SUPPLEMENTAL BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-344

EMANUEL LEYTON PICON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2021-CF3-4336

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SUMMARY OF ARGUMENT

Everyone seems to agree that the Constitution allows *some* age-based firearm restrictions—no one suggests that a legislature lacks authority to prohibit a 12-year-old from possessing a gun. The key dispute in this appeal centers on whether the Second Amendment requires the government to draw the line at age 18, instead of age 21. The Second Amendment's historical-tradition test provides a ready answer: At the time of the founding, the framers understood legislatures to have the authority to set age qualifications for a range of important activities. By far the most common age limitation was age 21, given that younger individuals were understood to be "infants" at common law who lacked wisdom and judgment. As firearms became deadlier in the 19th century, a range of jurisdictions moved to restrict handguns based on age, uncontroversially drawing the same line at age 21. And today, legislatures continue to draw the line for firearms at age 21 based on the same concerns, even as the age of majority has changed for some other rights. Because restrictions on firearm possession by people under age 21 (like the District's current restrictions) would have been valid in 1787, 1868, and even 1968, under the historical-tradition test, such restrictions remain valid today.

Recent legal developments—particularly the Supreme Court's decision in *United States v. Rahimi*, 602 U.S. 680 (2024)—buttress this conclusion. The contrary arguments by Leyton and amicus Public Defender Service (PDS) place

undue reliance on legal developments in the 1970s, arising from the adoption of the Twenty-Sixth Amendment (which lowered the voting age from 21 to 18) and the passage of subsequent state laws that lowered the age of majority from age 21 to age 18. Such modern legal developments play little role in the Second Amendment's historical-tradition test. The Twenty-Sixth Amendment's age-based voting protections do not broadly invalidate other age-based restrictions. Age is not a protected classification akin to the race- and sex-based distinctions that the Fourteenth Amendment broadly prevents. Instead, states retain discretion to establish different minimum ages for non-voting activities. The District's longstanding restrictions on handgun possession and carrying by those under age 21 are constitutional. Leyton's convictions should be affirmed.

ARGUMENT

I. Recent Second Amendment Decisions

A. Supreme Court's *Rahimi* Decision

In *Rahimi*, the Supreme Court clarified the Second Amendment test introduced in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). The Court began with a lengthy warning that some lower courts had "misunderstood the methodology of [the Court's] recent Second Amendment cases," wrongly reading *Bruen* to "suggest a law trapped in amber." *Rahimi*, 602 U.S. at 691. But, *Rahimi* emphasized, "the Second Amendment permits more than just those

regulations identical to ones that could be found in 1791." *Id.* at 691-92. Rather than demanding a "historical twin" for a challenged regulation, a court reviewing a Second Amendment challenge should ask "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Id.* (emphasis added). "Why and how the regulation burdens the right are central to this" principle-based inquiry, and "[d]iscerning and developing the law in this way is a commonplace task for any lawyer or judge." *Id.* (cleaned up). A challenged regulation that "does not precisely match its historical precursors" is still "analogous enough to pass constitutional muster" if it "comport[s] with the principles underlying the Second Amendment." *Id.* at 692 (cleaned up).

Rahimi upheld the constitutionality of 18 U.S.C. § 922(g)(8), a federal statute that prohibits firearm possession by someone subject to a domestic violence restraining order that includes a finding that he represents a credible threat to his partner's safety, as it "fits comfortably within th[e] tradition" of laws "prevent[ing] individuals who threaten physical harm to others from misusing firearms." 602 U.S. at 690. Specifically, the Court pointed to historical "surety laws" that required people found to pose a risk of violence to post a bond (subject to forfeiture if they broke the peace) and to historical "going armed" laws that prohibited going armed in public with dangerous or unusual weapons "to terrify the good people of the land." *Id.* at 694-98. In upholding the constitutionality of § 922(g)(8), *Rahimi* distilled a larger

legal principle from the two historical regimes: "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. The Court acknowledged that "Section 922(g)(8) is by no means identical to these founding era regimes," but concluded that "it does not need to be" because a "prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent." *Id*. (citing *Bruen*, 597 U.S. at 30).

In reaching its decision, the Court reiterated *Heller*'s assurances that the Second Amendment allows "the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse," like felons and the mentally ill. 602 U.S. at 698-99 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008)). The Court rejected "the Government's contention (cf. U.S. Br. 32, 42) that Rahimi may be disarmed simply because he is not 'responsible,'" however, explaining that "'[r]esponsible' is a vague term" which lacks any grounding in the case precedent. 602 U.S. at 701-02. *Rahimi* did not resolve "the '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 when defining its scope (as well as the scope of the right against the Federal Government).'" *Id.* at 692 n.1.

Two concurrences offered guidance that is especially relevant to this appeal. First, Justice Barrett emphasized that "[h]istorical regulations reveal a principle, not a mold," so "a challenged regulation need not be an updated model of a historical counterpart." *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). The concurrence highlighted two "serious problems" with "imposing a test that demands overly specific analogues": "It forces 21st-century regulations to follow late-18th-century policy choices, giving us 'a law trapped in amber.' And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority." *Id.*

Second, Justice Kavanaugh stressed the value of post-ratification history ("sometimes referred to as tradition") in interpreting the Second Amendment. *Rahimi*, 602 U.S. at 723-29 (Kavanaugh, J., concurring). "The collective understanding of Americans who, over time, have interpreted and applied the broadly worded constitutional text can provide good guidance for a judge who is trying to interpret that same text decades or centuries later." *Id.* at 724. Indeed, in *The Federalist* No. 37, James Madison "explained that the meaning of vague text would be 'liquidated and ascertained by a series of particular discussions and adjudications,'" thus "articulat[ing] the Framers' expectation and intent that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text." *Id.* at 725; *see also*

id. at 723-29 (collecting dozens of Supreme Court cases using post-ratification history to interpret Constitution); *id.* at 737 (Barrett, J., concurring) (agreeing that "postenactment history can be an important tool").

B. Circuit Decisions on Age-Based Restrictions

While some appeals on age-based firearms restrictions remain pending (see U.S. Br. 31 n.8),[1] others have been resolved in the wake of *Rahimi*.

On one side, the Tenth Circuit upheld a Colorado law establishing 21 as the minimum purchase age for a firearm. *See Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024). The court held that a law-abiding 18- to 20-year-old is part of "the people" protected by the Second Amendment. *Id.* at 114-17. A minimum purchase age of 21 falls outside of the Second Amendment's plain text, though, because it is a presumptively lawful qualification on the commercial sale of arms. *See id.* at 112-28. Thus, the Tenth Circuit rejected the Second Amendment challenge at *Bruen*'s step one. *Id.* In reaching that conclusion, the Tenth Circuit explained that "the minimum age for firearm purchases need not rise or fall entirely with the age at which most states currently set as the age of majority," emphasizing that at the founding, the legal age of majority was 21. *Id.* at 124-26; *see also id.* at 128-43

[1] *See McCoy & Brown v. ATF*, Nos. 23-2085, 23-2275 (4th Cir.) (calendared for consolidated oral argument Jan. 30, 2025); *Reese v. ATF*, No. 23-30033 (5th Cir. reargued Sept. 23, 2024); *NRA v. Commissioner*, No. 21-12314 (11th Cir.) (en banc) (argued Oct. 22, 2024).

(McHugh, J., concurring) (reaching same result at *Bruen* step two).

On the other side, a few weeks after *Rahimi* issued, the Eighth Circuit struck down a Minnesota law barring 18- to 20-year-olds from lawfully carrying a handgun. *See Worth v. Jacobson*, 108 F.4th 677 (8th Cir. 2024). Although the Eighth Circuit recognized that "our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others," it concluded that "Minnesota has failed to show that 18- to 20-year olds pose such a threat." *Id*. at 695. *Worth* paid relatively little attention to the just-issued *Rahimi* opinion, instead relying primarily on *Bruen* and demanding the sorts of strict historical matches that *Rahimi* rejected. *See* Case Comment, *United States v. Rahimi*, 138 Harv. L. Rev. 325, 334 n.104 (2024) (noting that *Worth* did "not even treat[ ] *Rahimi* as a clarification" of *Bruen*). *Worth* thus committed the same errors as the *Rahimi* dissent and lower court, *see* 108 F.4th at 695-98, eliminating each proffered "historical analogue" one by one as "not sufficiently similar," rather than searching out "the principles that underpin our regulatory tradition." 602 U.S. at 691, 700-01. Instead, *Worth* emphasized that "the Second Amendment's plain text does not have an age limit." 108 F.4th at 692. But this observation proves little, because those under age 21 were "infants" under the law at the founding (see U.S. Br. 32-34; D.C. Br. 16-19), and everyone seems to agree that *some* age-based limits are permissible. *Worth* also discounted much of the relevant history. Although *Bruen* specifically

reserved judgment on the "ongoing scholarly debate" about whether to focus more on 1791 or 1868 sources, *see* 597 U.S. at 37-38, *Worth* decided in just a few sentences to prioritize "Founding-era history," deeming it "questionable whether the Reconstruction-era sources have much weight," and opining that post-enactment history "[c]ertainly" "is not given weight." 108 F.4th at 692-93, 696. *But see Bruen*, 597 U.S. at 35; *Heller*, 554 U.S. at 605; *Rahimi*, 602 U.S. at 723-29 (Kavanaugh, J., concurring); *Antonyuk v. James*, 120 F.4th 941, 972-74 (2d Cir. 2024) ("part[ing] ways" with the *Lara* panel decision and holding that in Second Amendment analysis, "1791 and 1868 are both fertile ground, and the adjacent and intervening periods are likewise places in the historical record to seek evidence of our national tradition of firearms regulation"); *Wolford v. Lopez*, 116 F.4th 959, 980 (9th Cir. 2024) (similar).

A divided Third Circuit panel recently issued a similar decision in *Lara v. Comm'r Pennsylvania State Police*, --- F.4th ---, No. 21-1832, 2025 WL 86539 (3d Cir. Jan. 13, 2025), following the same path as its prior opinion that was discussed in our initial brief (see U.S. Br. 30-31). After we filed our initial brief, the Third Circuit divided 7-6 on whether to rehear the case en banc. *See Lara v. Comm'r Pennsylvania State Police*, 97 F.4th 156 (3d Cir. 2024) (en banc). Six dissenting judges criticized the panel decision on multiple fronts, arguing that the Second Amendment allowed Pennsylvania to ban those under age 21 from possessing firearms. *See id.* at 156-66 (Krause, J., dissenting sur denial of rehearing en banc).

The dissenting judges also protested the panel's methodological failure to consider Reconstruction-era sources. *See id.* The Supreme Court then vacated the panel decision and remanded for further consideration in light of *Rahimi*. *See Paris v. Lara*, No. 24-93, 2024 WL 4486348 (U.S. Oct. 15, 2024). But the majority of the *Lara* panel largely "maintained" its original reasoning (see U.S. Br. 30-31), concluding that *Rahimi* did not meaningfully affect the analysis. *See, e.g.*, 2025 WL 86539, at *1, *4-5, *8, *10, *14. Rather than trying to distinguish the 19th-century sources, the *Lara* majority declined to consider them at all. *See id.* at *10. *But see Antonyuk*, 120 F.4th at 972-74; *Wolford*, 116 F.4th at 980. Judge Restrepo again dissented, maintaining that the constitutional challenge failed at both *Bruen* step one and *Bruen* step two, because "the scope of the right, as understood during the Founding era, excludes those under the age of 21," and the challenged statutory scheme is "consistent with the principles that underpin our regulatory tradition." 2025 WL 86539, at *14-20 (Restrepo, J., dissenting).[2]

[2] As indicated in our initial brief (see U.S. Br. 28), we agree with PDS (see PDS Br. 7-8) that this Court's prior decisions upholding other aspects of the District's registration and licensing schemes do not control the outcome of Leyton's challenge to the age-based restrictions on firearms. While we disagree with PDS about the extent to which those other decisions have survived *Bruen* (compare U.S. Br. 25-27, with PDS Br. 8-11), the Court need not resolve that broader question here.

II. The Historical Tradition Supports Age-Based Restrictions.

Rahimi buttresses our prior arguments (see U.S. Br. 31-45) supporting the constitutionality of the District's age-based firearm restrictions based upon historical tradition.

A. Understanding Leyton's Challenge

Leyton has never claimed that *all* applications of the D.C. age-based restrictions are unconstitutional. His arguments specifically focus on "adults" ages 18 to 20, not "juveniles under the age of 18" (PDS Br. 12 n.4; see Leyton Br. 14, 17-20; Leyton Reply 1, 4-8, 10-12, 16). Thus, Leyton's "as-applied" challenge addresses only whether "the application of the statute, by its own terms, infringe[s] constitutional freedoms *in the circumstances of the particular case.*" *Lowery v. United States*, 3 A.3d 1169, 1175 (D.C. 2010) (cleaned up); *see also Rahimi*, 602 U.S. at 693, 701 n.2. He does not seek to invalidate the statute as a whole.[3]

Leyton complains (Leyton Reply 4) that our initial brief failed to differentiate between the text-based analysis in "*Bruen* step one" (asking whether Leyton is part of "the people" who has a "right" to "keep and bear arms") and the historical-tradition-based analysis in "*Bruen* step two" (asking whether restrictions on firearms

[3] Although our initial brief referenced "Leyton's facial challenge" (U.S. Br. 31), we agree that Leyton is making an as-applied constitutional challenge (see Leyton Reply 4 n.4; D.C. Br. 13-14).

for those under age 21 are consistent with this Nation's "historical tradition"). *See Antonyuk*, 120 F.4th at 964 & n.11 (collecting cases recognizing two *Bruen* steps); *see also Rocky Mountain Gun Owners*, 121 F.4th at 120 (arguing that "a look at history is required at both steps in the test"). That is because we are defending the District's age-based restriction under both steps of the *Bruen* test (see U.S. Br. 31), and the same history supports both arguments: "These approaches will typically yield the same result; one uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away." *Kanter v. Barr*, 919 F.3d 437, 451-52 (7th Cir. 2019) (Barrett, J., dissenting).

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 Second Amendment was ratified in 1791. *Bruen*, 597 U.S. at 37-38. Lower courts have disagreed on the issue since *Bruen*, with some keying in on 1791, *see, e.g.*, *Worth*, 108 F.4th at 692; *Lara*, 2025 WL 86539, at *8-10; others focusing on 1868, *see, e.g.*, *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1322-24 (11th Cir.), *opinion vacated upon granting of rehearing en banc*, 72 F.4th 1346 (11th Cir. 2023); and still others concluding that "1791 and 1868 are both fertile ground," *Antonyuk*, 120 F.4th at 972-74; *see also, e.g.*, *Wolford*, 116 F.4th at 980. This appeal does not require resolution of the issue, given that the

applicable scope of the right "in both 1791 and 1868 was, for all relevant purposes, the same." *Bruen*, 597 U.S. at 37-38; *see also Rahimi*, 602 U.S. at 692 n.1.[4]

As we explained before (see U.S. Br. 39; cf. Leyton Reply 15-16; PDS Br. 4-5), however, even if the 1791 understanding controlled the Second Amendment's scope, 19th-century evidence would remain a "critical tool of constitutional interpretation." *Bruen*, 597 U.S. at 20, 36 (quoting *Heller*, 554 U.S. at 605, 614). Post-ratification history helps to "liquidate" the "meaning of vague constitutional text," just as the framers intended. *Rahimi*, 602 U.S. at 725 (Kavanaugh, J., concurring). Of course, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot

[4] This Court recently suggested in a footnote that *Bruen*'s "observation" about the "1791 or 1868" debate "is not relevant to the District of Columbia, which is treated as part of the sovereign United States rather than a state covered by the Fourteenth Amendment." *Ward v. United States*, 318 A.3d 520, 526 n.6 (D.C. 2024); *see also* Leyton Reply 13-14 & n.9; PDS Br. 4 & n.1. The footnote does not definitively resolve this issue, however. Rather, the Court prefaced its discussion of *Bruen* with a cautionary acknowledgment that "*Bruen* cannot readily be summarized in a few sentences or even a few paragraphs, so the parties and the trial court undoubtedly will carefully study the opinion itself." 318 A.3d at 525. Accordingly, the Court should not place more weight on *Ward* than the case can bear, particularly given that *Ward* did not present the question of how 19th-century sources might affect the Second Amendment analysis, and given that the Supreme Court itself has recognized the complexity of the issue. *Cf. Bruen*, 597 U.S. at 37 (explaining that the "1791 or 1868" debate is relevant to "the scope of the right against the Federal Government," because "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government"); *Rahimi*, 602 U.S. at 692 n.1 (reserving judgment on "1791 or 1868" debate in case involving challenge to federal statute).

overcome or alter that text." *Bruen*, 597 U.S. at 36. But as explained below, there is no viable argument that the Second Amendment in 1791 had an established meaning that was "inconsistent" with the 19th-century statutes limiting the firearm rights of people under age 21. Rather, the District's age-based firearm restrictions comport with the traditional principles from both the founding and Reconstruction.

B. Founding-Era Tradition

At the time of the founding and the adoption of the Second Amendment in 1791, the near-universal age of majority was 21 (see U.S. Br. 32-34; see also D.C. Br. 16-19). Those under age 21 were classified as "infants" at common law, and laws severely limited their rights and activities: infants often could not petition the government, form enforceable contracts, serve on juries, get married, become naturalized citizens, or vote (*id.*). While Leyton (Leyton Reply 6) points to Blackstone's statement that infants "have various privileges, and various disabilities," the "privileges" Blackstone goes on to describe were not the sort of individual rights at issue here: infants were generally not subject to claims of negligence, laches, or "neglect of demanding his right"; they "lose nothing by non-claim"; and they could sue, but only through their guardian or a "next friend" (frequently against a "fraudulent guardian"). 1 William Blackstone, *Commentaries on the Laws of England* 452-53 (1765). Blackstone instead emphasized the limits on infants' ability to exercise key legal rights: "It is generally true, that an infant can

neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him." *Id.* at 453-54. Indeed, Blackstone noted that "their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts." *Id.* at 452.[5] Founding-era parents thus generally retained substantial supervisory authority over their children. *See Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 834 (2011) (Thomas, J., dissenting).

Against that backdrop, it is hard to imagine how the Second Amendment would have been understood at the founding to prevent legislatures from limiting the ability of a 20-year-old "infant" to keep and bear arms. After all, the Second Amendment "codified" "a pre-existing right" that was "inherited from our English ancestors." *Bruen*, 597 U.S. at 20. And while no one has identified any founding-era source specifically addressing whether an "infant" had an individual right to keep and bear arms (none suggesting the existence of such a right, but also none restricting it), such sources are unnecessary. *Rahimi* clarifies that our historical-tradition inquiry is a search for "the principles that underpin our regulatory tradition." 602

[5] Blackstone's recognition of the legal "disabilities" imposed on those under age 21 finds ample support today. "Underlying both the [Incarceration Reduction Amendment Act] and the Supreme Court's Eighth Amendment juvenile jurisprudence is a body of scientific evidence demonstrating that the frontal lobes of the brain, which control executive functions like planning, working memory, and impulse control, may not be fully developed until the mid-twenties." *Bishop v. United States*, 310 A.3d 629, 635 (D.C. 2024) (cleaned up).

U.S. at 691-92. Indeed, if the absence of founding-era age restrictions on firearms were dispositive in the constitutional analysis, that would mean *no* age-based restrictions are permissible—a position that even Leyton and PDS do not defend. Most likely, the framers simply found no need to enact such a law given the state of firearms technology and limited "infant" rights at the time (see U.S. Br. 32-35). But the Second Amendment does not contain a "use it or lose it" requirement for exercising legislative authority. *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). As firearms became more deadly in the 19th century, states responded by enacting restrictions based on age (see U.S. Br. 35-38). Leyton and PDS's demand for founding-era "twins" of today's age-based firearm restrictions (see Leyton Reply 11-14, 17; PDS Br. 17-18) contravenes *Rahimi*'s principle-based inquiry.

In response, Leyton (but not PDS) points to founding-era militia practice and the National Militia Act of 1792 (Leyton Reply 4-6). *But see* U.S. Br. 42 (noting Leyton abandoned that argument in his opening brief). As explained in our initial brief (see U.S. Br. 45), *Heller*'s key holding was to recognize "an individual right *unconnected with militia service*." 554 U.S. at 582 (emphasis added). So, militia-based firearm practices cannot set the scope of the Second Amendment right. Indeed, the lone decision addressing the constitutionality on a ban on minors acquiring firearms (discussed further below) drew this very distinction, interpreting the law to allow a "citizen who is subject to military duty" to keep and bear arms for the

common defense, but not to carry arms as an individual "in times of public peace." *State v. Callicutt*, 69 Tenn. 714, 716 (1878). Possession of firearms within the militia structure also ensured supervision over the minor, akin to the supervision otherwise provided by parents (see U.S. Br. 44-45). Even today, the District's licensing and registration requirements for firearms—including the age-based restrictions at issue here—do not apply to members of the military "or of the National Guard or Organized Reserves when on duty and duly authorized to carry a firearm." D.C. Code § 7-2502.01(b)(1)(C) (registration); D.C. Code § 22-4505(b)(3) (licensing); *see also United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972) (discussing history of exemption). Nor would founding-era militia practice help Leyton anyway. The National Militia Act granted states discretion to exclude those under age 21 from militias, and age cutoffs changed over time, including multiple states at various points setting a minimum age of 21 (see U.S. Br. 42-45).

Given the limited rights of "infants" at the founding, and the irrelevant and inconsistent militia practice at the time, there is little doubt that a 1791 law prohibiting those under age 21 from accessing firearms would have passed Second Amendment muster.

C. Reconstruction-Era Tradition

The 19th-century evidence surrounding the adoption of the Fourteenth Amendment establishes the point even more clearly, with numerous states

uncontroversially restricting those under 21 from possessing pistols (see U.S. Br. 34-39). At least 20 jurisdictions adopted laws along these lines before and after the Civil War, with many of the laws effectively acting as near-twins for the D.C. law that Leyton now challenges. *See also Rocky Mountain Gun Owners*, 121 F.4th at 143 (McHugh, J., concurring) (collecting laws in appendix). Leyton and PDS identify no historical court, commentator, or legislature that called the constitutionality of those prohibitions into question. Instead, the lone judicial decision we have found upheld the law, explaining that a Tennessee law prohibiting the provision of pistols to those under 21 was "not only constitutional as tending to prevent crime but wise and salutary in all its provisions." *Callicutt*, 69 Tenn. at 716-17. Similarly, the "massively popular" Thomas Cooley treatise invoked by *Heller*, *see* 554 U.S. at 616, agreed "[t]hat the State may prohibit the sale of arms to minors." Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883). The widespread acceptance of these laws at the time "provide[s] good guidance" for their constitutionality today. *Rahimi*, 602 U.S. at 724 (Kavanaugh, J., concurring).

PDS and Leyton seek to distinguish these laws in various ways (see Leyton Reply 12-16; PDS Br. 18-22). But their piecemeal attempts to identify different reasons why each law should be disregarded mirrors the approach followed by *Rahimi*'s lone dissenter but rejected by the majority, which derived principles by

looking to historical laws when "[t]aken together." 602 U.S. at 698. In any event, none of their proposed distinctions withstand scrutiny.

Leyton and PDS emphasize (see Leyton Reply 12-15; PDS Br. 20-22) that some of these laws formally applied to "a minor" (at the time age 21), rather than including an age restriction in the text of the statute. *See, e.g.*, 1856 Ala. Laws 17; 1859 Ky. Acts 245.[6] *See generally Rocky Mountain Gun Owners*, 121 F.4th at 143 (McHugh, J., concurring) (collecting laws in appendix). But other laws specifically applied to those under age 21, with no mention of minority. *See, e.g.*, 1875 Ind. Acts 59; 1890 La. Acts 39; 1882 W. Va. Acts. 421; 1890 Wyo. Sess. Laws 140. And still

[6] Leyton accuses us of "seriously misrepresenting the Kentucky legislation" (Leyton Reply 12 n.8), but he fails to substantiate the charge. True, the restriction appears in an act entitled "An act to reduce into one the several acts in relation to the town of Harrodsburg." 1859 Ky. Acts 241. But while some of the sections in the act were expressly limited to Harrodsburg, section 23's prohibition on giving a pistol to a minor was not. *See* 1859 Ky. Acts 245. Courts and commentators have thus consistently construed the 1859 Kentucky law as having statewide effect. *See, e.g.*, *Rocky Mountain Gun Owners*, 121 F.4th at 143 (McHugh, J., concurring); *Worth*, 108 F.4th at 697; *Lara*, 97 F.4th at 161 (Krause, J., dissenting sur denial of rehearing en banc); *Bondi*, 61 F.4th at 1326; *Jones v. Bonta*, 34 F.4th 704, 720 (9th Cir.), *opinion vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022); Duke Center for Firearms Law, https://firearmslaw.duke.edu (last visited Jan. 6, 2025) (classifying law as "state" not "municipal" law); David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 318 & n.733 (2024); Megan Walsh & Saul Cornell, *Age Restrictions and the Right to Keep and Bear Arms, 1791-1868*, 108 Minn. L. Rev. 3049, 3092 (2024). In any event, at the very least, this was a statute passed by the Kentucky General Assembly, thus reflecting a statewide view that limits on giving pistols to minors under 21 are consistent with the right to bear arms.

others gave both conditions, applying to a "minor under the age of twenty-one." *See, e.g.*, 27 Stat. at 116-17 (D.C. law); 1882 Md. Laws 656. These variances in phrasing are differences of form, not substance. The effect of each law was to prohibit those under age 21 from receiving a pistol. Even if today's D.C. law does not "precisely match its historical precursors," it is "analogous enough to pass constitutional muster." *Rahimi*, 602 U.S. at 692.

PDS next argues (see PDS Br. 18-20) that pistols at the time were considered "dangerous and unusual weapons" that could be prohibited under *Heller*. *See* 554 U.S. at 627. But the 20 jurisdictions with age-based firearm restrictions we have cited from the 19th century specifically target carrying of pistols *by those under age 21*, not carrying of pistols generally (see U.S. Br. 34-39). *See also Heller*, 554 U.S. at 629 ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down."). In other words, the historical record offers a clear reason as to "why" these 19th-century laws regulated carrying of pistols by those under age 21 were justified, *see Rahimi*, 602 U.S. at 692: because of age. The fact that those laws "regulated firearm use to address particular problems" of youths possessing firearms is "a strong indicator that contemporary laws imposing similar restrictions for similar

reasons fall within a permissible category of regulations." *Id.*[7]

PDS also seems to suggest that the 1800s laws restricted only "sales" of pistols to minors (see PDS Br. 18-20). That is incorrect. The cited laws make it unlawful to sell *or give* a pistol to someone under age 21—as PDS's own footnote quoting a few of the laws makes clear (see PDS Br. 18 n.8). *See also Rocky Mountain Gun Owners*, 121 F.4th at 143 (McHugh, J., concurring) (appendix). *Heller* deems laws "imposing conditions and qualifications on the commercial sale of arms" (like age restrictions under federal law (see U.S. Br. 21 n.6)) "presumptively lawful regulatory measures." 554 U.S. at 627. But the 1800s statutes we cite prohibited almost all transfers of possession of a pistol, not just commercial sales. True, the statutes formally enforced

[7] *Bruen* specifically rejects the interpretations that PDS offers of allegedly contrary cases (see PDS Br. 19-20). *Bruen* examined *English v. State*, 35 Tex. 473 (1872), and ultimately dismissed it as an "outlier[ ]." 597 U.S. at 64-66. Moreover, as *Bruen* explains, even Texas practice did not support regulating pistols as a "dangerous or unusual weapon"; although *English* held that the Second Amendment protected only "holster pistols, but not other kinds of handguns," the Texas Supreme Court "modified its analysis" in *State v. Duke*, 42 Tex. 455 (1875), and held instead that "the right to bear arms covered the carry of 'such pistols at least as are not adapted to being carried concealed.'" *Bruen*, 597 U.S. at 64-65. Similarly, while the government in *Bruen* argued that three pre-1700 colonial laws supported a right to ban carrying of firearms generally, *Bruen* disagreed. *See* 597 U.S. at 46-50. In *Bruen*'s view, two of the colonial laws were merely "going armed" laws: "[f]ar from banning the carrying of any class of firearms, they merely codified the existing common-law offense of bearing arms to terrorize the people." *Id.* at 47. And the third prohibited concealed carry of tiny "pocket pistols," a prohibition that did not "touch the open carry of larger, presumably more common pistols." *Id.* at 48. *Bruen* thus found no support in these colonial laws for restricting pistols as "dangerous and unusual weapons" even in the 1690s—let alone in the late 1800s.

their prohibitions by regulating the adult who provided the pistol instead of the minor who received it, consistent with the view at the time that "minors were not recognized as independent legal actors." 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, 11 (2021). But the effect of these laws once again was to prevent anyone under 21 from possessing a pistol.[8]

III. 1970s Legal Developments Do Not Alter the Second Amendment's Scope.

Leyton and PDS primarily counter that times have changed. They contend that modern legal developments making 18-to-20-year-olds "adults"—especially the 26th Amendment's lowering the voting age to 18 in 1971, and the District's lowering the legal age of majority to 18 in 1976, *see* District of Columbia Age of Majority Act, D.C. Law 1-75 (1976)—also invalidate age-based firearm restrictions on people aged 18 to 20 (see Leyton Reply 11, 14-15; PDS Br. 11-12, 15-16, 22-23). *See also*

[8] As PDS notes, three of the 20 statutes apparently allowed a parent or guardian to furnish a firearm. *See* 1859 Ky. Acts 245; *Revised Statutes of the State of Missouri* 224 (1879); 1897 Tex. Gen. Laws 221-22; *cf.* 1881 Fla. Laws 87 (applicable only to "minor under 16"). Such a practice comports with the view that minors required parental supervision. Moreover, PDS fails to explain how, in its view, parents in the other 17 states could have authorized a minor to carry the parent's pistol (cf. PDS Br. 21), when the statute (for example) made it unlawful to "sell, trade, give, loan or otherwise furnish any pistol . . . to minors." 1883 Kan. Sess. Laws 159, ch. CV, 1-2.

Worth, 108 F.4th at 695-98 (similar).[9]

Under this theory, those age-based firearms restrictions might well have been valid in 1791 (at the Second Amendment's ratification) or in 1868 (at the 14th Amendment's ratification). And also valid in 1892 (when Congress enacted the predecessor to today's age-based D.C. gun restrictions, *see* 27 Stat. at 116-17) or even in 1968 (when Congress enacted federal age-based gun restrictions (see U.S. Br. 21 n.6)). And those age-based restrictions could become constitutional again if the District and other states returned the age of majority to 21. Indeed, under their theory, such restrictions would seem to be valid even today in states that retain 21 as the age of majority. *See, e.g.*, Miss. Code § 1-3-27; *see also, e.g.*, Ala. Code § 26-1-1 (setting age of majority to 19); Neb. Rev. Stat. § 43-2101 (same).

Nothing in the Supreme Court's cases justifies that uncertain and unstable understanding of the Second Amendment. There is no plausible historical "principle[ ]" that would require legislatures to establish identical age qualifications for access to arms as for activities that do not involve deadly weapons. *Rahimi*, 602 U.S. at 692. "By its plain text, the Constitution does not establish a one-age-fits-all standard for all rights." *Rocky Mountain Gun Owners*, 121 F.4th at 124. In fact, a number of historical age qualifications described the class of regulated individuals

[9] Substantial portions of this section are taken from the federal government's reply brief in *Brown v. ATF*, No. 23-2275 (4th Cir.) filed on November 7, 2024.

by reference to their age, without regard to their designation as minors for other purposes. *See, e.g.*, 1875 Ind. Acts 59; 1890 La. Acts 39; 1882 W. Va. Acts. 421; 1890 Wyo. Sess. Laws 140.

In any event, the modern practices on which Leyton and PDS seek to rely confirm that legislatures retain authority to establish an age qualification of 21. Legislatures continue to set 21 as the age requirement for many activities, including purchasing alcohol, lottery tickets, and tobacco products. *See Nat'l Rifle Ass'n of America v. ATF*, 700 F.3d 185, 204 n.17 (5th Cir. 2012), *abrogated in part by Bruen*, 597 U.S. 1; 21 U.S.C. § 387f(d)(3)(A)(ii). And a substantial majority of states have likewise enacted laws restricting the possession or purchase of arms by 18-to-20-year-olds, including 15 jurisdictions (with the District) that generally bar public carrying of certain firearms by people under age 21.[10] Federal law likewise generally limits licensed sales of handguns to people under age 21 across the country (see U.S. Br. 21 n.6). The age qualifications at issue here thus fall within the range accepted

[10] *See* Conn. Gen. Stat. §§ 29-28(b), 29-35(a); Del. Code tit. 11, § 1448(a)(5) (taking effect July 1, 2025); Fla. Stat. §§ 790.06(1), (2)(b), 790.053(1); Ga. Code §§ 16-11-125.1(2.1), 16-11-126(g)(1), 16-11-129(b)(2)(A); Haw. Stat. § 134-9(a); 430 Ill. Comp. Stat. 66/25(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); Md. Public Safety Code § 5-133(d); Mass. Gen. Laws ch. 140, § 131(d)(iv); Minn. Stat. § 624.714; N.J. Stat. §§ 2C:58-3(c)(4), 2C:58-4(c); N.Y. Penal Law § 400.00(1); Okla. Stat. tit. 21 § 1272(A); R.I. Gen. Laws §§ 11-47-11, 11-47-18; S.C. Code § 23-31-215(A); *see also* States' Amicus Br. at 9-13, *McCoy v. ATF*, No. 23-2085 (4th Cir. filed Dec. 28, 2023) (collecting other under-21 arms restrictions).

by historical and modern legislatures alike.[11]

Nor does it make sense to read the 26th Amendment or the D.C. Age of Majority Act to change the age cutoff for gun restrictions. The 26th Amendment provides that "[t]he 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." We are not aware of any cases suggesting that the 26th Amendment grants a right to exercise other rights beyond voting or limits the government's ability to enact minimum-age restrictions above age 18. The Age of Majority Act "specifically affect[ed] eligibility to do various things such as practice a profession, make a will, marry and to enter into a contract." *United States v. Tucker*, 407 A.2d 1067, 1071 n.5 (D.C. 1979). But it did not affect firearm-related age restrictions. Indeed, just two months after passing the Age of Majority Act, the D.C. Council enacted the Firearms Control Regulations Act of 1975, which contained the predecessor to D.C. Code § 7-2502.03(a)(1), requiring parental permission and assumption of liability for firearm registrants between ages 18 and 21. *See* D.C. Law 1-85, § 203(a)(1) (1976).

[11] Similarly, D.C. law authorizes courts to reduce sentences for some individuals who committed offenses *before the age of 25*, based on the view that "persons under age 25" have "diminished culpability" and on "the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences." D.C. Code § 24-403.03(c)(10).

Likewise, as explained in our initial brief (U.S. Br. 40-41), attempts to analogize to other constitutional amendments do not hold up (cf. Leyton Reply 9). The Second Amendment's historical-tradition test makes the constitutionality of firearms restrictions turn on the historical record, whereas other amendments have distinct legal tests—sometimes explicitly ahistorical ones (see U.S. Br. 40-41). PDS and Leyton mistakenly analogize to race- and sex-based classifications (see Leyton Reply 8-10; PDS Br. 16). These legally suspect classifications implicate the Fourteenth Amendment in a manner that age classifications do not. *See United States v. Virginia*, 518 U.S. 515, 531-34 & n.6 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) ("age is not a suspect classification under the Equal Protection Clause"). Illustrating the problems with the analogy, no one seriously disputes that the Second Amendment allows a legislature to ban children from carrying a weapon. Yet similar age-based bans likely would not fly under other constitutional amendments. *See, e.g.*, *Ent. Merchants Ass'n*, 564 U.S. at 794-95 (First Amendment); *California v. Hodari D.*, 499 U.S. 621 (1991) (Fourth Amendment). Because the District's age-based firearm restrictions would have been valid in 1791 and 1868 and are consistent with the principles underpinning our regulatory tradition, the Second Amendment's historical-tradition test also allows them today.

CONCLUSION

WHEREFORE, the government respectfully submits that, with the exception of the merged convictions, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Matthew B. Kaplan, counsel for intervenor-appellee the District of Columbia, Tessa Gellerson, and counsel for amicus Public Defender Service, Alice Wang, on this 17th day of January, 2025.

/s/
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