No. 24-795

In The
Supreme Court of the United States

IVAN ANTONYUK, et al.,

Petitioners,

v.

STEVEN G. JAMES, in his official capacity as the Superintendent of the New York State Police, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES AND REGULATIONS

INTEREST OF *AMICUS CURIAE*[1]

The National Rifle Association of America (NRA) is America's oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

Many NRA members wish to carry firearms for lawful purposes in the public places that New York now deems gun-free zones. Additionally, the NRA has a similar case challenging New York's "Concealed Carry Improvement Act" currently pending in the Northern District of New York. The outcome of the instant case may prove dispositive for many claims in that case.

[1] All parties received timely notice of *Amicus*'s intent to file this brief. No counsel for any party authored this brief in any part. Only *Amicus* funded its preparation and submission.

SUMMARY OF ARGUMENT

The Second Circuit held that "1868 and 1791 are both focal points" of a Second Amendment analysis and that Reconstruction-Era evidence is "at least as relevant as evidence from the Founding Era regarding the Second Amendment itself." *Antonyuk v. James*, 120 F.4th 941, 972, 988 n.36 (2d Cir. 2024). This decision adds to a growing circuit split over which time period controls—a split that results in disparate outcomes in otherwise similar cases.

The Second Circuit's holding—like similar holdings by other courts—is contrary to this Court's precedents. This Court has strongly indicated that the original 1791 understanding of the Second Amendment controls and that the significance of historical evidence depends on its proximity to the Founding. Even modern regulations that would have been unimaginable at the Founding require reasoning by analogy to the Founding generation's understanding of the right.

Three recent Supreme Court cases have considered Reconstruction-Era evidence "secondary" to Founding-Era evidence in Second Amendment analyses. These decisions align with this Court's jurisprudence regarding other provisions of the Bill of Rights, which are similarly pegged to their original Founding-Era scope and understanding.

Nevertheless, lower courts continue to reach divergent conclusions on whether the understanding of the right from the Founding Era or Reconstruction Era controls. This Court should grant the Petition for Writ of Certiorari to clarify that the Founding Era is

the most relevant period in Second Amendment analyses.

ARGUMENT

I. Lower courts are divided over whether 1791 or 1868 is the most relevant period for a Second Amendment analysis.

This Court has left unresolved the question of "whether courts should primarily rely on the prevailing understanding of" the Second Amendment from when it was ratified in 1791 or "when the Fourteenth Amendment was ratified in 1868." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37 (2022); *see also United States v. Rahimi*, 602 U.S. 680, 692 n.1 (2024). Lower courts have split over the question, taking several conflicting approaches.

A. Some courts have identified 1791 as the most relevant period.

Some courts have determined that the prevailing understanding of the Second Amendment in 1791 controls.

The Third Circuit recently held that "the constitutional right to keep and bear arms should be understood according to its public meaning in 1791." *Lara v. Comm'r Pennsylvania State Police*, 125 F.4th 428, 441 (3d Cir. 2025). The Third Circuit recognized that this Court "gave a strong hint" that the 1791 public understanding controls "when it observed that there has been a general assumption 'that the scope of the protection applicable to the Federal Government and States [under the Bill of Rights] is pegged to the

public understanding of the right when the Bill of Rights was adopted in 1791.'" *Id.* at 440 (quoting *Bruen*, 597 U.S. at 37) (brackets in *Lara*). The Third Circuit also noted that this Court "interpreted the bounds of the Sixth, Fourth, and First Amendments … according to their public meaning at the founding" and found no reason "for defining some rights according to their public meaning in 1791 and others according to their public meaning in 1868." *Id.* at 440.

The Fifth Circuit also concluded that "[t]he scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 127 F.4th 583, 600 (5th Cir. 2025) (quoting *Bruen*, 597 U.S. at 37). The court deemed 19th-century sources relevant only "to confirm and reinforce earlier historical evidence contemporaneous with the Constitution's ratification." *Id.* (citing *Bruen*, 597 U.S. at 37).

The Eighth Circuit similarly focused on the 1791 understanding, recognizing that "*Bruen* strongly suggests that we should prioritize Founding-era history." *Worth v. Jacobson*, 108 F.4th 677, 692 (8th Cir. 2024). This made sense, the court reasoned, because "[o]therwise, the 'individual rights enumerated in the Bill of Rights and made applicable against the States'" might have different scopes against different governments. *Id.* at 692–93 (quoting *Bruen*, 597 U.S. at 37).

The Sixth Circuit explained that under this Court's precedents, "courts must study how and why the founding generation regulated firearm possession

and determine whether the application of a modern regulation 'fits neatly within' those principles." *United States v. Williams*, 113 F.4th 637, 648 (6th Cir. 2024) (quoting *Rahimi*, 602 U.S. at 698).

The First Circuit acknowledged that "[t]he Supreme Court has indeed indicated that 'founding-era historical precedent' is of primary importance for identifying a tradition of comparable regulation," *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 51 (1st Cir. 2024) (quoting *Bruen*, 597 U.S. at 27), but added that late-19th-century and 20th-century evidence "may have probative value if it does not 'contradict earlier evidence,'" *id.* (quoting *Bruen*, 597 U.S. at 66 n.28) (brackets omitted).

B. Some courts consider evidence from 1868 to be equally relevant to, or more relevant than, evidence from 1791.

Some courts have determined that the prevailing understanding of the Second Amendment in 1868 controls, or that evidence from that period is at least as significant as evidence from the Founding.

The Second Circuit in this case asserted 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." *Antonyuk v. James*, 120 F.4th 941, 988 n.36 (2d Cir. 2024).

Similarly, the Eleventh Circuit, in a case now being reheard *en banc*, held that "the Reconstruction Era understanding of the right to bear arms—that is, the understanding that prevailed when the States

adopted the Fourteenth Amendment—is what matters." *National Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1322 (11th Cir.), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir. 2023).

Maryland's district court "agrees with the Eleventh Circuit's reasoning" and "conclud[ed] 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." *Maryland Shall Issue, Inc. v. Montgomery Cnty., Maryland*, 680 F. Supp. 3d 567, 582, 583 (D. Md. 2023).

New Mexico's district court also "agrees with the Eleventh Circuit" and prioritizes Reconstruction-Era evidence. *We the Patriots, Inc. v. Grisham*, 697 F. Supp. 3d 1222, 1234 (D.N.M. 2023); *see also Frey v. Nigrelli*, 661 F. Supp. 3d 176, 188 (S.D.N.Y. 2023) (deeming historical sources from both "around when the Second Amendment was adopted (1791) and when the Fourteenth Amendment was adopted (1868) a[s] particularly instructive").

The Third Circuit, however, took issue with the Eleventh Circuit's approach:

> *Bondi* overlooks that two generations of Americans ratified the Second and Fourteenth Amendments. If we are to construe the rights embodied in those amendments coextensively, as the Supreme Court has instructed we must, and if there is daylight between how each generation understood a particular right, we must pick

> between the two timeframes, and … the better choice is the founding era.

Lara v. Comm'r Pennsylvania State Police, 91 F.4th 122, 134 n.14 (3d Cir.), *cert. granted, judgment vacated sub nom. Paris v. Lara*, 145 S. Ct. 369 (2024).

C. Some courts focus on 1791 for federal laws but 1868 for state laws, creating two different Second Amendments.

This Court has "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." *Bruen*, 597 U.S. at 37. Nevertheless, some courts have determined that 1791 is the most relevant period for federal laws while 1868 is the most relevant period for state laws. This approach effectively creates two different Second Amendments, depending on whether the federal government or a state or local government enacts a regulation.

When considering federal laws, the Ninth Circuit focuses on Founding-Era evidence. *See, e.g.*, *United States v. Perez-Garcia*, 96 F.4th 1166, 1184 (9th Cir. 2024). But "at least when considering the 'sensitive places' doctrine" under state law, the court "look[s] to the understanding of the right to bear arms both at the time of the ratification of the Second Amendment in 1791 and at the time of the ratification of the Fourteenth Amendment in 1868." *Wolford v. Lopez*, 116 F.4th 959, 980 (9th Cir. 2024).

Under the Seventh Circuit's pre-*Bruen* doctrine, the court determined that the 1791 understanding

controls in challenges to federal laws but reasoned 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 v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011); *see also id.* at 705. It is unclear whether *Bruen* altered the court's approach. Dissenting from a decision to remand a case in light of *Bruen*, Judge Wood indicated that the court's pre-*Bruen* approach remained intact: "*Bruen* … adds that the most persuasive analogous regulations are those enacted or in place at the time the Second Amendment was ratified (1791) or those that date from the adoption of the Fourteenth Amendment (1868) (presumably if the regulation at issue comes from a state entity rather than the federal government)." *Atkinson v. Garland*, 70 F.4th 1018, 1029 (7th Cir. 2023) (Wood, J., dissenting). Drafting the majority opinion in *Bevis v. City of Naperville, Ill.*, Judge Wood noted "the Supreme Court's insistence that the relevant time to consult is 1791, or maybe 1868." 85 F.4th 1175, 1194 (7th Cir. 2023); *see also id.* at 1199.

A Florida district court adopted the same approach, explaining that "the pertinent time period for a Second Amendment (compared to a Fourteenth Amendment) challenge is the founding—not 1868." *United States v. Ayala*, 711 F. Supp. 3d 1333, 1342 n.4 (M.D. Fla. 2024); *see also id.* at 1340 ("To decide the constitutionality of this *federal* statute, then, I must ascertain the scope of the Second Amendment right against the federal government in 1791.").

II. Whether courts focus on 1791 or 1868 has led to different results in similar cases.

Courts considering similar issues have reached different conclusions depending on whether the court considers 1791 or 1868 to be the most relevant historical period.

Despite this Court's assurance that "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry," *Bruen*, 597 U.S. at 38, courts focusing on 1868 have reached different holdings in carry challenges than courts focusing on 1791.

For example, a California district court, concluding that "[t]he most significant historical evidence comes from 1791," enjoined much of California's *Bruen*-response law prohibiting carry in 26 categories of public locations. *May v. Bonta*, 709 F. Supp. 3d 940, 952 (C.D. Cal. 2023) (quoting *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1237 (S.D. Cal. 2023)). But the Ninth Circuit, providing 1868 evidence equal weight, upheld nearly all the law. *Wolford v. Lopez*, 116 F.4th 959, 980 (9th Cir. 2024).

A similar divide has developed in cases involving the rights of adults under 21. The Third, Fifth, and Eighth Circuits held restrictions on 18-to-20-year-olds unconstitutional when focusing on Founding-Era laws. *Lara*, 125 F.4th at 444 ("the Commissioner cannot point to a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns"); *Reese*, 127 F.4th at 600 ("The federal

government has presented scant evidence that eighteen-to-twenty-year-olds' firearm rights during the founding-era were restricted in a similar manner to the contemporary federal handgun purchase ban"); *Worth*, 108 F.4th at 696 ("Minnesota's proffered founding-era analogues do not meet its burden to demonstrate that the Nation's historical tradition of firearm regulation supports the Carry Ban" for adults under 21). By contrast, the Eleventh Circuit upheld a statute prohibiting 18-to-20-year-olds from purchasing firearms while emphasizing that "historical sources from the Reconstruction Era are more probative of the Second Amendment's scope than those from the Founding Era." *Bondi*, 61 F.4th at 1322.

In sum, lower courts are not only split over whether 1791 or 1868 is the relevant period for a historical analysis, but the split is leading to conflicting holdings in similar cases.

III. This Court's Second Amendment precedents demonstrate that the original 1791 understanding of the right controls.

As discussed *supra*, the Second Circuit asserted that Reconstruction-Era evidence is "at least as relevant" as Founding-Era evidence in determining the scope of the Second Amendment. *Antonyuk*, 120 F.4th at 988 n.36. But this Court has repeatedly demonstrated that the original 1791 understanding of the Second Amendment controls.

A. *Heller* defined the Second Amendment based on the Founding-Era understanding of the right.

District of Columbia v. Heller began with a "textual analysis" of the Second Amendment, 554 U.S. 570, 578 (2008), in which the Court defined every word of the plain text based on the Founding-Era understanding, *see id.* at 581 (determining "[t]he 18th-century meaning" of "Arms"); *id.* at 584 (defining "bear arms" based on "our review of founding-era sources"); *id.* at 582 (consulting "written documents of the founding period" to define "keep arms"); *id.* at 579 (considering how "the people" was used in the "unamended Constitution and the Bill of Rights"); *id.* at 595 (adopting the definition of "militia" from *United States v. Miller*, 307 U.S. 174, 179 (1939), because it "comports with founding-era sources"); *id.* at 597 ("security of a free State" in "18th-century political discourse" meant "'free country' or free polity"); *see also id.* at 586 (rejecting the argument that "bear arms" connotes only the carrying of arms during militia service because "no source … indicates that it carried that meaning at the time of the founding").

The Court then confirmed its interpretation of the plain text by consulting "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment." *Id.* at 600–01.

Looking to history, the Court made clear that it was "adopti[ng] … the *original understanding* of the Second Amendment." *Id.* at 625 (emphasis added). *Heller* then held that common arms are protected by the Second Amendment because the "traditional

militia" of the colonial and Founding eras "was formed from a pool of men bringing arms 'in common use at the time.'" *Id.* at 624 (quoting *Miller*, 307 U.S. at 179). Because handguns are common, the handgun ban at issue was ruled unconstitutional. *Id.* at 629. Thus, as the dissenting Justices acknowledged, the majority indicated that the constitutionality of modern laws depends on whether "similar restrictions existed in the late-18th century." *Id.* at 721 (Breyer, J., dissenting); *see also Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting) ("*Heller* examined the right to keep arms as it was understood in 1791 when the Second Amendment was ratified.").

The Court addressed evidence surrounding the Fourteenth Amendment's ratification for the first time 41 pages into the *Heller* opinion. But the Court immediately cautioned that "[s]ince those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." *Id.* at 614.

B. The *City of New York* dissent clarified that state laws must be consistent with Founding-Era regulations.

In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336 (2020), New York City mooted a challenge to its rule prohibiting the transport of firearms to a second home or shooting range outside of the City by changing the law before this Court issued its ruling. Nevertheless, the case further demonstrates that the Founding Era is the relevant timeframe for Second Amendment analyses, including in challenges to state and local laws.

Justice Alito, joined by Justices Gorsuch and Thomas, dissented and addressed the merits of the case. Justice Kavanaugh, while joining the majority, expressed in a concurrence that he "agree[d] with Justice ALITO's general analysis of *Heller*." *Id.* at 340 (Kavanaugh, J., concurring). The dissent explained that the Court "based [the *Heller*] decision on the scope of the right to keep and bear arms *as it was understood at the time of the adoption of the Second Amendment*." *Id.* at 364 (quoting *Heller*, 554 U.S. at 577–605, 628–29) (emphasis added). The dissent then concluded that New York City failed to justify its law because "[i]t points to no evidence of laws in force *around the time of the adoption of the Second Amendment* that prevented gun owners from practicing outside city limits." *Id.* at 365 (emphasis added). Indeed, "neither the City, the courts below, nor any of the many *amici* supporting the City have shown that municipalities *during the founding era* prevented gun owners from taking their guns outside city limits for practice." *Id.* at 366 (emphasis added).

C. *Bruen* emphasized that the significance of historical evidence depends on its proximity to the Founding.

The *Bruen* Court considered evidence from five historical periods and emphasized that the significance of evidence from each period depended on its proximity to the Founding. 597 U.S. at 34. *Bruen* "categorize[d] these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries." *Id*. The Court's evaluation of evidence from

each period demonstrates the centrality of the Founding Era.

(1) Medieval to early modern England.

Bruen deemed it acceptable to consider "English practices that 'prevailed up to the "period immediately before and after the framing of the Constitution,"'" *id.* (quoting *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting)), but not to "rely on an 'ancient' practice that had become 'obsolete in England at the time of the adoption of the Constitution' and never 'was acted upon or accepted in the colonies,'" *id.* at 35 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935)). Similarly, "English common-law practices and understandings" matter only if they reflect the understanding "at the time of the separation of the American Colonies." *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 529 (1884)).

Thus, "in interpreting our own Constitution, 'it [is] better not to go too far back into antiquity for the best securities of our liberties,' unless evidence shows that medieval law survived to become our Founders' law." *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)) (brackets in *Heller*).

When it came to the "initially limited" English arms right, therefore, what mattered most was that "'by the time of the founding,'" it was "'understood to be an individual right protecting against both public and private violence.'" *Id.* at 44–45 (quoting *Heller*, 554 U.S. at 594); *see also Heller*, 554 U.S. at 593 ("By the time of the founding, the right to have arms had become fundamental for English subjects."). Likewise,

when it came to the Statute of Northampton, what mattered most was that "it was no obstacle to public carry for self-defense in the decades leading to the founding." *Bruen*, 597 U.S. at 45.

Having repeatedly confirmed that the analytical baseline for English history is what the Founders thought of it, *Bruen*'s analysis of English history concluded with the understanding of English law at "the time of the founding." *Id.*

(2) The American Colonies and the early Republic.

Reaffirming the centrality of 1791, *Bruen* consulted *Heller*'s plain text analysis—which defined the Second Amendment based on Founding-Era understandings—to determine that the plaintiffs were part of "the people," 597 U.S. at 31–32 (citing *Heller*, 554 U.S. at 580), that the handguns they desired to carry were protected arms, *id.* at 32 (citing *Heller*, 554 U.S. at 627), and that the Second Amendment protects "carry[ing] weapons in case of confrontation," *id.* (citing *Heller*, 554 U.S. at 592). *Bruen* then mandated that courts begin every Second Amendment analysis by consulting *Heller*'s 1791-focused textual analysis. *Id.* at 24 (setting forth "the standard for applying the Second Amendment," which begins by determining whether "the Second Amendment's plain text covers an individual's conduct").

Hence, the *Bruen* Court emphasized that "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,'" *id.* at 34 (quoting *Heller*, 554 U.S. at 634–35) (emphasis *Bruen*'s), and that the Second Amendment's "meaning is fixed according to the understandings of

those who ratified it," *id.* at 28; *see also id.* ("the Second Amendment's definition of 'arms' is fixed according to its historical understanding").

Accordingly, when it comes to colonial restrictions, their relevance depends on their proximity to the Founding. A law from "roughly a century before the founding sheds little light on how to properly interpret the Second Amendment." *Id*. at 49. Likewise, whether pocket pistols were uncommon in colonial America did not matter since they gained commonality "by the founding." *Id.* at 48 n.13.

Not one law, circumstance, or source from the Founding Era was disparaged in either *Heller* or *Bruen* based on the date it was produced—unlike those from every other period.

(3) Antebellum America.

The *Bruen* Court reiterated *Heller*'s assertion that "evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century' represented a 'critical tool of constitutional interpretation.'" 597 U.S. at 35 (quoting *Heller*, 554 U.S. at 605). But in the same breath, the *Bruen* Court warned that "[w]e must also guard against giving postenactment history more weight than it can rightly bear." *Id.* Specifically, "'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'" *Id.* at 36 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting)) (emphasis in *Heller II*).

Significantly, the *Bruen* Court dismissed an 1860 New Mexico law in part because it was enacted "nearly 70 years after the ratification of the Bill of Rights." 597 U.S. at 55 n.22. Due to its distance from 1791, this Court determined that "[i]ts value in discerning the original meaning of the Second Amendment is insubstantial." *Id.* How it impacted the understanding of the right when the Fourteenth Amendment was ratified eight years later was irrelevant—the law's distance from the Founding determined its significance.

(4) Reconstruction.

Bruen expressly called Reconstruction-Era evidence "secondary" and useful as "mere confirmation" of Founding-Era evidence:

> As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." 554 U. S. at 614, 128 S.Ct. 2783; cf. *Sprint Communications Co.*, 554 U.S. at 312, 128 S.Ct. 2531 (ROBERTS, C. J., dissenting) ("The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of the Constitution in 1787"). And we made clear in *Gamble* that *Heller*'s interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence "only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second

> Amendment and state constitutions." *Gamble* [*v. United States*, 587 U.S. 678, 702 (2019)] (majority opinion). In other words, this 19th-century evidence was "treated as mere confirmation of what the Court thought had already been established." *Ibid.*

Bruen, 597 U.S. 36–37 (brackets omitted).

Bruen, *Gamble*, and *Heller* all considered Reconstruction-Era evidence "secondary" to Founding-Era evidence. But in the decision below, the Second Circuit held that "evidence from the Reconstruction Era … is *at least as relevant* as evidence from the Founding Era" in determining the scope of the Second Amendment. *Antonyuk*, 120 F.4th at 988 n.36 (emphasis added). That holding contradicts these recent Supreme Court cases.

(5) The late-19th and early-20th centuries.

Bruen explained that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66. It is less insightful than earlier evidence due to its "temporal distance from the founding." *Id.* In other words, the closer to the Founding the greater the significance.

The *Bruen* Court thus refused to "stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption." *Id.* at 67–68. And the Court declined to consider 20th-century evidence for the same reason: "[a]s with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight

into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66 n.28.

Bruen repeated *Heller*'s statement that "'the public understanding of a legal text in the period after its enactment or ratification' was 'a critical tool of constitutional interpretation.'" *Id.* at 20 (quoting *Heller*, 554 U.S. at 605) (emphasis omitted). Given this Court's repeated rejections of late-19th-century evidence, this statement is irreconcilable with the Second Circuit's holding that Reconstruction-Era evidence is "at least as relevant" as evidence from closer to the Second Amendment's ratification. *Antonyuk*, 120 F.4th at 988 n.36.

Other factors that the *Bruen* Court identified as relevant considerations in Second Amendment analyses revolve around the Founding Era.

First, the *Bruen* Court explained that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." 597 U.S. at 26. By requiring that the general societal problem be in existence "since the 18th century" for this evidence to be relevant, this Court ensured that the problem be known to the Founders. A problem known to the ratifiers of the Fourteenth Amendment but unknown to the Founders is insignificant—which would not be the case if "1868 and 1791 [were] both focal points" of Second Amendment inquiries and thus entitled to equal weight. *Antonyuk*, 120 F.4th at 972.

As *Bruen* noted,

> *Heller* itself exemplifies this kind of straightforward historical inquiry…. The District in *Heller* addressed a perceived societal problem—firearm violence in densely populated communities—and it employed a regulation—a flat ban on the possession of handguns in the home—*that the Founders themselves could have adopted* to confront that problem. Accordingly, after considering "*founding-era historical precedent*," including "various restrictive laws in the colonial period," and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional. *Id.*, at 631, 128 S.Ct. 2783; see also *id.*, at 634, 128 S.Ct. 2783 (describing the claim that "there were somewhat similar restrictions in the founding period" a "false proposition").

597 U.S. at 27 (emphasis added). Likewise, in *Bruen*, this Court "consider[ed] whether 'historical precedent' from before, during, and even after *the founding* evinces a comparable tradition of regulation" as the carry restriction at issue. *Id.* (quoting *Heller*, 554 U.S. at 631) (emphasis added). After "find[ing] no such tradition," the Court held the law unconstitutional. *Id.*

Second, as for "modern regulations that were unimaginable *at the founding*," the "historical inquiry that courts must conduct will often involve reasoning by analogy." *Id.* at 28 (emphasis added). This reasoning by analogy, like the rest of the test articulated in *Bruen*, must focus on the Founding Era. Because "the Second Amendment is the 'product of an

interest balancing by the people'" of the Founding generation, *id.* at 29 n.7 (quoting *Heller*, 554 U.S. at 635) (emphasis omitted), "[a]nalogical reasoning requires judges to apply faithfully the balance struck *by the founding generation* to modern circumstances," *id.* (emphasis added).

D. *Rahimi* confirmed the Court's Founding-Era focus in Second Amendment analyses.

In *Rahimi*, this Court clarified "the methodology of our recent Second Amendment cases" by explaining that "[t]hese precedents were not meant to suggest a law trapped in amber," 602 U.S. at 691, but instead require "'applying faithfully the balance struck *by the founding generation* to modern circumstances,'" *id.* at 692 (quoting *Bruen*, 597 U.S. at 29) (brackets omitted).

Rahimi upheld 18 U.S.C. § 922(g)(8) because Section 922(g)(8)(C)(i) "is 'relevantly similar' to those founding era regimes [of surety and going armed laws] in both why and how it burdens the Second Amendment right." *Id.* at 698. The Court did not consider whether Section 922(g)(8) still accorded with the understanding of the right at the time of the Fourteenth Amendment's ratification. That it was analogous to Founding-Era laws is all that mattered.

Although this Court has thus far found it "unnecessary" to "resolv[e] the dispute" over "whether courts should primarily rely on" evidence from 1791 or 1868 when applying its Second Amendment test, *id.* at 692 n.1, this Court's precedents clearly demonstrate that 1791 is the focus. Certiorari should be granted to resolve this dispute explicitly.

IV. This Court's interpretations of other Bill of Rights provisions confirm that the Founding-Era understanding controls.

This Court has "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." *Bruen*, 597 U.S. at 37. And this Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right *when the Bill of Rights was adopted in 1791*." *Id.* (emphasis added).

In *Ramos v. Louisiana*, this Court held that the Sixth Amendment's jury unanimity requirement "applies to state and federal criminal trials equally" because as "[t]his Court has long explained, … incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government." 590 U.S. 83, 93 (2020).

Similarly, in *Timbs v. Indiana*, this Court held that the Eighth Amendment's Excessive Fines Clause is equally applicable to both states and the federal government, because "[i]ncorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 586 U.S. 146, 150 (2019) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010)).

Indeed, this Court "has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (quotation omitted) (incorporating the Fifth Amendment's protection against self-incrimination). This is because "[i]t would be incongruous to have different standards determine the validity of a claim … depending on whether the claim was asserted in a state or federal court." *Id.* at 11. "Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs*, 586 U.S. at 150.

The scope of provisions of the Bill of Rights must be pinned to the original, Founding-Era understanding. Neither the passage of the Fourteenth Amendment nor the resulting incorporation of Bill of Rights provisions changed the scope of those provisions as applied against the federal government. And because the scope must be the same against states as against the federal government, *Ramos*, 590 U.S. at 93; *Timbs*, 586 U.S. at 150; *McDonald*, 561 U.S. at 765; *Malloy*, 378 U.S. at 11, the Founding-Era scope must control in all circumstances.

Again, the Court's precedents confirm this conclusion. In *Crawford v. Washington*, the Court reviewed cases from 1794 through 1844 to determine "the original understanding of the common-law right" codified in the Sixth Amendment's Confrontation Clause. 541 U.S. 36, 49–50 (2004). It referenced treatises from the second half of the 19th century only to note that they "confirm" the earlier understanding.

Id. at 50. Throughout the *Crawford* opinion, the Court repeatedly returned to how the Framers of the Constitution would have understood the right. *See e.g.*, *id.* at 53–54, 56, 59, 61, 66, 67–68; *see also Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("We are aware of no historical indication that *those who ratified the Fourth Amendment* understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.") (emphasis added).

Similarly, in *Espinoza v. Montana Dep't of Revenue*, this Court considered "the founding era and the early 19th century" evidence to determine the relevant scope of the Establishment Clause of the First Amendment. 591 U.S. 464, 480 (2020). The Court rejected later 19th-century evidence that contradicted earlier sources because "such evidence may reinforce an early practice but cannot create one." *Id.* at 482.

Time and again, this Court has pegged the scope of provisions of the Bill of Rights—against both federal and state governments—to how those provisions were understood by the Founding generation. Because the right protected by the Second Amendment is "not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'" *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780), it too must be pegged to its Founding-Era scope and understanding.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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