Appeal No. 23-CF-0344

DISTRICT OF COLUMBIA COURT OF APPEALS

EMANUEL LEYTON PICON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE IN SUPPORT OF APPELLANT

JACLYN S. FRANKFURT

* ALICE WANG

PUBLIC DEFENDER SERVICE
633 Third Street, NW
Washington, DC 20001
(202) 628-1200
awang@pdsdc.org

* Counsel for Oral Argument

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF AMICUS CURIAE

This appeal presents a constitutional issue of first impression: whether the District of Columbia's restrictions on the possession and carrying of firearms and ammunition by adults under the age of 21 violate the Second Amendment under the text-and-history test set forth in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). This issue is important to clients of the Public Defender Service (PDS). PDS files this brief as amicus curiae in support of the appellant, pursuant to this Court's order of October 10, 2024.

PROCEDURAL HISTORY

Emanuel Leyton Picon was convicted after a jury trial on multiple assault and weapons charges, including carrying a pistol without a license (CPWL), in violation of D.C. Code § 22-4504(a)(1); possession of an unregistered firearm (UF), in violation of D.C. Code § 7-2502.01(a); and unlawful possession of ammunition (UA), in violation of D.C. Code § 7-2506.01(a)(3). App. 7–8. At the time of his charged conduct, Mr. Leyton was 20 years old and thus ineligible to obtain a license to carry a pistol. App. 1; D.C. Code § 7-2509.02(a)(1). He was also disqualified based on his age from registering a firearm—and thus prohibited from possessing a firearm or ammunition—without a parent's written consent and assumption of civil liability associated with the firearm. App. 2; D.C. Code § 7-2502.03(a)(1).

Prior to trial, Mr. Leyton moved to dismiss the CPWL, UF, and UA charges as violations of the Second Amendment under *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). App. 1. The trial court denied the motion, ruling that the District's "age-based restrictions on the right to keep and bear arms are consistent with the text and history of the Second Amendment." *Id.* at 5.

On appeal, Mr. Leyton renewed his Second Amendment claim in a brief filed on February 6, 2024. The United States filed a responsive brief on February 29, 2024, and Mr. Leyton filed a reply brief on September 10, 2024. On September 19, 2024, this Court *sua sponte* removed this case from the oral argument calendar and invited the Public Defender Service and the District of Columbia to participate in this case as amicus curiae and intervenor, respectively.

ARGUMENT

Under D.C. law, adults under the age of 21 are completely prohibited from carrying firearms in public for self-defense. They are also prohibited from keeping firearms and ammunition in their homes without the consent of their parents, who no longer exercise custody or control over them. Because this statutory scheme is inconsistent with the Nation's historical tradition of firearm regulation, it violates the Second Amendment as applied to adults like Mr. Leyton.

I. Legal Framework

The Second Amendment commands that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held "on the basis of both text and history" that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." *Id.* at 592, 595. Fourteen years later, in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), the Supreme Court "made the constitutional standard endorsed in *Heller* more explicit," *id.* at 31, by holding that "the standard for applying the Second Amendment is as follows:"

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 24. The Supreme Court recently applied and further clarified this text-and-history test in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). Together, *Bruen* and

Rahimi set forth several important constitutional principles that courts must apply when adjudicating Second Amendment challenges.

First, in the "text" portion of the text-and-history test, the only question is whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 597 U.S. at 24. If the challenged statute "regulates arms-bearing conduct," "the Constitution presumptively protects that conduct," and the government "bears the burden to 'justify its regulation'" "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 17, 19, 24; *Rahimi*, 144 S. Ct. at 1897 (quoting *Bruen*, 597 U.S. at 24).

Second, in the "history" portion of the text-and-history test, "not all history is created equal." *Bruen*, 597 U.S. at 34. Because "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," *id.* (quoting *Heller*, 554 U.S. at 634–35) (emphasis in *Bruen*), the historical precedent identified by the government must reflect "the public understanding of the right [to keep and bear arms] when the Bill of Rights was adopted in 1791," *id.* at 37.[1] Although "evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century'" can provide helpful "confirmation" of its original meaning at the time of ratification, *id.* at 35,

[1] *Bruen* and *Rahimi* acknowledged but did not resolve an "ongoing scholarly debate" about whether state firearm regulations can be justified by historical evidence from 1868, when the Fourteenth Amendment was ratified. *Bruen*, 597 U.S. at 37–38; *Rahimi*, 144 S. Ct. at 1898 n.1. That debate is irrelevant here, however, where the Second Amendment applies directly to the laws of the District of Columbia, *see Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974); *Palmore v. United States*, 290 A.2d 573, 580 n.17 (D.C. 1972).

37 (first quoting *Heller*, 554 U.S. at 605; and then quoting *Gamble v. United States*, 587 U.S. 678, 702 (2019)), such post-ratification evidence is "secondary" and "cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence" from the founding era, *id.* at 35, 66. *See also id.* at 36–37 ("The belated innovations of the mid- to late-19th century courts come too late to provide insight into the meaning of the Constitution in 1787" (quoting *Sprint Communications Co. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting)) (brackets and quotation marks omitted)); *id.* at 66 (rejecting "late-19th-century evidence" based on its "temporal distance from the founding"); *Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring) (explaining that, although post-ratification history can "reinforce our understanding of the Constitution's original meaning," "the history that matters most is the history surrounding the ratification of the text," as "that backdrop illuminates the meaning of the enacted law," and history that "long postdates ratification does not serve that function").

Third, although the meaning of the Second Amendment "is fixed according to the understandings of those who ratified it," its "historically fixed meaning applies to new circumstances," *Bruen*, 597 U.S. at 28, and does not "suggest a law trapped in amber," *Rahimi*, 144 S. Ct. at 1897. The Second Amendment's "reference to 'arms,'" for example, "does not apply only to those arms in existence in the 18th century," and instead "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582) (brackets and quotation marks omitted); *see also Rahimi*, 144 S. Ct. at 1897. Likewise, historical bans on

carrying firearms in "sensitive places" like "legislative assemblies, polling places, and courthouses" provide historical justification for "modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places," even if those places were not considered "sensitive" at the time of the founding. *Bruen*, 597 U.S. at 30.

Fourth, while the challenged statute need not "precisely match its historical precursors," *Rahimi*, 144 S. Ct. at 1898, it must be "'relevantly similar' to those founding era regimes in both *why* and *how* it burdens the Second Amendment right," *id.* at 1901 (emphases added) (quoting *Bruen*, 597 U.S. at 29); *see Bruen*, 597 U.S. at 29 ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." (quoting *Heller*, 554 U.S. at 599) (emphasis in *Bruen*) (quotation marks omitted)). "For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through *materially different means*, that also could be evidence that a modern regulation is unconstitutional." *Bruen*, 597 U.S. at 26–27 (emphases added); *see Rahimi*, 144 S. Ct. at 1898 ("For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing *similar restrictions for similar reasons* fall within a permissible category of regulations. Even when a law regulates arms-bearing for a

permissible reason, though, it may not be compatible with the right if it does so to an *extent beyond* what was done at the founding." (emphases added)).

Finally, the text-and-history test articulated in *Bruen* is the exclusive test for assessing a Second Amendment claim; courts may not consider other factors when deciding the constitutionality of a firearm regulation. "*Only if* a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen*, 597 U.S. at 17 (emphasis added); *see also Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring) ("A regulation is constitutional *only if* the government affirmatively proves that it is 'consistent with the Second Amendment's text and historical understanding.'" (emphasis added) (quoting *Bruen*, 597 U.S. at 26)); *id.* at 1928 (Jackson, J., concurring) ("[P]er *Bruen*, courts evaluating a Second Amendment challenge must consider history *to the exclusion of all else*.").

II. This Court's Prior Second Amendment Decisions Do Not Apply Here.

As the government acknowledges, this Court has never "squarely ruled on the constitutionality of the District's age-based firearm restrictions," much less analyzed them under the *Bruen* text-and-history test. Br. for Appellee 28. The government nonetheless makes it a point to argue that this Court has "repeatedly upheld the District's gun registration and licensing regimes based on reasoning that survives *Bruen*." *Id.* at 25; *see id.* at 25–27 (first citing *Lowery v. United States*, 3 A.3d 1169 (D.C. 2010); then citing *Dubose v. United States*, 213 A.3d 599 (D.C. 2019); and then citing *Brown v. United States*, 979 A.2d 630 (D.C. 2009)). That argument is both irrelevant and incorrect.

First, because this Court's prior decisions upholding the District's firearm registration and licensing scheme did not address the age-based restrictions at issue here, they would not govern this case even in the absence of *Bruen*. *See Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. The rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question. A point of law merely assumed in an opinion, not discussed, is not authoritative." (internal citations and quotation marks omitted)). Indeed, the government does not suggest otherwise in its brief and has waived any claim to the contrary. *See Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) ("It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived.").

Second, contrary to the government's contention, this Court's decisions in *Lowery*, *Dubose*, and *Brown* were not "based on reasoning that survives *Bruen*." Br. for Appellee 25. As explained above, *Bruen* "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 597 U.S. at 26. This Court's previous Second Amendment decisions do not meet this requirement.

In upholding the CPWL statute in *Brown*, this Court did not even mention constitutional text and history, much less apply the text-and-history test prescribed in *Bruen*. Rather, *Brown* merely stated that, while the licensing statute "indisputably imposes a regulatory restriction on the right to bear arms," it does not violate the

Second Amendment because it "does not stifle a *fundamental* liberty" and "does not appear as a *substantial* obstacle to the exercise of Second Amendment rights." *Brown*, 979 A.2d at 639 (emphases added).

Both strands of reasoning have been overruled by the Supreme Court. The Court held in *McDonald v. Chicago*, 561 U.S. 742 (2010), that the right to possess and carry firearms is indeed "fundamental." *Id.* at 778. And as explained above, the Court held in *Bruen* that the constitutional validity of a firearm regulation depends *only* on whether it is consistent with the Second Amendment's text and history. *Bruen*, 597 U.S. at 17. *Bruen* does not allow a court to pretermit the text-and-history test based on its own determination that the firearm regulation "does not appear as a *substantial* obstacle to the exercise of Second Amendment rights." *Brown*, 979 A.2d at 639 (emphasis added). Indeed, asking "whether the statute burdens a protected interest in a way or to an extent" that makes the Second Amendment's protection "*really worth* insisting upon" is exactly the sort of "judge-empowering" inquiry that the Supreme Court has "expressly rejected." *Bruen*, 597 U.S. at 22–23 (quoting *Heller*, 554 U.S. at 634). Because *Brown* rested on reasoning that has been "substantially undermined by subsequent Supreme Court decisions," it has been "implicitly overruled and thus stripped of its precedential authority." *Fallen v. United States*, 290 A.3d 486, 493 (D.C. 2023) (quoting *Lee v. United States*, 668 A.2d 822, 828 (D.C. 1995)).

The same is true of *Dubose* and *Lowery*. In upholding the UF and UA statutes in *Dubose*, this Court did not engage in the "historical inquiry" or "analogical reasoning" that courts "must conduct" under *Bruen*, 597 U.S. at 28. Instead, *Dubose*

relied on this Court's prior decision in *Lowery*, which simply asserted on plain error review, without any textual or historical analysis, that the District's firearm registration requirements "are compatible with the core interest protected by the Second Amendment." *Dubose*, 213 A.3d at 603 (quoting *Lowery*, 3 A.3d at 1176).

Although *Dubose* also cited the D.C. Circuit's conclusion in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011), that "[b]asic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional," *Dubose*, 213 A.3d at 603 (quoting *Heller II*, 670 F.3d at 1253), that conclusion does not survive *Bruen*. As then-Judge, now-Justice Kavanaugh explained in his dissent, *Heller II*'s historical analysis rested on "several state laws" from "the beginning of the 20th Century" that "required record-keeping by gun *sellers*, not registration of all lawfully possessed guns by gun *owners.*" *Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting) (citing *Heller II*, 670 F.3d at 1253–54 (majority opinion)). These "commercial" laws "provide no support for D.C.'s registration requirement" under "the Supreme Court's history-and tradition-based test," *id.* at 1292, 1294, as they were not "relevantly similar" in why and how they burdened the keeping and bearing of arms, *Bruen*, 579 U.S. at 29, and they came more than a century too late to reflect the original meaning of the Second Amendment, *id.* at 66 (rejecting "late-19th-century evidence" based on its "temporal distance from the founding"); *see Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting) ("D.C.'s law requiring registration of all lawfully possessed guns in D.C. is not part of the tradition of gun regulation in the United States[.]").

Because this Court's prior Second Amendment decisions do not address the issue presented in this case, and in any event do not survive *Bruen*, this Court should either disregard or reject the government's attempt to rely on them.

III. The District's Age-Based Firearm Restrictions Fail the *Bruen* Test.

A. D.C. Law Prohibits All Adults Under Age 21 from Carrying Pistols.

In 1976, the District of Columbia joined the vast majority of states in lowering the legal age of adulthood from 21 to 18. *See* District of Columbia Age of Majority Act, D.C. Law 1-75, § 2 (1976), *codified at* D.C. Code § 46-101 ("Not withstanding any rule of common or other law to the contrary in effect on July 22, 1976, the age of majority in the District of Columbia shall be 18 years of age, except that this chapter shall not affect any common-law or statutory right to child support"); Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 65 (2016), *cited in* Br. for Appellee 32–33. This national trend grew from the ratification of the 26th Amendment in 1971, which decreased the national voting age from 21 to 18,[2] and which itself grew from the reduction in the age for military conscription from 21 to 18 during World War II and protests to the draft during the Vietnam War. *See* Hamilton, *supra*, at 64–65; Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1358–59 (2003), *cited in* Br. for Appellee 33. Today, the "near universal age of majority" in the United States in 18 years old. Hamilton, *supra*, at 65.

[2] *See* U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

Despite being old enough to vote, serve on juries, become naturalized citizens, enter into binding contracts, execute wills, marry, consent to medical treatment, and serve in the military,[3] adults under the age of 21 are prohibited by D.C. law from exercising the Second Amendment "right to carry a handgun for self-defense outside the home," *Bruen*, 597 U.S. at 10. The District of Columbia makes it a felony to carry a pistol without a license, D.C. Code § 22-4504(a), and disqualifies anyone under the age of 21 from obtaining a license, *id.* § 7-2509.02(a)(1).[4] The District also makes it a misdemeanor to possess any type of firearm or ammunition without a registration certificate, *id.* §§ 7-2502.01(a), -2506.01(a)(3), and disqualifies all adults under the age of 21 from obtaining a registration certificate without parental consent and assumption of liability, *id.* § 7-2502.03(a)(1).[5] This appeal challenges the constitutionality of the District's restrictions on the rights of adults under the age of 21 to keep and bear firearms in self-defense.[6]

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[3] *See* Hamilton, *supra*, at 66–76; *United States v. Tucker*, 407 A.2d 1067, 1071 n.5 (D.C. 1979) (noting that the District of Columbia Age of Majority Act "specifically affected eligibility to do various things such as practice a profession, make a will, marry and to enter into a contract"); D.C. Code § 1-1001.02(2)(A) (election); D.C. Code § 11-1906(b)(1)(C) (jury service); D.C. Code § 46-411 (marriage); 8 U.S.C. § 1445(b) (naturalization); 10 U.S.C. § 505(a) (military enlistment).

[4] The District also makes it a felony for a person of any age to carry a rifle or shotgun. *See* D.C. Code § 22-4504(a-1).

[5] These restrictions are far harsher than federal gun laws, which do not prohibit the *possession or carrying* of firearms and ammunition by adults under the age of 21, *see* 18 U.S.C. § 922(x)(2), (5), and prohibit only the *sale* of handguns—but not rifles or shotguns—to adults under the age of 21, *id.* 18 U.S.C. § 922(b)(1).

[6] Because Mr. Leyton was a 20-year-old adult at the time of his charged conduct, he does not challenge the application of the District's age-based firearm restrictions to juveniles under the age of 18. *See* Reply Br. for Appellant 4 n.4.

B. The Second Amendment's Plain Text Covers the Regulated Conduct.

In the "text" portion of the *Bruen* text-and-history test, the sole inquiry is whether the "conduct" regulated by the challenged statute is covered by "the Second Amendment's plain text." *Bruen*, 597 U.S. at 24. As explained above, D.C. law makes it impossible for adults under the age of 21 to carry handguns (and long guns) for self-defense, and it conditions their possession of firearms and ammunition on their parents' consent, even though they are no longer under the custody and control of their parents. Because this statutory scheme unquestionably "regulates arms-bearing conduct," "the Constitution presumptively protects that conduct," and the government "bears the burden to 'justify its regulation.'" *Bruen*, 597 U.S. at 24; *Rahimi*, 144 S. Ct. at 1897.

The government attempts to avoid that burden by arguing that appellant "fails to show that the plain text of the Second Amendment applies to persons under 21." Br. for Appellee 31. But appellant bears no such burden. As the Supreme Court held in *Heller* and reiterated in *Bruen*, the Second Amendment's plain text protects a right of "the people," a term used consistently throughout the Constitution[7] to refer to "all Americans." *Heller*, 554 U.S. at 581; *Bruen*, 597 U.S. at 70 ("the right to bear commonly used arms in public" is "guaranteed to 'all Americans'" (quoting *Heller*, 554 U.S. at 581)); *see Heller*, 554 U.S. at 580 ("[I]n all six other provisions of the

[7] *See, e.g.*, U.S. CONST. amend. II (protecting "the right of *the people* to keep and bear arms" (emphasis added); *id.* amend. I (protecting "the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances" (emphasis added)); *id.* amend. IV (protecting "[t]he right of *the people* to be secure . . . against unreasonable searches and seizures" (emphasis added)).

Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."); *id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), for the proposition that "the people" protected by the First, Second, and Fourth Amendments "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection to this country to be considered part of that community"); *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) ("*Heller* itself . . . interpreted the word 'people' as referring to 'all Americans'" (quoting *Heller*, 554 U.S. at 581)). Because *Heller* held that the plain text of the Second Amendment establishes "a strong presumption" that the right of "the people" to keep and bear arms "belongs to *all* Americans," "not an unspecified subset," *Heller*, 554 U.S. at 580–81 (emphasis added), it is the government's burden to show that adults under the age of 21 are *not* part of "the people"—not the appellant's burden to show that they are. The government fails to meet that burden.

To the extent the government argues that adults under the age of 21 are not part of "the people" protected by the Second Amendment because the legislature has determined that they are not "responsible" enough to keep and bear arms, Br. for Appellee 42, that argument contravenes Supreme Court precedent. Contrary to the government's suggestion, the Supreme Court has never held that the Second Amendment protects only "law-abiding, *responsible* citizens." *Id.* (quoting *Bruen*, 597 U.S. at 26 (quoting *Heller*, 554 U.S. at 635)) (emphasis added in Br. for Appellee). Although the Court used that phrase in *Heller* and *Bruen* "to describe the class of ordinary citizens who *undoubtedly* enjoy the Second Amendment right," it

"said nothing" about whether the right is *limited* to that class of citizens, as that "question was simply not presented." *Rahimi*, 144 S. Ct. at 1903 (emphases added) (first citing *Heller*, 554 U.S. at 635; and then citing *Bruen*, 597 U.S. at 70). And when the question *was* presented in *Rahimi*, the Court specifically "reject[ed] the Government's contention that [a person subject to a domestic violence restraining order] may be disarmed simply because he is not 'responsible,'" emphasizing that such a rule does not "derive from our case law." *Id.*; *see also id.* at 1910 (Gorsuch, J., concurring) ("Not a single Member of the Court adopts the Government's theory" that firearms can be denied "on a categorical basis to any persons a legislature happens to deem, as the government puts it, not 'responsible.'" (first quoting *Rahimi*, 144 S. Ct. at 1903 (majority opinion); and then quoting *id.* at 1944 (Thomas, J., dissenting) (rejecting government's argument that "the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding,'" as that theory "lacks any basis in our precedents and would eviscerate the Second Amendment altogether") (quotation marks omitted)).

Moreover, even if the government could show that the founding generation understood the term "the people" to mean only "law-abiding, *responsible* citizens," Br. for Appellee 42, or even "law-abiding, *adult* citizens," *id.* at 23, its suggestion that the Second Amendment's plain text does not cover adults under 21 today because 18-to-20-year-olds were considered "infants" or "minors" at the time of the founding, *id.* at 29, 32 (brackets removed), is "bordering on the frivolous," *Heller*, 554 U.S. at 582. Just as the term "arms" does not cover "only those arms in existence in the 18th century," *id.*, the term "the people" does not cover only those people

considered "responsible" enough to exercise legal and political rights in 1791—a group "limited essentially to property-owning, taxpaying white males over the age of twenty-one," Karlan, *supra*, at 1345. Rather, just as "the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search," *Heller*, 554 U.S. at 582 (internal citation omitted), the Second Amendment protects modern "members of the political community," *id.* at 580, which now includes people who were disenfranchised at the founding, such as women and people of color. Because there can be no dispute that adults under the age of 21 are "members of the political community" today, they are part of "the people" covered by the plain text of the Second Amendment, and their arms-bearing conduct is presumptively protected. *See Worth v. Jacobson*, 108 F.4th 677, 691 (8th Cir. 2024) (holding that 18-to-20-year-olds are among "the people" protected by the Second Amendment's plain text because, "[e]ven if [they] were not members of the 'political community' at common law, they are today").

C. The Challenged Restrictions Lack Historical Justification.

In the "history" portion of the text-and-history test, the government "bears the burden to 'justify its regulation'" by showing that it is "consistent with the Nation's historical tradition of firearm regulation." *Rahimi*, 144 S. Ct. at 1897; *Bruen*, 597 U.S. at 24. The government fails to meet that burden.

As *Bruen* and *Rahimi* make clear, our Nation's historical tradition of firearm regulation has always included provisions aimed at preventing the dangerous misuse of firearms—a "general societal problem that has persisted since the 18th century." *Bruen*, 597 U.S. at 26; *see Rahimi*, 144 S. Ct. at 1899 ("From the earliest days of the

common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others."). "At the founding, the bearing of arms was subject to regulations ranging from rules about firearm storage to restrictions on gun use by drunken New Year's Eve revelers. Some jurisdictions banned the carrying of 'dangerous and unusual weapons.' Others forbade carrying concealed firearms." *Rahimi*, 144 S. Ct. at 1897 (internal citations omitted).

When the founding generation ratified the Second Amendment in 1791, however, age restrictions were not part of the Nation's historical tradition of firearm regulation, and indeed did not emerge until several generations later, in the latter half of the 19th century. Br. for Appellee 35–36. Although the government contends that the founding generation viewed "minors" or "infants" (defined at common law as anyone under the age of 21) as too immature and irresponsible to exercise many of the legal rights and duties of (white male) adult citizens, *id.* at 32–34 (noting that minors were disqualified from getting married, becoming naturalized citizens, forming enforceable contracts, serving on juries, voting in elections, and serving as peace officers), it presents no evidence that founding-era legislatures ever placed age restrictions on the keeping or bearing of arms for personal defense—a "*pre-existing*" "natural right of resistance and self-preservation" belonging to "the whole people, old and young, men, women and boys," *Heller*, 554 U.S. at 592, 594, 612 (first quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 139 (1765); and then quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)) (quotation marks omitted). Indeed, the ubiquity of founding-era "age qualification[s] for many important activities," Br. for Appellee 33—but not for the constitutionally protected, yet potentially dangerous,

activity of possessing and carrying a firearm—strongly suggests that the founding generation refrained from enacting age-based firearm regulations because they viewed such restrictions as inconsistent with the right codified in the Second Amendment. *See Bruen*, 597 U.S. at 26 ("[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." (emphases added)).

Moreover, even when state legislatures began to enact age-based firearm restrictions in the latter half of the 19th century, they did not prevent adults from carrying weapons that were "'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. Rather, as illustrated by the five statutes highlighted in the government's brief, *see* Br. for Appellee 35–36 (citing statutes from Alabama, Tennessee, Kentucky, Indiana, and the District of Columbia),[8] 19th-

[8] *See* Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Laws 17, 17 (making it unlawful to "sell or give or lend, to any male minor, a bowie knife, . . . or air gun or pistol"); *Code of Tennessee* pt. IV, tit. 1, ch. 9, art. II, § 4864, at 871 (Return J. Meigs & William F. Cooper eds. 1858) ("Any person who sells, loans, or gives, to any minor a pistol, bowie-knife, dirk, Arkansas tooth-pick, hunter's knife, or like dangerous weapon, except a gun for hunting or weapon for defense in traveling, is guilty of a misdemeanor"); Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245 (making it unlawful for "any person, other than the parent or guardian, [to] sell, give or loan, any pistol, dirk, bowie-knife, brass knucks, slung-shot, colt, cane-gun, or other deadly weapon, which is carried concealed, to any minor"); Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59 (making it "unlawful for any person to sell, barter,

century legislatures focused their age-based restrictions on *sales* to *minors* of certain "dangerous and unusual weapons" "not typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, 627, such as pistols, Bowie knives, dirks, slung-shots, sword canes, and brass knuckles, *see supra* note 8, which were otherwise heavily regulated or even banned altogether. *See, e.g.*, *English v. State*, 35 Tex. 473, 474, 476 (1872) (upholding prohibition on carrying "pistols, dirks, daggers, slungshots, sword canes, spears, brass-knuckles and bowie knives" on the ground that such "dangerous or unusual weapons" were not "arms" protected by the Second Amendment), *cited in Heller*, 554 U.S. at 627; *Bruen*, 597 U.S. at 55 (citing 19th-century restriction on going armed with "a dirk, dagger, sword, pistol, or other offensive and dangerous weapon"); *Rupp v. Bonta*, --- F. Supp. 3d ----, 2024 WL 1142061, at *20, *23 (C.D. Cal. March 15, 2024) ("As they did in the colonial and Founding eras, states widely regulated the carry of certain dangerous and unusual weapons—focusing their regulatory efforts during the Antebellum period on Bowie knives, Arkansas Toothpicks, slung-shots, metal knuckles, sword-canes, and other so-called 'deadly weapons'" "associated with unlawful offensive use, instead of lawful self-defense."); Robert J. Spitzer, *Gun Law History in the United States and*

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or give to any other person, under the age of twenty-one years, any pistol, dirk, or bowie-knife, slung-shot, knucks, or other deadly weapon that can be worn, or carried, concealed upon or about the person"); Act of July 13, 1892, ch. 159, §§ 1, 5, 27 Stat. 116, 116–17 (making it unlawful "within the District of Columbia [to] sell, barter, hire, lend or give to any minor under the age of twenty-one years" "any deadly or dangerous weapons, such as daggers, air-guns, pistols, bowie-knives, dirk knives or dirks, blackjacks, razors, razor blades, sword canes, slung shot, brass or other metal knuckles").

Second Amendment Rights, 80 L. & CONTEMP. PROBS. 55, 67 (2017) (noting that regulations of "dangerous or unusual weapons" in "the country's early decades were aimed in part at pistols and offensive knives").

To the extent that 19th-century legislatures treated pistols as "dangerous and unusual weapons" and restricted their sale to minors accordingly, that historical tradition does not justify restricting access to pistols today, now that "handguns are the most popular weapon chosen by Americans for self-defense," *Heller*, 554 U.S. at 629. As *Bruen* explained in rejecting the government's reliance on colonial laws that purportedly prohibited the carrying of handguns as "offensive" arms: "Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.' Thus, even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 629) (internal citation omitted).

Similarly, restrictions on the *sale* of pistols to 18-to-20-year-old *minors* in the 19th century do not justify restricting the *carrying* of pistols by 18-to-20-year-old *adults* today. As the government acknowledges, historical restrictions on the sale of weapons to minors presupposed and reinforced the rights of parents to control the activities of their minor children, Br. for Appellee 34, 44, who were "not recognized as independent legal actors" and were instead "entirely subsumed under the authority of their parents." 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, 8, 11 (2021), *cited in* Br. for Appellee 32; *see also Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("[D]eeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'"). These commercial regulations did not prohibit minors from *carrying* weapons purchased and owned by their parents, and many of them contained specific exemptions for sales to minors authorized by their parents.[9] *See* Br. for Appellee 36 ("The scope of these laws varied, but all of them prohibited 18-to-20-year-olds from purchasing handguns *without the approval of their parents or guardians*" (emphasis added)). Because these laws were premised on the authority of parents to control their minor children's access to firearms, they

[9] *See, e.g.*, Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245 (making it unlawful for "any person, *other than the parent or guardian*, [to] sell, give or loan, any pistol, dirk, bowie-knife, brass knucks, slung-shot, colt, cane-gun, or other deadly weapon, which is carried concealed, to any *minor*" (emphases added)); Mo. Rev. Stat., ch. 24, art. 2, § 1274 (Carter & Regan 1879) (making it unlawful to "sell or deliver, loan or barter to any *minor*, any such weapon, *without the consent of the parent or guardian of such minor*" (emphases added)); 1881 Fla. Laws 87, ch. 3285, § 1 (making it unlawful "to sell, hire, barter, lend or give to any *minor* under sixteen years of age any pistol, dirk or other arm or weapon, other than an ordinary pocket knife, or a gun or rifle used for hunting, *without the permission of the parent of such minor*" (emphases added)); 1897 Tex. Gen. Laws 221, ch. 155, § 1 (making it unlawful to "knowingly sell, give or barter . . . to any *minor*, any pistol, dirk, dagger, slung shot, sword-cane, spear or knuckles made of any metal or hard substance, bowie knife or any other knife manufactured or sold for the purpose of offense or defense, *without the written consent of the parent or guardian of such minor*" (emphases added)).

do not justify restrictions on the arms-bearing conduct of *adults* who are no longer subject to such parental authority, no matter what their age. *See Rahimi*, 144 S. Ct. at 1898 ("As explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition. A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to *modern circumstances*.'" (emphases added) (quoting *Bruen*, 597 U.S. at 29) (brackets and internal citation omitted)).

The government's suggestion that the scope of the Second Amendment's protection is "trapped in amber" at the age of 21 is "bordering on the frivolous." *Rahimi*, 144 S. Ct. at 1897; *Heller*, 554 U.S. at 582. While 18-to-20-year-olds were considered minors at common law, they are undisputedly considered adults today. *See supra* p. 11. Unlike the 18-to-20-year-old minors of the 19th century, the 18-to-20-year-old adults of today are free from the custody and control of their parents, and presumed capable of making their own decisions and exercising the rights and duties of citizenship. *See* Hamilton, *supra*, at 66–76. Adults under the age of 21 can get married, make their own medical decisions, and join the military without the consent of their parents. They can form binding contracts and file their own lawsuits. They can vote and run for elected office, and they can (and must) serve on juries. They can be conscripted to serve in the military, and they can be imprisoned and executed for crimes. And they enjoy all of the other individual freedoms enumerated in the Bill of Rights, with no diminution of protection based on age. Thus, just as the historical treatment of pistols as "dangerous and usual weapons" does not justify

their modern treatment as such when "they are indisputably in 'common use' for self-defense today," *Bruen*, 597 U.S. at 47, the historical treatment of 18-to-20-year-olds as "minors" or "infants" does not justify their modern treatment as such when they are indisputably considered adults today. *Cf. Bellotti*, 443 U.S. at 635 n.13 (explaining that the presumed incapacity of minor children to make their own decisions justifies restrictions on their rights "that would be constitutionally intolerable for adults"). Nothing in the Nation's historical tradition of firearm regulation supports precluding *adults* from exercising their inherent right of armed self-preservation based solely on their age.

Because the District's restrictions on the possession and carrying of firearms and ammunition by adults under the age of 21 are inconsistent with the Nation's historical tradition of firearm regulation, they violate the Second Amendment. Accordingly, appellant's convictions for CPWL, UF, and UA must be reversed.

Respectfully submitted,

/s/ Jaclyn S. Frankfurt
Jaclyn S. Frankfurt, Bar No. 415 252

/s/ Alice Wang
* Alice Wang, Bar No. 495 098

PUBLIC DEFENDER SERVICE
633 Third Street, NW
Washington, DC 20001
awang@pdsdc.org

* Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been served, by this Court's electronic filing system, on Matthew B. Kaplan, Esq., Counsel for Appellant; Chrisellen R. Kolb, Esq., and Eric Hansford, Esq., Counsel for Appellee; and Caroline Van Zile, Esq., and Tessa Gellerson, Esq., Counsel for District of Columbia, this 13th day of November, 2024.

/s/ Alice Wang
Alice Wang