No. 23-CF-0344

(Superior Court No. 2021-CF3-004336)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

EMANUEL LEYTON PICON,

APPELLANT

v.

UNITED STATES,

APPELLEE

Appeal from the Superior Court of the District of Columbia
Criminal Division
(Hon. Robert Okun, Trial Judge)

REPLY BRIEF FOR APPELLANT

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In his opening Brief Appellant Emanual Leyton Picon explained that reversal is required because of improper prejudicial remarks by the prosecutor.[1] That argument is fully addressed in that Brief. Leyton, who was 20 years old at the time of the conduct for which he was convicted, also argued in his Brief that his firearms convictions must be vacated because they were based on statutes that unconstitutionally restricted the rights of 18-20-year-olds to keep and bear arms, in violation of the Second Amendment. Leyton now responds to the government's arguments on this constitutional issue.

ARGUMENT

LEYTON'S FIREARMS CONVICTIONS ARE INCONSISTENT WITH THE CONSTITUTION

As Leyton explained in his opening Brief, the right to "keep and bear arms" set out in the Second Amendment is a fundamental constitutional right and, as is the case with other constitutional guarantees, it cannot be denied to all persons between 18 and 20 years old simply because of their age. Since Leyton filed his opening Brief, two federal appellate courts have endorsed this view.

[1] Leyton is identified by his initials in his opening Brief because this court's April 28, 2023, initial order referred to him by his initials. Consistent with Hispanic naming conventions, "Leyton" is Appellant's principal surname.

A. Recent Decisions Support Leyton's Position

In the first of these recent Second Amendment cases, *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122, 126 (3d Cir. 2024), *reh'g denied*, 97 F.4th 156 (3d Cir. 2024), the Third Circuit ruled that a Pennsylvania statute that "effectively bans 18-to-20-year-olds from carrying firearms outside their homes during a state of emergency" violated the Second Amendment. Subsequently, in *Worth v. Jacobson*, No. 23-2248, 2024 U.S. App. LEXIS 17347, 108 F.4th 677 (8th Cir. July 16, 2024), *reh'g denied*, No. 23-2248, 2024 U.S. App. LEXIS 21237 (8th Cir. Aug. 21, 2024)), the Eighth Circuit struck down a statutory scheme that "bans those under 21 years old from carrying handguns in public."[2] *Lara* and *Worth* are the only two non-vacated federal appellate decisions addressing 18-20-year-olds' Second Amendment rights issued since the Supreme Court's landmark decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), which greatly undermined or invalidated the reasoning of prior lower court decisions on that issue.[3] After ruling that the lower courts had been improperly analyzing the Supreme Court's Second Amendment jurisprudence, *Bruen* set out the test to

[2] This case affirmed *Worth v. Harrington*, 666 F. Supp. 3d 902 (D. Minn. 2023), which Leyton cited in his opening Brief.

[3] In *National Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir. 2023), decided post-*Bruen*, an Eleventh Circuit panel upheld a law imposing firearms restrictions on 18–21-year-olds, but that opinion was vacated on the granting of rehearing en banc, 72 F.4th 1346 (11th Cir. 2023).

determine the constitutionality of firearms regulations. In addition to these two important decisions, in June of this year, the Supreme Court's most recent Second Amendment decision, *United States v. Rahimi*, 144 S. Ct. 1889 (2024), fleshed out that Court's Second Amendment jurisprudence in a manner that supports Leyton's position.

As Leyton explained in his opening Brief, and as this court recognized in *Ward v. United States*, __ A.3d __, No. 16-CO-0241, 2024 D.C. App. LEXIS 256 (D.C. July 18, 2024), *Bruen* mandates a two-pronged analysis to determine whether a challenged firearms regulation is valid. First, a reviewing court must determine if a defendant (or other relevant person) challenging the regulation is "'part of 'the people' whom the Second Amendment protects." *Id.* at *9 (quoting *Bruen*, 597 U.S. at 31). If so, "then the burden falls on the government to show that its regulation is consistent with this Nation's historical tradition of firearm regulation. Only if the government carries that burden can it show that the pre-existing right codified in the Second Amendment … does not protect the defendant's course of conduct." *Id.* at *10 (cleaned up) (quoting *Bruen*, 591 U.S. at 33-34). In determining Second Amendment constitutionality, a court may not look to purported societal benefits associated with a challenged regulation: "the Second Amendment does not permit … 'judges to assess the costs and benefits of

firearms restrictions.'" *Bruen*, 597 U.S. at 23 (quoting *McDonald v. City of Chi.*, 561 U.S. 742, 790 (2010) (plurality opinion)).

B. The Government's Application of the *Bruen* Test Is Muddled

The government, at 23-24, seemingly acknowledges *Bruen*'s two-part test. Nevertheless, it does not separately analyze the two prongs of *Bruen*'s analytical framework. Its position appears to be that the same undifferentiated historical evidence indicates both that 18–20-year-olds are not among "the people," the group protected by the Second Amendment, and that, in any event, restrictions on 18-20-year-olds possessing firearms are consistent with this country's historic tradition of firearms regulations.[4]

C. Leyton Is Part of the People

The government, at 29, seems to think that "persons under 21," including Leyton at the time of his firearms offenses, are not part of the people protected by the Second Amendment "because they were considered 'infants' [minors] in the founding era." But that view is not tenable.

As an initial matter, despite the government's contrary contention, at 32-34, 18–20-year-olds were likely understood to have been protected by the Second

[4] The government mistakenly says, at 31, that Leyton's constitutional challenge to the firearms statutes is a "facial challenge." Leyton asserts that the challenged statutes are unconstitutional as applied to him. However, under the circumstances of this case, the distinction between a facial and an "as applied challenge" may be unimportant.

Amendment in 1791, when it was adopted. In the 1790s the default rule was that males 18-20 served in the militia.[5] Significantly, the Amendment's prefatory clause declares that "[a] well regulated Militia" is "necessary to the security of a free State." *See Heller*, 544 U.S. at 577 ("a prefatory clause" may "resolve an ambiguity in the operative clause"). It is unlikely that the Founders would have

[5] The Militia Act of 1792 required that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." *District of Columbia v. Heller*, 554 U.S. 570, 596 (2008) (quoting Act of May 8, 1792, 1 Stat. 271); *see also id.* at 595 (in founding era it was understood that "the Militia comprised all males physically capable of acting in concert for the common defense"). The 1792 Act is compelling evidence of the Founders' understanding of the age range of the militia. *See also* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495, 498, 533-34 (2019) ("The most common ages for mandatory militia service were from 16 to 60. But by the end of the eighteenth century, the militia mandate had been narrowed in most states to 18 until 45 or 50." Except in Virginia from 1738-1757, through the end of the 1700s, the minimum age for militia service was "never higher" than 18.).

This evidence is not overcome the government's few examples, which supposedly show that, in some states, in some periods, the minimum militia age was higher or lower than 18. The government seems to be cherry-picking. It cites, at 43 & n.10, Virginia laws enacted in 1723 and 1754-55 to show that 21 was that state's normal minimum militia age. But it ignores a 1779 statute setting the minimum at 16, an age that was increased to 18 in 1784. A Bill for Regulating and Disciplining the Militia, 18 June 1779 & n. 2, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0005 (last visited Sept. 4, 2024). And it is difficult to understand why the government cites to *Opinion of the Justices*, 39 Mass. 571, 573 (Mass. 1839), which held that the Massachusetts legislature could, if it wanted, exclude 18-21-year-olds from the militia. The opinion indicates that from at least 1792 members of that age group had been obligated both to participate in the militia and, relatedly, to "keep[] themselves at all times armed." *Id.* at 573.

referred to the militia and then set out a right denied to many members of the militia. Indeed, *Heller* tells us that the members of "the 'militia' in colonial America consisted of a subset of 'the people.'" *Id.* at 650; *see also Lara*, 91 F. 4th at 136 ("That young adults had to serve in the militia indicates that founding-era lawmakers believed those youth could … keep and bear arms.").

It is true, as the government says, that in 1791 the generally recognized age of majority was 21. Nevertheless, as Blackstone explained, minors (then referred to as "infants") had certain rights: "[i]nfants have various privileges, and various disabilities." 1 Blackstone *452.[6] Moreover, as the Supreme Court has observed, early case law indicates that the Second Amendment was understood to protect "the whole people, old and young, men, women and boys." *Heller*, 554 U.S. at 612 (quoting *Nunn v. State*, 1 Ga. 243, 251 (Ga. 1846)). Indeed, after carefully reviewing relevant history, the Ninth Circuit, in an opinion later vacated for other reasons, concluded that "any argument that 18-to 20-year-olds were not considered, at the time of the founding, to have full rights regarding firearms is

[6] One of the government's sources, 1 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 213 (1795), explains that, although at the time of its publication, those under 21 did not have the full rights of adults because they were minors, older minors nevertheless had certain important rights, including the right to make a will, act as an executor, and chose their guardian.

inconceivable." *Jones v. Bonta*, 34 F.4th 704 (9th Cir. 2022) (cleaned up), *vacated*, 47 F.4th 1124 (9th Cir. 2022).[7]

In any event, even if 18-20-year-olds were not part of "the people" at the time the Second Amendment was adopted, they are now. The phrase "the people" in the Second Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Heller*, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). As *Worth* correctly recognizes,

> [s]ince the founding, the guarantee of political rights has constitutionally expanded, especially in the right to vote. *See* U.S. Const. amend. XV (proscribing the abridgment of voting rights based on race); U.S. Const. amend. XIX (proscribing the abridgment of voting rights based on sex); U.S. Const. amend. XXIV (proscribing the poll tax); U.S. Const. amend. XXVI (proscribing the abridgment of voting rights based on age for those over 18). Reading the Second Amendment in the context of the Twenty-Sixth Amendment unambiguously places 18 to 20-year-olds within the national political community.

Worth, 2024 U.S. App. LEXIS 17347, at *19.

[7] *Bonta*, which held unconstitutional a ban on the sale of certain firearms to 18-to-21-year-olds, was vacated and remanded after *Bruen* was issued, presumably because, after conducting its historical analysis, *Bonta* had applied a balancing of interests tests of the type *Bruen* rejected. 34 F.4th at 727. But nothing in *Bruen* undermines *Bonta*'s historical analysis.

Lara agrees, explaining that today, "[i]t is undisputed that 18-to-20-year-olds are among 'the people' for other constitutional rights such as the right to vote, freedom of speech, peaceable assembly, government petitions, and the right against unreasonable government searches and seizures." 91 F.4th at 131 (citations omitted). Consequently, "wholesale exclusion of 18-to-20-year-olds from the scope of the Second Amendment would impermissibly render the constitutional right to bear arms in public for self-defense a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 132 (cleaned up). If, as the government suggests, the Second Amendment only protects persons who were deemed part of the national community in the 1790s, it would only protect "white, landed men, and that is obviously not the state of the law." *Id.* at 131.

In his opening Brief Leyton made the point, now endorsed by *Worth* and *Lara*, that it would be incongruous to interpret the right to keep and bear arms as applying only to persons older than twenty when no other part of the Bill of Rights is applied this way. The government responds, at 40, that "the scope of the Second Amendment" is not "coterminous" with the other amendments because it must be interpreted in accordance with "the Nation's historical tradition of firearm regulation." But the government conflates the content of a protected right with the separate issue of who is protected by that right. The Supreme Court has held that

founding-era history is the exclusive basis for understanding ***what*** firearms regulations are permitted by the Second Amendment. But that is not true with respect to ***who*** is protected by the Amendment. *Lara*, 91 F.4th at 131 ("Although the government is tasked with identifying a historical analogue at the second step of the *Bruen* analysis, [a reviewing court is] not limited to looking through that same retrospective lens at the first step.").

The class of persons protected by other portions of the Bill of Rights has expanded since 1791 and there is no reason for the Second Amendment to be treated differently. For example, in explaining why it thinks those under 21 are not protected by the Second Amendment, the government says, at 33, that, at the founding, such individuals did not have the right to petition the government. But surely no one would today contend that a twenty-year-old does not enjoy this First Amendment-protected right because many decades ago he would have been considered a minor. Moreover, like the Second Amendment, the Fourth Amendment protects the rights of "the people," a concept the Founders might well not have understood to include Black persons and women in addition to, if the government is right, minors. *See, e.g., Scott v. Sandford*, 60 U.S. 393, 407 (1857) ("when the Constitution of the United States was framed and adopted" Black persons "had no rights which the white man was bound to respect"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Through a century plus three decades and

more of [this country's] history, women did not count among voters composing 'We the People'"). But today the Fourth Amendment undisputedly protects such individuals. The same is true of the Second Amendment.

D. The Government Has Not Demonstrated That the Challenged Firearms Prohibitions Are Consistent With Historic Practice

Because Leyton is among the class of persons protected by the Second Amendment, the relevant firearms statutes, which took away his rights because of his age, are unconstitutional, and his convictions pursuant to them must be vacated unless the government has shown that these restrictions on the possession of firearms by persons between 18-20 years of age are "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The government has not made such a showing.

In determining whether a firearms regulation is consistent with this historical tradition, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898 (2024) (citing *Bruen*, 597 U.S. at 26-31)). "In assessing whether a firearm regulation is consistent with historical tradition, *Bruen* advised that courts will often have to analogize the challenged regulation to the firearms regulations that were in place when the Second Amendment was ratified." *Ward*, 2024 D.C. App. LEXIS 256, at *10.

> Determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar…." [F]or 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.

Rahimi, 144 S. Ct. at 1932 (citing *Bruen*, 597 U.S. at 26-31).

The government points to what it contends are two analogues to the District's restrictions on 18-21 year-olds: founding era regulations on minors unrelated to firearms and later age-based firearms restrictions, almost all of which were imposed after the Civil War. The government, at 32-24, presents evidence that the Founders were concerned that those under 21 lacked the "[j]udgment" and "prudence" of older persons and that, consequently, the colonial era legal regime denied them certain rights, including the right to vote, the right to petition, and to enter into "many kinds of contracts." Leyton does not dispute that, in 1791, those under 21 were not treated as adults for a number of purposes. However, as discussed above, 18, not 21, is now the universally recognized age of majority in this country.

More importantly, the government's evidence indicates that the "societal problem" that presumably animates current age-based restrictions, concerns about the maturity of young adults, is not new. What is striking is that, despite this

concern, and despite other colonial-era age-based restrictions on other rights, the government has not identified a single founding-era limitation on the right of those under 21 to bear arms. This "lack of a distinctly similar historical regulation" to address a "a general societal problem that has persisted since the 18th century" "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Rahimi*, 144 S. Ct. at 1932.

The first age-related firearm restriction that the government can point to is an Alabama Statute, enacted in 1856, 65 years after the Second Amendment, which prohibited providing any "air gun or pistol" (but not long guns) "to any male ***minor***." Gov't Br. at 35 (quoting Alabama Act of Feb. 2, 1856, No. 26, § 1, 1856 Ala. Laws 17, 17 (emphasis added)). Two years later Tennessee prohibited giving a ***minor*** a pistol "except a gun for hunting or a weapon for defense in travelling," and two years after that the government asserts that Kentucky prevented anyone other than parents or guardians from providing "any pistol[] … or other deadly weapon[] … to any ***minor***."[8] Gov't Br. at 35-36 (citing *The Code of Tennessee* pt.

[8] The government appears to have seriously misrepresented the Kentucky legislation. The text it cites is in a statute titled "AN ACT to amend an act, entitled 'An act to reduce into one the several acts in relation to the town of Harrodsburg[']" and it is not published in the official statutory compilation under the "Public Acts" heading, but under "Local and Private Acts," along with other locality-specific laws. 1859 Ky. Acts at III, XI-XII, 532 (capitalization altered). This, and the language in other parts of the statute, make it clear that the

(footnote continued next page)

IV, tit. 1 ch. 9, art. II, § 4864, at 871 (Return J. Meigs & William F. Cooper eds.) (1858)); Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245. The government says that these prohibitions applied to those under 21 because, at the time, such persons were minors. *Id.* It adds that after the Civil War, and the 1868 ratification of the Fourteenth Amendment, apparently starting with Indiana in 1875, additional states enacted statutes restricting firearms access by those under 21. According to the government, in this period there was "consistent support for 'laws restricting the sale of dangerous weapons to ***minors***.'" *Id.* at 37 (quoting Jacob Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* ch. 4 & n.211-12 (2019) (emphasis added)).

The government's argument is unconvincing for several reasons. As an initial matter, what is important when analyzing the Second Amendment compliance of District of Columbia firearms regulations is whether they are consistent with the legal framework "in place when the Second Amendment was ratified," in 1791. *Ward*, 2024 D.C. App. LEXIS 256, at *10 & n.6. Not only are there no analogues to the currently challenged statutes in 1791, but the first,

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government-cited restrictive language applied only to Harrodsburg. *Id.* at 241-46. Harrodsburg was in Mercer County, a county that had an 1860 population of only 13,700, including 3,274 slaves. Kenneth H. Williams & James Russell Harris, *Kentucky in 1860: A Statistical Overview*, 103 The Register of the Kentucky Historical Society 743, 747 (2005). Moreover, the statute only applied to weapons that are "carried concealed." 1859 Ky. Acts at 245. In addition to "minor[s]," it also applied to "slave[s]" and "free negro[es]." *Id.*

isolated age-based restriction did not appear for another 65 years. This is compelling evidence that such restrictions were ***not*** "consistent with this Nation's historical tradition of firearm regulation" when the Second Amendment was adopted.[9]

Moreover, all of the government-cited nineteenth century statutes were adopted when persons under 21 were deemed minors for most purposes. Only

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[9] Referencing *Bruen*, *Ward* explained that there is an "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791." 2024 D.C. App. LEXIS 256, at *10 n.6 (quotation marks omitted). The Fourteenth Amendment made most Bill of Rights provisions applicable to the states. Nevertheless, *Ward* held that, for D.C. statutes, only 1791 matters because the District "is treated as part of the sovereign United States," not as a state. *Id.* This language is not dicta—*Ward* was providing binding guidance on how the trial court, on the remand it ordered, was to interpret *Bruen*. *See id.* at *33.

In any event, even though the Supreme Court has not decided the issue, the suggestion that it is 1868 that matters is mistaken. "[I]ndividual rights enumerated in the Bill of Rights and made applicable against the States … have the same scope as against the Federal Government." *Bruen*, 597 U.S. at 37. Moreover, the Supreme Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* (citing cases). Despite this, a few scholars argue that "[w]hen the people adopted the Fourteenth Amendment …, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings." *Id.* at 38. In other words, in 1868 the Second Amendment and the other incorporated amendments suddenly obtained new meanings with respect to both the state and federal government. This implausible theory was properly rejected by *Lara*, 91 F.4th at 134: *see also Rahimi*, 144 S. Ct. at 1901 (challenged statute consistent with Second Amendment because it was "relevantly similar" to "***founding era***" firearms regulatory "regimes." (emphasis added)).

with the ratification of the Twenty Sixth Amendment in 1971 was 18 clearly established as the age of majority. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 64-65 (2016). The most reasonable interpretation of these government-cited statutes is that a few legislatures thought that they could regulate firearms possession by minors, not that they could impose similar regulations on adults entitled to full constitutional rights.[10]

It is true that *Heller* and *Bruen*, the seminal modern Second Amendment cases, referred to nineteenth century statutes and cases in their analyses of that Amendment's meaning. But *Heller* cited to nineteenth century sources to show that the post-ratification "*public understanding*" of the Amendment was consistent with what evidence contemporary to the Bill of Rights' adoption showed: that, from its ratification, the Amendment "conferred an individual right to keep and bear arms." 554 U.S. at 595, 605. *Heller* emphasized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," and that the Second Amendment "codified a *pre-existing* right," a right that existed fully formed at that time and could not be modified by "future legislatures." *Id.* at 592, 634-635. "*Heller*'s interest in mid- to late-19th-century commentary was secondary." *Bruen*, 597 U.S. at 37. "In other words, this 19th-

[10] *Worth*, 2024 U.S. App. LEXIS 17347, at *37, pointed out that "Alabama's [1856] statute … targets only minors, a status not held by 18 to 20-year-olds in Minnesota."

century evidence was treated as mere confirmation of what the Court thought had already been established." *Id.* (quotation marks omitted). Similarly, the nineteenth century cases and statutes *Bruen* cited confirmed earlier evidence supporting that case's holding that restricting firearms carrying to those with "some …special need" was inconsistent with this country's "tradition of firearm regulation." *Id.* at 11, 17, 50-66. *Bruen* explained that, to the extent that there had been "postratification adoption or acceptance of laws … *inconsistent* with the original meaning of the constitutional text," that "obviously cannot overcome or alter that text." *Id.* at 36.

In the present case the government does not seek to use nineteenth century evidence to confirm evidence of the Second Amendment's meaning contemporaneous with its adoption. Instead, it argues that prohibitions on restricting possession of firearms by 18-20-year-olds enacted long after the Second Amendment's adoption—most in the last quarter of the 1800s and beyond—indicate that such restrictions were part of "this Nation's historical tradition of firearm regulation" in 1791. This is not a valid method of constitutional interpretation.

E. *Rahimi* Rejects One of the Government's Principal Arguments

The Supreme Court's recent decision in *Rahimi*, a case mentioned in the government's August 20, 2024, additional authority letter to this court, provides

further support for Leyton's position. The issue in that case was the constitutionality of a federal statute, 18 U.S.C. § 922(g)(8), that prohibits a person from possessing firearms if the person is subject to a "domestic violence restraining order" and "that order includes a finding that [the person] represents a credible threat to the physical safety of" specified persons. *Rahimi*, 144 S. Ct. at 1894 (quotation marks omitted). The Court found the statute, as applied to the appellant, constitutional because, during the founding era, common law "surety laws" and "going armed" laws were used to limit the firearms rights of "individuals found to threaten the physical safety of another." *Id.* at 1899-01. There were significant differences between § 922(g)(8) and these earlier provisions, but the important point, in the Court's view, was that the challenged modern statute was "'relevantly similar' to those founding era regimes in both why and how it burdens the Second Amendment right." *Id.* at 1901 (quoting *Bruen*, 597 U.S. at 30).

The present case differs greatly from *Rahimi*. *Rahimi* made the point, as did *Bruen*, that the government can meet its burden by identifying a "relevantly similar" 1790s-era analogue—it need not find "a 'dead ringer.'" *Id.* at 1898 (quoting *Bruen*, 597 U.S. at 30). However, in the present case, not only is there no relevantly similar colonial-era analogue to the District's 18-20 year-old firearms prohibition, there is no analogue whatsoever.

Rahimi emphasized that its holding was narrow, upholding only a statute targeting "individual[s] found by a court" to be dangerous. *Id.* at 1903. The government had sought more, contending "that Rahimi may be disarmed simply because he is not 'responsible,'" a term it plucked out of context from *Heller* and *Bruen*. *Id.* The court rejected this view, explaining that the term was "vague" and that "such a line" does not "derive from our case law." *Id.*

The government has made a similar, but much broader argument in this case. It says that persons under 21 are not "*responsible*" and, consequently, may be denied their Second Amendment rights. Gov't Br. at 42 (government's emphasis). This is not because there is evidence of lack of responsibility, but because the D.C. Council says so. *Id.* ("The Second Amendment's text and history permits a legislature to draw the line for 'responsible citizens' at age 21.").[11] But the reason

[11] The closest the government gets to showing that permitting 18-21-year-olds to have firearms is especially dangerous is a misleading reference to a single-state study supposedly providing "empirical evidence identifying a relationship between setting the minimum age to purchase handguns at 21 and a decrease in violent crime." Gov't Br. at 21 n.6 (citing Kara E. Rudolph et al., *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides*, 105 Am. J. of Pub. Health e49, e49-e50 (2015), https://perma.cc/A5K8-ZZQT. But this study only purported to measure the overall impact of a new Connecticut gun control regime which, in addition increasing the purchase age to 21, required purchasers to apply for a permit, to be fingerprinted, pass a "strengthened background check," and complete at least eight hours of training. *Id.* at e49. Moreover, according to a review of gun control academic literature, the Rudolph study cannot be relied on because it has "critical methodological concerns."

(footnote continued next page)

the Founders adopted the Bill of Rights was so that the rights they enumerated could not be denied by legislatures. This argument by the government must be rejected, as it was in *Rahimi*.[12]

CONCLUSION

For the foregoing reasons, and those advanced in his opening Brief, Emanuel Leyton Picon's convictions should be reversed. If some but not all of his convictions are reversed this matter should be remanded for sentencing or other appropriate action. The government and Leyton agree that certain of his convictions merge and must, consequently, be vacated. Gov't Br. at 8 n.2.

Rajeev Ramchand, *Effects of Licensing and Permitting Requirements on Violent Crime*, Rand Corp., https://www.rand.org/research/gun-policy/analysis/license-to-own/violent-crime.html (July 16, 2024).

[12] *Rahimi*'s conclusion that an individual's Second Amendment rights can be denied after a judicial determination of dangerousness would not support the view that persons aged 18-20 are collectively members of a dangerous group and can thus be denied Second Amendment rights. That argument was made in *Worth*, 2024 U.S. App. LEXIS 17347, at *25-28, but the Eight Circuit rejected it as unsupported by evidence. It also observed that "[a] legislature's ability to deem a category of people dangerous based only on belief would subjugate the right to bear arms in public for self-defense to a second-class right." *Id.* at *28. In any event, the government has forfeited any such argument here by making it, at best, only by vague implication, and by not making it all in the trial court. *Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n.9 (D.C. 2001) (arguments not made "squarely and distinctly" are forfeited); *Gilchrist v. United States*, 954 A.2d 1006, 1012 n.16 (D.C. 2008) ("Questions not properly raised and preserved" in the court below "will normally be spurned on appeal.").

Date: September 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing (including any appendix or other accompanying documents) was served by this court's electronic filing system, on the date indicated below, on all counsel who have registered for electronic filing, including Chrisellen R. Kolb, counsel for Appellee.

/s/Matthew B. Kaplan
Matthew B. Kaplan
Date: September 10, 2024