration certificate for anyone convicted of two or more DUIs within the five years prior to application. D. C. Code § 7–2502.03(a)(4)(C). And Pennsylvania prohibits the transfer or purchase of firearms after a third conviction for DUI within five years. 18 Pa. Cons. Stat. § 6105(c)(3). All of these consequences attach at the misdemeanor offense level and do not require a felony-level conviction.

Even if a state does not impose its own firearm restriction on misdemeanor DUI offenders, federal law may. For example, South Carolina treats a third DUI within 10 years as a misdemeanor punishable by a maximum of three years’ imprisonment. S. C. Code Ann. § 56–5–2930(A)(3). This triggers the federal prohibition under 18 U.S.C. § 922(g)(1).⁵ And

⁴ The law requires denial to anyone convicted of “a misdemeanor punishable by imprisonment for more than 2 years.” A first-offense DUI is punishable by a maximum of 2.5 years. Mass. Gen. Laws ch. 90, § 24(1)(a)(1).

⁵ That section prohibits possession of a firearm by anyone convicted of a crime punishable by a term of imprisonment over one year and includes state misdemeanors punishable by a term over two years. 18 U.S.C. § 921(a)(20).

Massachusetts proves a double whammy: not only does the state impose its own five-year prohibition, but the maximum term of imprisonment for a first offense (2.5 years) invokes the prohibition under federal law, which can often be permanent.

And this is to say nothing of the vast majority of states that punish recidivist DUI at a felony level after a certain number of offenses (which varies between jurisdictions).⁶ This classification triggers the federal prohibition in addition to any state prohibition.

Some states also regulate the mixture of alcohol and firearms by targeting chemical dependency. *E. g.*, Ala. Code §13A-11-72(b)(1) (making it a Class A misdemeanor to own or possess a pistol for “habitual drunkard[s]” and those who have a drug addiction); Mo. Rev. Stat. §571.070.1(2) (making it a Class C felony to possess a firearm for those who are “habitually in an intoxicated or drugged condition”); Ohio Rev. Code Ann. §2923.13(A)(4) (making it a third-degree felony to possess a firearm for those who have “a drug dependency, [are] in danger of drug dependence, or ‘have) chronic alcoholism”); Haw. Rev. Stat. §134-7(c)1 (making it a misdemeanor to possess a firearm for those who “[are or have been] under treatment or counseling for addiction to, abuse of, or dependence upon any dangerous, harmful, or detrimental drug, intoxicating compound [. . .] or intoxicating liquor”).⁷

⁶ Andrew G. Bowen, et al., Relation of Driving Under the Influence Laws to Access to Firearms Across US States, 111 AM. J. OF PUB. HEALTH 253 (Feb. 1, 2021) online at <https://tinyurl.com/4mzj3kny> (as visited Aug. 31, 2026).

⁷ The Hawaii statute appears to be particularly draconian, considering that it bans firearm possession for anyone who has ever

The nature of regulation varies, but nearly all states regulate the mixture of alcohol and firearms in some manner. While this case would not and should not resolve every conceivable issue on the topic, answering the question presented would provide invaluable guidance to jurisdictions everywhere, especially when combined with the Court’s recent decision in *United States v. Hemani*, 608 U. S. ____ (2026).

II. The nation needs guidance on conviction-based prohibitions.

Hemani is helpful in establishing the limits of state firearm regulations that target chemical dependency because those are similar in nature to federal 18 U. S. C. §922(g)(3), the statute at issue in that case. But *Hemani* did not deal with a conviction-based prohibition, and is thus not dispositive of the question presented. So far, the Court has chosen to remain silent when asked to weigh in on the constitutional status of conviction-based prohibitions. *E. g.*, *United States v. Diaz*, 116 F. 4th 458 (CA5 2024), cert. denied, No. 24–6625 (Jun. 23, 2025); *United States v. Duarte*, 137 F. 4th 743 (CA9 2025), cert. denied, No. 25–425 (Jan. 20, 2026); *United States v. Dubois*, 139 F. 4th 887 (CA11 2025), cert. denied, No. 25–6281 (Jan. 20, 2026); *Zherka v. Bondi*, 140 F. 4th 68 (CA2 2025), cert. denied, No. 25–269 (Jan. 20, 2026). But see *United States v. Hembree*, 165 F. 4th 909 (CA5 2026), cert. pending, No. 25–1219.

Perhaps a driving reason behind these denials of certiorari is the nature of the petitioner: all had been

been to chemical dependency treatment and appears to have no temporal limitation.

convicted of a felony-level offense. After all, this Court has repeatedly stated that laws banning possession of a firearm by a felon are “presumptively lawful.” *District of Columbia v. Heller*, 554 U. S. 570, 626–27, n. 26 (2008); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U. S. 1, 80–81 (2022) (KAVANAUGH, J., concurring); *United States v. Rahimi*, 602 U. S. 680, 699 (2024); *Hemani*, 608 U. S., at ____ (2026) (ALITO, J., concurring in judgment) (slip op., at 1).

But the question continues to be asked, with mixed results and methodologies employed by the lower courts. The Second, Fourth Eighth, Ninth, Tenth, and Eleventh Circuits have turned away such challengers. *Hembree*, 165 F. 4th, at 911. The historical justification in those cases extends beyond the arbitrary label of “felony” or “misdemeanor” and allows categorical disarmament of anyone deemed by the legislature to present a “special danger of misuse” of firearms. *United States v. Martinez*, 169 F. 4th 1147, 1156 (CA9 2026) (upholding the constitutionality of §922(g)(9) for a misdemeanor crime of domestic violence). The Third, Fifth and Sixth Circuits allow as-applied challenges, but even those circuits are split on what information is relevant to such a challenge. *Hembree*, 165 F. 4th, at 911–12.

It is unclear what role labels play when deciding whose challenge may proceed and whose challenge is foreclosed. For what it’s worth, Holloway is not a felon. He may be the first person to come before this Court challenging a conviction-based prohibition, having been convicted only of a misdemeanor that contains no element of violence, physical force, bodily

injury, or threatening behavior whatsoever.⁸ Thus, his prohibition does not fall under those bans deemed presumptively lawful and his case presents an excellent vehicle for the Court to answer an important question without having to disturb the presumptively lawful nature of the felony prohibition or answer any thorny questions with respect thereto.

III. The Supreme Court of Washington’s decision is in conflict with this Court’s Second Amendment jurisprudence.

In defending the constitutionality of Wash. Rev. Code §9.41.040(2)(a)(i)(D), the State proffered three historical principles: (1) restriction of firearms for categories of people with a heightened risk of violence; (2) restriction of firearms for people convicted of serious crimes; and (3) restriction of firearms for those likely to abuse alcohol. App. 9–10. The Supreme Court of Washington accepted all three.

A. Categorical disarmament does not obviate the need for an historical analogue

With respect to categorical restrictions, the majority below relied primarily on *Duarte*, 137 F. 4th 743. App. 9–10. There, the Ninth Circuit rejected a felon’s challenge to §922(g)(1) by finding that the practice of categorical disarmament of those deemed dangerous by founding-era legislatures provided a historical analogue for the modern statute. 137 F. 4th, at 760–61. In support, the Ninth Circuit pointed to the historical

⁸ In *Range v. Attorney General*, 69 F. 4th 96 (CA3 2023), it was the Attorney General, not the challenger, who petitioned the Court for certiorari. No. 23–374 (Jul. 2, 2024).

categorical disarmament of Catholics, Native Americans, slaves, free Blacks, British loyalists during the American Revolution, minors, those of unsound mind, those presently intoxicated, and tramps. *Id.*, at 759–60.

Consequently, that court made two sweeping pronouncements. First, that “our historical tradition reveals that legislatures were permitted to categorically disarm those they deemed dangerous without having to perform an individualized determination of dangerousness as to each person in a class of prohibited persons.” *Duarte*, 137 F.4th, at 760. Second, that “[h]istory does not require felony-by-felony litigation to support the application of §922(g)(1).” *Id.*, at 761. On both holdings, the Ninth Circuit agreed with the Eighth Circuit in *United States v. Jackson*, 110 F.4th 1120 (CA8 2024), cert. denied together with *Jackson v. United States*, No. 24–6517 (May 19, 2025).

At best, the historical practice of categorically disarming certain groups of people deemed to be dangerous lends itself only to the conclusion that an individualized dangerousness assessment *of each person* within that group is not required. But that does not dispense with the requirement that the prohibition affecting *the group* be justified. The State must do this by demonstrating “why” and “how [...] a contemporary law mirrors a well-established historical analogue in purpose and operation.” *Hemani*, 608 U.S., at ____ (slip op., at 5). In other words, in what ways are recidivist DUI offenders “relevantly similar,” *ibid.*, to Catholics, Native Americans, slaves, free Blacks, tramps, etc.? Or if not one of those groups, in what ways are they relevantly similar to some other group disarmed during the founding era?

Concluding that group disarmament is okay because group disarmament occurred at the founding, without more, ends the analysis prematurely and does not provide a complete answer. A crucial step is missing: why and how a current prohibited group is analogous to a founding-era prohibited group. To ignore the need to justify the group prohibition with reference to history “risks endorsing outliers that our ancestors would never have accepted,” *Bruen*, 597 U. S., at 30, and brings back what is essentially rational basis review. See *id.*, at 17 (rejecting application of means-end scrutiny to the Second Amendment). “If courts uncritically deferred to Congress’s class-wide dangerousness determinations, disarmament laws would most often be subject to rational basis review.” *United States v. Williams*, 113 F.4th 637, 660 (CA6 2024). For example, a legislature could categorically disarm groups with a low IQ; those who are unemployed, less educated, or low-income; individuals under the age of 25; all men; those who play video games; and so on. *Duarte*, 137 F.4th, at 800 (VanDyke, J., dissenting) (collecting sources supporting a finding that each of these groups is more prone to violence). The categorical disarmament approach is arguably even less exacting than rational basis review because under *Bruen*, the government is not required to prove a regulation is rational, only that it has a basis in history.

Below, the State drew attention to modern studies about correlation between alcohol abuse and future gun violence, considered by the Washington state legislature during the passage of the challenged statute. App. 2–3. Reliance on modern studies in this context is problematic for a number of reasons. First,

defending legislation by arguing that there was a rational basis for it is literally rational basis review. Second, unless the study is specifically of history during the founding era, these studies do little to shed light on whether a regulation “is consistent with this Nation’s historical tradition of firearm regulation,” as required in a Second Amendment challenge. *Bruen*, 597 U. S., at 17.

Third, sociological studies are subject to debate and interpretation. For example, the majority and the dissent below each relied on sociological studies to buttress opposite points. Cf. App. 8–11 with 20–22. Finally, reliance on modern studies inherently requires deference to the legislature. But, while legislative deference “is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.” *Bruen*, 597 U. S., at 26. For its part, the majority below recognized that “deference to the legislature’s determination that a category of people are [sic] dangerous is inappropriate.” App. 10 (citing *Bruen*, 597 U. S., at 26). But the court immediately waived away this minor inconvenience in the very next sentence: “But our legislature’s findings are instructive and helpful in demonstrating the danger posed by those who repeatedly drive while intoxicated.” *Ibid*.

Perhaps the Eighth Circuit is right that not every single *crime* needs to be litigated on a crime-by-crime basis. See *Jackson*, 110 F. 4th, at 1125 (“[W]e conclude that there is no need for felony-by-felony litigation regarding the constitutionality of §922(g)(1).”) But, certain *categories* do. The category here is of a misdemeanor offense based on alcohol and/or drug consumption with no element of violence, physical

force, bodily injury, or threatening behavior. This category requires careful consideration of history without reliance on sweeping pronouncements of categorical disarmament.

B. There is no evidence that alcohol-based offenses were considered serious crimes during the founding era.

In response, the State might argue that the group most analogous to DUI offenders are those convicted of serious crimes during the founding era. Indeed, this was the State’s second point below. App. 10–11. The Supreme Court of Washington agreed under very dubious reasoning.

First, it recognized that “since the founding era, criminal laws have traditionally imposed far more severe penalties on people convicted of felonies than restrictions on firearm possession.” App. 11 (citing *Medina v. Whitaker*, 913 F.3d 152, 158 (CADC 2019)). Under this rationale, if a felony offender could face death or estate forfeiture during the founding era, surely a firearm restriction was not a problem. *Ibid.* Yet, the court made no attempt to explain why today’s misdemeanor DUI offense would be considered a felony during the founding era. And there is simply no historical support to argue that *every crime* during the founding era was punishable by death or estate forfeiture.

Second, the majority found that the same analogues relevant in *Rahimi*—surety and affray laws—are relevant in the context presented here. *Ibid.* Specifically, the court cited to *Rahimi* for its holding that an individual may be disarmed if he or she “poses a clear threat of physical violence to another.” 602 U.S., at

698. But *Rahimi* is a case about protection orders, which require an *individualized* finding by a court that a respondent presents a credible threat to a petitioner. *Id.*, at 702 (“[W]e conclude only this: 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* cannot be shoehorned to conclude that because a law authorizing disarmament after an individualized court finding is constitutional, a law authorizing categorical disarmament is also constitutional. This Court’s reference to “physical violence” in *Rahimi* is not a reference to the type of generalized dangerousness the State relies on to defend the constitutionality of the challenged statute. Nor could ethereal assumptions about future actions on the basis of sociological studies of questionable relevance be regarded as a “clear threat” as that phrase was used in *Rahimi*.

As to how surety and affray laws support a conviction-based prohibition, the majority provides no explanation. Affray laws “prohibited riding or going armed, with dangerous or unusual weapons, to terrify the good people of the land.” 602 U.S., at 697. Surety laws came in two flavors: sureties-of-the-peace and sureties for good behavior. *Hemani*, 608 U.S., at ____ (slip op., at 13–14). The former “required an individual shown to pose a *specific* threat of violence to post a bond and pledge to keep the peace.” *Id.*, at ____ (slip op., at 13) (emphasis added). Under the latter, “a judicial officer could impose a surety of good behavior on individuals who threatened a scandal.” *Ibid.* A surety for good behavior did not require showing a threat of violence, but rather “usually sought to

protect the community from scandals against good morals.” *Ibid.* In what possible way is conviction for misdemeanor DUI relevantly similar to any of these concepts?

Finally, the majority acknowledges this Court’s rejection of the “responsible, law-abiding person” standard. App. 11. The Court rejected this standard because it is “vague,” *Rahimi*, 602 U.S., at 702, and “would eviscerate the Second Amendment altogether.” *Id.*, at 773 (THOMAS, J., dissenting). But, once again, the majority immediately contradicts itself: “[T]he legislature has the constitutional authority to disarm groups of people whose convictions demonstrate they are not law-abiding and are unwilling to obey the law.” App. 11. The staggering breadth of this pronouncement demonstrates a regard for the Second Amendment as a “second-class right.” *Bruen*, 597 U.S., at 70.

Conspicuously missing from the majority’s opinion is any discussion whatsoever of why and how a misdemeanor DUI conviction is relevantly similar to crimes considered serious during the founding era. Instead, the Supreme Court of Washington concludes without explanation that “the recidivist nature of the drunk driving convictions, coupled with the legislature’s specific finding regarding the danger they pose, supports a determination that [the challenged statute] fits within the founding-era tradition of regulating certain serious, nonviolent offenses.” App. 11–12. In other words, a modern legislature has deemed misdemeanor DUI offenders dangerous, and historical analogues be damned.

C. The tradition of disarming individuals likely to abuse alcohol does not fit the why or the how of the challenged statute.

The last historical tradition cited by the Attorney General is that of “disarming individuals likely to abuse alcohol.” App. 13. The majority below agreed, citing “a tradition of preventing the harmful consequences of the combined use of alcohol with firearms and a more recent tradition of restricting firearm access for those suffering from alcohol dependence.” *Ibid.* Yet, the tradition of disarming individuals likely to abuse alcohol existed in very different ways both as to why and how.

Early America had a “culture of copious drinking.” *Hemani*, 608 U. S., at ___ (slip op., at 9). Even those who drank 12 ounces of hard liquor each day were considered only “occasional drunkards.” *Id.*, at ___ (slip op., at 10). And “habitual drunkard” laws existed not because “they regularly used intoxicants, or even sometimes used them to excess.” *Ibid.* Rather, those “laws focused on habitual drunkards because their drinking rendered them practically incapacitated and incapable of managing their affairs.” *Ibid.* But there is no evidence that the founding generation disarmed ordinary citizens for drunkenness, even if their intoxication was routine. *United States v. Connelly*, 117 F. 4th 269, 280 (CA5 2024). Even post-Reconstruction laws “at most, [support] a ban on carrying firearms while an individual is *presently* under the influence.” *Id.*, at 282.

A conviction for a recidivist misdemeanor DUI offense, by itself, cannot be used to label the driver as a

habitual drunkard. It is not evidence that the driver is “practically incapacitated and incapable of managing their affairs.” *Hemani*, 608 U. S., at ____ (slip op., at 10). And without a connection to habitual-drunkard laws, there is no alternative tradition of regulating the mixture of firearms and alcohol beyond the present state of intoxication.

The majority below referred to the challenged statute as “tackling a uniquely modern problem.” App. 13. It is true that the founding generation did not have personal vehicles as we know them today. But that generation was no stranger to alcohol abuse as a societal ill.

“[W]hen 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.” *Bruen*, 597 U. S., at 26–27.

Here, there is simply no “distinctly similar historical regulation,” *id.*, to support the imposition of a total ban on possession of firearms that extends years into the future. And to the extent that alcohol and firearms were historically regulated, the challenged statute does so “through materially different means” than history supports. *Ibid.* Put another way, “[t]he historical laws on which [the State] relies targeted different kinds of people, did so for different reasons, and

operated in different ways.” *Hemani*, 608 U.S., at ____ (slip op., at 19).

D. The lower courts misread *Rahimi*.

The majority below, like other courts reaching similar conclusions, relies heavily on *Rahimi*. App. 6–7, 9, 11. Specifically, the Court stated: “[W]e do 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.” *Rahimi*, 602 U.S., at 698. In their eyes, this phrase validates categorical disarmament and deference to legislatures to make determinations of dangerousness. See *Duarte*, 137 F. 4th, at 752 (characterizing this phrase as an “assurance” that supports categorical disarmament); *Jackson*, 110 F. 4th, at 1129 (citing this phrase in support of categorical disarmament); *Dubois*, 139 F. 4th, at 893 (same).

But this is a myopic reading of *Rahimi*. If *Rahimi* meant to endorse categorical disarmament and legislative deference, the opinion would have said so and stopped. It also would have had to reformulate the framework announced in *Bruen*. 597 U.S., at 26 (rejecting legislative deference). Instead, the Court methodically continued the analysis to find historical analogues by reference to surety and affray laws. *Rahimi*, 602 U.S., at 695–698. Discussion of those laws was specific, concrete, and detailed—not categorical, generalized, or deferential. *Ibid.* So, too, was the analysis in *Hemani*. 608 U.S., at ____ (slip op., at 4–18) (examining why and how §922(g)(3) compares with historical laws concerning habitual drunkards, vagrancy, civil commitment, and sureties). A correct

interpretation of *Rahimi*’s phrase blends the language with the context: A legislature may disarm on a categorical basis, but that does not absolve a party defending a firearm regulation from having to justify the category by finding a historical analogue.

In short, the Supreme Court of Washington’s decision is not a faithful application of this Court’s Second Amendment jurisprudence. The majority below provided no analysis of why and how the challenged statute is relevantly similar to laws in effect during the founding era. Instead, it relied on generalizations and legislative deference, methods rejected squarely by this Court in *Bruen*, *Rahimi*, and *Hemani*. In other words, the court “afford[ed] the government that kind of broad power to designate any group as dangerous and thereby disqualify its members from having a gun.” *Hemani*, 608 U.S., at ____ (slip op., at 18). This outcome “quickly swallow[s] the Second Amendment.” *Ibid*.

IV. Remanding for reconsideration is unlikely to be fruitful.

Following this Court’s announcement of *Rahimi* in June 2024, it granted petitions for certiorari in a number of cases and remanded them for reconsideration in light of *Rahimi*. *E. g.*, *Garland v. Range*, 603 U. S. ___, No. 23–374 (Jul. 2, 2024); *United States v. Daniels*, No. 23–376 (Jul. 2, 2024); *Cunningham v. United States*, 603 U. S. ___, No. 23–6602 (Jul. 2, 2024); *Vincent v. Garland*, 603 U. S. ___, No. 23–683 (Jul. 2, 2024); *Dubois v. United States*, 604 U. S. ___, No. 24–5744 (Jan. 13, 2025).

None of these cases were decided differently after reconsideration. *Range v. Attorney General*, 124 F. 4th

218 (CA3 2024); *United States v. Daniels*, 124 F. 4th 967 (CA5 2025); *United States v. Cunningham*, 114 F. 4th 671 (CA8 2024); *Vincent v. Bondi*, 127 F. 4th 1263 (CA10 2025); *United States v. Dubois*, 139 F. 4th 887 (CA11 2025).

The same is likely to occur here if the Court decides to grant the present petition and remand for reconsideration in light of *Hemani*. For starters, the court below knew that this Court would decide *Hemani* by the end of June, but decided to release its decision on June 11 anyway. App. 10 n. 7. This reflects a conscious decision that the outcome in *Hemani* would not have changed the outcome in this case.

Second, the court below made clear that its decision was based on recidivist DUI convictions and not on the status of having a chemical dependency. App. 13 (“[W]e agree with the State that [the challenged statute] is not triggered by the status of having a chemical dependency, but rather by a person’s having repeatedly taken the dangerous and reckless action of driving while drunk.”). *Hemani* dealt with a drug-use prohibition and not a conviction-based prohibition; thus, it is not dispositive of this case and only marginally helpful. For these reasons, reconsideration is unlikely to move the needle.

CONCLUSION

Wherefore, this Court should grant certiorari.

Respectfully submitted.

Vitaliy Kertchen
Counsel of Record
KERTCHEN LAW, PLLC
917 S 10th St
Tacoma, WA 98405
(253) 905-8415
vitaliy@kertchenlaw.com

SEPTEMBER 2026

Attorney for Petitioner

App-1

Appendix A

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

GEOFFREY G. MCLELLAN AND) No. 103799-6
JACKSON W. HOLLOWAY,)
Respondents,) En Banc
v.)
) Filed: June 11,
NICHOLAS W. BROWN, Attorney) 2026
General, Washington State,)
Petitioner.)
_____)

GONZÁLEZ, J.—Our constitutions protect a law-abiding individual’s right to bear arms. U. S. CONST. amend II; WASH. CONST. art. I, §24. From the beginning of our republic, that right has been subject to important, long-standing limitations. *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 128 S.Ct. 2783, 171 L. Ed. 2d 637 (2008). For example, the United States Supreme Court has noted long-standing limitations on concealed weapons. *See id.* at 626. Courts have also held that the Second Amendment attaches only to weapons “in common use” because “that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 624, 627 (quoting *United States v. Miller*, 307 U.S. 174, 179, 59 S.Ct. 816, 83 L. Ed. 1206 (1939)). Perhaps most relevant to us today, the Court has recognized that “longstanding prohibitions on the possession of firearms by felons and the mentally ill” are presumptively constitutional. *Id.* at 626.

App-2

Under the Second Amendment, Geoffrey McLellan and Jackson Holloway argue a Washington law that temporarily prohibits them from possessing firearms as a consequence of their multiple driving under the influence (DUI) convictions within seven years is unconstitutional as applied to them. We granted direct interlocutory review to determine whether that temporary prohibition violates the Second Amendment. We conclude it does not.

BACKGROUND

Washington law limits the firearm rights of several categories of people that our legislature has determined pose a special danger of misuse of firearms. RCW 9.41.040. Relevantly, Washington law temporarily prohibits anyone convicted twice within seven years of a DUI offense from possessing a firearm. RCW 9.41.040(2)(a)(i)(D).¹ People who have been legally disarmed under this statute may petition to have their firearm rights restored after five years of law-abiding behavior in the community. RCW 9.41.041(2)(a)(i)(I). During hearings on the proposed bill before it became law, the legislature considered studies about the correlation between alcohol abuse and future gun violence. *See, e. g.*, Hr’g on H.B. 1562 Before the S. L. & Just. Comm. (Wash. Mar. 21, 2023),

¹ In addition, DUI-related “prior offenses” trigger the possession prohibition, including physical control of a vehicle while under the influence, vehicular homicide and assault, reckless driving and negligent driving if amended from an original DUI charge, and several other vehicle operation offenses involving alcohol or drugs, even if they are later amended to exclude mention of alcohol or drugs or if prosecution or sentencing is deferred. RCW 46.61.5055(14)(a)(i)–(xvii).

App-3

at 45 min., 20 sec. to 45 min., 30 sec., *video recording* by TVW, Washington State’s Public Affairs Network, <https://tvw.org/video/senate-law-justice-2023031425/?eventID=2023031425>; *see also* LAWS OF 2023, ch. 295, §1(4) (justifying restriction because “frequent risky alcohol use” is a “particularly strong risk factor[] for future violence”).

McLellan was convicted of DUI three times within seven years, and Holloway was convicted of DUI twice within seven years. They applied for concealed carry permits, which were denied under RCW 9.41.040. In response, they brought a declaratory judgment action challenging RCW 9.41.040, as applied to them, for violating their Second Amendment rights.² The trial court denied the State’s motion for judgment on the pleadings, but granted the State’s alternative CR 56(f) request to permit further factual development, ruling that “[t]here are material issues of fact regarding the application of the law to McLellan and Holloway” and specifically whether their “possession of firearms poses a credible threat to public safety.” Clerk’s Papers (CP) at 145–46 (citing *United States v. Rahimi*, 602 U.S. 680, 702, 144 S.Ct. 1889, 219 L.Ed. 2d 351 (2024)).

² McLellan and Holloway brought this case as a mandamus action against the Spokane Police Department. The trial court correctly concluded that the department did not have a clear duty to act, denied mandamus, and dismissed the department as a party. The State intervened to defend the constitutionality of RCW 9.41.040(2)(a)(i)(D).

McLellan and Holloway do not address the state constitution, and we do not consider whether article I, section 24 requires a different analysis.

App-4

The State successfully sought our direct interlocutory review.³

ANALYSIS

The Second Amendment provides, “A well regulated militia, being 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.⁴ The Second Amendment secures a “general right” to possess and carry arms for lawful purposes such as self-defense. *N. Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U. S. 1, 31, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). That right is among the “fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago*, 561 U. S. 742, 778, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). However, the United States Supreme Court instructs us, that right “is not unlimited.” *Heller*, 554 U. S. at 626.

The government bears the burden of justifying regulation of the right. *See N. Y. State Rifle*, 597 U. S. at 17. To meet that burden, the government must “affirmatively prove” that the challenged regulation is consistent with our nation’s historical tradition of firearm regulation. *Id.* at 19. A court cannot simply “defer[] to legislative interest balancing.” *Id.* at 26; *see also id.* at 27 (“[C]ases implicating unprecedented societal concerns or dramatic technological changes may

³ The trial court denied McLellan and Holloway’s motion for summary judgment, and they did not seek this court’s review of that denial.

⁴ Because the State does not contend otherwise, we assume without deciding that McLellan and Holloway “are part of ‘the people’ protected by the Second Amendment.” *See* Opening Br. of Nicholas W. Brown at 17 n.5.

require a more nuanced approach.”). Instead, the State needs to prove historical regulations are “relevantly similar” to *how* the challenged regulation burdens a person’s right to carry firearms and *why* the government is imposing the challenged regulation. *Id.* at 29. The Court elaborated:

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straight-jacket nor a regulatory blank check. On the one hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.” *Drummond v. Robinson*, 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. at 30 (first alteration in original). Courts “must . . . guard against giving postenactment history more weight than it can rightly bear.” *Id.* at 35. In *N. Y. State Rifle*, the Court considered, among other things, historical evidence from the Reconstruction generation in 1868 to hold New York’s licensing law, which required an applicant to demonstrate a special need for self-defense, was unconstitutional. *Id.* at 64–66, 70.⁵

⁵ The United States Supreme Court has not decided the extent to which a court should rely on “the prevailing understanding of

In *Rahimi*, the United States Supreme Court recognized that our nation’s tradition of firearm regulation permits the “temporary disarmament” of persons who pose a “clear” danger of “misusing firearms.” 602 U. S. at 699, 698, 690. The *Rahimi* Court rejected the argument that a person could be disarmed because they are not “responsible.” *Id.* at 701–02. But the Court found an appropriate analog in founding era surety laws, which “authorized magistrates to require individuals suspected of future misbehavior to post a bond,” and affray statutes, which generally prohibited “riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land.” *Id.* at 695 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *251), 697 (alterations in original) (quoting 4 BLACKSTONE, *supra*, at *149). *Rahimi* concerned the constitutionality of a federal statute, 18 U.S.C. §922(g)(8), which prohibits someone subject to a civil restraining order from possessing firearms or ammunition. Like the statute before the statute before us, temporary disarmament under section 922(g)(8) is not the consequence of criminal convictions like we have here.

Rahimi did not involve, or suggest the Second Amendment prohibits, “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 (citing *Heller*, 554 U. S. at 626); *see Heller*, 554 U. S. at 626–27 & n.26; *see also Kanter v. Barr*, 919

an individual right when the Fourteenth Amendment was ratified in 1868” or on the public understanding of the right in 1791 when the Second Amendment was ratified. *N. Y. State Rifle*, 597 U. S. at 37; *accord Rahimi*, 602 U. S. at 692 n.1.

F. 3d 437, 451, 464–65 (7th Cir. 2019) (Barrett, J., dissenting) (“History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.”).

Here, the trial court allowed McLellan’s and Holloway’s as-applied challenge to proceed for a determination of whether they individually pose a credible threat to public safety like the defendant in *Rahimi*. See CP at 145–46; see *Rahimi*, 602 U. S. at 698. The dissent appears to endorse this approach. Dissent at 13 n.4, 18 (citing *Rahimi* and arguing historical regulations were “limited to preventing violent behavior by people who were individually found to be dangerous”).

We disagree. While the individualized findings in *Rahimi* supported disarmament in a civil restraining order proceeding unconnected to a criminal charge, that is not the backdrop we have here. Instead, in postconviction cases like the ones now before us, courts must first determine whether the legislature may disarm a category of people, without an individualized assessment of each person’s dangerousness, based on the type of conviction at issue. This is because a threshold question before the court under the Second Amendment is whether “a challenged *regulation*” fits within our “historical tradition of firearm regulation.” *Rahimi*, 602 U. S. at 691 (emphasis added) (quoting *N. Y. State Rifle*, 597 U. S. at 17). To answer that question, we begin with the nature of the regulation, i. e., whether “laws at the founding regulated firearm use to address particular problems” and whether our law “does so to an extent beyond what was done at the founding,” *id.* at 692—not whether individual circumstances justify application of our law in any particular case. This turns on the category of

conviction on which disarmament is based, and not facts specific to the individual dangerousness of McLellan and Holloway. As such, this case can be resolved as a matter of law, based on the pleadings.

The parties agree that DUI is extremely dangerous and potentially deadly, but McLellan and Hollway emphasize that DUI is “dangerous *because of the act itself*, not because a DUI offender has a supposed propensity for gun violence.” See CP at 121. However, the parties do not meaningfully dispute that “[t]he history of laws regulating the use and carrying of firearms by the intoxicated goes back to the earliest days of our nation.” Mark Anthony Frassetto, *The Historical Regulation of Intoxicated Firearms Possession and Carry: A Response to F. Lee Francis’s “Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen”*, 108 MARQ. L. REV. 531, 540 (2024); see also *id.* at 540–57 (collecting laws prohibiting carrying guns while intoxicated and regulating public intoxication).⁶ Based on historical intoxication laws, McLellan and Holloway concede “RCW 9.41.040(2)(a)(i)(D) passes the ‘why’ test” but contend that the law “fails the ‘how’ test” based on the burden it imposes. Resp’ts’ Answering Br. at 35–36.

⁶ Additionally, at least one study has concluded that “prior convictions for DUI and other alcohol-related crimes were associated with a large increase in risk of arrest for crimes of all types, including violent and firearm-related crimes.” Garen J. Winemute et al., *Firearms, Alcohol and Crime: Convictions for Driving Under the Influence (DUI) and Other Alcohol-Related Crimes and Risk for Future Criminal Activity Among Authorised Purchasers of Handguns*, INJ. PREV. 3 (Jan. 30, 2017), https://web.archive.org/web/20200709153215id_/https://injuryprevention.bmj.com/content/injury_prev/early/2017/01/27/injuryprev-2016-042181.full.pdf [<https://perma.cc/B75C-M89J>].

RCW 9.41.040(2)(a)(i)(D) temporarily restricts a category of people our legislature determined pose a special danger of misuse of firearms. *See, e. g.*, LAWS OF 2023, ch. 295, §1(4). The State contends RCW 9.41.040(2)(a)(i)(D) “fits well within at least three enduring historical principles: (1) restricting firearm possession for categories of people with a heightened risk of violence; (2) restricting firearm possession for people convicted of serious crimes; and (3) restricting firearm possession for those likely to abuse alcohol.” Opening Br. of Nicholas W. Brown (Opening Br.) at 18. McLellan and Holloway contend the State must provide a much more specific “historical analogue for support that the founding generation would have considered alcohol-based offenses serious enough to warrant categorical and total disarmament or worse.” Resp’ts’ Answering Br. at 33. But “a ‘historical twin’ is not required.” *Rahimi*, 602 U.S. at 701 (quoting *N. Y. State Rifle*, 597 U.S. at 30). We hold that the State’s historical analogs are sufficient to uphold the law.

First, the State calls to our attention a historical tradition of disarming groups of people deemed dangerous by the legislature based on federal circuit court decisions upholding the federal felon-in-possession statute, 18 U.S.C. §922(d)(1). *See* Opening Br. at 23–26 (collecting cases). We recognize there is a historical tradition of disarming groups of people who pose a heightened risk of danger, particularly where there is a plausible link to physical violence. *See United States v. Duarte*, 137 F.4th 743, 759–60 (9th Cir. 2025) (en banc), *cert. denied*, 223 L. Ed. 2d 556 (2026); *cf. Range v. Att’y Gen. U.S.*, 124 F.4th 218, 230 (3d Cir. 2024) (noting the lack of evidence showing

“that food-stamp fraud is closely associated with physical danger”). The courts of this nation have also recognized that for centuries, states have limited firearm use by people who are intoxicated. *See, e. g., Wolford v. Lopez*, 116 F. 4th 959, 985 (9th Cir. 2024) (citing various Reconstruction-era prohibitions on the carry of firearms while intoxicated), *cert. granted in part*, 146 S. Ct. 79 (2025); *Antonyuk v. James*, 120 F. 4th 941, 1030 (2d Cir. 2024) (same), *cert. denied*, 145 S. Ct. 1900 (2025).⁷

These cases analyzing our historical traditions show that groups of people can be constitutionally disarmed “without having to perform ‘an individualized determination of dangerousness as to each person in a class of prohibited persons.’” *Duarte*, 137 F. 4th at 760. We are mindful that under *N. Y. State Rifle*, deference to the legislature’s determination that a category of people are dangerous is inappropriate. 597 U. S. at 26. But our legislature’s findings are instructive and helpful in demonstrating the danger posed by those who repeatedly drive while intoxicated. We conclude that this firearm prohibition is similar to prohibitions recognized in our nation’s history and traditions.

Second, the State asks us to recognize a historical tradition of restricting firearm possession for people convicted of serious crimes. McLellan and Holloway

⁷ The United States Supreme Court is considering whether 18 U. S. C. §922(g)(3), the federal statute that prohibits possession of firearms by a person who is “an unlawful user of or addicted to any controlled substance” violates the Second Amendment in *United States v. Hemani*, *pet. for cert. filed*, No. 24–1234 (U. S. June 2, 2025) (quoting 18 U. S. C. §922(g)(3)), *cert. granted*, 146 S. Ct. 326 (2025).

contend the founders would not have considered alcohol-related offenses to be serious crimes. We recognize that since the founding era, criminal laws have traditionally imposed far more severe penalties on people convicted of felonies than restrictions on firearm possession. *See generally Medina v. Whitaker*, 439 U. S. App. D. C. 294, 913 F. 3d 152, 158 (2019) (“it is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms”). In addition, the historical analogs recognized in *Rahimi*—affray statutes and going armed laws—are relevant here. 602 U. S. at 698 (“When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”).

These historical traditions demonstrate that categories of people have been temporarily disarmed when they are shown to be dangerous through their serious criminal convictions. But here, we do not understand the State to argue that legislators may disarm any category of persons deemed generally not “responsible”—an approach the U. S. Supreme Court has rejected. *Id.* at 701–02. Rather, the State contends the legislature has the constitutional authority to disarm groups of people whose convictions demonstrate they “are not law-abiding and are unwilling to obey the law.” Opening Br. at 40 (quoting *United States v. Jackson*, 110 F. 4th 1120, 1126 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 2708 (2025)). Here, the recidivist nature of the drunk driving convictions, coupled with the legislature’s specific finding regarding the danger they pose, supports a determination that RCW 9.41.040(2)(a)(i)(D) fits within the founding-era

tradition of regulating certain serious, nonviolent offenses that nonetheless pose “real danger of public injury from individuals.” *Jackson*, 110 F. 4th at 1127 (quoting 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971)).

Third, the State asks us to recognize a historical tradition of disarming individuals likely to abuse alcohol. McLellan and Holloway contend the limit of the legislature’s power is “a ban on carrying firearms while an individual is *presently* under the influence.” Resp’ts’ Answering Br. at 35 (quoting *United States v. Connelly*, 117 F. 4th 269, 282 (5th Cir. 2024)). We recognize a tradition of preventing the harmful consequences of the combined use of alcohol with firearms and a more recent tradition of restricting firearm access for those suffering from alcohol dependence. *See* Opening Br. at 10–11, 49–54 (collecting laws). Further, we agree with the State that RCW 9.41.040(2)(a)(i)(D) “is not triggered by the status of having a chemical dependency, but rather by a person’s having repeatedly taken the dangerous and reckless *action* of driving while drunk.” Reply Br. at 29. None of these traditions in isolation might be sufficient to justify disarming recidivist DUI offenders like McLellan and Holloway, but we do not consider our nation’s historical traditions in isolation, particularly when the legislature is tackling a uniquely modern problem.

Taken together, our nation’s history of limiting the firearms rights of those who have been convicted of serious crimes and those who have a history of dangerous use of intoxicants, such as repeatedly driving while under the influence, is sufficient justification for the regulation here. We hold that the State has

shown RCW 9.41.040(2)(a)(i)(D)’s temporary disarmament of recidivist drunk drivers is consistent with this nation’s historical tradition of disarming groups of people presenting a special danger of misuse.⁸

CONCLUSION

The “Second Amendment is neither a regulatory straightjacket nor a regulatory blank check.” *N. Y. State Rifle*, 597 U. S. at 30. Under the Second Amendment, the temporary firearm prohibition for recidivist drunk drivers in RCW 9.41.040(2)(a)(i)(D) is constitutional without an individualized assessment of McLellan’s or Holloway’s dangerousness. We reverse and remand to the superior court for entry of judgment on the pleadings in favor of the State.

⁸ We would reach the same outcome even if, as the dissent claims, “[t]he history and tradition of firearm restrictions . . . was limited to preventing violent behavior by people who were individually found to be dangerous.” Dissent at 18. As discussed above, individualized findings have not historically been required in the postconviction context. And even if they were required, a vehicle is a dangerous instrument when driven under the influence. Likewise, driving under the influence has a plausible link to physical violence in the same way that combining the use of alcohol and a firearm does. The dissent questions our use of the phrase “plausible link to physical violence.” *See* dissent at 8. By this phrase, we mean more than a possible or speculative connection. Consequently, when the State proves beyond a reasonable doubt that a person has driven under the influence, twice within seven years, our legislature may temporarily disarm them to prevent future violent behavior.

/s/ González, J.

WE CONCUR:

/s/ Stephens, C.J./s/ Melody, J./s/ Montoya-Lewis, J./s/ Madsen, J.P.T.

* * *

WHITENER, J. (dissenting)—Who is among “the people” whose right “to keep and bear arms” is protected by the Second Amendment? U. S. CONST. amend. II. Most recently, in *United States v. Rahimi*, the U. S. Supreme Court said, “[W]e conclude only this: 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.” 602 U. S. 680, 702, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). The question of what is considered a “credible threat” in a Second Amendment analysis remains unanswered. Today, the majority relies on dicta to extend the State’s ability to restrict an individual’s Second Amendment right to keep and bear arms to include those who have never been and may never be convicted of any violent conduct against another person. Majority at 1 (citing *District of Columbia v. Heller*, 554 U. S. 570, 626–27, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)). However, it is clear that *Heller* did not decide the question of *who* may possess firearms, nor did the reference in dicta to “longstanding prohibitions on the possession of firearms by felons and the mentally ill” mean the legal presumption given to the law at issue here is irrebuttable. 554 U. S. at 626. The majority goes too far. I respectfully dissent.

The Second Amendment right presumptively “belongs to all Americans.” *Id.* at 581. “Individual self-

defense is “the *central component*” of the Second Amendment right.” *N. Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 29, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (quoting *Heller*, 554 U.S. at 599)). In *N. Y. State Rifle*, the U. S. Supreme Court provided a framework to determine where a person’s right to bear arms may be limited, stating, “Our holding decides nothing about who may lawfully possess a firearm.” *Id.* at 72 (Alito, J., concurring). *N. Y. State Rifle* requires that we decide first whether the text of the Second Amendment applies to a person and their proposed conduct, and if it does, “the Constitution presumptively protects that conduct.” *Id.* at 24. It is the government’s burden to “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 19. The government is then required to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 24. Only then “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, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961)).

Respondents Geoffrey McLellan and Jackson Holloway were separately convicted at least twice of driving under the influence (DUI) in a seven-year period. Opening Br. of Nicholas W. Brown (Opening Br.) at 12. As a result of those DUI convictions, the State denied both respondents a license to carry a concealed firearm under RCW 9.41.040(2)(a)(i)(D). *Id.* at 13. The legislature passed the law in 2023 after hearing

evidence that recidivist drunk driving may be a predictive risk factor for future firearm violence.¹ *Id.* at 6. Respondents challenged the law as a violation of their Second Amendment right to keep and bear arms. *Id.* at 12–13. The State argued that the law is consistent with the nation’s history of restricting firearm access among individuals who pose a heightened risk of danger to the public, who have been convicted of a serious crime, and/or who misuse alcohol in a way that may cause danger to others. *Id.* at 1–2. The State argued and the majority agrees that there was no violation of the respondents’ Second Amendment right to carry and bear arms. I disagree because *N. Y. State Rifle* requires the State to identify “a well-established and representative historical *analogue*” that is “enough to pass constitutional muster.” 597 U. S. at 30. The State has failed to do so. Therefore, the respondents’ Second Amendment rights were violated.

I. RCW 9.41.040(2)(a)(i)(D) restrictions on the Second Amendment right to bear arms must have a historical analog

The Second Amendment grants Americans the right to possess firearms independent of their participation in military service and to use firearms “for traditionally lawful purposes, such as self-defense within the home.” *Heller*, 554 U. S. at 577. The government may regulate firearms if “the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *N. Y. State Rifle*, 597 U. S. at 17. RCW

¹ The same provision criminalizes firearm possession by individuals convicted of domestic violence, stalking, cyberstalking, cyberharassment, or animal cruelty. RCW 9.41.040(2)(a)(i)(D).

9.41.040(2)(a)(i)(D) falls within the scope of the Second Amendment as it restricts a person’s right to possess firearms. It is therefore the State’s burden to show the law falls within the nation’s historical tradition of firearm regulation. *Id.* Two questions guide a historical analysis: “whether modern and historical regulations impose a comparable burden on the right of armed self-defense [(the how)] and whether that burden is comparably justified” (the why). *Id.* at 29. “[A]nalogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*.” *Id.* at 30. However, courts should not “‘uphold every modern law that remotely resembles a historical analogue,’ because doing so ‘risk[s] endorsing outliers that our ancestors would never have accepted.’” *Id.* (alteration in original) (quoting *Drummond v. Robinson*, 9 F. 4th 217, 226 (3d Cir. 2021)).

In July 2023, the Washington State Legislature passed RCW 9.41.040(2)(a)(i)(D). According to the State, recidivist drunk driving correlates with a heightened risk of firearm violence and there are fewer firearm-related crimes in states that ban firearm possession among recidivist drunk drivers. Opening Br. at 6–8. In support of this assertion, the State indicates that across the United States at least 4 jurisdictions restrict firearm use by individuals who have been convicted of multiple DUIs and another 11 jurisdictions place restrictions on firearm possession by individuals suffering from alcohol dependence.² *Id.*

² MD. PUB. SAFETY CODE §5-L33(B)(4); 18 PA. CONS. STAT. §6105(C)(3); MASS. GEN. LAWS ch. 140, §129B; MASS. GEN. LAWS ch. 90, §24(1)(a)(1); D. C. CODE §7–2502.03; ALA. CODE §13A-L

at 10–11. The State also claims that “at least 47 states have passed laws bringing recidivist drunk driving within the federal felon-in-possession statute, 18 U.S.C. §922(d)(1).” Reply Br. at 17. The statute bans firearm possession among those convicted of a crime punishable by more than one year in prison. Some states require four DUIs to trigger the federal law, while others require only one. In some states disarmament is permanent and in others only temporary. Andrew G. Bowen et al., *Relation of Driving Under the Influence Laws to Access to Firearms Across US States*, 111 AM. J. OF PUB. HEALTH (2021), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2020.305995>.

To further support their position, the State cites *United States v. Goins*, a federal court decision that specifically considered whether disarming a person with multiple DUI convictions is constitutionally permissible. Opening Br. at 27–28 (citing 118 F. 4th 794 (6th Cir. 2024)). In *Goins*, the Sixth Circuit Court of Appeals upheld a felony statute, 18 U.S.C. §922(g)(1), as applied to a defendant who had been convicted at least three times of driving under the influence (as well as drug possession, public intoxication, third-degree criminal mischief, and driving with a suspended license). 118 F.4th at 796–97. The court noted the disarmament was limited to the defendant’s probation period and his “prior convictions for the same dangerous conduct—driving under the

L-72; HAW. REV. STAT. §134-7(c)(L); IND. CODE §35-47-4-1; KAN. STAT. §21-6301(9), (13); MO. REV. STAT. §571.070; N.J. STAT. §2C:58-3; OHIO REV. CODE §2923.13(A)(4); S.C. CODE §16-23; TENN. CODE ANN. §39-17-1316; TEX. GOV’T CODE §411.172; W. VA. CODE §61-7-7(a)(2).

influence—evince a likelihood of future dangerous conduct.” *Id.* at 804. The court concluded the defendant posed “a danger to public safety” because of his repeated DUIs and held it was constitutional to suspend his right to possess firearms. *Id.* at 804–05.

In another federal case, a district court in the Eastern District of Pennsylvania reached the opposite conclusion as the court in *Goins*, holding that restricting firearm possession under 18 U.S.C. §922(g)(1) was unconstitutional as applied to a defendant who had been arrested for three DUIs. *Williams v. Garland*, No. 17-cv-2641, 2023 WL 7646490 (E.D. Pa. Nov. 14, 2023). The court concluded that “historical regulations on persons deemed dangerous do not present a sufficient historical analogue without showing that the regulated conduct itself is analogous to Plaintiffs.” *Id.* at *4. The court rejected the relevance of historical laws banning presently intoxicated people from possessing firearms because those laws restricted firearm possession only until the person was no longer intoxicated. *Id.* at *5. It added that because the Supreme Court previously held that a DUI “cannot be considered a crime of violence because it lacked a mens rea requirement,” a “DUI cannot be categorically defined as a crime of violence for which there may be historical support for Second Amendment restrictions.” *Id.* (citing *Leocal v. Ashcroft*, 543 U.S. 1, 4, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)).

Here, the State argues that RCW 9.41.040(2)(a)(i)(D) falls within the historical traditions of disarming categories of people (1) “whom the legislature determines would pose a heightened risk of danger if armed,” (2) “who are likely to abuse alcohol,” and (3) “convicted of serious crimes.” Opening

Br. at 1. The majority agrees entirely with the State and holds “that the State’s historical analogs are sufficient to uphold the law.” Majority at 10. I disagree. The State has not shown that the first or second of these traditions are sufficiently analogous to RCW 9.41.040(2)(a)(i)(D) to satisfy *N. Y. State Rifle*. Furthermore, the third tradition justifies categorical restrictions only on those convicted of *violent* crimes, and a DUI does not qualify as a violent crime.

II. A Second Amendment restriction requires a clear threat of physical violence

“When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.” *Rahimi*, 602 U. S. at 698. In *Rahimi*, the U. S. Supreme Court upheld “[a] federal statute prohibit[ing] an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he ‘represents a credible threat to the physical safety of [an] intimate partner,’ or a child of the partner or individual.” *Id.* at 684–85 (third alteration in original) (quoting 18 U.S.C. §922(g)(8)). The State argues that RCW 9.41.040(2)(a)(i)(D) is constitutional because it is sufficiently analogous to the same “surety” and “affray” laws the U. S. Supreme Court relied on in *Rahimi*. Opening Br. at 1, 22. The majority agrees, finding “there is a historical tradition of disarming groups of people who pose a heightened risk of danger, particularly where there is a *plausible link* to physical violence.” Majority at 10 (emphasis added). The majority does not adequately explain why DUI convictions create a “plausible” expectation of potential, future firearm misuse or why the conclusion that a

person who drives under the influence will one day misuse firearms is anything more than speculative. The U. S. Supreme Court requires the State show that there is “a credible threat to the physical safety of another” that would warrant a restriction on an individual’s Second Amendment right to keep and bear arms. *Rahimi*, 602 U. S. at 702. The State has failed to show the existence of any such link here.

McLellan and Holloway were both convicted of having two or more DUIs. Opening Br. at 12. Neither individual carried firearms or committed violent acts. The State cites several studies that do not directly discuss the relationship between DUIs and firearm violence. *Id.* at 6–10. The cited studies are not persuasive or helpful in answering the issue before us. One study considered the prevalence of general alcohol use in intimate partner violence. Marlene C. Lira et al., *Alcohol Policies and Alcohol Involvement in Intimate Partner Homicide in the U. S.*, 57 AM. J. PREV. MED. (2019), <https://pmc.ncbi.nih.gov/articles/PMC6642831/> [https://perma.cc/5BJW-CX5Y]. A second study concluded that “measures of individual, family, and neighborhood substance use—particularly for illicit drugs—increased the risk of becoming a victim of firearm homicide among Philadelphia adolescents.” Emma E. McGinty & Daniel W. Webster, *The Roles of Alcohol and Drugs in Firearm Violence*, 177 JAMA INTERN. MED. (2017), <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2594799>. A third study surveyed the literature on the misuse of firearms while actively intoxicated. Charles C. Branas et al., *Alcohol Use and Firearm Violence*, 38 EPIDEMIOLOG. REV. (2016), <https://pubmed.ncbi.nlm.nih.gov/26811427>. A DUI

recidivist certainly may be dangerous. However, the dangerous conduct addressed in *Rahimi* had a historical analog to the Second Amendment right to keep and bear arms for self-defense. There is no such historical analog for driving under the influence.

The “central component” of the Second Amendment right is individual self-defense. *Heller*, 554 U.S. at 599 (emphasis omitted). The State here, unable to show “a credible threat to the physical safety of another” to warrant temporary disarmament consistent with the Second Amendment, argues that RCW 9.41.040(2)(a)(i)(D) falls within the same historical tradition as surety and affray laws. *Rahimi*, 602 U.S. at 690; Opening Br. at 21–23. The State fails, however, to show that either the “why” or the “how” of RCW 9.41.040(2)(a)(i)(D) is sufficiently analogous to those regulations.

The “why” of surety and affray laws was to prevent people from possessing firearms if they had shown they had or could have *used those firearms* in a way that was dangerous to others.³ *Rahimi*, 602 U.S. at 698–99. While affray laws existed to redress only the immediate violent misuse of a specific dangerous

³ In precolonial times, “surety” laws were “[w]ell entrenched in the common law” and “could be invoked to prevent all forms of violence.” *Rahimi*, 602 U.S. at 695. Some surety laws required bonds from those armed with an “offensive and dangerous weapon.” *Id.* at 696 (quoting former MASS. REV. STAT. ch. 134, § 16 (1835)). Additionally, precolonial “going armed” or “affray” laws prohibited carrying “dangerous or unusual weapons” for the purpose of terrifying others. *Id.* at 697. Those who broke affray laws faced imprisonment and/or forfeiture of their weapons. *Id.* Common law and statutory laws pre- and post-Revolutionary War incorporated affray laws into the colonies and states. *Id.* at 697–98.

weapon, firearms, RCW 9.41.040(2)(a)(i)(D) has a very different purpose of restricting all firearm access by a person who has not acted violently. *Id.* at 697. Affray laws, in particular, regulated people who had “terrified” others *with* “dangerous or unusual weapons.” *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149). The goal of these laws was to curb “conduct [that] disrupted the ‘public order’ and [le[d] almost necessarily to actual violence.” *Id.* (second alteration in original) (quoting *State v. Huntly*, 25 N.C. 418, 421–22 (1843)). In fact, the very word “affray” is “[d]erived from the French word ‘affraier,’ meaning ‘to terrify.’” *Id.* (quoting 4 BLACKSTONE, *supra*, at *145). The phrase implies the disarmed person had some intent to cause harm with their weapon of choice, providing a clear connection to the Second Amendment right of self-defense. The State has not met its burden here to show that the “how” of surety and affray laws is sufficiently analogous to RCW 9.41.040(2)(a)(i)(D).

Similarly, the “why” of surety laws was to be “a form of ‘preventive justice,’” laws that “could be invoked to prevent all forms of violence, including spousal abuse,” and “also targeted the *misuse of firearms*.” *Id.* at 695–96 (emphasis added) (citing 4 BLACKSTONE, *supra*, at *251). Here, the State relies on the logic of early laws that disarmed groups of people based on ethnicity or religion (i.e., all Native American or Catholic people) as support for the proposition that categorical disarmament is historically permissible. Opening Br. at 23–24; *United States v. Duarte*, 137 F.4th 743, 759 (9th Cir. 2025), *cert. denied*, 223 L. Ed. 2d 556 (2026). The *Duarte* court found such disarmament laws “would likely be unconstitutional today

under *other* parts of the Constitution,” and the State here agrees. 137 F.4th at 760; Opening Br. at 24–25. Yet the State argues that the logic of those now unconstitutional laws should control the as-applied analysis here. Opening Br. at 23–25. The majority finds this argument persuasive. Majority at 10–11. However, even accepting the legitimacy of these unconstitutional laws as potential analogs, the “why” of such categorical disarmament is not sufficiently similar to the “why” of RCW 9.41.040(2)(a)(i)(D).

Early U. S. lawmakers disarmed groups of people because they feared potential political dissidence. *Duarte*, 137 F.4th at 761. Under this “modern-day [firearm] regulation” the State disarms people with multiple DUI convictions without even a showing of a “historical precursor[]” that is “analogous enough to pass constitutional muster.” *N. Y. State Rifle*, 597 U. S. at 30. I do not find this regulation to be consistent with our nation’s historical tradition, nor am I persuaded by the State’s use of studies that use predictions of a person’s potential, future dangerous behavior based on nonviolent and unrelated past criminal conduct, to restrict an individual’s Second Amendment right to keep and bear arms. The State has not met its burden here to show that the “why” of surety and affray laws is sufficiently analogous to RCW 9.41.040(2)(a)(i)(D).

Unlike surety and affray laws, RCW 9.41.040(2)(a)(i)(D) does not curb the actual source of the danger. In *Rahimi*, the Court considered the traditions of surety and affray laws to uphold a firearm restriction where the defendant faced domestic *violence* charges. 602 U. S. at 686–87. The Court found that “taken together, the surety and going armed laws

confirm what common sense suggests: When an individual poses a clear threat of *physical violence to another*, the threatening individual may be disarmed.” *Id.* at 698 (emphasis added). The Court reviewed surety and affray laws and showed that early governments contemplated some kind of connection between the conduct and the weapon (i. e., surrendering the actual weapon).⁴ The reason the connection is needed is because the “central component” of the Second Amendment right is individual self-defense. *N. Y. State Rifle*, 597 U.S. at 29 (emphasis and internal quotation marks omitted) (quoting *McDonald*, 561 U.S. at 767). The constitutional presumption protects the person and their proposed conduct. Therefore, any regulation that places a restriction on the Second Amendment right to bear arms for self-defense must fit within our “historical tradition of firearm regulation.” *Id.* at 24. A criminal conviction can constitute an individualized finding of dangerousness for Second Amendment purposes, but only where there is a showing that the criminal conduct meets the threshold of a “credible threat” of physical violence. RCW 9.41.040(2)(a)(i)(D) has no such historical analog because those convicted of DUIs under this statute do not present a credible threat of *physical violence*.

⁴ Furthermore, both surety and affray laws “involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon.” *Rahimi*, 602 U.S. at 699. *Rahimi* “was explicitly based on the fact that a court had made an *individualized* finding of dangerousness.” Resp’ts’ Answering Br. at 21; see *Rahimi*, 602 U.S. at 702 (“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.”).

The State can restrict the recidivist drunk driver from consuming alcohol, and from being in possession of motor vehicles while in possession of alcohol or after consuming alcohol to a level of impairment, but for the State to extend the restriction to the constitutional right to keep and bear arms a historical analog is needed. Surety and affray laws do not provide that analog. Therefore, the State has not met its burden to show that the “how” or the “why” of surety and affray laws is sufficiently analogous to RCW 9.41.040(2)(a)(i)(D).

III. Second Amendment restrictions target “fire-arm misuse”

In this case, we are not asked to answer whether the misuse of alcohol and firearm possession is dangerous. It is. The question here is whether the firearm prohibition of RCW 9.41.040(2)(a)(i)(D) is sufficiently analogous to historical regulations of firearms and alcohol use in the DUI context to permit a restriction under the Second Amendment. The respondents, McLellan and Holloway, did not misuse firearms. They are recidivist DUI offenders who misused alcohol to a level of impairment when they drove motor vehicles. Following the analogy the State provides to affray laws suggests the State could restrict recidivist drunk drivers from consuming and accessing alcohol and operating motor vehicles. The analogy does not justify a restriction on the individual’s right to bear arms.

A historical twin is not required to restrict a Second Amendment right. The State claims the articles it provides show that “frequent risky alcohol use” is a “particularly strong risk factor[] for future violence.”

Opening Br. at 4 (alteration in original) (quoting LAWS OF 2023, ch. 295, § 1(4)). According to the State, the legislature reasonably relied on this data when it passed RCW 9.41.040(2)(a)(i)(D) and reached the same conclusion as the *Goins* court in the Sixth Circuit that “prior convictions for the same dangerous conduct—driving under the influence—evinced a likelihood of future dangerous conduct.” *Id.*; *Goins*, 118 F. 4th at 804. However, even though a historical twin is not required to restrict a Second Amendment right, the crime of DUI and the crime of domestic violence are relevantly similar only if one’s metric is generally “dangerous crimes.” They are not relevantly similar if the applicable metric is a dangerous crime that can “pose a credible threat to the physical safety of another” within the context of disarmament under the Second Amendment. *Rahimi*, 602 U. S. at 702.⁵

The State acknowledges that a prohibition on carrying firearms *while* intoxicated is not the same as a prohibition on carrying firearms *after* driving while intoxicated, yet argues this tradition shows the government has long imposed general restrictions aimed at mitigating “the dangers of mixing alcohol and firearms.” Opening Br. at 53–54 (quoting *Wolford v. Lopez*, 116 F. 4th 959, 986 (9th Cir. 2024), *cert. granted in part*, 146 S. Ct. 79 (2025)). Yet, according to the State and the majority RCW 9.41.040(2)(a)(i)(D) “is consistent with the historical tradition of regulations that mitigate the danger of alcohol combined

⁵ “For instance, a green truck and a green hat are relevantly similar if one’s metric is ‘things that are green.’ They are not relevantly similar if the applicable metric is ‘things you can wear.’” *N. Y. State Rifle*, 597 U. S. at 29 (citation omitted).

with guns.” *Id.* at 49; *see* majority at 13–14. These restrictions have included prohibiting (1) establishments that sell liquor from “keeping gunpowder,” (2) the sale of alcohol to militia members (all of whom were presumably armed), and (3) perhaps most commonly, carrying firearms while intoxicated. Opening Br. at 49–50 (quoting *Wolford*, 116 F.4th at 985). The State notes as additional support that today “11 states restrict firearm access for those suffering alcohol dependence.” *Id.* at 54. However, those laws temporarily removed access to firearms from people who were *presently* intoxicated. Resp’ts’ Answering Br. at 17–18.

We are not asked to decide whether mixing alcohol and firearms is dangerous. It clearly is, but that is not the case before us. Early laws aimed to prevent harm caused by *current* intoxication like DUI laws required refraining from driving and only until a person was no longer intoxicated. While early alcohol-and-firearm laws focused on controlling the threat of imminent harm by forbidding access to weapons over a very short period, RCW 9.41.040(2)(a)(i)(D) restricts access to firearms for five years without a finding that the individual poses or would “pose a credible threat to the physical safety of another.” *Rahimi*, 602 U. S. at 702.

Early American lawmakers were aware that people who consumed alcohol were likely to do so again, but they did not elect to deprive people of firearms for long periods of time solely because they were habitual alcohol users. *See United States v. Connelly*, 117 F.4th 269, 279 (5th Cir. 2024) (“Even as the Founders disarmed Catholics and politically disaffected citizens, they left ordinary drunkards unregulated ... neither

Congress nor the states disarmed alcoholics.”). The State cites no authority that shows the founders disarmed individuals on an ongoing basis for alcohol misuse. The majority interprets early alcohol-related firearm laws as “a tradition of preventing the harmful consequences of the combined use of alcohol with firearms and a more recent tradition of restricting firearm access for those suffering from alcohol dependence.” Majority at 13. However, respondents were not convicted of “alcohol dependence” or combining firearms and alcohol. The respondents were convicted of multiple DUIs, and the State has failed to show that a DUI is sufficiently related to early Second Amendment alcohol and firearm regulations.

IV. Not all felonies require Second Amendment restrictions

The U.S. Supreme Court has stated that “longstanding prohibitions on the possession of firearms by felons and the mentally ill” are “presumptively lawful.” *Heller*, 554 U. S. at 626–27 & n.26. It is not a categorical bar, but a rebuttable presumption. The conduct of people who drive under the influence can be categorized as “dangerous,” but that does not make the conduct “violent.” In Washington, a DUI is defined as a “serious traffic offense,” drawing a distinction from violent crimes. RCW 9.94A.030(45)(a). The history and tradition of firearm restrictions, as explained above, was limited to preventing violent behavior by people who were individually found to be dangerous. It is true that respondents’ recidivist DUI actions placed themselves and others in physical danger. However, the legislature’s purpose in passing RCW 9.41.040(2)(a)(i)(D), by the State’s own

characterization, was not to punish recidivist drunk drivers for creating a public danger but to prevent *potential future firearm misuse* based on data showing a correlation between DUIs and violence. Opening Br. at 29. The State relies on past “dangerous” conduct to infer a likelihood of future “violent” conduct.

The State argues that RCW 9.41.040(2)(a)(i)(D) is constitutional due to the nation’s history of disarming individuals who have been convicted of serious crimes. *Id.* at 40. Respondents argue their criminal activities were nonviolent and the State must show they are individually dangerous to justify disarmament. Resp’ts’ Answering Br. at 21–26; Reply Br. at 8–9. The State counters that “the only federal appellate decisions upholding as-applied challenges to possession bans have been for crimes that are not ‘closely associated with physical danger,’” such as marijuana possession and lying on an application for public benefits. Opening Br. at 36 (quoting *Range v. Att’y Gen. U. S.*, 124 F. 4th 218, 230 (3d Cir. 2024)).

The majority considers this evidence sufficient reason to uphold the law because “the recidivist nature of the drunk driving convictions, coupled with the legislature’s specific finding regarding the danger they pose, supports a determination that RCW 9.41.040(2)(a)(i)(D) fits within the founding-era tradition of regulating certain serious, nonviolent offenses that nonetheless ‘pose real danger of public injury from individuals.’” Majority at 12 (internal quotation marks omitted) (quoting *United States v. Jackson*, 110 F. 4th 1120, 1127 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 2708 (2025)). Interestingly, neither the State nor the majority specifically identifies early nonviolent offenses that led to disarmament, other

than those laws that merited estate forfeiture or execution, such as forgery and horse theft. *Duarte*, 137 F. 4th at 756–57.

The State is depriving individuals of their Second Amendment constitutional right to bear arms *before* they commit a violent crime on the assumption that one day they might. The Second Amendment does not permit such preventative action. *Rahimi*, 602 U. S. at 700. Rather, the Second Amendment grants firearm rights to all citizens unless they are convicted of crimes that show the individual “has been found to pose a credible threat to the physical safety of others.” *Id.* No such showing exists in this case.

Where respondents have been convicted only of dangerous but nonviolent crimes, the national tradition of disarming felons does not provide a sufficient analog to RCW 9.41.040(2)(a)(i)(D). The majority finds that “since the founding era, criminal laws have traditionally imposed far more severe penalties on people convicted of felonies than restrictions on firearm possession,” concluding that is sufficient reason to uphold the restriction here. Majority at 11. However, the fact “[t]hat Founding-era governments punished some nonviolent crimes with death does not suggest the *particular* (and distinct) punishment” of disarmament “is rooted in our Nation’s history and tradition.” *Range v. Att’y Gen. U. S.*, 69 F. 4th 96, 105 (3d Cir. 2023), *vacated and remanded sub nom. Garland v. Range*, 144 S. Ct. 2706 (2024). The right to bear arms is a constitutional right and restrictions on such rights must be “comparably justified” by the nation’s historical tradition. *N. Y. State Rifle*, 597 U. S. at 29. *N. Y. State Rifle* warned us not to “uphold every modern law that remotely resembles a historical

analogue,’ because doing so ‘risk[s] endorsing outliers that our ancestors would never have accepted.’” *Id.* at 30 (quoting *Drummond*, 9 F. 4th at 226).

RCW 9.41.040(2)(a)(i)(D) is an outlier. It violates the respondents’ constitutional rights under the Second Amendment to the U. S. Constitution. I would affirm the trial court and remand.

/s/ Whitener, J.

/s/ Johnson, J.

/s/ Gordon McCloud, J.

/s/ Mungia, J.