

24-1290

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NEW YORK STATE FIREARMS ASSOCIATION, GEORGE BORRELLO, DAVID
DIPIETRO, WILLIAM ORTMAN and AARON DOOR,
Plaintiffs-Appellants,

v.

DOMINICK L. CHIUMENTO, in his official capacity as Acting Superintendent
of the New York State Police,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of New York

**BRIEF OF EVERYTOWN FOR GUN SAFETY
AS AMICUS CURIAE IN SUPPORT OF
DEFENDANT-APPELLEE AND AFFIRMANCE**

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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.

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INTEREST OF AMICUS CURIAE

Everytown for Gun Safety (“Everytown”) is the nation’s largest gun-violence-prevention organization, with over ten million supporters across the country. 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 used an assault weapon to murder twenty children and six adults at an elementary school in Newtown, Connecticut. 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

INTRODUCTION AND SUMMARY OF ARGUMENT

New York’s ammunition regulations are constitutional under the approach to Second Amendment cases set out in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 144 S. Ct. 1889 (2024), for the reasons stated in the State’s opening brief, Dkt. 22 (“State Br.”).² Everytown

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.

² This amicus brief addresses only aspects of Plaintiffs-Appellants’ Second Amendment claim. The Court should affirm the district court’s order denying Plaintiffs’ motion for a preliminary injunction or vacate the opinion below and

submits this amicus brief to expand on two methodological points. *First*, on the initial, textual inquiry of the *Bruen-Rahimi* framework, Plaintiffs have the burden to establish that the challenged law infringes their right to keep and bear arms, and they have not met that burden. Rather, as the Fifth Circuit recently explained, such “ancillary firearm regulations” do not fall within the scope of the Second Amendment’s plain text at all, but instead are “presumptively lawful” “conditions and qualifications on the commercial sale of arms.” *McRorey v. Garland*, 99 F.4th 831, 836-39 (5th Cir. 2024) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008)).

Second, if this Court reaches the historical inquiry of the *Bruen-Rahimi* framework—which asks whether a law is “consistent with the principles that underpin our regulatory tradition,” *Rahimi*, 144 S. Ct. at 1898—it should affirm that evidence from the 19th-century is critical to the historical analysis, including because it can “provide persuasive evidence of the original meaning,” *id.* at 1924 (Barrett, J., concurring); illuminate how the people understood the right to keep and bear arms when they made it applicable to the states through the ratification of the Fourteenth Amendment in 1868, *see Antonyuk v. James*, --- F.4th ----, 2023 WL

remand for dismissal of the complaint for all of the reasons the State set out, including Plaintiffs’ lack of standing.

11963034, at *17, *19, *28 n.36 (2d Cir. Oct. 24, 2024); and contextualize earlier legislative inaction, *see id.* at *15.

Properly applied, *Bruen* and *Rahimi* support affirmance of the district court’s decision denying Plaintiffs’ motion for a preliminary injunction.

ARGUMENT

I. Plaintiffs Have Not Met Their Burden To Establish that the Second Amendment’s Plain Text Covers Their Conduct

The Second Amendment right to “keep and bear” arms is “not unlimited,” *Heller*, 554 U.S. at 626, but rather is subject to a range of textually- and historically-grounded constraints, *see, e.g., id.* at 626-27, 627 n.26, 635 (providing a non-exhaustive list of “permissible” firearm regulations); *see also Antonyuk*, 2023 WL 11963034, at *14 (“[T]he Second Amendment ... can fairly be read to incorporate ‘traditional limitations’”). Courts assess whether a regulation impermissibly infringes the right to keep and bear arms in two steps. First, the court must ask whether “the Second Amendment’s plain text covers an individual’s conduct.” *Bruen*, 597 U.S. at 17. If so, the court then asks whether the government has shown that its regulation is “consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 144 S. Ct. at 1898. If not, the inquiry ends: self-evidently, if the regulated conduct falls outside the Second Amendment’s protection, then the government may restrict it without infringing the right to keep and bear arms. *See Bevis v. City of Naperville*, 85 F.4th 1175, 1192 (7th Cir. 2023) (explaining that if

challenged regulation does not implicate Second Amendment’s text, Constitution “has nothing to say” and state is “free to [regulate], or not to [regulate], depending on the outcome of the democratic process”), *cert. denied*, 144 S. Ct. 2491 (2024).

The burden to satisfy the initial, textual inquiry is on the party challenging a law. *See, e.g., Hanson v. District of Columbia*, No. 23-7061, slip op. at 8 (D.C. Cir. Oct. 29, 2024) (“The plaintiff bears the burden of proof at the first step, whereas the Government bears the burden of proof at the second step.”); *B&L Prods. v. Newsom*, 104 F.4th 108, 117 (9th Cir. 2024) (holding that “a litigant invoking the Second Amendment must first establish that ‘the Second Amendment’s plain text covers an individual’s conduct’” (quoting *Bruen*, 597 U.S. at 24)). *Bruen* itself made this 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 Bruen*, 597 U.S. at 24, 44 n.11. The burden shifts to the government only after this threshold analysis. *Rahimi* does not change this analysis; in that case, “no one question[ed]” that the text step was satisfied, so the Court did not have reason to discuss it (or its burden) in depth. *See* 144 S. Ct. at 1907 (Gorsuch, J., concurring). Plaintiffs rightly do not appear to dispute their textual burden. *See* Pls. Br. 18.

As the State has explained, Plaintiffs have not met that burden. *See* State Br. 24-29. They have not shown—and cannot show—that the Second Amendment protects a right to purchase ammunition without a background check or

administrative fee. *See id.*; *see also, e.g., Oakland Tactical Supply, LLC v. Howell Twp.*, 103 F.4th 1186, 1196 (6th Cir. 2024) (“[I]n defining a plaintiff’s proposed conduct, courts should look to the intersection of what the law at issue proscribes and what the plaintiff seeks to do.”), *petition for cert. filed*, No. 24-178 (U.S. Aug. 16, 2024); *Doe v. Bonta*, 101 F.4th 633, 639 (9th Cir. 2024) (stating that “critical inquiry” at text step is “what conduct of the plaintiffs is relevant,” and that “*Bruen* itself suggests that the relevant conduct of the plaintiffs is ‘the proposed course of conduct,’ i.e., the conduct the regulation prevents plaintiffs from engaging in” (quoting *Bruen*, 579 U.S. at 32)).

The Fifth Circuit’s recent decision in *McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024), is particularly instructive. There, the court found that “ancillary firearm regulations such as background checks preceding sale” do not fall within the scope of the Second Amendment’s plain text, but instead are presumptively lawful “conditions and qualifications on the commercial sale of arms.” *Id.* at 836-39 (quoting *Heller*, 554 U.S. at 626-27 & n.26). *McRorey* affirmed the denial of a motion for a preliminary injunction against the federal law that requires enhanced background checks, including up to a 10-business-day wait, before federally-licensed dealers may transfer firearms to individuals under age 21. *See id.* In so holding, *McRorey* observed that the Second Amendment’s “plain text covers

plaintiffs’ right ‘to keep and bear arms,’” and “on its face ‘keep and bear’ does not include purchase—let alone without background check.” *Id.* at 838.

This Court reached a similar conclusion in *Gazzola v. Hochul*, where it rejected a challenge to safety and training requirements for firearms dealers without conducting a historical analysis because the regulations did not “have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms.” 88 F.4th 186, 196 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2659 (2024). Other courts of appeals have also rejected challenges to ancillary firearm regulations, including licensing, zoning, or other sales-related restrictions, at the text step. *See, e.g., Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 223-29 (4th Cir. 2024) (en banc) (upholding Maryland’s handgun licensing requirements, including background check and processing delay of up to thirty days, at text step), *petition for cert. filed*, No. 24-373 (U.S. Sept. 27, 2024); *Oakland Tactical*, 103 F.4th at 1197-99 (rejecting challenge to zoning ordinance precluding long-distance, outdoor shooting range at text step); *B&L Prods.*, 104 F.4th at 117-19 (rejecting challenge to prohibition on sale of firearms on state property at text step); *see also* State Br. 27-29 (discussing *United States v. Scheidt*, 103 F.4th 1281 (7th Cir. 2024), and *United States v. Manney*, 114 F.4th 1048 (9th Cir. 2024)).

To be sure, an ancillary regulation that does not *directly* prevent individuals from keeping and bearing arms may implicate the Second Amendment if its *effect* is

to prevent that conduct. In *Gazzola*, this Court held that “commercial regulations on firearms dealers ... cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms.” 88 F.4th at 196. The Fifth Circuit likewise cautioned in *McRorey* that “regulations on purchase so burdensome that they act as *de facto* prohibitions on acquisition” would almost certainly be captured by the Second Amendment’s text and be “subject to *Bruen*’s historical framework.” 99 F.4th at 838 n.18, 840; *see also Oakland Tactical*, 103 F.4th at 1197-98 (rejecting challenge where the government is not “seek[ing] to achieve through its zoning ordinances what it cannot do directly—ban all shooting ranges”); *B&L Prods.*, 104 F.4th at 119 (observing that, while a complete ban on selling a type of gun or ammunition in a region “generally implicates the Second Amendment” because it “meaningfully constrains the right to keep and bear,” a “minor constraint on the precise locations within a geographic area where one can acquire firearms does not”). The regulations challenged here, however, do not come close to preventing Plaintiffs from acquiring the ammunition necessary to effectuate their right to keep and bear arms. Instead, like the laws upheld in *Gazzola*, *McRorey*, *Oakland Tactical*, *Maryland Shall Issue*, and *B&L Productions*, they create at most minor inconveniences. Ammunition purchasers need only undergo a brief background check, and ammunition dealers need only obtain a license and pay a small administrative fee for the administration of those background checks. *See, e.g., N.Y.*

Exec. Law § 228; *see also* State Br. 6-8 (describing statutory requirements). Plaintiffs have offered no evidence that these modest requirements infringe their right to keep and bear arms. *See* State Br. 23 n.2, 26-29; *see also Gazzola*, 88 F.4th at 197-98 (affirming denial of preliminary injunction where “besides [plaintiffs] say-so, there is no evidence that [the challenged] regulations will impose such burdensome requirements on firearms dealers that they restrict protections conferred by the Second Amendment”); *McRorey*, 99 F.4th at 840 (holding that a point-of-sale background check, including a 10-business-day waiting period, does not constitute “a *de facto* prohibition on possession” of a firearm, and thus does not fall within the scope of the Second Amendment’s text); *Md. Shall Issue*, 116 F.4th at 224-29 (rejecting challenge where law does not “effectively deny ... the right to keep and bear arms”).

In sum, Plaintiffs have not carried their textual burden, and this Court may affirm on that basis alone. *See Gazzola*, 88 F.4th at 195-98 (affirming denial of preliminary injunction without addressing history and tradition).

II. New York’s Ammunition Regulations Are Consistent with Historical Tradition

Because New York’s ammunition regulations do not meaningfully constrain Plaintiffs’ ability to “keep and bear” arms, they do not implicate the Second Amendment’s text and this Court need not consider whether they are “consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 144 S. Ct. at

1898. But if the Court does reach that second, historical step, it may confront the question of the relevant time period for that inquiry. In the following sections, we explain that (a) Reconstruction-era history is a critical part of the inquiry; (b) Plaintiffs are wrong to dismiss post-1880 laws as too late; and (c) the Court should consider historical context in evaluating the constitutionality of the State’s ammunition regulations.

A. 19th-century evidence is critically important to the historical inquiry

Plaintiffs concede that “[r]elevant historical markers include dates of the adoption of the Second and Fourteenth Amendments in 1791 and 1868.” Pls. Br. 31. That concession was unavoidable: both Supreme Court and Second Circuit caselaw put beyond dispute that Reconstruction-era history is a critically important part of the analysis. Specifically, *Heller* and *Bruen* emphasized that examining post-ratification sources is “a critical tool of constitutional interpretation.” *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 605). *Bruen* also explained that “a regular course of practice” following the enactment of a constitutional provision “can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution.” *Id.* at 35-36 (cleaned up). Both decisions extensively canvassed 19th-century evidence, including through Reconstruction.³ Then, *Rahimi* put the

³ See, e.g., *id.* at 21 (recounting that *Heller* had considered, among other things, “19th-century cases that interpreted the Second Amendment,” the “discussion of

importance of 19th-century sources to the Second Amendment analysis beyond question, by resting its decision *upholding* a challenged law in significant part on laws that were passed between 1836 and 1868. *See* 144 S. Ct. at 1900 (relying on Massachusetts surety statute from 1836); *id.* (invoking similar statutes of nine other jurisdictions by citation to *Bruen*, 597 U.S. at 56 & n.23); *Bruen*, 597 U.S. at 56 & n.23 (citing 1838 Wisconsin, 1840 Maine, 1846 Michigan, 1847 Virginia, 1851 Minnesota, 1854 Oregon, 1857 District of Columbia, 1860 Pennsylvania, and 1868 West Virginia surety laws). As Justice Kavanaugh explained, “the Framers[] expect[ed] and inten[ded] that post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text.” *Rahimi*, 144 S. Ct. at 1917 (Kavanaugh, J., concurring); *see also id.* at 1924 (Barrett, J., concurring) (confirming that “postenactment history can be an important tool,” including to “liquidate ambiguous constitutional provisions” and “provide persuasive evidence of the original meaning”).⁴

the Second Amendment in Congress and in public discourse’ after the Civil War,” and the work of “post-Civil War commentators” (quoting *Heller*, 554 U.S. at 610, 614, 616-19); *id.* at 51-57 (discussing mid-19th-century cases and statutes); *id.* at 60 (surveying “public discourse surrounding Reconstruction” as demonstrating “how public carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens”); *id.* at 30 (explaining 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 (emphasis added)).

⁴ The Supreme Court has also relied on post-ratification history, including history from long after the founding, to resolve ambiguities in *other* constitutional

In accord with these decisions, this Court confirmed in *Antonyuk* that the historical analysis must encompass 19th-century history. *Antonyuk* held that “evidence from the Reconstruction Era regarding the scope of the right to bear arms incorporated by the Fourteenth Amendment is at least as relevant as evidence from the Founding Era regarding the Second Amendment itself.” 2023 WL 11963034, at *28 n.36; *see also id.* at *17 (concluding that “the prevailing understanding of the right to bear arms in 1868 and 1791 are both focal points of [the] analysis”); *id.* at *19 (deeming 1868 and the surrounding period “fertile ground” for “seek[ing] evidence of our national tradition of firearms regulation”).

The conclusion that 19th-century evidence is critical to the historical analysis is firmly grounded in originalist principles. The Constitution’s protection of the right to keep and bear arms did not constrain the states until 1868. *See Bruen*, 597 U.S. at 37 (“[A state] is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second.”). In a case against a state, therefore, to disregard the Reconstruction-era understanding would be to reject what the people understood the right to be at the time they gave it effect. *See Antonyuk*, 2023 WL 11963034, at *17-18. And that, in turn, would violate the originalist mandate of *Heller* and *Bruen*: “Constitutional rights are enshrined with

provisions. *See id.* at 1918-19 (Kavanaugh, J., concurring) (collecting cases).

the scope they were understood to have *when the people adopted them.*” *Bruen*, 597 U.S. at 34 (quoting *Heller*, 554 U.S. at 634-35; emphasis added in *Bruen*).⁵

Accordingly, this Court should consider Reconstruction-era evidence in assessing the constitutionality of New York’s ammunition regulations. Doing so easily resolves this case in favor of the State. *See* State Br. 29-41 (summarizing long

⁵ The State has explained that the understanding of the Second Amendment right has, for all purposes relevant to this case, remained consistent over time. *See* State Br. 11-12 (describing unbroken tradition spanning “from the colonial era to the 19th century”). If, in a different case, positive evidence showed that the understanding of the right *changed* between the founding and Reconstruction eras, this Court may have to decide which period to prioritize. *Cf. Bruen*, 597 U.S. at 37-38 (leaving time-period issue unresolved where founding- and Reconstruction-era understandings were “for all relevant purposes, the same”); *Rahimi*, 144 S. Ct. at 1898 n.1 (similar). If and when such a case arises, originalist principles dictate that the understanding in the Reconstruction era should take precedence, including for the reasons an Eleventh Circuit panel has identified. *See Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317, 1323 (11th Cir. 2023) (surveying leading originalist scholars and concluding that, in a case against a state and where the understandings in the two periods conflict, “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”), *vacated on grant of reh’g en banc*, 72 F.4th 1346 (11th Cir. 2023); *see also Antonyuk*, 2023 WL 11963034, at *10 n.11, *18 (citing *Bondi* as persuasive, despite vacatur for rehearing); *id.* at *19 (maintaining that evidence from both periods can be relevant even though “evidence nearest to 1791 can differ from that nearest to 1868”). *Bondi*’s conclusion is far from radical: when asked by Justice Thomas about the correct time period during oral argument in *Bruen*, counsel for New York’s NRA affiliate responded with the Reconstruction era. *See* Tr. of Oral Arg. at 8:2-17, *Bruen* (No. 20-843) (“[If] 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.”).

Everytown has set out these arguments more fully in prior briefs to this Court. *See, e.g.,* Br. of Everytown for Gun Safety as Amicus Curiae 7-16, *Antonyuk v. Nigrelli*, 84 F.4th 271 (2d Cir. 2023) (Nos. 22-2908, 22-2972).

regulatory history of preventing dangerous individuals from possessing ammunition); A-56-61 (listing and attaching historical sources evidencing this tradition); *see also Md. Shall Issue, Inc.*, 116 F.4th at 232-33 (Rushing, J., concurring) (explaining that Maryland’s handgun licensing requirements—including background check—continues longstanding “tradition of regulating firearm possession by dangerous individuals”).⁶

B. Plaintiffs are wrong to dismiss later laws

Although Plaintiffs correctly concede the relevance of Reconstruction-era evidence, they err in asserting that some laws on which the State relies nevertheless “fail via their date of enactment.” Pls. Br. 41. Specifically, they claim that laws from 1883 Ohio, 1884 and 1887 Alabama, 1890 and 1891 South Carolina, and 1895 Virginia, are irrelevant because they all “post-date the ratification of the Fourteenth Amendment by at least a decade.” *Id.* (citing A268-279, 283-305, 312-315). This Court has already rejected that argument. As *Antonyuk* explained, “[t]he period of relevance extends past 1868. Laws enacted in 1878 or even 1888 were

⁶ *See also, e.g., United States v. Perez-Garcia*, 96 F.4th 1166, 1189 (9th Cir. 2024) (recognizing a long historical tradition of disarming individuals “whose possession of firearms would pose an unusual danger, beyond the ordinary citizen, to themselves or others.”); *United States v. Jackson*, 110 F.4th 1120, 1128 (8th Cir. 2024) (“Legislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed.”); *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.”).

likely drafted or voted on by members of the same generation that ratified the Fourteenth Amendment and thus remain probative as to the meaning of that Amendment.” 2023 WL 11963034, at *28 n.36.

To be sure, *Antonyuk* suggested that there is some limit to the time period past 1868 to which it would look for evidence of the Reconstruction generation’s understanding. *See id.* at *17. But there is no reason to apply any strict limit when later laws are *consistent with* earlier laws.⁷ After all, as both the Supreme Court and this Court have recognized, “[p]rinciples of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness.” *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011); *see also Antonyuk*, 2023 WL 11963034, at *17 (finding it “implausible that [a] public understanding would promptly dissipate whenever [one] era gave way to another”). If the American public in 1868, or 1878, or 1888 understood the right to keep and bear arms to protect—or not to protect—particular conduct, it is highly unlikely that their understanding would have changed by 1895. And far from suggesting any such unlikely change in public understanding, the laws from 1890s

⁷ In *Antonyuk*, this Court recognized that consistent historical evidence from “into the early-twentieth century and beyond,” while “not as probative as nineteenth-century evidence,” “remain[s] probative as to the existence of an American tradition of regulation.” *Id.* at *29 & n.41. Later history is also particularly relevant in cases involving “unprecedented societal concerns or dramatic technological changes.” *See Bruen*, 597 U.S. at 27; *see also infra* Section II.C.

South Carolina and Virginia *continue* the tradition manifested in earlier laws. *See* State Br. 11-12; 40-41 (explaining that New York’s ammunition laws continue regulatory tradition spanning “from the colonial era to the 19th century”). Thus, they also illuminate that tradition.

In *Bruen*, by contrast, when the Court rejected New York’s reliance on a few late-19th and early-20th century laws, it did so because they “contradict[ed] the overwhelming weight of other evidence regarding the right to keep and bear arms for defense in public,” 597 U.S. at 65-66 (citation omitted) (discussing Texas law); *see also id.* at 67-68 (discussing territorial laws); *id.* at 66 n.28 (discussing 20th century laws); *Antonyuk*, 2023 WL 11963034, at *29 n.41 (“The *Bruen* Court’s concern was with temporally distant laws *inconsistent* with prior practices.”). Here, there is no such contradiction, and Plaintiffs’ effort to invoke *Bruen*’s treatment of late-19th century laws, *see* Pls. Br. 41 (quoting 597 U.S. at 38), therefore misses the mark.

C. This Court should consider historical context in evaluating New York’s ammunition regulations

History from the Reconstruction-era and later—including not just laws, but the historical context surrounding them—plays a role in Second Amendment analysis in another way: it provides important insight into how legislatures historically have responded to new and evolving social problems. If a technological development or societal concern motivating a modern firearms regulation did not

exist in the period a court is examining, then self-evidently there will be no laws addressing the development or concern from that time—making “a more nuanced approach” to the historical inquiry, *see Bruen*, 597 U.S. at 27, including consideration of later history, particularly important. *See LaFave v. County of Fairfax*, No. 1:23-cv-01605, 2024 WL 3928883, at *7 (E.D. Va. Aug. 23, 2024) (“If a societal condition did not exist in the relevant period a court is examining, then self-evidently there will be no historical firearms laws addressing that condition in that period—making the consideration of later history particularly crucial.”), *appeal docketed*, No. 24-1866 (4th Cir. Sept. 16, 2024). As such, later evidence can contextualize earlier legislative inaction. That is precisely the case here.

It “makes sense that licensing regimes [including background check requirements] ... were not enacted until after the Civil War.” *Antonyuk*, 2023 WL 11963034, at *33. Postwar America “was transformed by rapid urbanization,” including the “explosive growth of cities” and the concomitant emergence of organized police forces. *Id.* at *31-32; *see also* Sheldon Pollack, *War, Revenue, and State Building: Financing the Development of the American State* 214 (2009) (explaining that the Civil War was a “watershed event in the ... development of the American state,” including because it “triggered an unprecedented growth of the state apparatus”). “[N]either sophisticated record-keeping nor modern policing existed in most places until the beginning of the twentieth century.” Robert J.

Spitzer, *Historical Context, Weapons Laws, and Early American Governance*, Duke Ctr. for Firearms Law Blog: Second Thoughts (Oct. 18, 2024), <https://firearmslaw.duke.edu/2024/10/historical-context-weapons-laws-and-early-american-governance>. Indeed, many American police departments did not even reliably maintain arrest records until the early 1890s. Elizabeth Rholetter Purdy, *Technology, Police*, in *The Social History of Crime and Punishment in America: An Encyclopedia* (Wilbur R. Miller ed., 2012). The gradual professionalization of law enforcement following the Civil War made it technically possible for governments to institute background check requirements like New York's for the first time in the late 19th and early 20th centuries. *See Antonyuk*, 2023 WL 11963034, at *31-33.

Additionally, the need to require background checks for ammunition has greatly increased in recent years with the rise of 3D-printed firearms and self-assembled “ghost guns.” These dangerous, untraceable weapons have proliferated in recent years; data from the Bureau of Alcohol, Tobacco, Firearms, and Explosives reveals an increase of over 1,000% in ghost guns recovered by law enforcement between 2017 and 2021. *See Bureau of Alcohol, Tobacco, Firearms, and Explosives, Part III – Crime Guns Recovered and Traced within the United States and its Territories*, in *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns – Volume Two Report*, at 5 (2024), available at

<https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us>. Ghost guns can be obtained without a background check, enabling people with felony convictions, minors, and others legally barred from owning firearms to obtain deadly weapons without law enforcement’s knowledge. *Untraceable: The Rising Specter of Ghost Guns*, Everytown Research & Policy (May 14, 2020), <https://bit.ly/3OcBb1W> (explaining that ghost guns are appealing to “buyers who cannot legally purchase firearms,” and giving examples of law enforcement recovering ghost guns from “felons, domestic abusers, criminal gangs, drug dealers, extremists, and minors”). Ammunition background check requirements like New York’s are an innovative response to this dangerous new loophole.

Given this context, it should come as no surprise that New York has not located examples of licensing or background check requirements from before the 19th century. Governments are not expected to “regulate for problems that do not exist” in their jurisdictions. *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (citation omitted); *cf., e.g., Bianchi v. Brown*, 111 F.4th 438, 464, 471 (4th Cir. 2024) (en banc) (explaining that, throughout this Nation’s history, there is “a definable arc of technological innovation and corresponding arms regulation,” and that “legislatures, since the time of our founding, have responded to the most urgent and visible threats posed by excessively harmful arms with responsive and

proportional legislation”), *petition for cert. filed sub nom. Snope v. Brown*, No. 24-203 (U.S. Aug. 23, 2024). Equally, they cannot be expected to establish regulations—like background checks—that are impossible to implement without appropriate investigative and record-keeping resources, before those resources existed.

In any event, “[l]egislatures past and present have not generally legislated to their constitutional limits.” *Antonyuk*, 2023 WL 11963034, at *15; *see also, e.g., Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring) (dismissing “flawed” assumption that “founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority”). Accordingly, even if both the need for and the capacity to carry out background checks had existed prior to the 19th century, the absence of such requirements would not have demonstrated their unconstitutionality. *See, e.g., Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 253 (2022) (“[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.”). Indeed, *Rahimi* itself makes this clear, by upholding a modern law prohibiting individuals under domestic violence restraining orders from possessing firearms, even though the founding generation—who were well aware of domestic violence—did not pass laws specifically disarming domestic abusers. *See* 144 S. Ct. at 1900.

“Taken together,” *id.* at 1901, the historical record in this case—including the historical regulations presented by the State and context explaining why background check requirements emerged when they did—demonstrates that New York’s ammunition regulations are constitutional.

CONCLUSION

If it reaches the merits of Plaintiffs’ Second Amendment claim, the Court should affirm the district court’s order denying Plaintiffs’ motion for a preliminary injunction.

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Respectfully submitted,

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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) and Local Rules 29.1(c) and 32.1(a)(4)(A) because this brief contains 4,817 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 Baskerville font.

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