No. 23-2248

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KRISTIN WORTH, et al.,

Appellees,

v.

BOB JACOBSON, in his individual capacity and in his official capacity as Commissioner of the Minnesota Department of Public Safety,

Appellant.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF OF EVERYTOWN FOR GUN SAFETY AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with nearly ten million supporters across the country, including over 230,000 in Minnesota. 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 20-year-old gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut. The mayors of eighteen cities in Minnesota 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.[1]

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 90 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

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

overlooked. 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 & 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, 2210-11 nn.4 & 7 (2019) (Alito, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

Minnesota's public-carry restrictions on 18- to 20-year-olds are constitutional under the approach to Second Amendment cases set out in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), for the reasons Appellant Jacobson ("the State") sets out in his brief ("State Br."). Everytown submits this amicus brief to expand on two points. *First*, plaintiffs have the burden in the initial, textual inquiry of the *Bruen* framework to show that the regulation they challenge implicates the Second Amendment's text. The Court should not move on to the second, historical inquiry—asking whether the regulation is "consistent with the Nation's historical tradition of firearm regulation," 142 S. Ct. at 2130—without first determining that plaintiffs have met this burden, and, as the State explains, they have failed to do so. *Second*, if this Court does proceed to the historical inquiry,

it should center its analysis on 1868, when the Fourteenth Amendment was ratified. Moreover, 1868 is neither a starting line nor a cutoff; under *Bruen* and *District of Columbia v. Heller*, 554 U.S. 570 (2008), both earlier and later history are also relevant.

ARGUMENT

I. Plaintiffs Have Not Met Their Burden to Establish that 18- to 20-Year-Olds Fall Within the Second Amendment's Plain Text

Bruen's framework requires both a textual inquiry and a historical inquiry. The court first must ask whether "the Second Amendment's plain text covers an individual's conduct." 142 S. Ct. at 2129-30. *Bruen*'s analysis makes clear that the "people" challenging a gun regulation, the "weapons" they put at issue, and their "proposed course of conduct" must *all* fall within the Second Amendment's plain text. *See id.* at 2134. If so, the court then moves 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, the inquiry ends: self-evidently, if people, weapons, or conduct are outside the Second Amendment's protection, then the government may regulate them without infringing the Second Amendment. *See, e.g.*, *United States v. Sitladeen*, 64 F.4th 978, 987 (8th Cir. 2023) (rejecting defendant's Second Amendment challenge to indictment and plea under § 922(g)(5)(A) at *Bruen*'s threshold, textual inquiry because "the law of our circuit is

that unlawful aliens are not part of 'the people' to whom the protections of the Second Amendment extend").

Plaintiffs have the burden on the initial, textual inquiry; the government's burden to show consistency with historical tradition only arises *after* plaintiffs have carried their burden. *Bruen* itself makes that clear, by indicating that a presumption that the Constitution protects a plaintiff's conduct arises after ("when" or "because") the textual inquiry is satisfied. *See* 142 S. Ct. at 2126, 2141 n.11. If the burden were on the government throughout—in what would be an unusual departure from ordinary principles of constitutional litigation—the Court would have said so. Placing the initial burden on the plaintiff also accords with the Court's approach to other constitutional rights. For example, just a week after *Bruen*, the Court announced in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), that, "[u]nder th[e] Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to [justify] ... its actions[.]" *Id.* at 2421. Accordingly, multiple courts have read *Bruen* to place the burden on the plaintiff to establish that the Second Amendment's plain text covers their conduct. *See, e.g.*, *Oregon Firearms Fed'n, Inc. v. Kotek*, No. 2:22-cv-01815, 2023 WL 4541027, at *5 n.4 (D. Or. July 14, 2023) (concluding that, under *Bruen*, "the burden is on the plaintiff … to show that the challenged law implicates

conduct covered by the plain text of the Second Amendment," in light of *Bruen*'s language and "first principles of constitutional adjudication").

It is especially important that a plaintiff meets their burden at the textual step before a court undertakes the historical inquiry, given the "institutional challenges in conducting a definitive review of the relevant historical record." *See Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives* (*NRA v. ATF*), 700 F.3d 185, 204 (5th Cir. 2012);[2] *see also, e.g.*, *United States v. Jackson*, No. 1:22-cr-00141, 2023 WL 2242873, at *10-12 (D. Md. Feb. 27, 2023) (noting that "judges are not historians" and historical analysis under *Bruen* presents "challenges" and "problems").[3] In light of these challenges, it made sense that this Court in *Sitladeen* saw no need to resolve the "difficult historical debate" raised by the parties, when it had already determined that the defendant was not part of "the people" covered by the Second Amendment's plain text. *Sitladeen*, 64 F.4th at 985, 986 n.3.

[2] Although *Bruen* disapproved the use of means-end scrutiny as employed in *NRA v. ATF* and other Second Amendment cases, it did not disapprove their historical analyses. *See infra* pp. 13-14.

[3] Indeed, the district court below expressed its own "apprehension about the historical inquiry that *Bruen* commands." App. 22; R. Doc. 84, at 22; *id.* at 21("The process of consulting historical sources to divine the intent of those responsible for ratifying constitutional amendments is fraught with potential for error and confirmation bias.").

Accordingly, this Court should not consider the historical analysis unless convinced that plaintiffs satisfied their burden at *Bruen*'s threshold, textual step.

Plaintiffs have failed to do so. Minnesota's carry restriction does not implicate the Second Amendment because it regulates only underage individuals. *See* State Br. 9-17. The age of majority at common law was 21, and those under that age did not enjoy the full range of civil and political rights. *Id.* at 11-15; *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.").[4] Accordingly, when Justice Alito stressed that the Court's decision in *Bruen* "does not expand the categories of people who may lawfully possess a gun," he added with no hint of disapproval that

[4] As the State notes, *see* State Br. 12-13, minors lacked legal capacity to enlist in military service against their parents' wishes. In 1802, Congress prohibited enlistment of 18- to 20-year-olds without parental consent. *See* Act of March 16, 1802, ch. 9, sec. 11, 2 Stat. 132, 135. The Supreme Court later emphasized that restricting enlistment age was "for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian … but it gives no privilege to the minor." *Morrissey v. Perry*, 137 U.S. 157, 159 (1890).

"federal law … bars the sale of a handgun to anyone under the age of 21." *Bruen*, 142 S. Ct. at 2157-58 (Alito, J., concurring).

Indeed, this Court in *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011), recognized *Heller*'s characterization of the Second Amendment guarantee as being "consistent with the view that in 'classical republican philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the "virtuous citizen,"' such that 'the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.'" *Id.* at 1183 (citing Don B. Kates, Jr., *The Second Amendment: A Dialogue,* Law & Contemp. Probs., Winter 1986, at 146 (1986)). And scholarship by a leading Second Amendment historian confirms that individuals under the age of 21 at the time of the founding were considered "infants" whose few legal rights did not include a right to keep and bear arms. *See* 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, 2 (2021) (explaining that, "when framed in historically correct terms," the answer to the question whether "the Second Amendment recognize[s] a right of infants, meaning those under twenty-one, to keep and bear arms" is "simple: no").

The district court also erred in concluding that plaintiffs had carried their burden at the textual step by relying on early militia laws and references to "the

people" in other constitutional provisions. App. 15-19; R. Doc. 84, at 15-19. With respect to militia laws, as the State explains, *Heller* disconnected the Second Amendment right from militia service; legislatures could (and many did) exclude those under 21 from service; and, in any event, laws imposing a duty to serve in the militia did not create an individual right to do so or establish an entitlement to Second Amendment rights. *See* State Br. 17-22.[5] Moreover, other groups were included in militias but excluded from private firearms possession, demonstrating that being part of the militia did not bestow Second Amendment coverage. *See* Br. for Appellees, *United States v. Reese*, No. 23-30033, Dkt. 32 at 26 (5th Cir. May 12, 2023) (explaining that Black people served in some state militias but were barred from possessing arms in other states, and Virginia disarmed those who refused to

[5] Even though there is a duty to serve in the military if drafted, "[i]t is well established that there is no right to enlist in this country's armed services." *Lindenau v. Alexander*, 663 F.2d 68, 72 (10th Cir. 1981). The Supreme Court made that clear in the militia context almost 150 years ago. *See Presser v. Illinois*, 116 U.S. 252, 267 (1886) (holding that participation in a non-government-organized militia "cannot be claimed as a right independent of law"). And it reaffirmed that principle in *Heller*, explaining that "weapons … most useful in military service," which are not typically possessed by law-abiding citizens for lawful purposes, fall outside of the Second Amendment's scope, *see* 554 U.S. at 627-28, even though the government may mandate their use in the military or militia. Moreover, when the Supreme Court analyzed the early history of the Militia Act of 1792, it observed that the Act's "command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponry was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force." *Perpich v. Dep't of Def.*, 496 U.S. 334, 341 (1990) (footnote omitted).

swear a loyalty oath but required them to enroll in the militia). With respect to other constitutional provisions, the district court endorsed plaintiffs' argument that "the people" should be interpreted consistently with its use in the First and Fourth Amendments, which have been held to apply to those under 21. App. 15; R. Doc. 84, at 15 (citing *Hirschfeld v. ATF*, 5 F.4th 407, 422 (4th Cir.) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985)), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021)). But this argument has no lower limit, and thus carries the absurd consequence that the Second Amendment would cover very young children. *See Tinker*, 393 U.S. at 504 (challengers aged 13, 15, and 16); National Constitution Center, *West Virginia State Board of Education v. Barnette (1943)*, constitutioncenter.org/the-constitution/supreme-court-case-library/west-virginia-board-of-education-v-barnette (Barnette sisters were 8 and 11 years old); *T.L.O.*, 469 U.S. at 328 (14-year-old challenger). The district court acknowledged this absurd consequence but dismissed it as "not raise[d]" in this case. App. 18; R. Doc. 84, at 18. That was not sufficient. Accepting plaintiffs' interpretation of "the

people" would mean accepting its absurd consequence in a case where that consequence *is* raised.

For all these reasons and those set out in the State's brief, this Court should reverse because plaintiffs have not met their burden to establish that 18- to 20-year-olds are within the Second Amendment's scope.

II. If this Court Proceeds to the Second, Historical Inquiry, the Proper Focus for Analysis Is the Reconstruction Era, Not the Founding Era

Plaintiffs' claim fails under *Bruen*'s textual inquiry, and that should end the case. However, if the Court proceeds to the second, historical inquiry, it should first conclude that the most relevant time period for that inquiry centers around 1868, when the Fourteenth Amendment was ratified and made the Second Amendment applicable to the states.

As the State has explained, Minnesota's carry restriction is entirely consistent with the American tradition of firearms regulation regardless of which period this Court considers. In the founding era, legislatures "categorically disarmed groups whom they judged to be a threat to the public safety," State Br. 24 (quoting *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting)); *see also id.* at 23-27—precisely the judgment the Minnesota legislature made when it restricted the ability of those 18 to 20 to carry in public, *see id.* at 27-30. In addition, as the State explains, the common-law tradition at the founding treated those under 21 as

"infants" with few legal rights, *see id.* at 33-36, and founding-era collegiate firearms restrictions and municipal regulations confirmed this understanding, *id.* at 36-39. In the Reconstruction era, myriad state laws restricted the ability of those under 21 to access or use firearms. *See* State Br. 39-53; *see also id.* at 39 (discussing influential 1868 treatise, cited in *Heller*, that confirmed government's ability to prohibit sale of arms to those under 21); *id.* at 48-51 (discussing absence of constitutional challenges to historical age restrictions aside from decision *upholding* challenged law).[6]

Where, as here, the inquiry into the public understanding in 1791 and 1868 yield the same result, the court need not resolve the issue of the correct time period. *See Bruen*, 142 S. Ct. at 2138 (2022) (explaining that the Court did not need to

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[6] As the State also explains, the district court's summary dismissal of these 19th-century laws violated *Bruen*'s admonition that the government need not identify historical "twins" to a challenged law. *See* State Br. 45 (explaining that, under *Bruen*, historical and modern laws need only be comparably burdensome and justified). Not only did the State identify laws that prohibited those under 21 to carry firearms, *see id.* at 44-45, but laws that prohibit selling or giving firearms to those under 21, *see id.* at 42-44, are also proper analogues under *Bruen*. At a general level, the numerous, well-established restrictions on furnishing firearms to those under 21 demonstrate a historical understanding that the government could limit the ability of those under 21 to keep and bear arms. As for the comparability of the burden these laws placed on the Second Amendment right, in other cases challenging age restrictions on purchasing handguns, plaintiff Firearms Policy Coalition has repeatedly diminished the significance of any difference between a prohibition on sale of firearms to those under 21 and a prohibition on possession, arguing that "the right to 'have' arms implies the right to acquire them." *See, e.g.*, Brief of Plaintiffs-Appellants at 11, *Reese v. ATF*, No. 23-30033, Dkt. 28 (5th Cir. 2023). If FPC's argument in those cases holds true, then the burden of a purchase restriction is at least comparable to the burden of Minnesota's carry restriction (which, unlike a possession restriction, does not apply inside the home).

resolve the issue because, with respect to carrying handguns in public without special need, "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same").

Nevertheless, if this Court wishes to resolve the issue to guide district courts in future cases, it should hold that the inquiry centers on 1868. To begin with, in a case challenging the constitutionality of a state law, focusing on 1868 is the only correct way to answer the originalist question: How did the people understand the right at the time of its adoption? The U.S. Constitution's protection of the right to keep and bear arms did not constrain the states 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. And that, in turn, would violate the originalist mandate of *Heller* and *Bruen*: "'Constitutional rights are enshrined with

the scope they were understood to have *when the people adopted them*.'" *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634-35; emphasis added in *Bruen*).

Prior to *Bruen*, several circuits reached this conclusion in analyzing the tradition of firearm regulation at the first, historical step of the then-applicable Second Amendment framework. [7] *See Gould*, 907 F.3d at 669 ("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

[7] 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 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.

"[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 courts to have reached that conclusion: 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 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.

A panel of the Eleventh Circuit recently reached the same conclusion post-*Bruen*, concluding that, in cases involving state laws, where "the Fourteenth Amendment Ratification Era understanding of the right to keep and bear arms … differ[s] from the 1789 understanding, … the more appropriate barometer is the public understanding of the right when the States ratified the Fourteenth

Amendment and made the Second Amendment applicable to the States." *Nat'l Rifle Ass'n v. Bondi* (*NRA v. Bondi*), 61 F.4th 1317, 1323 (11th Cir. 2023), *vacated on grant of reh'g en banc*, No. 21-12314, 2023 WL 4542153 (July 14, 2023). Although that panel opinion has now been vacated for rehearing en banc, we submit that its analysis is correct. As the panel explained:

> This is necessarily so if we are to be faithful to the principle that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." As with statutes, when a conflict arises between an earlier version of a constitutional provision (here, the Second Amendment) and a later one (here, the Fourteenth Amendment and the understanding of the right to keep and bear arms that it incorporates), "the later-enacted [provision] controls to the extent it conflicts with the earlier-enacted [provision]." … The opposite rule would be illogical.

61 F.4th at 1323-24 (alterations in original) (citations omitted); *see also Maryland Shall Issue, Inc. v. Montgomery Cnty.*, No. 8:21-cv-01736, 2023 WL 4373260, at *8 (D. Md. July 6, 2023) (concluding that "historical sources from the time period of the ratification of the Fourteenth Amendment are equally if not more probative of the scope of the Second Amendment's right to bear arms as applied to the states by the Fourteenth Amendment"), *appeal docketed*, No. 23-1719 (4th Cir. July 10, 2023). Even the court below recognized that it is "difficult" to reach a conclusion different

from *NRA v. Bondi*'s "if the answer is derived from adherence to originalist theory." App. 25-26; R. Doc. 84, at 25-26.[8]

The conclusion that the 1868 understanding of the Second Amendment right should apply in a case against a state is far from a radical position. Indeed, it was the position former Solicitor General Paul Clement took as counsel for the NRA's New York affiliate during oral argument in *Bruen*:

> 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?
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> 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).

It is also the position prominent scholars of originalist theory have taken. "Many prominent judges and scholars—across the political spectrum—agree that, at a minimum, 'the Second Amendment's scope as a limitation on the States

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[8] The district court nevertheless concluded that *NRA v. Bondi* "declined to follow rather clear signs that the Supreme Court favors 1791 as the [relevant] date." App. 26; R. Doc. 84, at 26. To the contrary, the signs the Supreme Court gave favor 1868. *See infra* pp. 20-21 (explaining that Court's citations to two academics who support 1868, and none who supports 1791, coupled with invocation of 18th- *and 19th-century* laws in approving "sensitive places" restrictions, signal preference for focusing on 1868).

depends on how the right was understood when the Fourteenth Amendment was ratified.'" *NRA v. Bondi*, 61 F.4th at 1322 n.9 (quoting *Ezell*, 651 F.3d at 702) (citing, among others, Josh Blackman, Ilya Shapiro, Steven Calabresi, and Sarah Agudo); *see also* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 Geo. J.L. & Pub. Pol'y 1, 52 (2010) ("Federal protection against state encroachments on individual liberty began with the ratification of the Fourteenth Amendment. 1868 is thus the proper temporal location for applying a whole host of rights to the states, including the right that had earlier been codified as the Second Amendment as applied against the federal government. Interpreting the right to keep and bear arms as instantiated by the Fourteenth Amendment—based on the original public meaning in 1791—thus yields an inaccurate analysis." (footnote omitted)); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 115-16 & 116 n.485 (2008) (asserting that "[Akhil] Amar is exactly right"—"the question is controlled not by the original meaning of the first ten Amendments in 1791 but instead by the meaning those texts and the Fourteenth Amendment had in 1868"); Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 Hofstra L. Rev. 1, 23 (2022) ("The view is ascendant among originalists who hold that the Fourteenth

Amendment requires states to respect some or all of the individual rights listed in the first eight amendments that those rights ought to be understood *as they were understood in 1868*."). Others who have endorsed this view include Michael Rappaport[9] and Stephen Siegel.[10] In sum, originalist analysis compels applying the 1868 understanding of the right to keep and bear arms in a case challenging a state law.[11]

To be sure, if the public understanding of the Bill of Rights changed between ratification in 1791 and incorporation in 1868, then "[o]riginalists seem," at first

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[9] Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 San Diego L. Rev. 729, 748 (2008) ("[T]he incorporated Bill of Rights under the Fourteenth Amendment may have had a different meaning than the original Bill of Rights. If the rights in the original Bill had developed a new meaning in the years leading up to Reconstruction, and if the enactors of the Amendment had used those new meanings, the incorporated Bill would have a different meaning than the original Bill.").

[10] Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 Buff. L. Rev. 655, 662 n.32 (2008) ("I am unaware of any discussion by an originalist asserting, as a matter of theory, that the meaning of the Bill of Rights in 1789 should be preferred to its meaning in 1868 when the subject is the limitations the Fourteenth Amendment imposes on the states. In addition, I am unable to conceive of a persuasive originalist argument asserting the view that, with regard to the states, the meaning of the Bill in 1789 is to be preferred to its meaning in 1868. In discussions, some originalists have suggested the importance of 'consistency' between the rights held against the national and state governments. The desire for consistency, however, is not justified on originalist grounds. In addition, consistency may be brought about by imposing the meaning of the Bill in 1868 on the national government, rather than vice-versa.").

[11] To be clear, we do not suggest that each of these scholars also believe that 1868 is the correct focus for analyzing the public meaning of the right to keep and bear arms in cases against the federal government. Professors Blackman and

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." Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1441 (2022). 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

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Shapiro, for example, maintain that 1868 is the correct focus for cases against a state and 1791 is correct for cases against the federal government. *See* Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 51. As discussed below, because *Bruen* subsequently rejected the possibility of different standards for the state and federal governments, originalists must choose one period or the other, and the weight of authority and analysis favors 1868. *See infra* pp. 18-21.

relevant focus, and it 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. 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)); *see also, e.g.*, *United States v. Meyer*, No. 4:22-cr-10012, 2023 WL 3318492, at *2 n.4 (S.D. Fla. May 9, 2023) (noting that "Justice Thomas, writing for the majority in *Bruen*, signaled an openness to the feedback-effect theory of the Fourteenth Amendment").

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.[12]

[12] *See* Amar, *The Bill of Rights*, *supra*, at xiv (noting that a "particular principle in the Bill of Rights may change its 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

More recently, Professor Lash wrote—as quoted in *Bruen*—"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 the 19th-century laws restricting guns in any of the three locations the Court listed were from the *late* 19th century.[13]

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.

"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.").

[13] *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

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 *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)

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).

settle the meaning of the Second Amendment right and demonstrate that the challenged laws are constitutional. *See also* State Br. 33-35 (describing Supreme Court's reliance on 19th-century authorities and practices in *Heller*, *Bruen*, and decisions involving other constitutional rights).

In light of these principles, disregarding the wealth of 19th-century laws that limited the ability of those under 21 to access or use firearms would be profoundly mistaken, *even if* the meaning of the right is keyed to the public understanding in 1791. Those 19th century laws are convincing evidence of how the right was understood not only when they were passed, but also in earlier decades. Plaintiffs have provided no reason to believe that the understanding of the right of those under 21 to keep and bear arms underwent some startling transformation between 1791 and 1868. In these circumstances, the actions of state legislatures in the decades around Reconstruction—starting *within the lifetimes* of some who were alive at the founding—are robust evidence of how the public understood the right to keep and bear arms at the founding. For plaintiffs to suggest that they have better insight into the founding-era understanding of the Second Amendment right in 2023, 232 years distant from its ratification, than the Reconstruction generation had when 77 years distant, is nothing short of hubris.

CONCLUSION

This Court should reverse the judgment of the district court and order that summary judgment be granted to the State.

Respectfully submitted,

Dated: July 18, 2023

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CERTIFICATE OF COMPLIANCE

Fed. R. App. P. 32

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,243 words, excluding the portions exempted by Fed. R. App. P. 32(f). This brief 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 it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

8th Cir. R. 28A(h)(2)

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July 18, 2023

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CERTIFICATE OF SERVICE

On July 18, 2023, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which will effect service on all registered CM/ECF users.

July 18, 2023

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RE: 23-2248 Kristin Worth, et al v. Bob Jacobson

Dear Counsel:

The amicus curiae brief of Everytown for Gun Safety has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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