No. ________

In the Supreme Court of the United States

CHRISTOPHER PARIS, COMMISSIONER, PENNSYLVANIA STATE POLICE,

Petitioner

v.

MADISON M. LARA; SOPHIA KNEPLEY; LOGAN D. MILLER; SECOND AMENDMENT FOUNDATION, INC.; FIREARMS POLICY COALITION,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania

SEAN A. KIRKPATRICK
Chief Deputy Attorney General
Chief, Appellate Litigation Section
Counsel of Record

DANIEL B. MULLEN
Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-2331
COUNSEL FOR PETITIONER

QUESTION PRESENTED

Pennsylvania—like 31 other states and the federal government—establishes 21 as the minimum age for certain gun rights. A divided three-judge panel of the Court of Appeals ruled that these laws violate the Second Amendment and enjoined a Pennsylvania law prohibiting 18-to-20-year-olds from openly carrying firearms during a declared state of emergency. App.1a-49a. The panel majority held that Pennsylvania had to point to specific Founding-era statutes imposing similar restrictions on the freedom of 18-to-20-year-olds to carry guns to prevail, and could not rely on any historical evidence from the mid-to-late-1800s. App.17a-20a, 25a-26a.

In March of this year, the Court of Appeals denied en banc review by a narrow 7-6 vote. App.83a-84a. One of the dissenting Judges admonished her colleagues for the "perplexing" decision to preempt this Court's then-imminent decision in *United States v. Rahimi*, noting that it would "necessarily bear on the panel's reasoning and may well abrogate it[.]" App.105a. The question presented is:

Do firearms laws that restrict the rights of 18-to-20-year-olds comply with the Second Amendment?

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is the Commissioner of the Pennsylvania State Police, Christopher Paris, in his official capacity.[*]

Respondents (plaintiffs-appellants below) are Madison Lara, Sophia Knepley, Logan Miller, the Firearms Policy Coalition, and the Second Amendment Foundation.

RELATED PROCEEDINGS

United States District Court for the Western District of Pennsylvania:

Lara, et. al., v. Col. Robert Evanchick, No. 2:20-cv-01582 (Judgment entered on April 16, 2021).

United States Court of Appeals for the Third Circuit:

Lara v. Commissioner Pennsylvania State Police, 21-1832 (Judgment entered on January 18, 2024).

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[*] Christopher Paris succeeded Robert Evanchick as Commissioner of the State Police.

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OPINIONS BELOW

The opinion of the Court of Appeals and dissent are reported at 91 F.4th 112 and are reproduced in the appendix at 1a-49a. The dissenting opinion from the denial of rehearing en banc is reported at 97 F.4th 156 and is reproduced in the appendix at 85a-105a. The decision of the District Court is reported at 534 F.Supp.3d 478 and is reproduced in the appendix at 50a-80a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 2024. The Court of Appeals denied rehearing en banc on March 27, 2024. On May 6, 2024, Justice Alito extended the time to file a petition for a writ of certiorari to and including July 25, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and the relevant provisions of Pennsylvania's Uniform Firearms Act are reproduced in the appendix at 106a-134a.

INTRODUCTION

All 50 states and the federal government have gun-safety laws imposing minimum age requirements on the ability to acquire, possess, and carry firearms. As the panel dissent emphasized here, "there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply." Appx.34a. "The * * * question in this case * * * is where does that age threshold lie?" *Ibid.*

Historically, the answer was age 21. From the time of the Founding, through Reconstruction and

most of the 20th century, anyone under 21 was considered a minor. App.37a-43a. This common law threshold was codified in our Nation's gun laws beginning in the 1850s, when legislatures sought to address the then-emerging danger of firearm violence by minors—a discrete problem the Founding generation did not confront. App.48a, 96a-98a, 103a-105a. Between 1856 and 1897, 20 jurisdictions enacted laws specifically curtailing the gun rights of under-21-year-olds—most of which were significantly more restrictive than the Pennsylvania law under review here. Megan Walsh & Saul Cornell, *Age Restrictions and the Right to Keep and Bear Arms, 1791-1868*, 108 Minn. L. Rev. 3049, 3092 (2024) (collecting statutes).

Courts and scholars at the time agreed that these minimum age restrictions were lawful exercises of states' inherent police powers. *See, e.g.*, *State v. Callicutt*, 69 Tenn. 714, 716-17 (1878); Thomas M. Cooley, *Treatise on Constitutional Limitations*, 740 n.4 (5th ed. 1883). That consensus is unsurprising, given that the Founding generation also understood that legislatures could "categorically disarm groups whom they judged to be a threat to public safety." App.98a (Krause, J., dissenting) (quoting *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting)).

Laws imposing a minimum age of 21 for gun rights thus comport with the "principles that underlie our regulatory tradition." *United States v. Rahimi*, 602 U.S. ___ (2024) (slip op. at 7-8). And these laws remain a widespread tool for preventing violent crime today, with the federal government and 31 other states using that threshold. Restrictions on 18-to-20-year-olds therefore stand in contrast to the extreme outlier laws this Court invalidated in *Bruen* and *Heller*. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 15,

26, 31-32, 60 (2022); *Id.* at 70 (Kavanaugh, J., joined by Roberts, C.J., concurring).

Justice Alito explained in his *Bruen* concurrence that this Court did not invalidate existing age restrictions, highlighting that federal law bars the sale of handguns to under-21-year-olds. 597 U.S. at 73 (Alito, J., concurring). But the Court of Appeals interpreted *Bruen* to do just that, holding that Pennsylvania could not prohibit 18-to-20-year-olds from openly carrying firearms during a state of emergency. The panel majority believed *Bruen* required Pennsylvania to produce a regulatory twin from the Founding era imposing similar restrictions on the freedom of 18-to-20-year-olds to prevail, committing the same interpretative error as the Fifth Circuit in *Rahimi*, 602 U.S. at (slip op. at 7-8). App.4a, 17a-20a, 25a-26a.

The Court of Appeals also weighed in on an important, reoccurring methodological question this Court has acknowledged twice, but not resolved: "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[.]"*Bruen*, 597 U.S. at 30; *Rahimi*, 602 U.S. ___ (slip op. at 8 n.1). The Third Circuit held that all historical evidence from the mid-to-late-1800s had to be ignored when assessing the constitutionality of Pennsylvania's law, and that it could consider only historical evidence from the Founding. App.17a-20a.

Because *Rahimi* abrogated the Court of Appeals' reasoning, this Court should grant the petition, vacate the Court of Appeals' decision, and remand (GVR) for reconsideration, as it has done with eight other petitions since deciding *Rahimi*. If this Court does not issue a GVR, however, it should grant the petition and resolve the question presented, as well as the subsidiary

methodological question about which historical time periods can be examined in Second Amendment cases.

STATEMENT OF THE CASE

1. Pennsylvania's Uniform Firearms Act establishes a minimum age of 18 to possess a handgun or other firearm in one's home or place of business. 18 Pa.C.S. §§ 6106(a) and 6110.1. With respect to carrying firearms outside the home, the Act does not generally prohibit unlicensed open-carry by lawful gun owners, but makes it a crime to carry a concealed firearm without a license. 18 Pa.C.S. § 6106(a)(1) The Act establishes a minimum age of 21 for concealed-carry licenses. 18 Pa.C.S. § 6109(b).

The Act also provides that "[n]o person shall carry a firearm upon the public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive" unless the person (1) has a concealed-carry license or (2) is "[a]ctively engaged in a defense of that person's life or property from peril or threat." 18 Pa.C.S. § 6107(a).

Because 18-to-20-year-olds cannot obtain concealed-carry licenses, functionally, these provisions mean that 18-to-20-year-olds can carry firearms openly in public, but may not do so when the Commonwealth is in a declared state of emergency.

2. In 2021, three individual plaintiffs (Lara, Knepley, and Miller) and two institutional plaintiffs (the Second Amendment Foundation and the Firearms Policy Coalition) brought suit in the Western District of Pennsylvania.[2] The plaintiffs asserted a facial challenge to Pennsylvania's law, claiming that it violates

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[2] The three individual plaintiffs were between the ages of 18 and 21 when the suit was filed, but all of them are now at least 21 years' old. The Court of Appeals determined that the case was not

the Second Amendment rights of 18-to-20-year-olds. App.50a-54a.[3] The plaintiffs also moved for a preliminary injunction. *Ibid*. The Commissioner moved to dismiss the complaint and opposed the preliminary injunction request. *Ibid.*

The District Court granted the Commissioner's motion to dismiss and denied the plaintiffs' request for a preliminary injunction. App.50a-82a. Because the District Court's ruling pre-dated this Court's decision in *Bruen*, the District Court analyzed Pennsylvania's law under the Third Circuit's pre-*Bruen* framework and precedents, as well as precedents from other Circuits analyzing the same issue. App.56a-60a.

The District Court concluded that, under the first step of that framework, Pennsylvania's law mirrored "longstanding" historical restrictions enacted in the mid-to-late-1800s that "have long been accepted as being consistent with the right to keep and bear arms." App.77a-78a. The District Court rejected the plaintiffs' argument that Pennsylvania's law could not pass muster because there were not identical age restrictions during the Founding era. App.77a. The District Court also noted the broad consensus among federal courts at the time that laws establishing 21 as the minimum age for gun rights were constitutional. App.68a-74a, 78a (collecting cases).[4]

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moot, however, because the institutional plaintiffs had independent standing to continue litigating the claims. App.28a-29a n.22.

[3] Although the plaintiffs also raised an as-applied challenge, they later forfeited that claim on appeal. App.6a n.4.

[4] Because the District Court concluded that Pennsylvania's law mirrored "longstanding" historical restrictions, it was unnecessary for the court to undertake the means-end balancing analysis that this Court later abrogated in *Bruen*. App.79a-80a n.8.

3. A divided three-judge panel of the Court of Appeals reversed the District Court's judgment.[5] The Court of Appeals remanded with instructions to enter an injunction forbidding the Commissioner from arresting 18-to-20-year-olds who openly carry firearms when the Commonwealth is in a declared state of emergency. App.33a.

a. The majority began by considering whether 18-to-20-year-olds are among "the people" covered by the plain text of the Second Amendment. App.11a. The majority built upon the Third Circuit's since-vacated decision in *Range v. Attorney General*, 69 F.4th 96, 98 (3d Cir 2023) (en banc), in which the court "construed the term 'the people' to cast a wide net." App.12a.[6] Based on *Range*, the majority presumed that the Second Amendment applied to 18-to-20-year-olds and required the Commissioner to defeat that presumption. App.11a-13a.

The majority acknowledged the Commissioner's historical argument that when the Second Amendment was adopted, anyone under 21 was considered a minor with few independent legal rights. App.12a-13a. But the majority concluded that it could not consider this historical fact—or, indeed, any historical facts—when construing the text because it "conflates *Bruen*'s two distinct analytical steps[.]" App.13a.

Next, the majority considered whether Pennsylvania's law is consistent with historical regulations. In

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[5] The parties' initial appellate briefs were filed in 2021, before this Court's decision in *Bruen*. *See* 3d Cir. Dkt. ECF Nos. 14, 23, 38. After *Bruen*, the parties filed supplemental briefs addressing the impact of that decision. 3d Cir. Dkt. ECF Nos. 56, 57, 62, 63.

[6] This Court recently issued a GVR order in *Garland v. Range*, 21-2835 (U.S. July 2, 2024) (remanding for reconsideration in light of *Rahimi*).

undertaking this assessment, the majority held that it could consider only historical evidence from the Founding. App.17a-21a. The majority therefore disregarded all of the Commissioner's historical evidence from the mid-to-late-1800s, which demonstrated that 20 jurisdiction enacted analogous age restrictions during that time period. *Ibid.*

Although the panel majority acknowledged that this Court did not resolve the timeframe question in *Bruen*, the majority believed that this Court gave a "strong hint" as to the relevant time period when it stated that the Court has "generally assumed" that the scope of a particular protection in the Bill of Rights "is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." App.18a (quoting *Bruen*, 597 U.S. at 37). Based on this purported "hint," the majority "set aside the Commissioner's catalogue of statutes from the mid-to-late nineteenth century as each was enacted at least 50 years after the ratification of the Second Amendment." App.20a.[7]

After confining its analysis to the Founding, the majority concluded that Pennsylvania's law violates the Second Amendment because the Commissioner did not produce a regulatory twin from the 1790s. App.26a ("* * * the Commissioner cannot point us to a single founding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns"). And, to bolster that conclusion, the majority endorsed the plain-

[7] A three-judge panel of the Eleventh Circuit had reached the opposite conclusion on this issue. *See Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1322-23 (11th Cir. 2023). Although the Eleventh Circuit had already granted en banc review and thus vacated the panel ruling, *see* 72 F.4th 1346 (11th Cir. 2023), the panel majority here nonetheless acknowledged its disagreement with the Eleventh Circuit panel decision. *See* App.20a n.14.

tiffs' argument that 18-to-20-year-olds necessarily enjoy the right to keep and bear arms in modern times because they occasionally served in militias in the decades surrounding the adoption of the Second Amendment. App.23a-26a.

b. Judge Restrepo dissented. Beginning with the text, Judge Restrepo emphasized that the Second Amendment must be given the "normal and ordinary" meaning known to the citizens who adopted the right to keep and bear arms. App.34a-35a. He consulted various "historical sources evidencing how the public would have understood its text near the time of its ratification." App.35a (citing *Bruen*, 597 U.S. at 20 and *Heller*, 554 U.S. at 576).

Judge Restrepo noted that at English common law and 18th century American law, there was a widely-held consensus that anyone under 21 was considered a minor. App.12a-13a, 37a-38a (citing, *inter alia*, 1 William Blackstone, *Commentaries on the Laws of England* 451 (Oxford, Clarendon Press 1765)). The consequences of this categorization were "profound," as it meant that under-21-year-olds had "few independent legal rights" and "very little independent ability to exercise fundamental rights, including those of contract and property." App.39a-43a (citing, *inter alia*, Saul Cornell, "*Infants" and Arms Bearing in the Era of the Second Amendment*, Yale L. & Pol'y Rev. (Oct. 26, 2021)). "[I]n one historical context * * * any right [a minor] may have had to bear arms could be abrogated in its entirety at the pleasure of the [minor's] parent or an authority standing *in loco parentis*." Appx.43.

In Judge Restrepo's view, "that this class of persons had no power to independently exercise almost any rights of speech, association, conscience, marriage, contract, suffrage, petition, or property strongly suggests that they would not be understood as receiving

constitutional protections * * * under the Second Amendment." App.45a.

Judge Restrepo also addressed the majority's reliance on Founding-era militia laws, noting that these laws actually undercut the plaintiffs' argument that 18-to-20-year-olds had the unfettered right to keep and bear arms when the Second Amendment was ratified. App.43a-45a. He emphasized that the minimum age for militia service "varied from state-to-state" and that children as young as 15 were sometimes required to serve. App.34a. And, more fundamentally, when Founding-era militia laws imposed duties on minors to enroll in the militia, they carried arms in that highly-regulated context "under the supervision of peace officers who * * * stood *in loco parentis*." App.44a.

Thus, that minors occasionally bore arms in the militia "at the pleasure of their superiors" did not mean they had "an independent *right* under the Second Amendment" that they could assert against the government. App.44a, 46a (emphasis in original). Moreover, "*Heller* made clear that the Second Amendment codifies an individual right to keep and bear arms that is unconnected to militia service[.]" App.44a.

Judge Restrepo next looked to post-enactment history to confirm his initial textual analysis. App.48a ("Under *Bruen*, it is appropriate to consider the evidence from the Founding and determine if later evidence offers greater proof and context."). He highlighted a series of statutes enacted in the mid-to-late-1800s that restricted the ability of under-21-year-olds to acquire firearms—many of which were more restrictive than the Pennsylvania law under review. App.48a. Based on the totality of this historical evidence, Judge Restrepo concluded that Pennsylvania's law is consistent with the Nation's historical tradition of firearm regulation. App.48a-49a.

4. The Commissioner filed a sur-petition for rehearing en banc. By a 7-6 vote, the Court of Appeals denied the Commissioner's petition. App83a-84a. Judge Krause authored a dissent from that decision. App.85a.

Judge Krause criticized the majority for relying "exclusively on 18th century militia laws" and for disregarding the "voluminous support" for Pennsylvania's law in "19th-century analogues[.]" App.86a. And she rebuked the panel majority's "novel" methodology, "which the majority attempted to ground in a 'hint'" in *Bruen*. App.88a.

Judge Krause emphasized that this Court has "cited to and relied upon Reconstruction-era sources" and rejected the argument that these sources were "'illegitimate postenactment legislative history.'" App.89a, 92a (quoting *Bruen*, 597 U.S. at 20). She also noted that the panel majority's ruling split with recent decisions in the First and the Second Circuits. App.90a-91a n.11 (citing, *inter alia Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 51 (1st Cir. 2024) and *Antonyuk v. Chiumento*, 89 F.4th 271, 305 (2d Cir. 2023)).[8]

Judge Krause then explained how the timing of these 19th-century minimum age laws coincided with the Nation's first mass production of handguns and a corresponding rise in interpersonal gun violence by minors—a specific danger that the Founding generation did not confront. App.96a-97a, 103a-104a. She noted that this Court "anticipated this situation in *Bruen*" when it stated that the "regulatory challenges posed by firearms today are not always the same as those that

[8] This Court recently issued a GVR order in *Antonyuk v. James*, 23-910 (U.S. July 2, 2024) (remanding for reconsideration in light of *Rahimi*).

preoccupied the Founders in 1791 or the Reconstruction generation in 1868" and that laws "implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." App.104a-105a (quoting *Bruen*, 597 U.S. at 27).

Judge Krause also explained that, even under the panel majority's limited approach to history, Pennsylvania's law should still be upheld because it is analogous to Founding-era laws that categorically disarmed groups whom posed a threat to public safety. App.98a-103a (citing, *inter alia*, *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting)).

Finally, Judge Krause chastised her colleagues for the "perplexing" decision to not grant the en banc petition—or, at least hold it *c.a.v.*—in light of this Court's then-pending decision in *Rahimi*. App.86a-87a, 92a-93a, 105a. She explained that *Rahimi* "will necessarily bear on the panel's reasoning and may well abrogate it even as the panel's mandate issues." App.105a. Judge Krause thus called on this Court to review this case. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. BECAUSE THE THIRD CIRCUIT'S DECISION CANNOT BE RECONCILED WITH *RAHIMI*, THIS COURT SHOULD VACATE THE JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS.

Judge Krause's observation about the Third Circuit's refusal to wait for this Court's decision in *Rahimi* was prescient. By requiring the Commissioner to produce historical twins from the Founding era, the panel majority here committed the same error as the Fifth Circuit in *Rahimi*. App.4a, 17a-18a, 26a ("* * * the Commissioner cannot point us to a single [F]ounding-

era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns.").

In *Rahimi*, this Court expressly rejected that flawed approach and clarified that "when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" 602 U.S. at ___ (slip op. at 7) (quoting *Bruen*, 597 U.S. at 30). "[T]he appropriate analysis is whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at ___ (slip op. at 7) (citing *Bruen*, 597 U.S. at 26-31). *Rahimi* has thus abrogated the Third Circuit's analysis, just as Judge Krause predicted it would.

This Court frequently issues GVR orders where, as here, there is "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration[.]" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Since *Rahimi*, this Court has issued eight GVR orders in Second Amendment cases. *Garland v. Range*, 23-374 (U.S. July 2, 2024); *Antonyuk v. James*, 23-910 (U.S. July 2, 2024); *United States v. Daniels*, 23-376 (U.S. July 2, 2024); *United States v. Perez-Gallan*, 23-455 (U.S. July 2, 2024); *Vincent v. Garland*, 23-683 (U.S. July 2, 2024); *Jackson v. United States*, 23-6170 (U.S. July 2, 2024); *Cunningham v. United States*, 23-6602 (U.S. July 2, 2024); *Doss v. United States*, 23-6842 (U.S. July 2, 2024). It should do so here, too.

The GVR order in *Range* is particularly instructive. In *Range*, as here, the Third Circuit employed the same misreading of *Bruen* as the Fifth Circuit in *Rahimi*. *See Range*, 69 F.4th at 118, 130 (Krause, J., dissenting) (criticizing the Third Circuit's approach, under which "*any* difference between a historical law and contemporary regulation defeats an otherwise-

compelling analogy," and noting that *Range* "tracks precisely the Fifth Circuit's deeply disturbing opinion in *United States v. Rahimi* * * *"). The panel here was required to follow *Range* as binding precedent and expressly relied and built upon that now-vacated decision. App.12a-15a (citing *Range*). Because the panel did not have the benefit of this Court's guidance in *Rahimi*, and was required to follow *Range*'s deeply-flawed analysis, there is a "reasonable probability" that "further consideration" will yield a different result. *Lawrence*, 516 U.S. at 167.

The Court of Appeals should have heeded Judge Krause's warning to wait for this Court. *Rahimi* clarified the *Bruen* analysis, providing critical guidance the Court of Appeals lacked when it incorrectly analyzed Pennsylvania's law. For the same reasons a GVR order was warranted in *Range,* this Court should issue a GVR order here.

II. ALTERNATIVELY, THIS COURT SHOULD EXERCISE PLENARY REVIEW AND RESOLVE THE QUESTION PRESENTED ON THE MERITS.

If this Court decides not to issue a GVR order, it should exercise plenary review and resolve the question presented. It should also settle the important, reoccurring methodological question of whether courts may rely on the prevailing understanding of the right to keep and bear arms from 1868.

A. COURTS ARE DEEPLY CONFUSED ABOUT WHETHER AND HOW TO UTILIZE RECONSTRUCTION-ERA HISTORY.

This Court has twice acknowledged an ongoing debate over "whether courts should primary rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when

defining its scope[.]" *Rahimi*, 602 U.S. at ___ (slip op. at 6 n.1) (quoting *Bruen*, 597 at 37). Although the Court determined it was unnecessary to resolve that methodological issue in *Bruen* and *Rahimi*, the Third Circuit squarely resolved it here, foreclosing any reliance on post-enactment history from the mid-to-late-1800s. The divergent approaches to this question within the Third Circuit, *compare* App.17a-21a *with* App.85a-105a, are emblematic of the confusion among courts in general over whether, and how, to weigh Reconstruction-era history in Second Amendment cases.

In *Antonyuk*, *supra*, the Second Circuit decided this methodological question when considering the constitutionality of New York's Concealed Carry Improvement Act. The Second Circuit determined that "the prevailing understanding of the right to bear arms in 1868 and 1791 are both focal points in [the] analysis," and that evidence from Reconstruction is "at least as relevant as evidence from the Founding era[.]" 89 F.4th at 304-05, 318 n.27.

In reaching this conclusion, the Second Circuit highlighted this Court's decision in *McDonald*, noting that this Court "looked to evidence of the pre-Civil War and Reconstruction Eras to hold that [the] right to keep and bear arms was a fundamental right fully applicable to the States." *Id.* at 304-305 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 770-778 (2010)). The Second Circuit reasoned that "[i]t would be incongruous to deem the right to keep and bear arms fully applicable to the States by Reconstruction standards but then define its scope and limitations exclusively by 1791 standards." *Ibid.*

Applying its conclusion, the Second Circuit determined that aspects of New York's licensing scheme were constitutional because they mirrored laws "from

the years immediately following ratification of the Fourteenth Amendment." *Id.* at 317-321.[9]

A three-judge panel of the Eleventh Circuit also decided this methodological question in *Bondi*. And, as here, the Eleventh Circuit panel considered the issue in a challenge to a state law firearm law establishing a minimum age of 21. 61 F.4th at 1320. The panel concluded that Florida's law was constitutional because it mirrored "a flurry of state regulations" enacted around the time of Reconstruction to address the then-emerging "problem of deaths and injuries that underage firearm users inflicted." *Id.* at 1327-29.

In the view of those judges, "Reconstruction Era historical sources are the most relevant to our inquiry on the scope of the right to keep and bear arms" because "those sources reflect the public understanding of the right * * * at the very time the states made that right applicable to the state governments by ratifying the Fourteenth Amendment." *Id.* at 1321. And "[i]t would be odd indeed if the people who adopted the Fourteenth Amendment did so with the understanding that it would invalidate widely adopted and widely approved-of gun regulations at the time." *Id.* at 1330.[10]

Like *Antonyuk* and *Bondi*, recent opinions in the First and Seventh Circuits and the Pennsylvania Supreme Court have relied on Reconstruction-era history in Second Amendment cases. *Ocean State Tactical*, 95

[9] As noted, this Court entered a GVR order in *Antonyuk*.

[10] As noted, the panel's opinion was later vacated when the Eleventh Circuit granted rehearing en banc—a proceeding the Eleventh Circuit decided to delay until after *Rahimi*. *See Nat'l Rifle Ass'n v. Bondi*, 72 F.4th 1346 (11th Cir. 2023). But the Third Circuit nonetheless acknowledged the vacated panel opinion here to highlight the competing views of this methodological question. App.20a n.14.

F.4th at 51-52 (although Founding-era history is "of primary importance," courts should also consider "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century") (quoting *Heller*, 554 U.S. at 605); *Bevis v. City of Naperville*, 85 F.4th 1175, 1191-1194 (7th Cir. 2023) ("* * * the relevant time to consult is 1791, or maybe 1868 * * *"); *Barris v. Stroud Twp.*, 310 A.3d 175, 212 (Pa. 2024) (relying on statutes enacted after 1868). In contrast to the Third Circuit here, those courts rejected the argument that *no* laws enacted during the late 1800s may be considered. *See, e.g.*, *Ocean State Tactical*, 95 F.4th at 51-52.[11]

This case presents an opportune moment for resolving the historical timeframe question that the Third Circuit answered incorrectly. As the Pennsylvania Supreme Court stated in *Barris*, there is an "ever-growing chorus of courts across the country" calling on this Court to offer "more guidance in this ever-shifting area of the law[.]" 310 A.3d at 190, 215. How to utilize Reconstruction-era history is unquestionably among the most important unresolved questions about which courts are seeking this Court's guidance. *See, e.g.*, *United States v. Daniels*, 77 F.4th 337, 358 (5th Cir.

[11] Several pre-*Bruen* Circuit decisions also determined that courts should rely on Reconstruction-era history. *See, e.g., Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011) ("the most relevant historical period for questions about the scope of the Second Amendment as applied to the [s]tates is the period leading up to and surrounding the ratification of the Fourteenth Amendment"); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified)."), *abrogated on other grounds by Bruen*; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (quoting *Ezell*, supra), *abrogated on other grounds by Bruen.*

2023) (Higginson, J., concurring) ("courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry" including over the difficult and "often dispositive" question of whether "the operative time period" is 1791 or 1868).[12] And, as Justice Jackson observed, "when courts signal they are having trouble with one of our standards, we should pay attention." *Rahimi*, 602 U.S. at ___ (Jackson, J. concurring) (slip. op. at 2-3).

B. Courts Are Divided Over the Constitutionality of Firearms Restrictions on 18-to-20-Year-Olds.

Courts are also divided on the specific constitutional question of whether restrictions on 18-to-20-year-olds comport with the Second Amendment.

Before *Bruen*, laws establishing 21 as the minimum age for gun rights routinely survived constitutional challenges. *See, e.g.*, *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 n.8 (5th Cir. 2012) (upholding federal law prohibiting federally licensed firearms dealers from selling handguns to persons under age 21); *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (upholding Texas's public-carry restriction on 18-to-20-year-olds); *Powell v. Tompkins*, 926 F.Supp.2d 367, 385-393 (D. Mass. 2013) (upholding state law prohibiting 18-to-20-year-olds from obtaining concealed-carry licenses); *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (upholding public-carry restrictions on 18-to-20-year-olds as "historically rooted"); *Mitchell v. Atkins*, 483 F.Supp.3d 985, 993 (W.D. Wash. 2020) (upholding prohibition on selling semiautomatic assault rifles to 18-to-20-year-olds), *vacated* 20-35827 (9th Cir. Dec. 2,

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[12] As noted, this Court entered a GVR order in *United States v. Daniels*, 23-376 (U.S. July 2, 2024).

2022); *Jones v. Becerra*, 498 F.Supp.3d 1317, 1327 (S.D. Cal. 2020) (upholding California laws restricting the ability of 18-to-20-year-olds to purchase certain firearms), *vacated sub nom Jones v. Bonta*, 47 F.4th 1124 (9th Cir. 2022); *Nat'l Rifle Ass'n v. Swearingen*, 545 F.Supp.3d 1247, 1256-59 (N.D. Fla. 2021), *aff'd sub nom*, *Bondi*, 61 F.4th at 1317; *but cf. Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 5 F.4th 407 (4th Cir. 2021) (holding that federal law prohibiting federally licensed firearms dealers from selling handguns to persons under age 21 violated the Second Amendment), *vacated as moot* 14 F.4th 322 (4th Cir. 2021).

Like the District Court here, *see* App.56a-60a, most of these pre-*Bruen* decisions concluded that restrictions on 18-to-20-year-olds were consistent with longstanding historical restrictions enacted in the mid-to-late-1800s under the first step of the pre-*Bruen* framework. In *Bruen*, this Court confirmed that this type of analysis was "broadly consistent with *Heller*[.]" *Bruen*, 597 U.S. at 19.

Since *Bruen*, however, this consensus has broken down, and a number of courts have ruled that restrictions on 18-to-20-year-olds violate the Second Amendment. *See Worth v.* Jacobson, ___ F.4th ___, 2024 WL 3419668 (8th Cir. Jul. 16, 2024); *Fraser v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 672 F.Supp.3d 118 (E.D. Va. 2023), *appeal pending sub. nom. McCoy v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 23-2085 (4th Cir.); *Rocky Mountain Gun Owners v. Polis*, 685 F.Supp.3d 1033 (D. Col. 2023), *appeal pending* 23-1251 (10th Cir.); *Firearms Policy Coalition v. McCraw*, 623 F.Supp.3d 740 (N.D. Tex. 2022); *but cf.*, *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 647 F.Supp.3d 508 (W.D. La. 2022), *appeal pending* 12-30033 (5th Cir.); *Bondi*, 61 F.4th at

1327-29. Many of the post-*Bruen* opinions invalidating age restrictions on 18-to-20-year-olds commit the same error as the Fifth Circuit in *Rahimi* and as the panel majority here—that is, demanding identical age restrictions from the Founding. *See, e.g.*, *Fraser*, 672 F.Supp.3d at 143 ("The Government has not presented any evidence of age-based restrictions on the purchase or sale of firearms from the colonial era, Founding, or Early Republic."); *see also Rocky Mountain Gun Owners*, 685 F.Supp.3d at 1057.

The confusion among courts over the constitutionality of these minimum age laws, if allowed to fester, will be profoundly disruptive as laws limiting under-21-year-olds' access to firearms are ubiquitous. Federal law prohibits federally-licensed firearms dealers from selling handguns to anyone under 21 years' old. 18 U.S.C. § 922(b)(1). And 32 states—including every state within the Third Circuit—have laws establishing 21 as the minimum age for certain gun rights.[13]

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[13] Alaska Stat. §§ 11.61.220(a)(6), 18.65.705; Ariz. Rev. Stat. §§ 13-3102(A)(2), 13-3112(E); Ark. Code § 5-73-309; Cal. Penal Code §§ 26150(a)(2), 26155(a)(2); Colo. Rev. Stat. § 18-12-203(1)(b); Conn. Gen. Stat. §§ 29-28(b), 29-35(a); Del. Code Ann. tit. 11, § 1448(a)(5); Fla. Stat. §§ 790.06(1), (2)(b), 790.053(1); Ga. Code §§ 16-11-125.1(2.1), 16-11-126(g)(1), 16-11-129(b)(2)(A); Haw. Rev. Stat. § 134-9(a)(6); 430 Ill. Comp. Stat. 66/25(1); 720 Ill. Comp. Stat. 5/24-1(a)(10); Ky. Rev. Stat. § 237.110(4)(c); La. Rev. Stat. § 40:1379.3(C)(4); Md. Public Safety Code § 5-133(d); Mass. Gen. Laws ch. 140, § 131(d)(iv); Mich. Comp. Laws § 28.425b(7)(a); Minn. Stat. § 624.714; Neb. Rev. Stat. § 69-2433(1); Nev. Rev. Stat. § 202.3657(3)(a)(1); N.J. Stat. §§ 2C:58-3(c)(4), 2C:58-4(c); N.M. Stat. § 29-19-4(A)(3); N.Y. Penal Law § 400.00(1); N.C. Gen. Stat. § 14-415.12(a)(2); Ohio Rev. Code § 2923.125(D)(1)(b); Okla. Stat. tit. 21 § 1272(A)(6); Or. Rev. Stat. § 166.291(1)(b); R.I. Gen. Laws §§ 11-47-11, 11-47-18; Utah Code §§ 76-10-505, 76-10-523(5); Va. Code § 18.2-308.02(A); Wash. Rev. Code

Although these laws differ in degree and kind, they all reflect the same principle: unfettered access to firearms by immature 18-to-20-year-olds threatens public safety. App.97a-98a.

Litigants, including one of the plaintiffs in this case, are already attempting to expand the Third Circuit's holding here to invalidate other age restrictions. *See, e.g.*, *Second Amendment Foundation, et al. v. Paris*, 24-cv-01015 (M.D. Pa.) (arguing that *Lara* prohibits Pennsylvania from denying concealed-carry licenses to 18-to-20-year-olds). The officials on the front lines of enforcing these laws are eager for this Court to confirm the constitutionality of a widespread method of promoting public safety.

C. THE PANEL MAJORITY'S NOVEL METHODOLOGY CONFLICTS WITH *HELLER*, *MCDONALD*, *BRUEN*, AND *RAHIMI*.

This Court acknowledged in *Rahimi* that "some courts have misunderstood the methodology of our recent Second Amendment cases." 602 U.S. at ___ (slip op. at 7). The Third Circuit is one of those courts. In concluding that Pennsylvania's law violates the Second Amendment, the panel majority committed a series of analytical missteps that conflict with this Court's precedents.

1. The panel majority stumbled right out of the gate with its analysis of the Second Amendment's text. Instead of requiring the plaintiffs to demonstrate that their conduct was covered by the text, the majority simply *presumed* textual coverage and required the Commissioner to rebut that presumption. App.11a-12a. But the majority held that the Commissioner

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§ 9.41.070(1)(c); Wis. Stat. § 175.60(3)(a); Wyo. Stat. § 6-8-104(a)(iv), (b)(ii).

could not rely on *any* historical evidence to defeat that presumption. App.13a (the Commissioner's historically-rooted textual analysis "conflates *Bruen*'s two distinct analytical steps").

Precluding any reliance on historical evidence at the textual prong conflicts with *Bruen* and *Heller*, in which history guided this Court's interpretation of the Second Amendment's plain text. In those cases, this Court examined "a variety of legal and other sources" to determine the public understanding of the text at the time of its enactment. *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 605). The text is thus "informed by history" and "confirmed by the historical background of the Second Amendment." *Bruen*, 597 U.S. at 19-20.

In contrast to the majority, Judge Restrepo correctly followed *Bruen* and *Heller*'s command to consult history when construing the Second Amendment's text. App.37a-48a.

2. After refusing to consider historical evidence when construing the text, the panel majority then confined its historical analysis further by refusing to consider any analogous laws enacted in the mid-to-late-1800s. That limited historical purview is also contrary to this Court's precedents.

Far from foreclosing all reliance on mid-to-late-19th-century regulations, this Court consistently looks to that era to confirm its understanding of the Second Amendment. *Rahimi*, 602 U.S. at ___ (Kavanaugh, J., concurring) (slip op. at 13-16). In *Heller*, the Court surveyed Reconstruction-era views about the scope of the Second Amendment, describing those views as "instructive." *Heller*, 554 U.S. at 614. In *Bruen*, the Court relied on 19th-century-regulations as evidence that "concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry." 697 U.S. at 52-53 (emphasis in original). And in *McDonald*, mid-

to-late-19th-century evidence was central to the Court's conclusion that the right to bear arms applied to the states. 561 U.S. 770-78. There, the Court emphasized that "the Framers and *ratifiers of the Fourteenth Amendment* counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778 (emphasis added).

This Court's endorsement of 19th-century sensitive places restrictions in *Bruen* is particularly instructive on this score. The Court noted that there were "relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited[.]" *Bruen*, 597 U.S. at 30. The Court then cited a law review article collecting such statutes. *Ibid.* The overwhelming majority of those restrictions were enacted in the *late*-19th-century, *after* the Fourteenth Amendment was ratified. D. Kopel & J. Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205, 229-36, 244-47 (2018). Because there were "no disputes regarding the lawfulness of such prohibitions" the Court "assume[d] it settled" that those regulations were consistent with the Second Amendment. *Bruen*, 597 U.S. at 30. The same is true of the 19th-century age restrictions that the Commissioner has relied on in this case.

Disregarding post-enactment history altogether, as the panel majority did here, is inconsistent with *Bruen*, *Heller*, and *McDonald*.

3. The majority cabined its historical analysis even further by demanding that the Commissioner produce historical twins from the Founding era. *See* App.17a-18a, 26a ("* * * the Commissioner cannot point us to a single [F]ounding-era statute imposing restrictions on the freedom of 18-to-20-year-olds to carry guns."). In *Rahimi*, this Court clarified that "when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to

pass constitutional muster.'" 602 U.S. at ___ (slip op. at 7) (quoting *Bruen*, 597 U.S. at 30). So instead of requiring a "historical twin," "the appropriate analysis is whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." 602 U.S. at ___ (slip op. at 7) (citing *Bruen*, 597 U.S. at 26-31); *see also id.* (Barrett, J., concurring) (slip op. at 4) ("'Analogical reasoning' under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold.").

As this Court explained in *Bruen*, "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791[.]" 597 U.S. at 27. Therefore, "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 28 (citation omitted). Applying constitutional principles "to novel modern conditions * * * is an essential component of judicial decisionmaking under our enduring Constitution." *Id.* at 31 (citation omitted).

In searching for a Founding-era twin, the majority overlooked an important post-enactment societal development that the Founding generation did not confront: the mass-production of handguns in the mid-19th-century and the corresponding rise in firearms related violence—particularly by young people. App.96a-97a; *Bondi*, 61 F.4th at 1327-28; *see also* Megan Walsh & Saul Cornell, *Age Restrictions and the Right to Keep and Bear Arms, 1791-1868*, 108 Minn. L. Rev. 3049, 3087 (2024) ("The proliferation of guns in the decades after the adoption of the Second Amendment * * * produced an expansion of regulation to address a range of problems that did not exist in 1791.").

So, as Judge Restrepo correctly observed, the absence of a specific Founding-era law disarming under-

21-year-olds is not "determinative of whether the challenged regulation is 'consistent' with our Nation's historical tradition because "[l]egislatures tend not to enact laws to address problems that do not exist[.]" App.47a; *see also Rahimi*, 602 U.S. ___ (Barrett, J., concurring) (slip op. at 4) (requiring "21st-century regulations to follow late-18th-century policy choices * * * assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a "use it or lose it" view of legislative authority").

4. Ultimately, the panel majority's conclusion that Pennsylvania's law violates the Second Amendment was "based exclusively on 18th-century militia laws[.]" App.86a. Specifically, the majority concluded that because Founding-era statutes occasionally required "young adults" to serve in the militia, this "indicates that [F]ounding-era lawmakers believed that those youth could, and indeed should, keep and bear arms." App.23a-26a.

As Judge Restrepo explained, 18th-century militia laws actually demonstrate the Founding generation's view that under-21-year-olds should have access to deadly weapons only under appropriate adult supervision. When state militia laws called on under-21-year-olds to serve, parental consent was usually a prerequisite, and parents were often required to furnish their children with arms. 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, Table 1 (2021) (collecting statutes from 1776 to 1825).

Adult supervision was also a critical component of under-21-year-olds' ability to bear muskets once in the militia. App.44a (minors "only rendered militia service under the supervision of peace officers"). Once properly mustered, militiamen were subject to fines,

strict discipline, and punishment, and their arms were subject to periodic inspection. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 508-10 (2004). Thus, at the Founding, "access to, and the ability to keep and bear, weapons occurred in supervised situations where minors were under the direction of those who enjoyed legal authority over them: fathers, guardians, constables, justices of the peace, or militia officers." Saul Cornell, "*Infants*," *supra* at 14.

The Third Circuit's conclusion that militia laws demonstrate the Founding generation's disapproval of restrictions on under-21-year-olds is belied by the highly-supervised, highly-regulated nature of under-21-year-olds' militia service.

5. Judge Krause correctly observed that there would be "far-reaching consequences" to subjecting every state within the Third Circuit to the panel majority's "novel methodology." App.87-88. Those consequences are already being felt as litigants are attempting to exploit the panel majority's flawed analysis to erode all manner of gun-safety laws. *See, e.g.*, *Second Amendment Foundation, et al. v. Paris*, 24-cv-01015 (M.D. Pa.) (arguing that *Lara* prohibits Pennsylvania from denying concealed-carry licenses to 18-to-20-year-olds); *United States v. Moore*, 23-1843 (3d Cir.) (relying on *Lara* to argue that the Second Amendment prohibits disarming a felon convicted of drug-trafficking); *United States v. Biden*, 23-cr-00061 (D. Del) (relying on *Lara* to argue that a federal law prohibiting gun possession by drug users violates the Second Amendment); *Williams v. Attorney General*, 24-1091 (3d Cir.) (relying on *Lara* and arguing that the Second Amendment prohibits disarming a DUI felon); *Siegel v. Att'y Gen. of N.J.*, 23-1900 *and Koons v. Att'y Gen. of N.J.*, 23-2043 (3d

Cir) (arguing that *Lara* invalidates New Jersey's sensitive-place restrictions).

* * *

Even though laws establishing 21 as the minimum age for gun rights have existed for more than 150 years, and are consistent with the Founding-era practice of disarming those who present a danger to the public, the Third Circuit held that such laws are inconsistent with the Nation's historical tradition of firearms regulation. That holding reflects a profound and fundamental misunderstanding of this Court's Second Amendment precedents, and implicates important, unresolved methodological questions with which courts throughout the country are struggling.

CONCLUSION

The Court should grant the petition, vacate the Third Circuit's judgment, and remand for reconsideration in light of *Rahimi*. Alternatively, the Court should grant the petition, exercise plenary review, and resolve the question presented.

Respectfully submitted,

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania

SEAN A. KIRKPATRICK
Chief Deputy Attorney General
Chief, Appellate Litigation Section
Counsel of Record

DANIEL B. MULLEN
Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17102
(717) 783-3226

COUNSEL FOR PETITIONER

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