No. 22-4609

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America,

Plaintiff-Appellant,

v.

Randy Price,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of West Virginia (No. 2:22-cr-00097)
(Hon. Joseph R. Goodwin)

**BRIEF OF EVERYTOWN FOR GUN SAFETY
AS AMICUS CURIAE IN SUPPORT OF THE
UNITED STATES OF AMERICA AND REVERSAL**

Janet Carter
William J. Taylor, Jr.
Everytown Law
450 Lexington Avenue, P.O. Box 4184
New York, NY 10017
(646) 324-8174
jcarter@everytown.org

*Counsel for amicus curiae
Everytown for Gun Safety*

CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety (formally, Everytown for Gun Safety Action Fund) has no parent corporations. It has no stock and hence no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT............................ 2

ARGUMENT 4

I. If the Court Reaches the Issue of Historical Regulation, the Proper Focus for Its Analysis Is 1868, Not 1791 4

II. This Court Should Reject Any Effort to Dismiss the United States's Historical Analogues as "Outliers" 14

III. This Court Should Take a "Nuanced Approach" to History Because Conditions Warranting the Regulation of Firearms with Obliterated Serial Numbers Did Not Exist Until the 20th Century 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.,
910 F.3d 106 (3d Cir. 2018) 2

Davenport v. Wash. Educ. Ass'n,
551 U.S. 177 (2007) 16

District of Columbia v. Heller,
554 U.S. 570 (2008) 3, 5, 13, 15

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) 8, 9

Friedman v. City of Highland Park,
784 F.3d 406 (7th Cir. 2015) 16

Gould v. Morgan,
907 F.3d 659 (1st Cir. 2018) 7, 8

McDonald v. City of Chicago,
561 U.S. 742 (2010) 8, 16

New York State Rifle & Pistol Ass'n v. Bruen,
142 S. Ct. 2111 (2022) .... passim

Oregon Firearms Fed'n, Inc. v. Brown,
No. 2:22-cv-01815, 2022 WL 17454829 (D. Or. Dec. 6, 2022) 20

Range v. Attorney General United States,
53 F.4th 262 (3d Cir. 2022) 2

Rehaif v. United States,
139 S. Ct. 2191 (2019) 2

Rupp v. Becerra,
401 F. Supp. 3d 978 (C.D. Cal. 2019), *vacated and remanded*, No. 19-56004, 2022 WL 2382319 (9th Cir. June 28, 2022) 2

Teter v. Connors,

460 F. Supp. 3d 989 (D. Haw. 2020), *appeal docketed*, No. 20-15948 (9th Cir. May 19, 2020) 2

United States v. Greeno,
679 F.3d 510 (6th Cir. 2012) 8

United States v. Holton,
No. 3:21-cr-00482, 2022 WL 16701935 (N.D. Tex. Nov. 3, 2022) 6

United States v. Marzzarella,
614 F.3d 85 (3d Cir. 2010) 5

United States v. Reyna,
No. 3:21-cr-00041, 2022 WL 17714376 (N.D. Ind. Dec. 15, 2022) 5, 6

Statutes

1911 N.Y. Laws 444-45, ch. 195, § 2 19

1913 Iowa Acts 308-09, ch. 297, § 10 19

1913 Or. Laws 497, ch. 256, § 3 19

Other Authorities

Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) 11, 12

Brief for Independent Institute as Amicus Curiae, *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S.) 13, 15

Case Completed Against Mullen, Monett Times (weekly ed.), Aug. 26, 1921 18

David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165 (1999) 18

David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205 (2018) 13, 15

Donald C. Stone, *Practical Use of Police Records System*, 24 J. Crim. L. & Criminology 668 (1933) 19

Eric Monkkonen, *Police in Urban America, 1860-1920* 55 (1981) 18

Frank O. Lowden, *Criminal Statistics and Identification of Criminals*, 19 J. Am. Inst. Crim. L. & Criminology 36 (1928) 19

Kurt T. Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation* (Jan. 15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766917 ....11, 12

Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439 (2022) 6, 10

Testimony of Ashley Hlebinsky, United States Senate Subcommittee on the Constitution, Committee on the Judiciary (May 11, 2021), *available* at https://www.judiciary.senate.gov/download/ms-hlebinsky-testimony..... 18

Texas Triangle with a Murder Puzzles Police, Cairo Bulletin, Nov. 29, 1913 17

Transcript of Oral Argument, *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. Nov. 3, 2021) 9

INTEREST OF AMICUS CURIAE

Amicus curiae Everytown for Gun Safety ("Everytown") is the nation's largest gun violence prevention organization, with nearly ten million supporters across the country, including over 225,000 in the five states that make up the Fourth Circuit. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after a gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut. The mayors of 41 cities, towns, and other localities in the states in the Fourth Circuit are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws, as well as a national movement of high school and college students working to end gun violence.

Over the past several years, Everytown has devoted substantial resources to researching and developing expertise in historical firearms legislation. Everytown has drawn on that expertise to file more than 60 amicus briefs in Second Amendment and other firearms cases, offering historical and doctrinal analysis, as well as social science and public policy research, that might otherwise be overlooked. *See, e.g.*, *Hirschfeld v. ATF*, No. 19-2250, Dkt. 21 (4th

Cir.); *Miller v. Smith*, No. 22-1482, Dkt. 42 (7th Cir.); *Teter v. Shikada*, No. 20-15948, Dkt. 73 (9th Cir.). Several courts have expressly relied on Everytown's amicus briefs in deciding Second Amendment and other firearms cases. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 112 n.8 (3d Cir. 2018); *Rupp v. Becerra*, 401 F. Supp. 3d 978, 991-92, 992 n.11 (C.D. Cal. 2019), *vacated and remanded*, No. 19-56004, 2022 WL 2382319 (9th Cir. June 28, 2022); *Teter v. Connors*, 460 F. Supp. 3d 989, 1002-03 (D. Haw. 2020), *appeal docketed*, No. 20-15948 (9th Cir. May 19, 2020); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2210 n.4, 2211 n.7 (2019) (Alito, J., dissenting).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Randy Price was indicted for possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k).[2] For the reasons in the United States's opening brief, Section 922(k) is constitutional under the approach to Second Amendment cases set out in *New York State Rifle & Pistol*

---

[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund its preparation or submission; and, apart from Everytown, no person contributed money intended to fund its preparation or submission.

[2] Price was also indicted for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1); the district court correctly rejected his challenge to that provision, which is not before this Court. *See* J.A. 111-116; *see also Range v. Att'y Gen. U.S.*, 53 F.4th 262 (3d Cir. 2022) (per curiam) (rejecting Second Amendment challenge to Section 922(g)(1) even as applied to individual with non-violent, felony-equivalent conviction).

Ass'n v. Bruen, 142 S. Ct. 2111 (2022). *See* Opening Br. for the United States ("U.S. Br.") at 15-20 (explaining that the Second Amendment's text does not protect possessing a firearm with an obliterated serial number); *id.* at 21-31 (explaining that Section 922(k) is consistent with historical tradition); *id.* at 31-34 (explaining that Section 922(k) is, at the very least, constitutional as applied to those with felony convictions, like Price).

This Court should conclude that Section 922(k) is constitutional at the first, textual step of the *Bruen* analysis. But in case it reaches the issue of whether Section 922(k) is consistent with "the Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2130, Everytown submits this brief to expand on three methodological issues. *First*, the historical analysis should center on the public understanding of the right in 1868, when the Fourteenth Amendment was ratified, not 1791—not only in cases challenging state laws, but also in cases, like this one, challenging a federal law. Moreover, 1868 is not a cutoff; examining "legal and other sources to determine *the public understanding* of a legal text in the period *after* its enactment or ratification" is also "a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (second emphasis added). *Second*, *Bruen*'s analysis reveals that a small number of laws can be sufficient to establish this nation's tradition of firearm regulation, at least so long as there is not

overwhelming affirmative evidence of an enduring tradition to the contrary. *Third*, in reviewing the record of historical laws, this Court should be mindful of the context in which those laws arose. Prohibitions on obliterating serial numbers emerged only after police and prosecutors began using serial numbers for investigating crimes. The absence of such laws in earlier periods provides no evidence that the American people, acting through their elected governments, thought they were unconstitutional; rather, until serial numbers were used to investigate crimes, criminals would not have had reason to obliterate them, and governments would not have seen a need to prohibit their obliteration. In cases that involve such "unprecedented societal concerns or dramatic technological changes," *Bruen* instructs courts to take a "more nuanced approach" to history. *See* 142 S. Ct. at 2132.

ARGUMENT

I. If the Court Reaches the Issue of Historical Regulation, the Proper Focus for Its Analysis Is 1868, Not 1791

Bruen's framework involves a textual inquiry and a historical inquiry. Courts first must ask whether "the Second Amendment's plain text covers an individual's conduct." 142 S. Ct. at 2129-30. If so, then courts move on to ask whether the government has shown that its regulation is "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. *See generally id.* at 2134-38 (separating application of test into Part III.A (text) and Part III.B

(history)). If not, then the law is constitutional and the inquiry ends: self-evidently, if conduct or weapons are outside the Second Amendment's protection, then the government may regulate that conduct or those weapons without infringing the Second Amendment. *See United States v. Reyna*, No. 3:21-cr-00041, 2022 WL 17714376, at *5 (N.D. Ind. Dec. 15, 2022) (dismissing defendant's challenge to indictment and plea because "§ 922(k)'s regulated conduct is outside [the] scope of the Second Amendment" and that fact "is enough to decide" the case; declining to reach historical inquiry); *see also Bruen*, 142 S. Ct. at 2126, 2141 n.11 (explaining that a presumption that the Constitution protects a challenger's conduct arises *after* ("when" or "because") the textual inquiry is satisfied).

As the United States explains, the text of the Second Amendment does not encompass a right to possess a firearm with an obliterated serial number. The Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, and law-abiding citizens do not typically possess firearms with obliterated serial numbers. *See* U.S. Br. at 17-18; *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010) ("[W]e … cannot conceive of a lawful purpose for which a person would prefer an unmarked firearm[.]"); *see also* U.S. Br. at 18-20 (identifying additional reasons why possessing firearms with obliterated serial

numbers falls outside the Second Amendment's text); *Reyna*, 2022 WL 17714376, at *5 (dismissing challenge to Section 922(k) because regulated conduct falls outside Second Amendment); *United States v. Holton*, No. 3:21-cr-00482, 2022 WL 16701935, at *4 (N.D. Tex. Nov. 3, 2022) (dismissing challenge to Section 922(k) because it "does not infringe an individual's right to possess a firearm"; considering and agreeing with government's historical analysis in the alternative). This Court should reverse the district court's decision under the first, textual inquiry of *Bruen*'s framework.

If, however, the Court proceeds to the second, historical inquiry, it should conclude that the most relevant time period for that inquiry centers on 1868, when the Fourteenth Amendment was ratified. That ratification not only made the Second Amendment applicable to the states, but, as scholars have explained, "it also requires an updated 1868 understanding of the Bill of Rights itself." Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1441 (2022); *see Bruen*, 142 S. Ct. at 2138 (citing pre-publication version of Professor Lash's article). Accordingly, under this originalist approach, it is the 1868 understanding of the right to keep and bear arms that should inform all Second Amendment cases after *Bruen*—including challenges, like this one, to federal gun laws.

To understand why this is the correct rule for cases challenging federal laws, it is necessary first to understand why it is correct for cases challenging state laws. In a case involving a state law, focusing on 1868 is the only way to answer the originalist question: How did the people understand the right at the time of its adoption? There was no right to keep and bear arms constraining the states under the U.S. Constitution until 1868; as *Bruen* correctly observed, a state "is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." 142 S. Ct. at 2137. Thus, when the people chose to extend the Bill of Rights to the states in 1868, *their* understanding of the scope of each right at that time should control the originalist analysis today. In a case against a state, to elevate a founding-era understanding of the right over the Reconstruction-era understanding would be to reject what the people understood the right to be at the time they gave it effect.

Several circuits reached this conclusion in analyzing the tradition of firearm regulation at the first, historical step of the Second Amendment framework that courts applied prior to *Bruen*.[3] *See Gould*, 907 F.3d at 669

[3] Between *Heller* and *Bruen*, every federal court of appeals to address the issue concluded that analyzing Second Amendment claims should proceed in two steps: a historical step, in which courts examined whether the challenged law restricted conduct falling within the scope of the Second Amendment, as historically understood; and, if so, a means-end scrutiny step, where courts

("Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified)."); *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("*McDonald* [*v. City of Chicago*, 561 U.S. 742 (2010),] confirms that if the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified."); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (following *Ezell*).

Bruen does not alter that conclusion; the step-one analyses in these cases remain, as a general matter, good law. *See* 142 S. Ct. at 2138 (leaving open the question whether 1868 or 1791 is the correct focus); *id.* at 2127 (concluding that "[s]tep one of the predominant framework [applied in the lower courts before *Bruen*] is broadly consistent with *Heller*"). Moreover, there is good reason for these conclusions: insisting that the 1791 understanding should apply against the states does not make sense in light of the Supreme Court's lengthy analysis in *McDonald* of the understanding of the right to keep and bear arms around 1868. *See McDonald*, 561 U.S. at 770-78 (plurality opinion); *id.* at 826-38 (Thomas, J., concurring in part and concurring in the judgment). It

---

examined the fit between the government's interest and the challenged law, usually under intermediate scrutiny. *See Bruen*, 142 S. Ct. at 2126-27; *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018) (citing cases), *criticized by Bruen*, 142 S. Ct. at 2124, 2126-27.

would be extraordinary if the public understanding of the right in 1868 were so central to *whether* the right was incorporated against the states, but irrelevant to *what* right was incorporated. That is presumably why the Seventh Circuit, in an opinion by Judge Sykes, reads *McDonald* to have "confirm[ed] that when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified." *Ezell*, 651 F.3d at 702.

Further confirmation that 1868 is the correct focus, at least as to Second Amendment challenges to state gun laws, appears in the *Bruen* oral argument, where the following exchange took place between Justice Thomas and former Solicitor General Paul Clement as counsel for the NRA's New York affiliate:

> JUSTICE THOMAS: [Y]ou mentioned the founding and you mentioned post-Reconstruction. But, if we are to analyze this based upon the history or tradition, should we look at the founding, or should we look at the time of the adoption of the Fourteenth Amendment, which then, of course, applies it to the states?
>
> MR. CLEMENT: So, Justice Thomas, I suppose, if there were a case where there was a contradiction between those two, you know, and the case arose in the states, I would think there would be a decent argument for looking at the history at the time of Reconstruction … and giving preference to that over the founding.

Tr. of Oral Arg. at 8:2-17, *Bruen* (No. 20-843).

In sum, originalist analysis compels applying the 1868 understanding in a case challenging a state law. The next question is what the rule should be for challenges, like this one, to federal gun laws, to which the Second Amendment applies directly rather than through the Fourteenth Amendment. To be sure, the choice between 1791 and 1868 is a less straightforward one with respect to such challenges. If the public understanding of the Bill of Rights changed between ratification in 1791 and incorporation in 1868, then "[o]riginalists seem," at first glance, to be "forced to either abandon originalism or accept a world in which we have two Bills of Rights, one applicable against the federal government and invested with 1791 meanings and one incorporated against the states and invested with 1868 meanings." Lash, 97 Ind. L.J. at 1441. But *Bruen* rejected the possibility of different standards for the state and federal governments. 142 S. Ct. at 2137 ("[W]e have made clear that 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."). Accordingly, originalists must justify applying either the 1868 understanding or the 1791 understanding (where they conflict) to all levels of government.

Existing doctrine does not resolve this choice between 1791 and 1868: *Bruen* noted prior decisions that had "assumed" that the scope for both state

and federal governments "is pegged to the public understanding … in 1791." *Id*. But if the majority believed those decisions controlled the issue, it would have said so. Instead, the Court expressly left open the question whether 1868 or 1791 is the relevant focus, and pointed to "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 2138. And the Court then cited two scholars who support the 1868 view, Professors Akhil Amar and Kurt Lash, and none who supports the 1791 view. *See id.* (citing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* xiv, 223, 243 (1998), and Kurt T. Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation* (Jan. 15, 2021) (manuscript, at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766917 (now published at 97 Ind. L.J. 1439)).

On Professor Amar's account, when the Fourteenth Amendment was ratified, then-contemporary understandings of incorporated rights could transform their meaning not only against the states, but also as to the federal government.[4] More recently, Professor Lash wrote—as quoted in *Bruen*—

[4] *See* Amar, *The Bill of Rights*, at xiv (account is "attentive to the possibility" that a "particular principle in the Bill of Rights may change its

"When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings." Lash, manuscript, at 2; *see Bruen*, 142 S. Ct. at 2138. On this view, too, 1868 meanings bind both the states and the federal government.

The 1868 view is also consistent with the passage in *Bruen* instructing the lower courts on historical methodology through the example of sensitive places restrictions. There, the Court indicated that "18th- *and 19th-century*" laws contained adequate restrictions on the possession of guns in legislative assemblies, polling places, and courthouses to satisfy its historical analysis, 142 S. Ct. at 2133 (emphasis added)—an incomprehensible statement if the Court believed that the 18th century was the only relevant period. Notably, in the pages of the article and brief the Court cited for that proposition, *see id.*, all of

---

shape in the process of absorption into the Fourteenth Amendment"); *id.* at 223 ("[W]hen we 'apply' the Bill of Rights against the states today, we must first and foremost reflect on the meaning and spirit of the amendment of 1866, not the Bill of 1789. … [I]n the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill may be subtly but importantly transformed[.]"); *id.* at 243 (arguing that "the Fourteenth Amendment has a doctrinal 'feedback effect' against the federal government"); *see also id.* at 283 ("[W]ords inserted into the Constitution in 1791 must be read afresh after 1866.").

the 19th-century laws restricting guns in any of the three locations the Court listed were from the *late* 19th century.[5]

For the reasons set out in the United States's brief, this Court should conclude that Section 922(k) is constitutional even if it focuses its analysis on the period around 1791. *See* U.S. Br. at 21-31. But if this Court prefers to settle the issue the Supreme Court left open now, to guide district courts in cases where the choice of 1868 or 1791 might be determinative, it should conclude that 1868 is the correct focus. Moreover, 1868 is neither a starting-line nor a cutoff; *Heller* and *Bruen* both examined history preceding even 1791, *see Heller*, 554 U.S. at 592-93; *Bruen*, 142 S. Ct. at 2135-36, 2142-45, and *Heller* instructs that "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period *after* its enactment or ratification" is also "a critical tool of constitutional interpretation," 554 U.S. at 605 (second emphasis added); *see also Bruen*, 142 S. Ct. at 2127-28 (quoting same). *Bruen* clarified that, under this passage in *Heller*, materially later history that

[5] *See* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205, 244-47 (2018) (citing 1870 Louisiana law, 1874 and 1886 Maryland laws, 1873 Texas law, and 1874 decision upholding 1870 Georgia law); Br. for Indep. Inst. as Amicus Curiae at 11-17, *Bruen* (No. 20-843) (July 20, 2021) (disputing relevance of 19th-century laws but (at 16 n.10) citing 1869 Tennessee, 1870 Texas, and 1890 Oklahoma laws that prohibited guns in (among others) polling places).

contradicts the established original meaning of the constitutional text at the relevant point in time would not change that meaning. *See* 142 S. Ct. at 2137, 2154 n.28. But it emphasized that, conversely, "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution." *Id.* at 2136 (cleaned up) (quoting decision quoting James Madison). Thus, even if evidence in the period up to and around 1868 left the meaning of the Second Amendment right "indeterminate," courts should look to "practice" in the decades that followed to "settle" the meaning of the right. Equally, even if a court were to conclude (contrary to the scholars the Supreme Court cited) that the relevant date is 1791, not 1868, and even if it found evidence in that period indeterminate, it should recognize that later laws (and other historical evidence of regulatory authority) can settle the meaning of the Second Amendment right and demonstrate a regulation's permissibility.

II. This Court Should Reject Any Effort to Dismiss the United States's Historical Analogues as "Outliers"

Challengers in recent Second Amendment cases have sought to dismiss historical regulations as "outliers" insufficient to establish a historical tradition under *Bruen*. *See, e.g.*, Pls.' Suppl. Br. at 14-15, *Teter v. Shikada*, No. 20-15948 (9th Cir. Sept. 16, 2022), Dkt. 67 (arguing that as many as fifteen historical laws should be dismissed as "outliers"). No such argument is remotely tenable in this case, given the robust and extensive record of historical laws. *See* U.S.

Br. at 21-31. But to the extent this Court might wish to address the issue to guide district courts' Second Amendment analysis in future cases, it should observe that a small number of laws can establish a tradition in light of *Bruen*'s discussion of the historical laws justifying sensitive places.

Specifically, *Bruen* repeated *Heller*'s identification of "schools and government buildings" as sensitive places, 142 S. Ct. at 2133 (quoting *Heller*, 554 U.S. at 626), and then recognized that three additional, more specific locations—legislative assemblies, polling places, and courthouses—were also "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment," *id.* But the sources the Court cited for the historical record justifying restrictions in those three locations identified only two laws naming legislative assemblies and two naming courthouses. *See* Kopel & Greenlee, 13 Charleston L. Rev. at 235, 246; Br. for Indep. Inst. at 11-12. Under *Bruen*'s sensitive places analysis, therefore, a small number of laws can be sufficient to establish this nation's tradition of firearm regulation, at least so long as there is not overwhelming affirmative evidence of an enduring tradition to the contrary.[6]

---

[6] To be sure, *Bruen* expressed "doubt" that three colonial regulations "could suffice to show a tradition." 142 S. Ct. at 2142. But that tentative statement should not be given undue weight, given the Court's discussion of sensitive places.

Concluding that a small number of state laws can demonstrate a "public understanding" of a limitation on the Second Amendment right is also consistent with bedrock federalism principles that entitle a state to effectuate the policy choice of its citizens within constitutional bounds. Local conditions matter. Just as states today may (or may choose not to) "experiment[] with reasonable firearms regulations," *McDonald*, 561 U.S. at 785 (plurality opinion) (cleaned up), states historically may have chosen not to regulate certain weapons, people, or conduct, not because the public understood the right to keep and bear arms to prevent such regulations, but because of democratically supported policy choices. As this Court explained in *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity," and "[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment." *Id.* at 412. And the fact that states have latitude to experiment with regulations that meet their unique needs means that states historically may well have chosen not to regulate to the limits of constitutional permissibility. *Cf., e.g.*, *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007) ("The constitutional floor [by which the First Amendment restricts public-sector] unions' collection and spending of agency fees is not also a

constitutional ceiling for state-imposed restrictions."). Accordingly, while state laws restricting firearms demonstrate that the people of those states understood the right to keep and bear arms to permit such restrictions, the absence of such laws in other states does not warrant any inference that their citizens considered such restrictions unconstitutional.

III. This Court Should Take a "Nuanced Approach" to History Because Conditions Warranting the Regulation of Firearms with Obliterated Serial Numbers Did Not Exist Until the 20th Century

Legislatures do not enact laws to address a societal problem until that societal problem arises. Laws prohibiting the obliteration of serial numbers are an example of that principle: until police and prosecutors began using serial numbers to trace firearms used in crimes to identify offenders, criminals had no cause to obliterate serial numbers, and thus governments had no reason to prohibit their obliteration.

We are not aware of instances where police or prosecutors used serial numbers to trace firearms in investigating crimes before 1900.[7] That coheres

[7] Our searches for newspaper reports of police or prosecutors tracing firearms through serial numbers in the Library of Congress's "Chronicling America" database yielded no such reports earlier than 1900. Moreover, when such reports did emerge, they described the investigations with detail that highlights their novelty. *See, e.g.*, *Texas Triangle with a Murder Puzzles Police*, Cairo Bulletin, Nov. 29, 1913, at 5 ("The police today began an exhaustive search to identify the owner of the weapon used to kill Shilg. They will write to the manufacturers and through the serial number on the revolver try to learn to what retail dealer it was sent."); *Case Completed Against Mullen*, Monett Times

with the congressional testimony of a firearms consultant who has served as an expert witness for plaintiffs challenging gun laws in numerous recent cases,[8] who acknowledged that serial numbers became a tool for law enforcement investigation only in the 20th century.[9] It is also unsurprising, given that modern police forces did not develop until the latter part of the 19th century,[10]

(weekly ed.), Aug. 26, 1921, at 6 ("Sheriff Harry J. Mead … received a message Friday from Eustis, Va., to the effect that the serial number on a 45-calliber automatic Colts pistol found Wednesday near the scene of the murder, corresponded with the number on the pistol issued [to suspect] Mullens while he was a bugler in Camp Eustis.").

[8] *See, e.g.*, Decl. of Ashley Hlebinsky in Support of Plaintiffs' Supplemental Brief ¶ 8, *Duncan v. Becerra*, No. 3:17-cv-01017, Dkt. 132-1 (S.D. Cal. filed Dec. 1, 2022) (listing prior expert witness testimony in *Ocean State Tactical v. Rhode Island* (2022), *Guedes v. ATF* (2019), and *Miller v. Bonta* (2019-2021), among others).

[9] *See* Testimony of Ashley Hlebinsky, United States Senate Subcommittee on the Constitution, Committee on the Judiciary 7-8 (May 11, 2021), *available* at https://www.judiciary.senate.gov/download/ms-hlebinsky-testimony ("Serial numbers in a traditional sense really began to appear on firearms in the 19th century, and even then, it was more of an assembly number and guideline for those working in the factory, not a tool to trace crime. As the standardization continued and the federal government became involved in the 20th century, serial numbers had an expanded purpose; specifically, they became a tool for law enforcement investigations.").

[10] Early American law enforcement took the form of a "constable-watch" system, under which community members took on public peace-keeping duties as, at least in theory, an "unpaid civic obligation." *See* David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1206 (1999). "[D]etection—the business of identifying and pursuing an initially unknown offender— … 'was largely a private matter ….'" *Id.* (citation omitted). Over the second half of the 19th century, cities and towns replaced the constable-watch system with uniformed police forces. *See, e.g.*, Eric Monkkonen, *Police in Urban America, 1860-1920* 55 (1981). "By the end of the nineteenth century, the uniformed police in U.S.

and continued to struggle to erect the systems necessary for detailed, paper-trail-based investigations well into the 20th century.[11] And it accords with the actions of state legislatures in the early 20th century—first, starting in the 1910s, requiring sellers to record purchasers of firearms and the serial numbers of the weapons they purchased and to make those records available to law enforcement,[12] and then, starting in the 1920s, prohibiting the obliteration of

---

cities had assumed the form and roles with which most Americans have become familiar." *Id.* at 64.

[11] *See, e.g.*, Donald C. Stone, *Practical Use of Police Records System*, 24 J. Crim. L. & Criminology 668, 669 (1933) (urging police to adopt adequate records systems, in part "[t]o maintain a control over all police business through the use of the follow-up principle which will assure that all matters requiring investigation or attention are properly cared for," a "problem of day-to-day administration"); Frank O. Lowden, *Criminal Statistics and Identification of Criminals*, 19 J. Am. Inst. Crim. L. & Criminology 36, 40-41 (1928) ("[F]ew police forces in this country keep records that would even remotely compare with those of the average business house.").

[12] *See, e.g.*, 1911 N.Y. Laws 444-45, ch. 195, § 2 (requiring sellers to "keep a register in which shall be entered at the time of sale, the date of sale, name, age, occupation and residence of every purchaser of such a pistol, revolver or other firearm, together with the calibre, make, model, [and] manufacturer's number or other mark of identification," and requiring that "[s]uch register shall be open at all reasonable hours for the inspection of any peace officer"); 1913 Iowa Acts 308-09, ch. 297, § 10 (requiring sellers to "report within twenty-four hours to the county recorder, the sale of any revolver, pistol or pocket billy and in such report [to] set forth the … [name and other details of the purchaser], together with the number, make, and other marks of identification of such weapon or weapons"); 1913 Or. Laws 497, ch. 256, § 3 (requiring retailers to "keep a record of the sale of … pocket pistols or revolvers by registering the name of the person or persons and the number of the pocket pistol or revolver and [to] transmit same to the sheriff … on the 1st and 15th day of each calendar month").

serial numbers.[13]

Tracing firearms by serial numbers—and, correspondingly, criminals' incentive to obliterate serial numbers—thus represents an "unprecedented societal concern[] or dramatic technological change[]," and *Bruen* commands a "more nuanced approach" to determining whether Section 922(k) is consistent with the historical tradition of firearm regulation. 142 S. Ct. at 2132.

The United States's historical record amply satisfies its burden under that approach. Historical laws regulating the trade in firearms, requiring the inspection and marking of gunpowder, prohibiting the unlicensed manufacture and transportation of gunpowder, and requiring the proving and marking of gun barrels, *see* U.S. Br. at 21-26, are all "relevantly similar" to Section 922(k), because all are "comparably justified" and impose a comparable (or greater) burden. *See* U.S. Br. at 26-27 (explaining justifications); *id.* at 26 (explaining burdens); *cf. Oregon Firearms Fed'n, Inc. v. Brown*, No. 2:22-cv-01815, 2022 WL 17454829, at *13 (D. Or. Dec. 6, 2022) (accepting that historical evidence, which included "evidence that, in the 1800s, states often regulated certain types of weapons, such as Bowie knives, blunt weapons, slungshots, and trap guns because they were dangerous weapons commonly used for criminal behavior and not for self-defense," and "evidence that every state, except New

---

[13] *See* U.S. Br. at 30 n.7.

Hampshire, enacted laws restricting the carrying of arms in crowded places, in groups, or in a concealed ma[nn]er," carried Oregon's burden in defending its restriction on large-capacity magazines because that restriction was "comparably justified" and imposed no greater burden on armed self-defense than the historical laws). Thus, even if this Court believed that possessing firearms with obliterated serial numbers is protected by the Second Amendment's text, it should conclude that Section 922(k) is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

December 22, 2022

/s/ Janet Carter
Janet Carter
William J. Taylor, Jr.
Everytown Law
450 Lexington Avenue, P.O. Box 4184
New York, NY 10017

Counsel for amicus curiae Everytown for Gun Safety

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because this brief contains 5,250 words, excluding the portions exempted by Fed. R. App. P. 32(f), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Calisto MT font.

/s/ Janet Carter
Janet Carter
Counsel for amicus curiae
Everytown for Gun Safety

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, I electronically filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Janet Carter
Janet Carter
Counsel for amicus curiae
Everytown for Gun Safety