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

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1832

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

v.

COMMISSIONER PENNSYLVANIA STATE POLICE,

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. No. 2-20-cv-01582)
District Judge: Honorable William S. Stickman, IV

Argued
June 28, 2023

Before: JORDAN, RESTREPO, and SMITH, *Circuit Judges*

(Filed: January 18, 2024)

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OPINION OF THE COURT

JORDAN, Circuit Judge.

Through the combined operation of three statutes, the Commonwealth of Pennsylvania effectively bans 18-to-20-year-olds from carrying firearms outside their homes during a state of emergency. Madison Lara, Sophia Knepley, and Logan Miller, who were in that age range when they filed this suit, want to carry firearms outside their homes for lawful purposes, including self-defense. They, along with two gun rights organizations, sued the Commissioner of the Pennsylvania State Police (the "Commissioner") to stop enforcement of the statutes, but the District Court ruled against them. They now appeal the District Court's order dismissing their case and denying them preliminary injunctive relief. They assert that the Commonwealth's statutory scheme

violates the Second Amendment of the United States Constitution.

In response, the Commissioner contends that the Appellants[1] are not among "the people" to whom the Second Amendment applies, and that the Nation's history and tradition of firearm regulation support the statutory status quo. We disagree. The words "the people" in the Second Amendment presumptively encompass all adult Americans, including 18-to-20-year-olds, and we are aware of no founding-era law that supports disarming people in that age group. Accordingly, we will reverse and remand.

I. BACKGROUND[2]

A. Pennsylvania's firearm statutes

Under §§ 6106(a) and 6109(b) of the Pennsylvania Uniform Firearms Act of 1995 ("UFA"), 18 Pa. Cons. Stat. §§ 6101-6128, an individual may not

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[1] Lara, Knepley, and Miller are U.S. citizens and residents of Pennsylvania. Were it not for the challenged statutory provisions, they would have carried firearms outside of their homes. The two organizational Appellants are the Second Amendment Foundation and the Firearms Policy Coalition, both of which have at least one active 18-to-20-year-old member who is a U.S. citizen and Pennsylvania resident and who wishes to carry firearms in public for lawful purposes. For simplicity, we will speak of the "Appellants" in terms of the three named individuals, unless otherwise specified.

[2] The operative facts are not in dispute. We are bound, at this stage of the proceedings, to "accept all factual allegations as true, [and] construe the complaint in the light most favorable to the [Appellants]." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

carry a concealed firearm without a license and must be at least 21 years old to apply for a license. A concealed-carry license permits the holder to carry a firearm even during a state of emergency. *Id.* § 6107(a)(2). Ordinarily, Pennsylvanians without a concealed-carry license may carry openly, but § 6107(a) of the UFA provides that "[n]o person shall carry a firearm upon public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive[.]" *Id.* § 6107(a). Besides the exception for those with a concealed-carry license, there are exceptions for those "actively engaged in a defense" and those who qualify for one of fifteen other exceptions enumerated in § 6106(b).[3] *Id.* § 6107(a)(1)-(2).

Taken together, §§ 6106, 6107, and 6109 – when combined with a state or municipal emergency declaration – have the practical effect of preventing most 18-to-20-year-old adult Pennsylvanians from carrying firearms. When this suit was filed in October 2020, "Pennsylvania had been in an uninterrupted state of emergency for nearly three years" due to gubernatorial proclamations related to the COVID-19 pandemic, the opioid addiction crisis, and Hurricane Ida. (Comm'r Letter Br. at 4-5.) Perhaps out of weariness with the ongoing emergency declarations, Pennsylvania recently amended its constitution to

[3] For example, the exceptions permit individuals to carry concealed firearms if they are in law enforcement, the National Guard, or the military, and to transport firearms to and from places of purchase and shooting ranges if the firearms are not loaded. 18 Pa. Cons. Stat. § 6106(b). They do not, however, provide the typical, law-abiding Pennsylvanian with the option of carrying a loaded and operable firearm for most lawful purposes, including self-defense.

limit the governor's authority to issue such emergency declarations to twenty-one days, unless the General Assembly votes to extend it. Pa. Const. art. IV, § 20. Subsequently, all state-wide emergency declarations lapsed.

B. Proceedings below

The Appellants sued the Commissioner, Robert Evanchick, in his official capacity, challenging as unconstitutional under the Second Amendment the combined effect of §§ 6106, 6107, and 6109, which, together with the then-ongoing state of emergency, foreclosed them from carrying firearms in public places.[4]

They moved for a preliminary injunction in December 2020, and the Commissioner responded by moving to dismiss under Federal Rule of Civil Procedure 12(b)(6). The District Court denied the motion for a preliminary injunction and granted the Commissioner's motion to dismiss the case. Citing this Court's past decisions "giv[ing] broad construction to … 'longstanding' and 'presumptively valid regulatory measures' in the context of licensing requirements," and the "broad consensus" of decisions from other federal courts "that restrictions on firearm ownership, possession and use for people younger than 21 fall

[4] Besides facially challenging the UFA, the complaint also raised as-applied challenges in the alternative. The Appellants, however, have not articulated any as-applied challenge in their briefs and have therefore forfeited those claims. *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is [forfeited] unless a party raises it in its opening brief[.]").

within the types of 'longstanding' and 'presumptively lawful' regulations envisioned by [*District of Columbia v. Heller*, 554 U.S. 570 (2008)]," the District Court concluded that Pennsylvania's restrictions "fall outside the scope of the Second Amendment." (J.A. at 5, 20.)

The Appellants timely appealed.

II. DISCUSSION[5]

A. The Supreme Court's new, two-part test

The Second Amendment, controversial in interpretation of late,[6] is simple in its text: "A well

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[5] "When considering a Rule 12(b)(6) motion, we 'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 431 (3d Cir. 2017). When reviewing a district court's refusal to grant a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and its ultimate decision to deny the injunction for abuse of discretion. *Am. Express Travel Related Servs., Inc. v. Sidamon–Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). Whether the Second Amendment conflicts with the statutory scheme at issue here is a question of law that we review de novo. *Hernandez-Morales v. Att'y Gen.*, 977 F.3d 247, 249 (3d Cir. 2020).

[6] *Compare, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 105 (2023) ("Although there is still time for courts to develop workable standards (as they did after []*Heller*), post-*Bruen* cases reveal an erratic, unprincipled jurisprudence, leading courts to strike down gun laws on the basis of thin historical discussion and no meaningful explanation of historical analogy."), *with* Nelson Lund, Bruen's *Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 289 (2022) ("[T]he *Bruen* majority [saw] that the circuit courts were generally

regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In *Heller*, the Supreme Court held that, regardless of militia service, the Second and Fourteenth Amendments guarantee to an individual the right to possess a handgun in his home for self-defense. 554 U.S. at 584, 592. In that opinion, which addressed a District of Columbia law that banned handguns and required other "firearms in the home be rendered and kept inoperable at all times," the Court observed that the challenged law would be unconstitutional "[u]nder any of the standards of scrutiny … applied to enumerated constitutional rights." *Id.* at 628-30. We and other courts had interpreted that observation as endorsing a means-end scrutiny analysis in Second Amendment cases.[7]

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treating the Second Amendment with dismissive hostility, as if it were a second-class provision of the Bill of Rights.").

[7] *See, e.g.*, *Holloway v. Att'y Gen.*, 948 F.3d 164, 172 (3d Cir. 2020) ("If a challenger makes a 'strong' showing that the regulation burdens his Second Amendment rights … then 'the burden shifts to the Government to demonstrate that the regulation satisfies' intermediate scrutiny."); *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 128 (2d Cir. 2020) ("Laws that 'place substantial burdens on core rights are examined using strict scrutiny'; but laws that 'place either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens [only] on conduct outside the core … can be examined using intermediate scrutiny.'") (alteration in original); *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020) ("[A] 'regulation that threatens a right at the core of the Second Amendment'– i.e., the right to possess a firearm for self-defense in the home – 'triggers strict scrutiny,' while 'a regulation that does not encroach on the core of the Second Amendment' is evaluated under intermediate scrutiny."); *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) ("The appropriate level of scrutiny 'turn[s] on how

Then, last year, in *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, the Supreme Court held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun … outside the home." 142 S. Ct. 2111, 2122 (2022). The Court rejected "means-end scrutiny in the Second Amendment context" and announced a new two-step analytical approach. *Id.* at 2122, 2126-27. At the first step, a court determines whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129-30. That "'textual analysis' focuse[s] on the 'normal and ordinary' meaning of the Second Amendment's language." *Id.* at 2127 (quoting *Heller*, 554 U.S. at 576-78). If the text applies to the conduct at issue, "the Constitution presumptively protects that conduct." *Id.* at 2130.

At the second step, a court determines whether the regulation in question "is consistent with the Nation's historical tradition of firearm regulation." *Id.* If it is, the presumption made at the first step of *Bruen* is overcome, and the regulation in question can stand.

To aid the court in that second-step analysis, the government bears the burden of identifying a "founding-era" historical analogue to the modern firearm regulation. *Id.* at 2130-33. We are to look to the founding because "[c]onstitutional rights are enshrined

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closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.'"); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) ("[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end.").

with the scope they were understood to have when the people adopted them." *Id.* at 2130, 2136 (quoting *Heller*, 554 U.S. at 634-35). The question is "whether historical precedent from before, during, and even after the founding evinces a comparable tradition of regulation." *Id.* at 2131-32 (quoting *Heller*, 554 U.S. at 631 (internal quotation marks omitted)). In considering that precedent, however, we discount "[h]istorical evidence that long predates" 1791 and "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 2136-37.

Assessing the similarity of current regulations to those of the founding era calls on us to consider both "how and why the regulations [being compared] burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133; *see also id.* ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.") (internal quotation marks omitted). We must be wary of a modern law that only "remotely resembles a historical analogue," because to uphold such a law risks "endorsing outliers that our ancestors would never have accepted." *Id.* (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)). "On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

In sum, at a high level, *Bruen* requires two distinct analytical steps to determine the

constitutionality of a firearm regulation. The court first decides whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If it does, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

B. The Second Amendment's reference to "the people" covers all adult Americans.

In defense of the Pennsylvania statutes, the Commissioner first argues that 18-to-20-year-olds are not among "the people" protected by the Second Amendment, and the Appellants' challenge therefore fails the first step of the *Bruen* test. This is an issue of first impression for us.

To succeed on this argument, the Commissioner must overcome the strong presumption that the Second Amendment applies to "all Americans." *Heller*, 554 U.S. at 581. In *Heller*, the Supreme Court reiterated that "the people … refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 580 (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990)). The Court also explained that, like other references to "the people" in the Constitution, "the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* Accordingly, there is "a strong presumption that the

Second Amendment right … belongs to all Americans."[8] *Id.* at 581.

Bruen once again affirmed the broad scope of the Second Amendment, stating that the "Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to reasonable, well-defined restrictions." 142 S. Ct. at 2156 (quoting *Heller*, 554 U.S. at 581).[9] Taking our cue from the Supreme Court, we have construed the term "the people" to cast a wide net. In *Range v. Attorney General*, we considered an as-applied challenge to the constitutionality of a federal statute that barred the defendant from purchasing firearms because of a state-level conviction for having made a false statement to obtain food stamps. 69 F.4th 96, 98 (3d Cir. 2023) (en banc). We held that the Supreme Court's past references to "law-abiding citizens" did not mean that a criminal conviction removes an American citizen from "the people." *Id.* at 101-02. We reasoned that "[u]nless the meaning of the phrase 'the people' [in the Constitution] varies from provision to provision – and the Supreme Court in *Heller* suggested it does not – to conclude that [the defendant] is not among 'the people' for Second Amendment purposes would exclude him from those rights as well." *Id.* at 102.

The Commissioner endeavors to argue around that conclusion by saying that, "[a]t the time of the

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[8] *Heller* identified Second Amendment rightsholders at various points as "Americans," "all Americans," "citizens," and "law-abiding citizens." 554 U.S. at 580-81, 625.

[9] *Bruen* also stated that the protections of the Second Amendment extend to "ordinary, law-abiding, adult citizens." 142 S. Ct. at 2134.

Founding – and, indeed, for most of the Nation's history – those who were under the age of 21 were considered 'infants' or 'minors' in the eyes of the law[,]" "mean[ing] that they had few independent legal rights." (Comm'r Letter Br. at 8-9.) True enough, from before the founding and through Reconstruction, those under the age of 21 were considered minors. *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 451 (Oxford, Clarendon Press 1765) ("So that full age in male or female, is twenty one years … who till that time is an infant, and so styled in law."); 1 Zephaniah Swift, *A System of the Laws of the State Of Connecticut* 213 (Windham, John Byrne pub. 1795) ("Persons within the age of 21, are, in the language of the law denominated infants, but in common speech – minors."); *Infant*, *Black's Law Dictionary* (11th ed. 2019) ("An infant in the eyes of the law is a person under the age of twenty-one years") (quoting John Indermaur, *Principles of the Common Law* 195 (Edmund H. Bennett ed., 1st Am. ed. 1878)).

Notwithstanding the legal status of 18-to-21-year-olds during that period, however, the Commissioner's position is untenable for three reasons. First, it supposes that the first step of a *Bruen* analysis requires excluding individuals from "the people" if they were so excluded at the founding. That argument conflates *Bruen*'s two distinct analytical steps. Although the government is tasked with identifying a historical analogue at the second step of the *Bruen* analysis, we are not limited to looking through that same retrospective lens at the first step. If, at step one, we were rigidly limited by eighteenth century conceptual boundaries, "the people" would consist of white, landed men, and that is obviously not the state

of the law.[10] *Cf., Bruen*, 142 S. Ct. at 2132 (noting that the Second Amendment's "reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century'"); *Range*, 69 F.4th at 104-05 (observing that founding-era gun restrictions based on "race and religion" such as those on "Loyalists, Native Americans, Quakers, Catholics, and Blacks" would now be "unconstitutional under the First and Fourteenth Amendments").

Second, it does not follow that, just because individuals under the age of 21 lacked certain legal rights at the founding, they were ex ante excluded from the scope of "the people." As then-Judge Barrett explained, "[n]either felons nor the mentally ill are categorically excluded from our national community." *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). But "[t]hat does not mean that the government cannot prevent them from possessing guns. Instead, it means that the question is whether the government has the power to disable the exercise of *a right that they otherwise possess*." *Id.* (emphasis added).

Third, consistency has a claim on us. It is undisputed that 18-to-20-year-olds are among "the people" for other constitutional rights such as the right to vote (U.S. Const. art. I, § 2; *id.* amend. XVII), freedom of speech, peaceable assembly, government petitions (*id.* amend. I), and the right against unreasonable government searches and seizures (*id.*

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[10] *See* Note, *The Meaning(s) of 'The People' in the Constitution*, 126 Harv. L. Rev. 1078, 1085 (2013) ("'[T]he people' largely meant property-owning white adult males, at least initially.").

amend. IV).[11] As we recently observed in *Range*, there is "no reason to adopt an inconsistent reading of 'the people.'" 69 F.4th at 102. Indeed, wholesale exclusion of 18-to-20-year-olds from the scope of the Second Amendment would impermissibly render "the constitutional right to bear arms in public for self-defense … 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 142 S. Ct. at 2156 (quoting *McDonald v. Chicago*, 561 U.S. 742, 780 (2010)).

We therefore hold that 18-to-20-year-olds are, like other subsets of the American public, presumptively among "the people" to whom Second Amendment rights extend.[12] If there is any argument

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[11] The three other provisions in the Constitution that explicitly refer to "the people" are the preamble ("We the People"), the Ninth Amendment (providing that no enumerated constitutional right "shall … be construed to deny or disparage others retained by the people"), and the Tenth Amendment (providing "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[12] Two other federal appellate courts have determined that 18-to-20-year-olds are among "the people" protected by the Second Amendment. *Hirschfeld v. ATF*, 5 F.4th 407, 418-34 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021); *Jones v. Bonta*, 34 F.4th 704, 717-21 (9th Cir. 2022), *opinion vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022). *Hirschfeld* and *Bonta* were decided before *Bruen*. *Hirschfeld* was vacated as moot because the plaintiff turned 21 while the case was on appeal, 14 F.4th at 326-27, and *Bonta* was vacated and remanded to the district court for consideration in light of *Bruen*, 47 F.4th at 1125. Their analyses are nevertheless instructive.

In *Hirschfeld*, the Fourth Circuit, after reviewing the use of "the people" in the rights enumerated in the First and Fourth Amendments, expressed its view that "it is hard to conclude that 18-to-20-year-olds have no Second Amendment rights where

to be made that the Commonwealth can restrict the rights of 18-to-20-year-olds with respect to firearms, *Bruen* teaches that the Commissioner must make that argument by showing that such restrictions are part of the nation's historical tradition of gun regulation. 142 S. Ct. at 2130.

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almost every other constitutional right affords them that protection." 5 F.4th at 424. In a variant on a familiar canon of construction, the Fourth Circuit also explained that when the drafters of the Constitution and its amendments wanted to set an age restriction, they did so explicitly:

> [W]hile various parts of the Constitution include age requirements, the Second Amendment does not. The Founders set age requirements for Congress and the Presidency, but they did not limit any rights protected by the Bill of Rights to those of a certain age. *See* U.S. Const. art. I, § 2 (age 25 for the House); *id.* art. I, § 3 (age 30 for the Senate); *id.* art. II, § 1 (age 35 for the President); *cf. id.* amend. XXVI (setting voting age at 18). In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment.

Id. at 421.

The Ninth Circuit in *Bonta* reached the same conclusion about age limits, but on a different basis. It determined that the Second Amendment "protects the right of the people to keep and bear arms and refers to the militia. Young adults were part of the militia and were expected to have their own arms. Thus, young adults have Second Amendment protections as 'persons who are a part of a national community.'" *Bonta*, 34 F.4th at 724 (citing *Heller*, 544 U.S. at 580).

We acknowledge that our dissenting colleague sees things differently. He shares the Commissioner's view that 18-to-21-year-olds are not under the protection of the Second Amendment. Our understanding, however, for the reasons already described is to the contrary.

C. The relevant historical timeframe

The Commissioner does seek to shoulder that burden, but, before considering whether he has succeeded in his task, we must establish which period – the Second Amendment's ratification in 1791 or the Fourteenth Amendment's ratification in 1868 – is the proper historical reference point for evaluating the contours of the Second Amendment as incorporated against the Commonwealth. The Appellants direct us to 1791, but the Commissioner insists that 1868 is the correct temporal reference point.

Bruen declined to resolve this timeframe question because, in that case, the public understanding of the Second Amendment right at issue was the same in 1791 and 1868 "for all relevant purposes." 142 S. Ct. at 2138. We are situated differently, however, because, while the Commissioner has not pointed to an eighteenth century regulation barring 18-to-20-year-olds from carrying firearms, he says that there are "dozens of 19th century laws restricting 18-to-20-year-olds' ability to purchase, possess and carry firearms[.]" (Comm'r Letter Br. Reply at 7.)

A premise we begin with is that the "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*, 142 S. Ct. at 2137; s*ee also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."); *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("Incorporated 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.'") (quoting *McDonald*, 561 U.S. at 765); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) ("We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.") (internal citations omitted).

Accordingly, the Commissioner must establish that the Second Amendment – whether applied against a state or federal regulation – is best construed according to its public meaning at the time of the Fourteenth Amendment's ratification as opposed to the public meaning of the right when the Second Amendment was ratified. Although *Bruen* did not definitively decide this issue, it gave a strong hint 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." *Bruen*, 142 S. Ct. at 2137. In support, it cited *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004); *Virginia v. Moore*, 553 U.S. 164, 168-69 (2008); and *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011).

In those cases, the Court interpreted the bounds of the Sixth, Fourth, and First Amendments, respectively, according to their public meaning at the

founding. In *Crawford*, which considered the scope of the Confrontation Clause, the Court observed that "[t]he right to confront one's accusers is a concept that dates back to Roman times," but the emphasis in the opinion was on "English common law" because it was "[t]he founding generation's immediate source of the concept[.]" 541 U.S. at 43. Then in *Moore*, the Court explained that, "[i]n determining whether a search or seizure is unreasonable, we begin with history." 553 U.S. at 168. That history includes "the statutes and common law of the founding era" and the understanding "of those who ratified the Fourth Amendment." *Id.* Finally, in *Nevada Commission on Ethics*, the Court held that a Nevada statute requiring public officials to recuse themselves from voting on certain matters did not violate the First Amendment, and founding-era evidence was "dispositive" in the analysis.[13] 564 U.S. at 122; *see also id.* at 121 ("Laws punishing libel and obscenity are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since.").

While the Supreme Court has not held that all constitutional rights that have been made applicable to the states must be construed according to their public meaning in 1791, the Commissioner has not articulated a theory for defining some rights according to their public meaning in 1791 and others according to their public meaning in 1868. Moreover, *Bruen* has already instructed that historical evidence from 1791

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[13] *See also Printz v. United States,* 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning.'") (quoting *Bowsher v. Synar,* 478 U.S. 714, 723-24 (1986)).

is relevant to understanding the scope of the Second Amendment as incorporated against the states. *Bruen*, 142 S. Ct. at 2139, 2145. Accordingly, to maintain consistency in our interpretation of constitutional provisions, we hold that the Second Amendment should be understood according to its public meaning in 1791.[14]

We thus 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.[15] What is left is an

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[14] We thus part ways with the Eleventh Circuit, which held in *National Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir.), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir. 2023), that the Second Amendment's "contours turn on the understanding that prevailed at the time of the later ratification – that is, when the Fourteenth Amendment was ratified." *Id.* at 1323. According to *Bondi*, "[t]his is necessarily so if we are to be faithful to the principle that 'constitutional rights are enshrined with the scope that they were understood to have *when the people adopted them*.'" *Id.* at 1323 (quoting *Bruen*, 142 S. Ct. at 2136) (cleaned up). *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, as explained herein, we believe the better choice is the founding era.

[15] 1856 Ala. Acts 17 (banning gun sales to minors under 21); 16 Del. Laws 716 (1881) (banning concealed-carry, and banning the sale of deadly weapons to minors under 21); Wash. D.C. 27 Stat. 116 (1892) (criminalizing concealed-carry for all persons, and banning the sale of guns and dangerous weapons to minors under 21); 1876 Ga. Laws 112 (banning gun sales to minors under 21); 1881 Ill. Laws 73 (banning the sale of guns and other dangerous weapons to minors under 21); 1875 Ind. Acts 86 (banning the sale of pistols, cartridges, and other concealable deadly weapons to anyone under 21); 1884 Iowa Acts 86 (banning the sale of pistols

eighteenth-century statute that supposedly supports the contention that Pennsylvania's current restriction on 18-to-20-year-olds is a "longstanding, presumptively lawful regulation[.]" (Answering Br. at 27.) Specifically, the Commissioner directs us to Pennsylvania's Act of August 26, 1721, which prohibited "carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any plantation other than

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to minors under 21); 1883 Kan. Sess. Laws 159; (banning the purchase and possession of guns and other dangerous weapons by minors under 21); 1873 Ky. Stat. art. 29, at 359 (criminalizing concealed-carry for all persons, and banning the sale of all deadly weapons to minors under 21); 1890 La. Acts 39 (banning the sale of concealable deadly weapons to anyone under 21); 1882 Md. Laws 656 (banning the sale of firearms and deadly weapons other than rifles and shotguns to minors under 21); 1878 Miss. Laws 175 (criminalizing concealed-carry for all persons, and prohibiting the sale of firearms and deadly weapons to intoxicated persons or to minors under 21); 1883 Mo. Laws 76 (criminalizing concealed-carry for all persons, and prohibiting the sale of such weapons to minors under 21 without parental consent); 1885 Nev. Stat. 51 (prohibiting minors under 21 from carrying concealed pistols and other dangerous weapons); 1893 N.C. Sess. 468-69 (banning the sale of pistols and other dangerous weapons to minors under 21); 1856 Tenn. Pub. Acts 92 (prohibiting the sale of pistols and other dangerous weapons to minors under 21); 1897 Tex. Gen. Laws 221-22 (banning the sale of pistols and other dangerous weapons to minors under 21); 1882 W.Va. Acts 421-22 (criminalizing carrying guns and other dangerous weapons about one's person and prohibiting the sale of such weapons to minors under 21); 1883 Wis. Sess. Laws 290 (making it unlawful for "any minor . . . to go armed with any pistol or revolver" and for any person to sell firearms to minors under 21); 1890 Wyo. Sess. Laws 1253 (banning the sale of pistols and other dangerous weapons to anyone under 21).

Full texts of these laws are available at the *Repository of Historical Gun Laws*, Duke Univ. School of Law, https://firearmslaw.duke.edu/repository/search-the-repository/ (last visited Sept. 26, 2023).

his own[.]"[16] But we can discern no near equivalence or significant analogue between the burdens imposed by that statute and those at issue here. For one thing, the 1721 statute appears to be primarily focused on preventing Pennsylvanians from hunting on their neighbors' land, not on restricting the right to publicly

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[16] In full, the Act provided:

> Be it enacted by the authority aforesaid, That if any person or persons shall presume, at any time after the sixteenth day of November, in this present year one thousand seven hundred and twenty one, to carry any gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation, and shall thereof convicted ether upon view of any justice of the peace within this province, or by the oath or affirmation of any one or more witnesses, before any justice of the peace, he shall for every such offense forfeit the sum of ten shillings. And if any person whatsoever, who is not owner of fifty acres of land and otherwise qualified in the same manners as persons are or ought to be by the laws of this province for electing of members to serve in assembly, shall at any time, after the said Sixteenth day of November, carry any gun, or hunt in the woods or inclosed lands, without license or permission obtained from the owner or owners of such lands, and shall be thereof convicted in manner aforesaid, such offender shall forfeit and pay the sum of five shillings.

Act of Aug. 26, 1721, ch. 246, 3 Statutes at Large of Pa. 254, 255-56, *repealed by* Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46. Text available at the *Repository of Historical Gun Laws*, https://firearmslaw.duke.edu/laws/the-statutes-at-large-of-pennsylvania-c-142-p-254-an-act-to-prevent-the-killing-of-deer-out-of-season-and-against-carrying-of-guns-or-hunting-by-persons-not-qualified/ (last visited Sept. 26, 2023).

carry a gun. When the statute was later repealed and replaced in 1760, that subsequent statute included another provision that prevented "fir[ing] a gun on or near any of the King's highways," which indicates that carrying a firearm in public places was generally not restricted.[17] Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46, 48. More to the point, however, to the extent the statute did burden the right to carry a gun in public, it did so without singling out 18-to-20-year-olds, or any other subset of the Pennsylvania population for that matter.

Against that conspicuously sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification, we can juxtapose the Second Militia Act, passed by Congress on May 8,

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[17] In full, the relevant portion of the 1760 Act provided:

> Be it enacted, That if any person or persons shall presume, at any time after the publication of this act[,] to carry any gun or hunt on any enclosed or improved lands of any of the inhabitants of this province[,] other than his own[,] unless he shall have license or permission from the owner of such lands, or shall presume to fire a gun on or near any of the King's highways and shall be thereof convicted, either upon view of any [J]ustice of the [P]eace within this province or by the oath or affirmation of any one or more witnesses before any [J]ustice of the [P]eace, he shall for every such offence forfeit the sum of forty shillings.

Act of Apr. 9, 1760, ch. 456, 6 Statutes at Large of Pa. 46, 48. Text available at the Repository of Historical Gun Laws, https://firearmslaw.duke.edu/laws/laws-of-the-commonwealth-of-pennsylvania-from-the-fourteenth-day-of-october-one-thousand-seven-hundred-to-the-twentieth-day-of-march-one-thousand-eight-hundred-and-ten-page-229-image-288-vol-1/ (last visited Sept. 26, 2023).

1792, a mere five months after the Second Amendment was ratified on December 15, 1791. The Act required all able-bodied men to enroll in the militia and to arm themselves upon turning 18.[18] Second Militia Act of 1792 § 1, 1 Stat. 271 (1792). That young adults had to serve in the militia indicates that founding-era lawmakers believed those youth could, and indeed should, keep and bear arms.

The Commissioner contests the relevancy of the Second Militia Act on three grounds. First, he notes that, "to the extent 1791 militia laws have any relevance, the UFA contains an exception for members of the Military and National Guard, and is thus entirely consistent with them."[19] (Comm'r Letter Br. Reply at 7 (citing 18 Pa. Cons. Stat. § 6106(b)(2)).) Second, he objects that, when the Second Amendment

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[18] The Second Militia Act required that "every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years and under the age of forty-five years (except as herein exempted) shall severally and respectively be enrolled in the militia[.]" Second Militia Act of 1792 § 1, 1 Stat. 271 (1792). The Second Militia Act further required every member of the militia to "provide himself with a good musket or firelock ... or with a good rifle[.]" *Id*. § 1.

The First Militia Act, which Congress passed shortly before, on May 2, 1792, gave the president authority to call out the militias of the several states, "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." First Militia Act of 1792 § 1, 1 Stat. 264 (1792).

[19] Although the founding generation was "devoted to the idea of state control of the militia," modern statutes "nationalized the function and control of the militia" and reorganized it "into the modern National Guard." Saul Cornell, A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 37, 196 (2006).

was ratified, nine states set the threshold for militia service at 16 and seven states set the maximum age at 50. According to the Commissioner, the "logical extension of Appellants' argument that militia laws in 1791 determine the scope of the Second Amendment would also require the invalidation of any contemporary law restricting 16-year-olds from purchasing, possessing, and carrying firearms, but would allow laws stripping 51-year-olds of the right to keep and bear arms." (Comm'r Letter Br. Reply at 5.) And third, he asserts that the Second Militia Act of 1792 – as well as similar state statutes that required 18-to-20-year-olds to participate in the militia – "often assumed that militiamen younger than 21 did not have the independent ability to acquire firearms, and therefore required their parents to provide them with arms."[20] (Comm'r Letter Br. Reply at 5.)

No doubt, the Commissioner is correct that a duty to possess guns in a militia or National Guard setting is distinguishable from a right to bear arms unconnected to such service. *See Nat'l Rifle Assoc. v. Bondi*, 61 F.4th 1317, 1331 (11th Cir. 2023) (cautioning against the conflation of the obligation to perform militia service with the right to bear arms). Still, the Second Militia Act is good circumstantial evidence of the public understanding at the Second Amendment's ratification as to whether 18-to-20-year-olds could be

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[20] The Commissioner also notes that Pennsylvania's 1755 Militia Act provided that "no Youth, under the Age of Twenty-one Years, . . . shall be admitted to enroll himself . . . without the Consent of his or their Parents or Guardians[.]" The text of that statute is available at *Militia Act, [25 November 1755]*, Nat'l Archives, https://founders.archives.gov/documents/Franklin/01-06-02-0116#BNFN-01-06-02-0116-fn- 0001 (last visited Sept. 20, 2023).

armed, especially considering that 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.[21] The Commissioner's contention that any reliance on 1789 militia laws would force us to invalidate laws prohibiting 16-to-17-year-old from possessing firearms is simply not persuasive. Although the age of militia service dipped to 16 in some states during the colonial and revolutionary periods – a development that likely can be attributed to necessities created by ongoing armed conflicts – the Appellants rightly observe that, "[a]t the time of the Second Amendment's passage, or shortly thereafter, the minimum age for militia service in *every state* became eighteen." (Reply Br. at 17 (citing *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 340 (5th Cir. 2013) (Jones, J., dissenting)).) Finally, even though there were founding-era militia laws that required parents or guardians to supply arms to their minor sons, nothing in those statutes says that 18-to-20-year-olds could not purchase or otherwise acquire their own guns.

We understand that a reasonable debate can be had over allowing young adults to be armed, but the issue before us is a narrow one. Our question is whether the Commissioner has borne his burden of proving that evidence of founding-era regulations

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[21] *See Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 342 (5th Cir. 2013) (Jones, J., dissenting from the denial of rehearing) ("[T]hose minors were in the militia and, as such, they were required to own their own weapons. What is inconceivable is any argument that 18-to-20-year-olds were not considered, at the time of the founding, to have full rights regarding firearms.") (emphasis removed).

supports Pennsylvania's restriction on 18-to-20-year-olds' Second Amendment rights, and the answer to that is no.

D. This case is not moot

The Commissioner next argues that none of the foregoing matters because the Appellants no longer face any restrictions on their ability to carry publicly, which eliminates any injury for which they could obtain relief. In other words, he says the case is moot. He points to the amendment to Pennsylvania's constitution that now limits the governor's authority to issue an emergency declaration to 21 days, unless the General Assembly votes to extend it. *See* PA. Const. art. IV, § 20(c). And he notes that the emergency proclamations in place when this suit began have all lapsed. Accordingly, the Commissioner says, there is no longer any restriction on the Appellants' ability to openly carry firearms. He also argues that the claims of the individual Appellants are moot because they have reached the age of 21 and are now eligible to apply for a concealed-carry license.

Generally, a case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Virgin Islands*, 842 F.3d 201, 208 (3d Cir. 2016). "[A]n appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it impossible for the court to grant any effectual relief whatsoever." *In re World Imports Ltd.*, 820 F.3d 576, 582 (3d Cir. 2016).

Here, the Appellants invoke the "capable of repetition yet evading review" exception to the mootness rule, which applies "only in exceptional circumstances" when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). A plaintiff need not show that future injury is certain, only that there is "more than a theoretical possibility of the action occurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability." *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 231 (3d Cir. 2021) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The plaintiff has the burden of making that showing. *New Jersey Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 31-33 (3d Cir. 1985).

This is one such exceptional circumstance because, as the record shows, Pennsylvania has a recent history of declaring multiple emergencies, and it is reasonably likely that other 18-to-21-year-olds, including members of the organizational Appellants here, the Second Amendment Foundation and the Firearms Policy Coalition, will be banned from carrying guns in public yet again.[22] The Appellants

[22] As the organizational Appellants acknowledge, their standing "depends upon at least one of their members having standing in their own right." (3d Cir. D.I. 71-1 at 1 (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).) Although the three named individual Appellants have reached the age of 21, the Court has been made aware of at least one individual, George Pershall, a 19-year-old resident of Chester County, Pennsylvania and U.S. citizen, who is a member of both

persuasively argue that, while lengthy emergencies may now be less likely because of the recent constitutional amendment, the risk of regulated persons being unable to fully litigate this Second Amendment issue has increased since the adoption of the new constitutional amendment. Because emergencies may only last for twenty-one days, absent intervention from the General Assembly, there is not enough time to litigate a claim.

E. The Appellants' claim is not barred by the Eleventh Amendment or Article III standing[23]

The Commissioner's next salvo is, in essence, "they've got the wrong man." He says that the target of the Appellants' constitutional challenge is Pennsylvania's licensing scheme, not him, and that suing him is improper because he is powerless to issue licenses.[24] More specifically, he says that the *Ex parte Young* exception to the Eleventh Amendment, the exception that allows suits against an official who is a "representative of the state,"25 209 U.S. 123, 157 (1908), is properly invoked only More specifically, he says that the *Ex parte Young* exception to the Eleventh Amendment, the exception that allows suits against an

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the Second Amendment Foundation and the Firearms Policy Coalition, and will remain subject to the UFA's restrictions.

[23] We may consider Eleventh Amendment issues for the first time on appeal, *In re Hetchinger Inv. Co. of Del., Inc.*, 335 F.3d 244, 251 (3d Cir. 2003), and may affirm the District Court's judgment on any ground supported by the record, *TD Bank N.A. v. Hill*, 928 F.3d 259, 276 n.9 (3d Cir. 2019).

[24] Only county sheriffs may grant concealed-carry licenses.

official who is a "representative of the state,"[25] 209 U.S. 123, 157 (1908), is properly invoked only if the named defendant has a sufficient connection to the enforcement of the challenged law, as distinct from a generalized duty to enforce, and if there is a real potential that the official will in fact enforce the law. *See 1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 114-15 (3d Cir. 1993) (holding that "Commonwealth Officials' general duty to enforce the laws of the Commonwealth of Pennsylvania," standing alone, was "not … a proper predicate for liability"). The Commissioner further argues that the Appellants lack standing under Article III of the Constitution because they cannot establish the requisite causation and redressability of their claim.[26]

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[25] The Eleventh Amendment generally bars suits against states in federal court without their consent. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from suit against the State itself." *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010) (citing *Will*, 491 U.S. at 71) (cleaned up). A plaintiff can avoid that bar by naming a state official in a suit for prospective declaratory or injunctive relief to prevent a continuing violation of federal law. *Cf. Ex parte Young*, 209 U.S. 123, 157 (1908) (explaining that in bringing such an action, the "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party").

[26] To satisfy the Article III standing requirements of causation and redressability, a plaintiff must establish that his injury is causally connected to the government-defendant's challenged conduct, and that enjoining that conduct is likely to redress the plaintiff's injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). We agree with the Commissioner that, "[w]hen a plaintiff sues state officials to enjoin the enforcement of a state statute, the dictates of *Ex parte Young* overlap significantly with [the Article

The Appellants have a ready and effective response. They say they are "agnostic" as to whether they get licenses to carry concealed weapons under §§ 6106 and 6109, or whether, despite § 6107, they can carry openly without a license during an emergency. (Reply Br. at 3-4.) In other words, the existence of a license is not what they are fighting about; it is the right to openly carry a gun regardless of a state of emergency. And they contend that enjoining the Commissioner from arresting 18-to-20-year-olds who openly carry firearms would in fact redress their constitutional injuries.

We agree that a bar on arrests would be a form of relief.[27] Accordingly, the Commissioner has an adequate connection to the enforcement of the challenged law, and neither the Eleventh Amendment nor Article III bars the Appellants' claim.

III requirements of] causation and redressability." (Answering Br. at 17-18.) If a plaintiff can show that the defendant's conduct causes an injury and that enjoining the conduct would redress the injury, that showing will satisfy the "sufficient connection" requirement under *Ex parte Young*. *See 1st Westco Corp. v. Sch. Dist. Of Phila.*, 6 F.3d 108, 114-15 (3d Cir. 1993) (requiring a "real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests").

[27] The Commissioner appears to implicitly acknowledge this as well. (*See* Answering Br. at 50 (asserting that a bar on arrests "would lead to a perverse result, which would give an unlicensed 18-year-old high school senior the ability to carry concealed firearms in public at any time, but would leave her unlicensed parents vulnerable to criminal sanction for the same conduct. That result cannot be consistent with the intent of the General Assembly when it enacted the UFA").)

F. The Appellants have not waived their request for injunctive relief, and their request is sufficiently specific.[28]

Finally, the Commissioner asserts that the Appellants forfeited their request for injunctive relief and failed to adequately describe that relief as required under Federal Rule of Civil Procedure 65(d). That argument fails too.

The Appellants repeatedly referenced their request for injunctive relief throughout their opening brief, and they discussed each of the elements of the preliminary injunction test, citing caselaw in support. The issue of injunctive relief therefore should not be a surprise to anyone in this case. The Commissioner had a full opportunity to develop a response in his answering brief. *Cf. Wood v. Milyard*, 566 U.S. 463, 473 (2012) (holding that courts should exercise restraint in reaching issues that parties "would not have anticipated in developing their arguments on appeal").

And contrary to the Commissioner's argument that "it is unclear" as to "how an injunction (preliminary or permanent) against Commissioner Evanchick would function" (Answering Br. at 48), we think it is abundantly clear. As an initial matter, Rule 65(d) governs the "contents and scope of every injunction and restraining order" issued by a court, not the way in which a party requests injunctive relief. For

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[28] Arguments not raised in an opening brief are forfeited, *In re Wettach*, 811 F.3d 99, 115 (3d Cir. 2016), and "arguments raised in passing (such as in a footnote), but not squarely argued, are considered [forfeited]," *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) (alteration in original).

that reason alone, the Commissioner's Rule 65(d) argument is meritless. More to the point though, while Rule 65(d) requires that the enjoined party "receive fair and precisely drawn notice of what the injunction actually prohibits," *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 322 (3d Cir. 2020), and that the injunction be "phrased in terms of objective actions, not legal conclusions," *id.*, the Appellants' complaint did provide notice and specificity when it said, "Plaintiffs respectfully request[] that this Honorable Court ... [p]reliminarily, and thereafter permanently, enjoin Defendant, his officers, agents, [and] servants, employees, and all persons in active concert or participation with him from enforcing against Plaintiffs and those similarly situated, 18 PA. C.S. § 6107." (J.A. at 70-71.) There is nothing vague about that.

III. CONCLUSION

For the foregoing reasons, we will reverse the decision of the District Court and remand with instructions to enter an injunction forbidding the Commissioner from arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency declared by the Commonwealth.

RESTREPO, *Circuit Judge*, dissenting.

Because Pennsylvania's statutory scheme does not violate the Second Amendment of the Constitution, I respectfully dissent. The challenged statutory scheme here is "consistent with this Nation's historical tradition," as defined in *New York State Pistol & Rifle Association Inc. v. Bruen,* 142 S. Ct. 2111, 2126 (2022).

In deciding whether a firearm regulation is constitutional under the Second Amendment, courts must examine whether the "regulation [being reviewed] is part of the historical tradition that delimits the outer boundaries of the right to keep and bear arms." *Id.* at 2127. In making this determination, "a court must decide whether the *challenger* or conduct at issue is protected by the Second Amendment and, *if so*, whether the Government has presented sufficient historical analogues to justify the restriction." *Range v. Att'y Gen.*, 69 F.4th 96, 113 (3d Cir. 2023) (Shwartz, J., dissent) (emph. added); *see* Majority Op. at II.A (citing *Bruen*, 142 S. Ct. at 2126) (explaining that, under *Bruen*, the court first decides whether "the Second Amendment's plain text covers an individual's conduct," and *if it does*, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

District of Columbia v. Heller, 554 U.S. 570 (2008), recognized that the Second Amendment protects the right of an "ordinary, law-abiding citizen to possess a handgun in the home for self-defense," *see Bruen*, 142 S. Ct. at 2122 (citing *Heller*, 554 U.S. at 581), and *Bruen* held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," *id.* However, there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply.

The more acute question in this case, then, is where does that age threshold lie? A "textual analysis focused on the normal and ordinary meaning of the Second Amendment's language," *see Bruen*, 142 S. Ct. at 2127 (citing *Heller*, 554 U.S. at 576-77, 578)

(quotation marks omitted), and an "examination of a variety of legal and other sources," *see id.* at 2127-28 (quoting *Heller*, 554 U.S. at 605), leads to the conclusion that the scope of the right, as understood during the Founding-era, excludes those under the age of 21.

I. The public in 1791 did not understand those under 21 to be part of "the people" protected by the Second Amendment.

Bruen affirms the historical-textualist methodology established in *Heller*. *Bruen*, 141 S. Ct. at 2127. To interpret the language of the Second Amendment, one must look to historical sources evidencing how the public would have understood its text near the time of its ratification. *Bruen*, 141 S. Ct. at 2127-28; *Heller*, 554 U.S. at 576. This principle presumes that constitutional rights do not change over time, but "are enshrined with the scope they were understood to have when the people adopted them." *Bruen*, 141 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634-35). When later history or understanding contradicts the original public meaning of the text, the original understanding controls. *Id.* at 2137.

Under *Bruen*, "[w]hen the Second Amendment's plain text *covers an individual's conduct*, the Constitution presumptively protects that conduct." *Bruen*, 141 S. Ct. at 2126, 2129-30 (emph. added). Thus, here, it would appear a presumption would apply only if the plain text of the Second Amendment covers the *Appellants'* conduct. In other words, if the text doesn't protect the Appellants here, it doesn't protect their conduct, and a presumption would not apply.

While my colleagues in the Majority acknowledge that "from before the founding and through Reconstruction, those under the age of 21 were considered *minors*," *see* Majority Op. at II.B (emph. added), the Majority also holds that the "words 'the people' in the Second Amendment presumptively encompass all *adult* Americans, *including* 18-to-20-year-olds." *See* Majority Op. at intro. (emph. added). Thus, the Majority concludes that "all adult Americans" "include[es] 18-to-20- year-olds." *Id.* It is worth reiterating that there is no dispute that there is some age threshold before which the protection of the Second Amendment does not apply.

In *Bruen*, it was "undisputed that [the petitioners] – two ordinary, law-abiding, *adult* citizens – [were] part of 'the people' whom the Second Amendment protects." *Bruen*, 142 S. Ct. at 2134 (emph. added). Whether the plain text of the Second Amendment covered the individual petitioners in *Bruen* was not at issue, and the Supreme Court "therefore turn[ed] to whether the plain text of the Second Amendment protects [the petitioners'] proposed *course of conduct*." *Id.* (emph. added). There was no dispute in *Bruen* that the petitioners were part of "the people" in the Second Amendment. Similarly, whether individuals under 21 were part of "the people" in the Second Amendment was not at issue before the Supreme Court in *Heller* or before this Court in *Range*.

The Majority seems to acknowledge that the Commissioner's argument that 18-to-20-year-olds are not among "the people" protected by the Second Amendment is a challenge to "the *first* step of the *Bruen* test," *see* Majority Op. at II.B (emph. added). However, the Majority then concludes that "[t]o

succeed on this argument, the Commissioner must overcome the strong presumption that the Second Amendment applies to 'all Americans.'" *Id.* (citing *Heller*, 554 U.S. at 581). It stands to reason that any reference to a definition of "the people" as it relates to 18-to-20-year-olds in *Heller*, *Bruen*, and *Range* is dictum.

It is only when the Second Amendment's plain text covers an "individual's conduct" (first step) that the presumption of constitutional protection applies, and "the government must *then* justify its regulation by demonstrating that it is consistent with the National historical tradition of firearm regulation" (second step). *Bruen*, 142 S. Ct. at 2129- 30. Because the first step of the *Bruen* test for presumption of constitutional protection to apply is not met here, there is no burden to overcome such a presumption. *See* Majority Op. at II.B (citing *Heller*, 554 U.S. at 581).

Nevertheless, assuming a need to overcome a "presumption that the Second Amendment applies to 'all Americans'," *see id.* (citing *Heller*, 554 U.S. at 581), as the Majority appears to do, in order to conclude the plain text of the Second Amendment covers the conduct of individuals under 21 at the first step of the *Bruen* test, there is evidence that the Founding-era public would not have understood the text of the Second Amendment to extend its protection to those under 21.

At the Founding, people under 21 lacked full legal personhood. Indeed, there is no disagreement that at the time of the Founding, people under 21 were considered "infants" in the eyes of the law. *See* Majority Op. at II.B; *see also* 1 William Blackstone, *Commentaries* *453; 4 James Kent, *Commentaries on*

American Law 266 (W.M. Hardcastle Brown ed. 1894) (1826). Nor is there serious debate that the conception of adulthood beginning at age 18 is relatively new to American law.[1] But to understand the significance of the historical-legal conception of infant status, one must understand its predicate presumption of incapacity.

The Founding-era generation inherited the common-law presumption that persons who lacked rationality or moral responsibility could not exercise a full suite of rights. Abrams, *supra* note 1, at 20. This idea has its roots in the Enlightenment conception of rights as being endowed only to those "with discernment to know good from evil, and with power of choosing those measures which appear . . . to be more desirable." 1 William Blackstone, *Commentaries* *125; *see* Abrams, *supra* note 1, at 20. In other words, those whom society considered to be rational.

Both at English common law and in eighteenth-century American law, infants were universally believed to lack such rationality. Infants were viewed as requiring the protection of a guardian in the management of their affairs. 3 William Blackstone, *Commentaries* *48; 1 *Commentaries* *463. James Kent, a respected contemporary scholar of American constitutional law, said "[t]he necessity of guardians results from the inability of infants to take care of

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[1] *See* Douglas E. Abrams, Susan V. Mangold, & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy, and Practice* 19 (2020). Of course, the drinking age is still 21, and federal law currently prohibits tobacco sales to persons under 21. Id. The tradition of limiting the rights of those under 21 continues into the present.

themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years." Saul Cornell, "*Infants" and Arms Bearing in the Era of the Second Amendment*, Yale L. & Pol'y Rev. (Oct. 26, 2021) (hereinafter "*Infants*") (quoting 2 James Kent, *Commentaries on American Law* 191 (O. Halsted ed., 1827)). Moreover, Blackstone referred to infancy as "a defect of the understanding." 4 William Blackstone, *Commentaries* *15-18.

A consequence of this legal presumption was that at the Founding, infants had few independent rights. Blackstone explains that, because of infants' inherent incapacity, parents had the power to limit their children's rights of association, to control their estates during infancy, and to profit from their labor. 1 William Blackstone, *Commentaries* *452-53. Infants could not marry without their father's consent. *Id.* at *437, *452. Fathers had a right to the profits of their infants' labor. *Id.* Even the right to contract, which the Framers thought to enshrine in the body of the Constitution, was greatly abridged for infants. *Id.* at *465; *Infants*; Eugene Volokh, *Symposium: The Second Amendment and the Right to Keep and Bear Arms After Heller*, 56 UCLA L. Rev. 1443, 1508-13 (2009) (noting restrictions on minors' exercise of fundamental rights and freedoms, including the right to contract). Blackstone went so far as to say that it was "generally true, that an infant [could] do no legal act." 1 William Blackstone, *Commentaries* *465. It was not until the infant reached the age of 21 that "they [were] then enfranchised by arriving at the years of discretion . . . when the empire of the father, or other guardian, gives place to the empire of *reason*." 1 William Blackstone, *Commentaries* *463 (emph. added).

In England and the United States, infants could not sue or be sued except by joining their guardians. *Id.* at *464. For example, infants had "no legal standing to assert a claim in court to vindicate their rights, including Second Amendment-type claims." *Infants.* Because they could only access courts through their guardians, infants necessarily lacked redress against their parents except in cases of extreme neglect or abuse. 1 William Blackstone, *Commentaries* 168 n.9 (George Chase, ed.).[2]

There is substantial evidence that this legal incapacity controls in the context of the Second Amendment. An important element of Justice Scalia's reasoning in *Heller* was that the Second Amendment did not create a new right, but rather "codified a pre-existing right." *Heller*, 554 U.S. at 592, 599-600, 605, 652. Accordingly, common-law principles are crucial to answering whether the right in question extends to people under the age of 21.

At the Founding, there was an important connection between property law and the right to keep arms. Some state constitutions expressly discussed both arms and militia service in the context of property law. *See, e.g.,* Saul Cornell, *History and Tradition or Fantasy and Fiction*, 39 Hastings Const. L.Q. 145, 153 (2022) (hereinafter "*History and Tradition*"). Several states exempted arms used in the militia from seizure

[2] Reason reemerges as a central justification of the delegation of rights on the question of estates: a child could only attack divestment from his father's estate if he could demonstrate a lack or deficiency of reason in doing so. 1 William Blackstone, *Commentaries* *448.

during debt proceedings. *Id.* Some colonies required single men who could not afford to arm themselves, to work as servants until they could pay off the cost of a weapon. Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 243 (2022). And all colonies required certain persons to arm themselves at their own expense and without just compensation, often mandating that militia members purchase specific equipment and that dependents be armed by their guardians. *Id.* at 177-88, 242-54. There was thus an important relationship between property law and gun law at the Founding. Infants' common- law lack of independent property rights suggests that they were similarly disabled in keeping and bearing arms.

One might infer additional context from another source: the eighteenth-century college. At the Founding, "[c]ollege was one of the very few circumstances where minors lived outside of their parents' or a guardian's direct authority." *Infants.* But students were not liberated by their attendance; rather, the representatives of the college stood *in loco parentis*, a status based on parental consent which allowed them to exercise full legal power over the infants as though they were in fact the youths' parents.[3]

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[3] 1 William Blackstone, *Commentaries* *453 ("[A father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is the *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

Importantly, as with the parents themselves, the person standing *in loco parentis* could not excessively punish or abuse a child, suggesting that fundamental rights remained intact under this relationship. 1 William Blackstone, *Commentaries* *168 n.9 (George Chase ed.). Yet colleges at the Founding could and did prohibit possession of firearms by students. *Infants.* This was true of Yale (founded 1701), the University of Georgia (founded 1785), the University of North Carolina (founded 1776), and Thomas Jefferson's University of Virginia (founded in 1819). *Id.* Among these schools, such prohibitions were unambiguous: students were not permitted to possess arms while on campus. *Id.* The University of Georgia even prohibited possessing weapons *off*-campus, strongly suggesting that this authority was not predicated on or justified by the student's presence at a sensitive location, but rather stemmed from the inherent power of the authority standing *in loco parentis* to dictate all but the most fundamental rights of the infants under its charge.[4]

The totality of this evidence demonstrates that the public during the Founding-era understood the plain text of the Second Amendment did not cover individuals under the age of 21. At the Founding, those under 21 were considered infants, a status that was a result of the presumption that people under the age of

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[4] "[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever." *Infants* (quoting The Minutes of the Senate Academicus 1799–1842, Univ. of Ga. Librs. (2008) [https://perma.cc/VVT2-KFDB]).

21 lacked sufficient cognitive and moral faculties to govern themselves. The consequences of this presumption were profound: infants had very little independent ability to exercise fundamental rights, including those of contract and property. Indeed, except in a few narrow circumstances, infants could not seek redress in the courts except through their parents. Moreover, in one historical context, history suggests that any right that an infant may have had to bear arms could be abrogated in its entirety at the pleasure of the infant's parent or an authority standing *in loco parentis*. In light of such evidence, the conclusion that infants during the Founding-era were not meant to be protected under the Second Amendment seems clear.

The Majority points out that the Second Militia Act of 1792 required every white, male citizen between the ages of 18 and 45 to enroll in their local militia, equip themselves with certain accoutrements (including "a good musket or firelock"), and appear when called out to exercise or into service. 1 Stat. 271. In addition, the age of militia service varied by state, with some states requiring children as young as 15 to serve.[5] Notwithstanding an argument that the Second Militia Act supports Appellants' position, there appears to be no claim that 15-year-olds are part of "the people" in the Second Amendment. In any event, the fact that infants had a *duty* under the Second Militia Act to enroll in the militia and thus to equip themselves with arms for that purpose should not be confused with

[5] Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 188 (2022). Massachusetts had a typical conscription law which required male residents between ages 16 and 60 to serve. *Id.* at 242, 244. New Hampshire and Maine had similar requirements. *Id*. at 247.

such individuals otherwise having an independent *right* under the Second Amendment. Some states enacted statutes placing the burden of arming infants on their guardians.[6] Indeed, infants only rendered militia service under the supervision of peace officers who, like teachers, stood *in loco parentis*. *See* Johnson, *supra* note 5, at 243, 251. As noted above, at the Founding, infants exercised and sought redress of rights, including property rights, at the pleasure of their legal guardians. *See, e.g.,* 1 William Blackstone, *Commentaries* *452-53; *Infants*. That individuals under 21 were required to bear arms in the militia is not evidence that such individuals otherwise consistently owned arms in their individual capacities, much less that they had a right to own such property.

Heller made clear that the Second Amendment codifies an individual right to keep and bear arms that is unconnected to militia service: "[A]part from [a] clarifying function, [the] prefatory clause does not limit or expand the scope of the operative clause." *Heller*, 554 U.S. at 578. Militia service cannot properly be disconnected from the right for the purpose of limiting

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[6] *See, e.g.*, 3 Laws of New Hampshire, Province Period 83 (Henry Harrison Metcalf ed., 1915) (1754); An Act for Forming and Regulating the Militia Within The State of New Hampshire, in New-England, and For Repealing All the Laws Heretofore Made for That Purpose, 1776 Acts & Laws of the Colony of N.H. 36, 39; An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, c. 1, § XIX, 1793 Mass Acts & Laws May Sess. 289, 297; An Act, for Regulating and Governing the Militia of This State 1797, c. LXXXI, No. 1, § 15, 2 The Laws of the State of Vermont, Digested & Compiled 122, 131-32 (Randolph, Sereno Wright 1808); 2 William T. Dortch, John Manning & John S. Henderson, The Code of North Carolina § 3168, 346-47 (New York, Banks & Bros. 1883).

its scope but connected for the purpose of expanding it; the two are independent. Again, *Bruen* affirmed this historical-textual analysis. *Bruen,* 141 S. Ct. at 2127.

Heller explains at length that the militia and "the people" are distinct. *Heller*, 554 U.S. at 650-51. Although the militia may overlap with "the people," this does not mean that every member of the militia is by extension part of "the people" covered by the Second Amendment.

As discussed above, infants during the Founding-era did not merely lack certain legal rights, but nearly all legal rights. The fact 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 as members of "the people" under the Second Amendment.

Then-Judge Amy Coney Barrett's discussion of felons and the mentally ill, *see* Majority Op. at II.B (citing *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting)), concerns classes distinct from infants. At the Founding, felons and the mentally ill were extended greater rights than infants, and their legal disability resulted from legal findings, not *a priori* legal classifications. Felons and the mentally ill lost their rights only after they were found untrustworthy, whereas persons under 21 were classified as infants because as a class of persons they were considered untrustworthy. While insanity and criminality test the capacities and character of the individual, respectively,

the age of majority as a concept suppresses individual differentiation.[7] *See* Abrams, *supra* note 1, at 19.

At the Founding, people under 21 bore arms at the pleasure of their superiors. Were they to find this condition violative of their rights, they would have no right to petition the courts for redress. Stated bluntly, the same generation from whom Appellants may have begged relief would not have permitted them to bring their claim. Accordingly, I respectfully disagree with my colleagues in the Majority, and conclude that during the Founding-era, the plain text of the Second Amendment was understood to mean that persons under 21 were not part of "the people" protected by the Second Amendment.

II. The challenged statutes are consistent with this Nation's historical tradition.

Under *Bruen*, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129-30. As explained above, the ordinary understanding of the plain text of the Second Amendment during the Founding-era was that individuals under the age of 21 were not part of "the people" whom the Second Amendment protects. Thus, the Second Amendment's plain text does not cover these Appellants' conduct, and the Constitution does

[7] Of course, there are some exceptions to this general rule. For example, some criminal penalties can accrue to individuals below the age of majority, a court may find that a minor is properly developed to make certain medical decisions for themselves, and a court may find a minor sufficiently mature to warrant emancipation. *See*, Abrams *supra* note 1, at 19.

not presumptively protect the conduct regulated by the challenged statutory scheme.

The Majority points out that, under *Bruen*: "The court first decides whether 'the Second Amendment's plain text covers an individual's conduct.' . . . *If it does*, 'the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.'" *See* Majority Op. at II.A (citing *Bruen*, 142 S. Ct. at 2126) (emph. added). Here, because the plain text of the Amendment does *not* protect the conduct of these Appellants, the government does not have a burden to "identify[] a 'founding-era' historical analogue to the modern firearm regulation." *See id.* (citing *Bruen*, 142, S. Ct. at 2130-33).

In that the ordinary Founding-era meaning of the Second Amendment's plain text does not cover these Appellants' conduct, it should not be surprising that the challenged statutory scheme "is consistent with this Nation's historical tradition," *see Bruen*, 142 S. Ct. at 2126. Whether there are any known Founding-era statutes that barred independent firearm ownership or possession by people under 21 would not seem to be determinative of whether the challenged regulation is "consistent" with our Nation's historical tradition. Legislatures tend not to enact laws to address problems that do not exist, and the absence of such laws does not speak to an inconsistency with the Nation's historical tradition or the undisputed Founding-era understanding of the limited rights of infants. As explained above, young people at the Founding bore arms only at the pleasure of their guardians, and they had no independent right to petition courts for redress.

Under *Bruen*, it is appropriate to consider the evidence from the Founding and determine if later evidence offers greater proof and context. Between 1856 and 1893, at least 17 states passed laws restricting the sale of firearms to people under 21. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Leg. 1, 192-93. Some restricted non-sale transfers. *Id.* Many included provisions expressly putting the gun rights of minors at the discretion of authority figures. *Id.*; *see also Repository of Historical Gun Laws*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/repository/search-the-repository/. These laws demonstrate that, at least as early as the mid-nineteenth century, legislatures believed they could qualify and, in some cases, abrogate the arms privileges of infants. While these laws cannot independently prove the constitutionality of the challenged laws, they certainly seem to be consistent with the challenged statutory scheme here in that they regulate arms privileges of "infants." But again, the 1791 meaning of the Second Amendment controls, and it appears that the challenged statutory scheme is not inconsistent (and thus is consistent) with this Nation's historical tradition.

III. Conclusion

A review of historical sources reveals that the Second Amendment's plain text does not cover Appellants' conduct because it would have been understood during the Founding-era that Appellants are not "part of 'the people' whom the Second Amendment protects." *See Bruen*, 142 S. Ct. at 2134. Further, the challenged statutory scheme here is "consistent with this Nation's historical tradition." *Id.*

at 2126. Because Pennsylvania's statutory scheme does not violate the Second Amendment of the Constitution, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No.2:20-cv-1582

Hon. William S. Stickman IV

MADISON M. LARA, et al.
Appellants

v.

COMMISSIONER PENNSYLVANIA STATE
POLICE,

OPINION

WILLIAM S. STICKMAN IV, United States District Judge

The Pennsylvania Uniform Firearms Act of 1995, 18 Pa. C.S. §§ 6101–6128, makes it unlawful to carry a concealed firearm without a license unless the individual falls within one of the statutorily enumerated exceptions. 18 Pa. C.S. § 6106(b). Section 6109 of the Act provides that licenses may only be issued to individuals who are at least 21 years old. 18 Pa. C.S. § 6109(b). Generally, Pennsylvanians without a license to carry concealed are free to carry openly (that is, in an unconcealed manner). Their right to

carry openly, however, is not unlimited because under Section 6107 of the Act, the right to do so on public streets and property is limited during a declared state of emergency:

> No person shall carry a firearm, rifle or shotgun upon the public streets or upon public property during an emergency proclaimed by a State or municipal governmental executive unless that person is:
>
> (1) Actively engaged in a defense of that person's life or property from peril or threat.
>
> (2) Licensed to carry firearms under section 6109 (related to licenses) or is exempt from licensing under section 6106(b) (relating to firearms not to be carried without a license).

18 Pa. C.S. § 6107(a)(1)–(2).

Pennsylvania has been in a state of emergency for over three years. Governor Thomas Wolf declared an emergency on January 10, 2018, arising out of the unprecedented level of opioid abuse in the Commonwealth. In March of 2020, a second state of emergency was declared because of the COVID-19 pandemic. Both emergency declarations have been renewed several times and remain in effect. Because of these two ongoing states of emergency, the limitations on open carry set forth in Section 6107 are and have been in place for over three years.

Plaintiffs in this case are three young adults, all of whom are over the age of 18 but not yet 21, and two Second Amendment advocacy groups. Plaintiffs are seeking declaratory, preliminary and permanent injunctive relief because they believe that the emergency declarations have created a situation in which Sections 6106, 6107 and 6109 work together to infringe upon their rights to keep and bear arms guaranteed by the Second Amendment. They contend that these provisions, taken together, "deprive 18-to-20-year-old Pennsylvanians of the right to bear arms in public in any manner." (ECF No. 36, p. 10).

The United States Court of Appeals for the Third Circuit's decision in *United States v. Marzzarella*, 614 F.3d 85 (3d. Cir. 2010), provides a two-step analysis for the examination of an alleged Second Amendment violation. *Id.* at 89. The first step asks whether the alleged violation burdens the Second Amendment or, alternatively, falls within one of the "longstanding" and "presumptively lawful" regulations recognized by *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Id.* at 89–93. If the violation falls within the purview of the Second Amendment, a court must proceed to the next step of the analysis and examine the alleged violation through the lens of, at least, intermediate level scrutiny. *Id.* at 89.

An examination of federal caselaw following *Heller* shows a broad consensus that restrictions on firearm ownership, possession and use for people younger than 21 fall within the types of "longstanding" and "presumptively lawful" regulations envisioned by *Heller* and, thus, fall outside the scope of the Second Amendment. The restrictions at issue in this case are far more limited than Plaintiffs portray and

significantly less restrictive than measures upheld by other federal courts. Even absent direct Third Circuit precedent, the Court believes the cases addressing age-based restrictions—particularly with regard to licensing—embody a view of the Second Amendment's scope that will likely be found consistent with *Heller*. Thus, in light of the consensus on this issue, the Court is not able to proceed to the second balancing prong where it would examine whether there is any significant relationship between the two open-ended and ongoing emergency declarations and the restrictions imposed by Section 6107 (individually and in combination with Sections 6106 and 6109). The Court is compelled, therefore, to grant Defendant's Motion to Dismiss (ECF No. 23).

FACTS AND PROCEDURAL HISTORY

The pertinent facts of this case are narrow and not in dispute. Plaintiffs Madison Lara, Logan Miller and Sophia Knepley are citizens of the Commonwealth who are over the age of 18 but not yet 21.[1] Defendant,

[1] In addition to the three individuals, Plaintiffs include two Second Amendment advocacy groups. Second Amendment Foundation "seeks to preserve the effectiveness of the Second Amendment through education, research, publishing, and legal action programs focused on the constitutional right to possess firearms and the consequences of gun control." (ECF No. 1, ¶ 23). It purports to represent the interest of its 650,000 members, which include thousands of Pennsylvanians, including individual Plaintiffs. (ECF No. 1, ¶ 23). Plaintiff Firearms Policy Coalition, Inc. is dedicated to "defending and promoting the People's rights—especially the fundamental, individual Second Amendment right to keep and bear arms—advancing liberty and restoring freedom." (ECF No. 1, ¶ 24). Individual Plaintiffs are members. These groups have standing to participate in this litigation in the

Colonel Robert Evanchick, is the Commissioner of the Pennsylvania State Police ("PSP") and is alleged by Plaintiffs to be responsible for the "implementation, execution and administration of the laws, regulations, customs, practices, and policies of the PSP and the Commonwealth, inter alia, in relation to the Uniform Firearms Act." (ECF No. 1, ¶ 25).

Each Plaintiff alleges that he or she was never charged with or convicted of a misdemeanor or felony offense, and each asserts that he or she wants to "procure a license to carry firearms and to be able to lawfully transport firearms and/or carry a firearm, including for purposes of self-defense, without violating the law." (ECF No. 1, ¶¶ 20–22). Plaintiffs assert that they are barred from obtaining a license under Section 6109 only because they are not yet 21 years old. Likewise, they assert that their ability to carry a gun without a license has been curtailed under Sections 6106, 6107 and 6109 due to Governor Wolf's declarations of emergency on January 10, 2018 and March 6, 2020, and the continual subsequent and ongoing renewal of those emergency declarations.

On October 16, 2020, Plaintiffs filed their Complaint. (ECF No. 1). On December 1, 2020, they moved for Preliminary Injunction. (ECF No. 11). On January 8, 2021, Defendant responded to the Motion for Preliminary Injunction (ECF No. 25) along with a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) (ECF No. 23). The Motion to Dismiss argues that Plaintiffs' claims should be dismissed because the restrictions at issue are

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interest of their members. *See Sierra Club v. U.S. Env't Prot. Agency*, 972 F.3d 290, 298–99 (3d Cir. 2020).

examples of the "longstanding" and "presumptively legal" measures that *Heller* recognized as consistent with the Second Amendment. In the alternative, they argue that the Court should hold that the restrictions pass scrutiny under the intermediate-level test. The Court conducted a status conference wherein the parties agreed that this case presents a fundamental legal issue and, as such, that both the Motion to Dismiss and the Motion for Preliminary Injunctive relief could be decided on the papers without a hearing or any other record development. (ECF No. 38).

STANDARD OF REVIEW

A motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A plaintiff must allege sufficient facts that, if accepted as true, state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must accept all well-pled factual allegations as true and view them in the light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

The "plausibility" standard required for a complaint to survive a motion to dismiss is not akin to a "probability" requirement but asks for more than sheer "possibility." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). In other words, the complaint's factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations are true even if doubtful in fact. *Twombly*, 550 U.S. at 555. Facial plausibility is present when the plaintiff pleads factual

content that allows a court to draw the reasonable inference that the defendants are liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Even if the complaint's well-pled facts give rise to a plausible inference, that inference alone will not entitle the plaintiff to relief. *Id.* at 682. The complaint must support the inference with facts to plausibly justify that inferential leap. *Id.*

"[A] motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011). Although the Court must accept the allegations in the Complaint as true, it is "not compelled to accept unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citations omitted).

ANALYSIS

In *Heller*, the Supreme Court held that the Second Amendment protects the rights of citizens, as individuals, to keep and bear arms. Two years later, the Court held that the Second Amendment applies to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Since *Heller*, the focus of Second Amendment litigation has been the scope and extent of the right protected by the Amendment or, conversely, the permissible extent of gun regulations in light of the individual right to keep and bear arms.

The *Heller* Court recognized that the Second Amendment "confer[s] an individual right to keep and

bear arms." *Heller*, 554 U.S. at 595. The focus of the Court's holding in *Heller* was that law-abiding citizens are free to "use arms in defense of hearth and home." *Id.* at 635. This has been described as the "core" of the Second Amendment by post-*Heller* cases and commentary. The *Heller* Court declined to explore fully the contours of the liberties enshrined in the Second Amendment and cautioned that it did not believe that the Amendment supported an absolutist view of the right to keep and bear arms. *Id.* at 625–27 ("Like most rights, the right secured by the Second Amendment is not unlimited .... [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms ...."). The Court recognized that certain "longstanding" prohibitions will not only pass muster, but can be viewed as falling outside the scope of the Second Amendment:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626–27. The Court was careful to highlight that the list of "presumptively lawful regulatory measures" was merely illustrative and not exhaustive. *Id.* at 627 n.26. The first challenge faced in post-*Heller* Second Amendment litigation is, therefore, determining

whether a gun restriction falls within the class of "longstanding prohibitions" and "presumptively lawful" regulations that the Supreme Court recognized as falling outside the scope of the liberty protected by the Second Amendment. Only if a restriction implicates the Second Amendment does a court need to determine whether it satisfies the appropriate constitutional scrutiny.

In *Marzzarella*, the Third Circuit outlined a two-part framework for examining post-*Heller* Second Amendment claims. It explained the need for a two-step inquiry in examining Second Amendment challenges:

> We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think the better reading, based on the text and structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms.

Marzzarella, 614 F.3d at 91 (citations and footnote omitted). The Court outlined the framework:

> As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

Id. at 89 (citations and footnote omitted). Thus, a court using the *Marzzarella* framework will first determine whether the restriction falls within the scope of the Second Amendment or, on the other hand, one of the "presumptively lawful regulatory measures" that is outside of the Amendment's scope. If a restriction is found to be within the scope of the Second Amendment, the Court must apply the appropriate level of constitutional scrutiny. Similar two-step analyses have been adopted by other courts in addressing Second Amendment cases. *See, e.g.*, *Heller v. D.C.*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*) (recognizing that certain firearms regulations do not fall within the protection of the Second Amendment, and utilizing a two-step approach to determine constitutionality); *Nat'l Rifle Assoc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives (BATFE)*, 700 F.3d 185, 194 (5th Cir. 2012) (applying two-step inquiry asking whether challenged conduct falls within the scope of the Second Amendment, and determining whether conduct survives scrutiny); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (applying same two-step inquiry).

The *Marzzarella* framework applies to both facial and as-applied Second Amendment challenges. *Binderup v. Att'y Gen. of the U.S.*, 836 F.3d 336, 339 (3d. Cir. 2016) ("In *United States v. Marzzarella* we adopted a framework for deciding facial and as-applied Second-Amendment challenges."). The Third Circuit has explained the difference between facial and as-applied challenges: "[u]nlike a facial challenge, an as-applied challenge 'does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.' " *Id.* at 345 (quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011)). *See also Ayotte v. Planned Parenthood of N. Eng.*, 546 U.S. 320, 329 (2006) (quoting *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)) ("It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.' "). In *Binderup*, the Third Circuit set forth an analytical framework to address the first prong of the *Marzzarella* analysis in an as-applied challenge. Plaintiffs assert a facial challenge to Sections 6106, 6107 and 6109. They argue that these provisions conjunctively result in a "categorically unconstitutional" Second Amendment restriction. (ECF No. 36, p. 25). As such, the Court will address Plaintiffs' challenge through the test as set forth in *Marzzarella*.

A. Sections 6106, 6107 and 6109 of the Pennsylvania Uniform Firearms Act of 1995 are "presumptively lawful regulatory measures" that fall outside the scope of the Second Amendment.

Under the first prong of the *Marzzarella* framework, the Court must determine whether the restrictions forming the basis of Plaintiffs' action fall within the scope of the Second Amendment or, on the contrary, fall within one of the "presumptively lawful regulatory measures" recognized by *Heller* and subsequent caselaw. To do so, the Court must first determine the nature and extent of the restrictions imposed upon Plaintiffs by the three statutory sections in question. While Plaintiffs suggest a near total deprivation of the right of 18-to-20-year-olds to keep and bear arms, a review of the statutory provisions dispels this characterization.

1) The Challenged Statutory Provisions.

Plaintiffs state that Sections 6106, 6107 and 6109, collectively and through their interaction, violate their rights under the Second Amendment. They are careful to point out, however, that they do not challenge any of the sections *individually*. (ECF No. 36, p. 10). Rather, they challenge "the enforcement of the three provisions together, which combine to deprive 18-to-20-year-old Pennsylvanians of the right to bear arms in public *in any manner*." (ECF No. 36, p. 10). They contend that the challenged provisions "bar virtually all 18-to-20-year-old adult Pennsylvanians from carrying loaded, operable firearms for lawful purposes, including the purpose of being prepared to defend themselves and their families from violent assault." (ECF No. 36, p. 10).

An examination of the challenged provisions, individually and read together, shows that the prohibitions effectuated are not as broad as have been characterized by Plaintiffs. There is no question that

Section 6109(b) requires that a person be at least 21 years old to obtain a license to carry a concealed firearm. *See* 18 Pa. C.S. § 6109(b) ("An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm concealed on or about his person or in a vehicle within this Commonwealth."). Pennsylvania generally permits the open (i.e., non-concealed) carrying of firearms without a license. However, that right is limited with respect to public streets and public property in times of declared emergencies by the provisions of Section 6107, which provides:

> No 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 that person is:
>
> (1) Actively engaged in a defense of that person's life or property from peril or threat.
>
> (2) Licensed to carry firearms under section 6109 (relating to licenses) or is exempt from licensing under section 6106(b) (relating to firearms not to be carried without a license).

18 Pa. C.S. § 6107(a)(1)–(2). Section 6107's limitations are location-specific and apply only to public streets and property. Further, the plain language of Section 6107 carves out two classes of exceptions from its limitation on open-carry for: (1) "[those] actively engaged in a defense of that person's life or property from peril or threat; and (2) all of those exceptions in

Section 6106(b) (permitting concealed carry without a license)." 18 Pa. C.S. § 6107(a)(1)–(2).

Section 6106(b) excepts a broad range of persons and activities from the licensure requirement:

> (1) Constables, sheriffs, prison or jail wardens, or their deputies, policemen of this Commonwealth or its political subdivisions, or other law-enforcement officers.
>
> (2) Members of the army, navy, marine corps, air force or coast guard of the United States or of the National Guard or organized reserves when on duty.
>
> (3) The regularly enrolled members of any organization duly organized to purchase or receive such firearms from the United States or from this Commonwealth.
>
> (4) Any persons engaged in target shooting with a firearm, if such persons are at or are going to or from their places of assembly or target practice and if, while going to or from their places of assembly or target practice, the firearm is not loaded.
>
> (5) Officers or employees of the United States duly authorized to carry a concealed firearm.
>
> (6) Agents, messengers and other employees of common carriers, banks, or

business firms, whose duties require them to protect moneys, valuables and other property in the discharge of such duties.

(7) Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person, having in his possession, using or carrying a firearm in the usual or ordinary course of such business.

(8) Any person while carrying a firearm which is not loaded and is in a secure wrapper from the place of purchase to his home or place of business, or to a place of repair, sale or appraisal or back to his home or place of business, or in moving from one place of abode or business to another or from his home to a vacation or recreational home or dwelling or back, or to recover stolen property under section 6111.1(b)(4) (relating to Pennsylvania State Police), or to a place of instruction intended to teach the safe handling, use or maintenance of firearms or back or to a location to which the person has been directed to relinquish firearms under 23 Pa. C.S. § 6108 (relating to relief) or back upon return of the relinquished firearm or to a licensed dealer's place of business for relinquishment pursuant to 23 Pa. C.S. § 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or back upon return of the relinquished firearm or to a location for

safekeeping pursuant to 23 Pa. C.S. § 6108.3 (relating to relinquishment to third party for safekeeping) or back upon return of the relinquished firearm.

(9) Persons licensed to hunt, take furbearers or fish in this Commonwealth, if such persons are actually hunting, taking furbearers or fishing as permitted by such license, or are going to the places where they desire to hunt, take furbearers or fish or returning from such places.

(10) Persons training dogs, if such persons are actually training dogs during the regular training season.

(11) Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

(12) A person who has a lawfully issued license to carry a firearm pursuant to section 6109 (relating to licenses) and that said license expired within six months prior to the date of arrest and that the individual is otherwise eligible for renewal of the license.

(13) Any person who is otherwise eligible to possess a firearm under this chapter and who is operating a motor vehicle which is registered in the person's name

> or the name of a spouse or parent and which contains a firearm for which a valid license has been issued pursuant to section 6109 to the spouse or parent owning the firearm.
>
> (14) A person lawfully engaged in the interstate transportation of a firearm as defined under 18 U.S.C. § 921(a)(3) (relating to definitions) in compliance with 18 U.S.C. § 926A (relating to interstate transportation of firearms).
>
> (15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:
>
> > (i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.
> >
> > (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.
>
> (16) Any person holding a license in accordance with section 6109(f)(3).

18 Pa. C.S. § 6106(b)(1)–(16).

An examination of the exceptions set forth in Sections 6106(b) and 6107 shows that the deprivation effectuated by the interaction of Sections 6106, 6107 and 6109 do not, as Plaintiffs argue, "bar virtually all 18-to-20-year-old adult Pennsylvanians from carrying loaded, operable firearms for lawful purposes, including the purpose of being prepared to defend themselves and their families from violent assault." (ECF No. 36, p. 10). Indeed, the language of Section 6107 specifically permits the use of firearms when "[a]ctively engaged in a defense of that person's life or property from peril or threat." 18 Pa. C.S. § 6107(a)(1). In addition, the exceptions of Section 6106(b) permit firearms to be kept, carried and used without regard to age, licensure or emergency declaration by individuals engaged in a wide range of occupations (peace officers, the armed forces, common carriers, banks, etc.), as well as for recreational purposes, such as target shooting, hunting, furbearing or fishing. Therefore, the threshold question at bar is whether the relatively (compared to other cases discussed below) limited restrictions imposed by the interplay of Sections 6106, 6107 and 6109 facially implicate the Second Amendment.

2) Post-*Heller* cases have found age-based restrictions on the possession and use of firearms to be "presumptively lawful regulatory measures."

The operative question in examining the first prong of the *Marzzarella* framework is whether age-related restrictions on carrying firearms—which, nevertheless, permit carrying for a broad range of purposes including the defense of "life or property from peril or threat" and a range of other activities—are the

kind of "presumptively lawful regulatory measures" recognized by Heller that fall outside the scope of the Second Amendment. The Third Circuit has not yet addressed age-related gun restrictions in light of Heller. However, federal courts from other circuits and districts recognize a broad range of age-related restrictions as falling within the class of "presumptively lawful regulatory measures" that are, therefore, outside the scope of the Second Amendment.

In *BATFE*, the United States Court of Appeals for the Fifth Circuit upheld a federal statute and regulations that prohibited firearms dealers from selling handguns to persons under the age of 21. *BATFE*, 700 F.3d at 200–11. As here, the challengers were law-abiding adults who were, nevertheless, not yet 21 years old. Id. at 188. The Fifth Circuit first explained that it would use the same two-step framework employed by the Third Circuit in *Marzzarella*. *Id.* at 194. In doing so, it determined that "the first inquiry is whether the conduct at issue falls within the scope of the Second Amendment right." *Id.*

The Fifth Circuit recognized that Heller did not provide a definitive analysis for what type of regulatory measures are considered "longstanding" or "presumptively lawful." *Id.* at 196. The Court explained that "*Heller* demonstrates that a regulation can been deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *Id.* at 196. The Fifth Circuit cited *Heller II*, in which the Court of Appeals for the District of Columbia explained that "longstanding" can be read to mean that a regulation has "long been accepted by the public [and] is not likely to burden a constitutional right." *Id.* (citing *Heller II*, 670 F.3d at 1253). In other words, under *Heller* and interpreting

cases, a challenged restriction does not have to date from the time of the framing of the Second Amendment. Rather, when viewed as a whole and in context, a restriction will not implicate the Second Amendment if it is within the type of restriction that has long been accepted by the public.

The Fifth Circuit reviewed the history of age-related gun restrictions. It explained that in the early republic, "the term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21, not only to persons under the age of 18." *Id.* at 201. The Fifth Circuit explained that restrictions based on minority were well accepted. Thus, "[i]f a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20 year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20 year-old's right to keep and bear arms." *Id.* at 202. The Fifth Circuit further explained that restrictions on the purchase and use of firearms remained pervasive and accepted throughout the nineteenth and twentieth centuries. *Id.* at 202–03. The Fifth Circuit concluded that the ban on selling handguns to adults under 21 years old fell into the category of "longstanding presumptively valid regulatory measures" that *Heller* excepted from the scope of the Second Amendment. *Id.* at 203 (citation omitted) ("[T]he present ban is consistent with a longstanding tradition of targeting select groups' ability to access and use arms for the sake of public safety. More specifically, the present ban appears consistent with a longstanding tradition of age and safety-based restrictions on the ability to access arms.").

The Fifth Circuit's subsequent decision in *National Rifle Association v. McCraw*, 719 F.3d 338 (5th Cir. 2013), decided only a year after *BATFE*, upheld a Texas law barring 18-to-20-year-olds from carrying handguns in public (either openly or concealed). The challengers argued that the licensing law at issue violated their rights under the Second Amendment because it completely divested them—legal adults—of the right to carry a handgun. *Id.* at 343. As in *BATFE*, the Court held that the age-based restrictions were "longstanding" and "presumptively lawful regulatory measures" that fall outside the scope of the Second Amendment. *Id.* at 347.

The United States District Court for the District of Massachusetts in *Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013), reached the same result as the Fifth Circuit did in *BATFE* and *McCraw*. At issue was a Massachusetts law precluding anyone from possessing a gun without a "firearm identification ("FID") card"[2] and from carrying a gun (in any manner) without a license.[3] *Id.* at 370. Neither could issue to those under 21. *Id.* at 383. The effect was to, generally, ban those under 21 from owning and carrying guns.

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[2] "Massachusetts General Laws chapter 140, section 129B, provides that an individual may not own or possess a firearm in her home or place of business without first obtaining an FID card from her local licensing authority." *Id.* at 373 (citing Mass. Gen. Laws ch. 140 §§ 129B(1), 129(c)).

[3] "Massachusetts General Laws chapter 269, section 10(a) subjects to criminal charges anyone who 'knowingly has in [her] possession ... a firearm, loaded or unloaded ... without ... having in effect a license to carry firearms outside her home or place of business.' " *Id.* at 373 (citing Mass. Gen. Laws ch. 269 § 10(a)(2)).

The District Court explained that *Heller* does not support an "unlimited" reading of the Second Amendment and that "[t]he Supreme Court ... has exhibited a rather favorable posture toward licensure, especially when the practice is used to moderate law and order." *Id.* at 379 (). The Court focused its prong-one *Heller* analysis less on the age issue than on the broad acceptance of licensing requirements of firearm ownership and use. Thus, it held, "[a]bsent evidence to the contrary, [it is] presume[d] that the Commonwealth's regulation of firearms by means of a comprehensive licensing scheme falls within the band of governmental action allowable under the Second Amendment." *Id.* at 380 (footnote omitted).

In *Mitchell v. Atkins*, 483 F. Supp. 3d 985 (W.D. Wash. 2020), the United States District Court for the Western District of Washington rejected a claim that a state law prohibiting the purchase of a semiautomatic assault rifle to people under 21 years old violated the Second Amendment rights of 18-to-20-year-olds.[4] *Id.* at 989–90. In holding that the restrictions were examples of "long-established" and "presumptively lawful regulatory measures," the court acknowledged that "U.S. law has long recognized that age can be decisive in determining rights and obligations. For most of our country's history, 18-to[-]20-year-olds were considered minors or 'infants' without the full legal rights of

[4] The law at issue did not preclude 18-to-20-year-olds from possessing and using semiautomatic assault rifles in certain enumerated exceptions, such as "(1) in their home or business; (2) on real property they control; (3) at competitions or shooting ranges; (4) hunting; (5) anywhere shooting is legal; (6) while on duty in the armed forces; or (7) traveling to or from a place they may legally possess such a weapon." *Id.* at 990 (citing RCW 9.41.240(2), 9.41.042, 9.41.060).

adulthood." *Id.* at 992. Thus:

> Against this historical backdrop, it is unsurprising that laws prohibiting those under 21 from purchasing firearms are longstanding. In the 19th century, 19 states and the District of Columbia enacted laws expressly restricting the ability of individuals under 21 to purchase or use particular firearms in jurisdictions where the age of majority was set at 21. By the early twentieth century, three more states had restricted the purchase or use of particular firearms by persons under 21. Thus by 1923, over half the states then in the union had set 21 as the minimum age for purchase or use of particular firearms.
>
> This long-held tradition of restricting certain firearm rights of 18-to-20-year-olds continues today. Since 1968, federal law has prohibited [federal firearms licensees] from selling handguns to persons under 21. Currently, 17 states and the District of Columbia have parallel or more exacting laws prohibiting those under 21 from purchasing or possessing handguns. And five states also prohibit the sale of *all* long guns—not just [semiautomatic assault rifles or] SARs—to individuals under 21. Prohibiting SAR sales to 18-to-20-year-olds comports with these longstanding laws.

Id. at 992-93 (citations omitted). The district court then examined several *post-Heller* cases in which federal courts held that age-based firearm restrictions fell outside the scope of the Second Amendment. *Id.* at 993–94. It concluded, "[t]hese authorities demonstrate that reasonable age restrictions on the sale, possession, or use of firearms have an established history in this

country." *Id.* at 993. As such, the district court held that the restrictions at issue did not violate the Second Amendment rights of 18-to-20-year-olds. *Id.* at 994.

Even more recently, the United States District Court for the Southern District of California upheld a state law that the challengers characterized as prohibiting 18-to-20-year-olds from purchasing, using, transferring, possessing or controlling any firearm. *Jones v. Becerra*, No. 19-1226, 2020 WL 6449198, at *1–2 (S.D. Cal. Nov. 3, 2020).[5] The district court reviewed the Fifth Circuit's decision in *BATFE* and other post-*Heller* cases and held that "age-based restrictions like the one in [the statute at issue] are longstanding and presumptively [c]onstitutional." *Id.* at *4–5.

Plaintiffs do not cite any federal case that holds that either age-based restrictions imposing limitations on the ability to own or carry firearms, or age-based limitations on the issuance of licenses, facially implicate the Second Amendment under the first step of the *Marzzarella* test and similar tests used in other circuits. Nor is the Court aware of any such case(s). Over twelve years after the Supreme Court's decision in *Heller*, the established consensus of federal appellate and district courts from around the country is that age-based restrictions limiting the rights of 18-

[5] The Court explained that California Penal Code § 27510 "imposed age-based restrictions on the sale, supply, delivery, possession, or control of a firearm." *Id.* at *2. The statute provided limited exceptions for those with a hunting license, active duty members of the military, active duty peace officers and honorably discharged members of the military. *Id.*

20-year-old adults to keep and bear arms fall under the "longstanding" and "presumptively lawful" measures recognized by the Supreme Court in *Heller* as evading Second Amendment scrutiny.

3) The Third Circuit gives broad construction to licensing regimens under *Heller*.

The Third Circuit has not yet addressed age-related restrictions on the possession and use of guns. It has, however, generally given broad construction to *Heller*'s recognition of "longstanding" and "presumptively valid regulatory measures" in the context of licensing requirements. In *Drake v. Filko*, 724 F.3d 426 (3d. Cir. 2013), for example, the Third Circuit examined and upheld a New Jersey statute limiting the issuance of handgun permits to those who could demonstrate a justifiable need.[6] In doing so, the Court observed that even after *Heller*, the law is unclear as to the scope of the Second Amendment outside of the home. *Id.* at 431 ("We reject Appellants' contention that a historical analysis leads *inevitably* to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense."). The Court observed:

> [W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the "core" of the right as identified by *Heller*. We do, however, recognize that the Second

[6] Under the New Jersey licensing regime, individuals who wish to carry a handgun in public for self-defense must first obtain a license. *Id.* at 428 (citing N.J.S.A. § 2C:39-5(b)).

> Amendment's individual right to bear arms *may* have some application beyond the home.

Id. at 431. The Third Circuit ultimately concluded that it was unnecessary to definitively address the scope of the Second Amendment outside the home because licensing requirements, including the challenged justifiable need requirement, "fit[ ] comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense." *Id.* at 433. Thus, "assuming that the Second Amendment confers upon individuals some right to carry arms outside the home, we would nevertheless conclude that the 'justifiable need' standard of the Handgun Permit Law is a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller* and expanded upon in our Court's precedent." *Id.* at 434.

Plaintiffs' claims here relate, in their essence, to restrictions imposed upon them because of their inability to obtain a license to carry a concealed firearm due to their age. In light of the Circuit's position that *Heller* gives states wide latitude on license-based restrictions and the broad consensus of federal courts permitting age-related restrictions, it is not a far stretch of the Third Circuit's position on licensure requirements to predict that it will give wide latitude to the age-based licensing restrictions at issue here.

4) The challenged statutory regimen falls under the class of "longstanding" and "presumptively lawful" regulations permitted by *Heller*.

In analyzing Plaintiffs' claims in light of the caselaw examined above, it is important to restate that they do not challenge any of the relevant provisions of the Pennsylvania Uniform Firearms Act *individually*. They do not, for example, argue that Section 6107, standing alone, is unconstitutional, but only that it is to the extent that Section 6109 limits the issuance of a concealed carry permit to individuals over 21 years old and Section 6106 criminalizes concealed carry and transport without a license. (ECF No. 36, p. 10) ("Plaintiffs do not challenge the carry restrictions under 18 Pa. C.S. §§ 6106, 6109, or those under 18 Pa. C.S. § 6107 standing alone, but instead the enforcement of the three provisions together ...."). They argue that the interaction of these three provisions "combine to deprive 18-to-20-year-old Pennsylvanians of the right to bear arms in public *in any manner*." (ECF No. 36, p. 10).

The real essence of Plaintiffs' claims centers upon the fact that they cannot obtain a concealed-carry license because of their age under the limitations of Section 6109, and to some extent, Section 6107 limits what they can do, vis-à-vis firearms, without a license. If they were able to obtain a license, the basis of their claims would fall away. Thus, the focus of the Court's examination of their claims under the first prong of the *Marzzarella* test must center primarily upon the age-based restriction on their ability to obtain a license more than the resultant restrictions caused by the emergency declarations.

The Third Circuit and many other *post-Heller* decisions have found that licensing requirements are generally viewed as longstanding and presumptively valid restrictions and generally do not implicate the

Second Amendment. Further, there is broad consensus among federal courts that individuals under the age of 21 may face restrictions consistent with the Second Amendment. Indeed, age-based restrictions accepted by courts have included far broader restrictions than those at issue here. The confluence of these two considerations—license and age-centered restrictions—compels the Court to conclude that Pennsylvania's age-based limitation on the issuance of concealed carry licenses falls within the class of "longstanding" and "presumptively lawful regulatory measures" recognized by *Heller* as falling outside the scope of the Second Amendment. Indeed, even as amplified by the restrictions on open-carry imposed by Section 6107, the age-based restrictions are still consistent with, and in some cases significantly less stringent than, measures found to have passed muster in the cases above.

Plaintiffs argue that the restrictions at issue cannot be considered "longstanding" because they do not date to the founding period when the Second Amendment was framed. (ECF No. 36, p. 18). As the Fifth Circuit recognized in *BATFE*, that is not the standard. *See BATFE*, 700 F.3d at 196–97 ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."). None of the cases cited above addressed a statute that dated to the founding era. Indeed, most of the statutes at issue were only decades old, like the provisions of the Pennsylvania Uniform Firearms Act of 1995 at issue here. The question is not whether the challenged laws themselves date to the founding, but rather, only whether they are the sort that have long been accepted as being consistent with the right to keep and bear arms. As the cases above

illustrate, there is no question that age-based restrictions on the ownership, use and, especially, carrying of firearms have a long history in this Country. A strong consensus exists among federal courts that such restrictions fall outside the scope of the rights protected by the Second Amendment. The Court will adhere to that consensus and reach the same result.

Here, the restrictions imposed by Pennsylvania's statutes are much narrower than characterized by Plaintiffs. Plaintiffs (and all 18-to-20-year-olds) are not precluded from "the right to bear arms in public in any manner" as they argue. The limitations only apply to public streets and public property. Further, even there, Plaintiffs are permitted to keep and bear arms for a wide array of purposes, including the defense of their persons and property,[7]

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[7] Plaintiffs recognize that Section 6107 contains a specific exception but argue that it is merely "empty reassurance" because the general provisions of Sections 6106 and 6107 "utterly vitiate the '[a]ctively engaged' in self[-]defense proviso [of Section 6107]." (ECF No. 36, p. 27). The Court recognizes that the scope of the self-defense provision in Section 6107 is undefined by statute or caselaw. In interpreting a Pennsylvania statute, the Court is guided by the Pennsylvania Statutory Construction Act, 1 Pa. C.S. §§ 1501–1504, 1901–1991. Some fundamental principles of the Act are "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable[,]" and "the General Assembly intends the entire statute to be effective and certain." 1 Pa. C.S. § 1922(1)–(2). Indeed, a "bedrock principle of statutory construction requires that a statute 'be construed, if possible, to give effect to all its provisions, so that no provision is mere surplusage." *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 822 A.2d 676, 679 (2003) (quoting 1 Pa. C.S. § 1921(a)). The Court will defer to Pennsylvania's courts to interpret that extent of the self-defense exception of Section 6107 in the context of actual cases exploring its scope and application. For the purposes

hunting, target shooting and a variety of occupation-based purposes. At its core, the Second Amendment protects the right of a citizen to keep and bear arms for self-defense. Pennsylvania's statutes expressly preserve this right, along with other purposes, including sporting and recreational uses of firearms.

In *BATFE* and *McCraw*, the Fifth Circuit held that statutes precluding the sale of handguns and forbidding individuals under 21 from carrying handguns (open or concealed) were examples of "longstanding" and "presumptively lawful regulatory measures." Likewise, the courts in *Powell* and *Jones* found that laws precluding those under 21 from obtaining a firearm identification card and purchasing, using, transferring, possessing or carrying a gun in any manner did not infringe upon the rights protected by the Second Amendment. In light of the consensus amongst federal courts that age-based restrictions—including restrictions more severe than imposed by the Pennsylvania statutes at issue—fall under the class of "longstanding" and "presumptively lawful" regulations recognized in *Heller*, the Court is compelled to find that the age-based restrictions at issue here fall outside the scope of the Second Amendment.[8]

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of this case, the Court will take the language of Section 6107 as written and accept that the restrictions imposed on Plaintiffs by the Pennsylvania Uniform Firearms Act of 1995 include an exception permitting them to use guns in self-defense.

[8] Because the Court holds that the regulations at issue are the type of "longstanding" and "presumptively valid" restrictions that do not implicate the Second Amendment under the first prong of the *Marzzarella* analysis, it is unnecessary for the Court to proceed to an examination of the restrictions under intermediate scrutiny. While respecting that some courts, having found that the first prong was not satisfied, will nevertheless undertake a belt-

CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Complaint. Although not formally styled as such, each of the Counts in Plaintiffs' Complaint invoke 42 U.S.C. § 1983 (ECF No. 1. ¶¶ 93, 106, 119). Although leave to amend is generally to be afforded in cases asserting claims under § 1983, it is not necessary if the Court finds that amendment would be inequitable or futile. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 246 (3d. Cir. 2008). Plaintiffs' claims here fail as a matter of law and cannot be cured by amendment. It would, indeed, be futile. As such, their Complaint is dismissed with prejudice. With the failure of the substantive claims in the Complaint, Plaintiffs' Motion for Preliminary Injunction (ECF No. 11) is DENIED as moot.

BY THE COURT:

/s/ William S. Stickman IV
WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

04/16/2021
Dated

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and-suspenders approach and analyze the second prong, this Court declines to do so. The *Marzzarella* test is sufficiently well established that the Court does not believe there is any question that its disposition under the first prong is, alone, sufficient to decide all of the issues at bar. Thus, proceeding to the second prong for an "even-if" analysis would be an exercise in dicta. To the extent that an appellate court would disagree with the Court's prong-one determination, the Court will address the second prong with the benefit of a more developed record addressing the specific relationship between the restrictions at issue and, for example, states of emergency arising out of opioid addiction and communicable disease.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MADISON M. LARA, *et al.*,
Plaintiffs,
v.
COMMISSIONER PENNSYLVANIA STATE
POLICE,
Defendant.

Civil Action No.2:20-cv-1582
Hon. William S. Stickman IV

ORDER OF COURT

AND NOW, this 16th day of April 2021, IT IS HEREBY ORDERED for the reasons set forth in the Opinion filed this day, the motion for Preliminary Injunction (ECF No. 11) is DENIED and the Motion to Dismiss (ECF No. 23) is GRANTED. All counts against the Defendants are hereby DISMISSED with prejudice. The Clerk of Court is directed to mark this CASE CLOSED.

BY THE COURT:

/s/ William S. Stickman IV
WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MADISON M. LARA, *et al.*,
Plaintiffs,
v.
COMMISSIONER PENNSYLVANIA STATE
POLICE,
Defendant.

Civil Action No.2:20-cv-1582
Hon. William S. Stickman IV

ORDER OF COURT

AND NOW, this 16th day of April 2021, IT IS HEREBY ORDERED that pursuant to Federal Rule of Civil Procedure 58 judgment is entered in favor of Defendant and against Plaintiffs. The Clerk of Court is directed to mark this CASE CLOSED.

BY THE COURT:

/s/ William S. Stickman IV
WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1832

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

v.

COMMISSIONER PENNSYLVANIA STATE POLICE,

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. No. 2-20-cv-01582)
District Judge: Honorable William S. Stickman, IV

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN,

MONTGOMERY-REEVES, CHUNG, and SMITH,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED. Judges Shwartz, Krause, Restrepo, Freeman, Montgomery-Reeves and Chung voted to grant the petition. Judge Krause files the attached dissent.

BY THE COURT

s/ Kent. A. Jordan
Circuit Judge

Date: March 27, 2024

cc: All counsel of record.

* Judge Smith's vote is limited to panel rehearing only.

APPENDIX F

KRAUSE, *Circuit Judge*, dissenting sur denial of rehearing *en banc*.

When they ratified the Second Amendment, our Founders did not intend to bind the nation in a straitjacket of 18th-century legislation, nor did they mean to prevent future generations from protecting themselves against gun violence more rampant and destructive than the Founders could have possibly imagined. At a minimum, one would think that the states' understanding of the Second Amendment at the time of the "Second Founding"[1]—the moment in 1868 when they incorporated the Bill of Rights against themselves—is part of "the Nation's historical tradition of firearms regulation"[2] informing the constitutionality of modern-day regulations.

Indeed, since the Supreme Court tethered their constitutionality to the existence of historical precedent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), we and the other Courts of Appeals have consistently looked to Reconstruction-era, as well as Founding-era sources, and, even as the Supreme Court has acknowledged the "ongoing scholarly debate" about their relevance,[3] it too has relied on Reconstruction-era

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[1] *See, e.g.*, Eric Foner, *The Second Founding: How The Civil War and Reconstruction Remade The Constitution* (2019); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 143 S. Ct. 2141, 2175, 216 L.Ed.2d 857 (2023) (referring to the incorporation of the Bill of Rights as "a Second Founding").

[2] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 2126, 213 L.Ed.2d 387 (2022).

[3] *Id.* at 2138.

sources in each of its recent major opinions on the right to bear arms. Notably, the Supreme Court is expected within the next few months, if not weeks, to issue its next seminal opinion, clarifying its historical methodology in the absence of Founding-era analogues.

Yet despite our own precedent acknowledging the relevance of Reconstruction-era sources, our recognition in an *en banc* opinion just last year that the Supreme Court relies on *both* Founding-era *and* Reconstruction-era sources,[4] and an imminent decision from the Supreme Court that may prove dispositive to this case, the panel majority here announced—over Judge Restrepo's compelling dissent—that all historical sources after 1791 are irrelevant to our Nation's historical tradition and must be "set aside" when seeking out the "historical analogues" required to uphold a modern-day gun regulations.[5] The panel majority then held—based exclusively on 18th-century militia laws and without regard to the voluminous support the statutory scheme finds in 19th-century analogues—that Pennsylvania's prohibition on 18-to-20-year-old youth carrying firearms in public during statewide emergencies is unconstitutional.[6]

The panel majority was incorrect, but more importantly, it erred profoundly in the methodology to

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[4] *Range v. Att'y Gen.*, 69 F.4th 96, 104 (3d Cir. 2023) (*en banc*), *petition for cert. filed sub nom. Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023).

[5] *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 134 (3d Cir. 2024).

[6] *Id.* (discussing Sections 6106, 6107, and 6109 of Pennsylvania's Uniform Firearms Act of 1995, 18 Pa. Cons. Stat. §§ 6101–6128 (2024)).

which it purports to bind this entire Court and with far-reaching consequences. Against this backdrop, we should be granting Pennsylvania's petition for *en banc* review,[7] supported by 17 other states and the District of Columbia as *amici*, or at least holding it *c.a.v.* pending the Supreme Court's decision in *United States v. Rahimi*.[8] But instead, over the objection of nearly half our Court, we are denying it outright.

I respectfully dissent from that denial for four reasons. First, without *en banc* review, the panel majority's pronouncement cannot bind future panels of this Court. We have held Reconstruction-era sources to be relevant in decisions both before and after *Bruen* so, under our case law and our Internal Operating Procedures, *en banc* rehearing is necessary before any subsequent panel can bind our Court to a contrary position.[9] Second, *en banc* review would allow us to apply the proper historical methodology, which would compel a different outcome in this case. Third, *en banc* review is necessary for error correction: Even if we limit ourselves to Founding-era sources, the panel failed to recognize that legislatures in that era were authorized to categorically disarm groups they reasonably judged to pose a particular risk of danger, and Pennsylvania's modern-day judgment that youth

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[7] *See generally* Commissioner's Petition for Rehearing, or, Alternatively, Rehearing *En banc, Lara*, 91 F.4th 122 (No. 21-1832), ECF No. 81.

[8] No. 22-915 (U.S. argued Nov. 7, 2023); *see* Brief of Amici Curiae Illinois et al. in Support of Defendant-Appellee's Petition for Rehearing or Rehearing *En banc, Lara*, 91 F.4th 122 (No. 23-1832), ECF No. 82 (explaining the wide-ranging impact of the divided panel's majority opinion for states across the country).

[9] *See* 3d Cir. I.O.P. 9.1.

under the age of 21 pose such a risk is well supported by evidence subject to judicial notice. And fourth, the majority's narrow focus on the Founding era demands rehearing because it ignores the Supreme Court's recognition that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[10] For each of these reasons, discussed in turn below, *en banc* review should be granted.

A. *En banc* Consideration Is Necessary Before Our Court Can Adopt the Panel Majority's Novel Methodology.

Confronted with 19th-century regulations supporting the constitutionality of Pennsylvania's statutory scheme, the panel majority took the position that it could simply "set aside" that evidence based on its pronouncement that "the Second Amendment should be understood according to its public meaning in 1791," rather than "according to [its] public meaning in 1868." *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 134 (3d Cir. 2024). But that novel methodology, which the majority attempted to ground in a "hint" in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022), and inferences from cases *outside* the Second Amendment context, *see Lara*, 91 F.4th at 133, not only contravened *Bruen* and other Supreme Court precedent within the Second Amendment context, *see infra*, but also violated our Internal Operating Procedures by purporting to overrule the holdings of prior panels without either *en*

[10] *Bruen*, 142 S. Ct. at 2131, 2132.

banc review or clear abrogation of our prior precedent by the Supreme Court, *see* 3d Cir. I.O.P. 9.1.

For its part, the Supreme Court has cited to and relied upon Reconstruction-era sources, in addition to Founding-era sources in all of its recent Second Amendment cases—*Bruen* included. Whatever "hint[s]" the panel majority may take from *Bruen, Lara*, 91 F.4th at 133, the Supreme Court there recognized that states are "bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second," and proceeded to consider not just 18th-century analogues but also "[e]vidence from around the adoption of the Fourteenth Amendment," *Bruen*, 142 S. Ct. at 2137, 2150. The Supreme Court has also cited Reconstruction-era sources as relevant historical evidence in its other Second Amendment cases. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010) (Alito, J.) ("[I]t is clear 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."); *Heller*, 554 U.S. at 605 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.").

Until the underlying panel opinion here, our Court, too, has followed the Supreme Court's instruction and consistently relied upon Reconstruction-era sources, alongside Founding-era sources, as relevant historic analogues in defining "the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126; *see, e.g., Frein v. Pa. State Police*, 47 F.4th 247, 255 (3d Cir. 2022) ("Plus, the Fourteenth Amendment's ratifiers understood that it

would stop gun seizures."); *Drummond v. Robinson Township*, 9 F.4th 217, 228 (3d Cir. 2021) ("Some Colonial and Reconstruction Era governments made it illegal to sell guns to enslaved or formerly enslaved people and members of Native American tribes."), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Folajtar v. Att'y Gen.*, 980 F.3d 897, 905 (3d Cir. 2020) (considering statutes from "the turn of the nineteenth century"), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111.

Most recently, our *en banc* opinion in *Range* likewise acknowledged that Reconstruction-era sources are relevant. We acknowledged *Bruen*'s "emphasis on Founding *and* Reconstruction-era sources" and rejected only the notion that a statute enacted "nearly a century after the Fourteenth Amendment's ratification" could be considered "longstanding." *Range v. Att'y Gen.*, 69 F.4th 96, 104 (3d Cir. 2023) (*en banc*) (emphasis added), *petition for cert. filed sub nom. Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023). Thus, both pre-and post-*Bruen*, we—along with other Courts of Appeals[11]—have held

[11] As the First Circuit recently observed, while *Bruen* "indeed indicated that founding-era historical precedent is of primary importance for identifying a tradition of comparable regulation," it also "relied upon how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" and "likewise left open the possibility that late-19th-century evidence and 20th-century historical evidence may have probative value if it does not contradict[ ] earlier evidence." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 51 (1st Cir. 2024) (internal citations and quotation marks omitted)). *See also Antonyuk v. Chiumento*, 89 F.4th 271, 305 (2d Cir. 2023) ("We therefore agree with the decisions of our sister circuits—emphasizing the understanding that prevailed when the States adopted the Fourteenth Amendment—is, along with the

Reconstruction-era sources to be both relevant and informative.

In view of this precedent, *en banc* rehearing is required before *any* subsequent panel has authority to hold—let alone to bind this Court to a holding—that Reconstruction-era sources must henceforth be "set aside," *Lara*, 91 F.4th at 134, when interpreting the Second Amendment. *See* 3d Cir. I.O.P. 9.1 (providing that prior panels' holdings are "binding on subsequent panels" and "no subsequent panel overrules the holding ... of a previous panel" because "Court *en banc* consideration is required to do so.").

The only exception to this well-established rule arises when the "prior panel's holding is in conflict with Supreme Court precedent." *Karns v. Shanahan*, 879 F.3d 504, 514–15 (3d Cir. 2018) (quotation marks omitted). But that is not the case here. Even the *Lara* panel acknowledged it was acting on what it perceived as a "hint" the Supreme Court dropped in *Bruen*, not a holding. *Lara*, 91 F.4th at 133. *Bruen*, in fact,

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understanding of that right held by the founders in 1791, a relevant consideration." (internal citations and quotation marks omitted)), *petition for cert. filed sub nom. Antonyuk v. James*, No. 23-910 (U.S. Feb. 20, 2024); *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011) ("[T]he most relevant historical period for questions about the scope of the Second Amendment as applied to the States is the period leading up to and surrounding the ratification of the Fourteenth Amendment."), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (similar), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) (discussing a "comprehensive survey of the historical record," which included laws from the 19th century), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *see also* Brief of Amici Curiae Illinois et al., *supra* note 7, 12 (collecting cases).

reiterated the "methodological approach to the Second Amendment" that the Court adopted in *Heller*, including its rejection of the notion that Reconstruction-era sources were "illegitimate postenactment legislative history." 142 S. Ct. at 2127 (quotation marks omitted). It also confirmed that examination of sources from that era—including "19th-century cases," congressional and public "discourse after the Civil War," and the understanding of post-Civil War commentators—"was a critical tool of constitutional interpretation" in understanding the Second Amendment. *Id.* at 2127–28 (quotation marks omitted). And although the Court cautioned against giving postenactment history "more weight than it can rightly bear" and noted that it 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," the Court was explicit that it was not resolving the "debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope." *Id.* at 2137–38.

Ironically, the Court appears poised to sway, if not resolve, that debate in its forthcoming decision in *United States v. Rahimi*, No. 22-915 (U.S. argued Nov. 7, 2023). The question presented there is whether prohibiting a domestic abuser from possessing a firearm, under 18 U.S.C. § 922(g)(8), violates the Second Amendment in the absence of comparable Founding-era precedent. Thus, *Rahimi* seems likely to address whether courts evaluating the constitutionality of modern-day legislation may consider developments in the law post-ratification or

are indeed constrained to Founding-era sources.[12] Why, then, are we denying Pennsylvania's petition for review, declining even to hold it *c.a.v.* for *Rahimi*'s forthcoming guidance, and ruling instead based on a supposed "hint" in *Bruen*? Hints and assumptions by the Supreme Court are not holdings, *see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), and neither can justify our denial of rehearing *en banc* when the novel approach of a divided panel purports to overturn our precedent.

In sum, our failure to grant *en banc* rehearing not only creates a circuit split and allows an opinion resting on an invalid premise to stand; it also means the panel majority's holding concerning Reconstruction-era sources will not bind this Court going forward. To the contrary, "where our cases conflict, the earlier is the controlling authority and the latter is ineffective as precedent." *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 290 n.14 (3d Cr. 2021) (cleaned up) (citing 3d Cir. I.O.P. 9.1). The petition for rehearing thus should be granted to secure the uniformity of our Second Amendment case law, or if not granted, at least held *c.a.v.* for the forthcoming opinion in *Rahimi*.

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[12] This petition should be held *c.a.v.* for the additional reason that *Rahimi* appears likely to address one or more other dispositive issues, including who counts among "the People" protected by the Second Amendment; the contours of *Bruen*'s "history and tradition" test; the level of deference we should give legislatures in making categorical, predictive judgments about groups that pose particular risks; what, if any, findings legislatures must make to justify those judgments; and whether evidence of legislative authority to make those judgments includes consensus among the states today. *See generally* Brief for the United States, *Rahimi*, No. 22-915 (U.S. Aug. 14, 2023).

B. *En Banc* Rehearing Is Necessary Because Under the Proper Methodology, Pennsylvania's Statutory Scheme is Constitutional.

Because Reconstruction-era sources are relevant and the panel majority disregarded them, *en banc* rehearing is the only way to conduct the comparative analysis *Bruen* requires. That analysis compels a different outcome. Judge Restrepo catalogued the historical evidence that "[a]t the Founding, people under 21 lacked full legal personhood," so, at the first step of the *Bruen* test, those youth are not among "the people" protected by the text of the Second Amendment. *Lara*, 91 F.4th at 142 (Restrepo, J., dissenting). He also persuasively explained why, even if we reach *Bruen*'s second step and determine whether the regulation is "consistent with the Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2126, Pennsylvania's statutory scheme is constitutional. Among other reasons, he observed that "at least 17 states passed laws restricting the sale of firearms to people under 21" between 1856 and 1893. *See Lara*, 91 F.4th at 147 (Restrepo, J., dissenting) (citing *Bruen*, 142 S. Ct. at 2129–30).

I join that conclusion and offer here some concrete examples of ways that the "how" and "why" of those historical statutes map onto Pennsylvania's.[13]

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[13] Although *Bruen* eschewed a free-standing "means-end scrutiny" or "interest-balancing inquiry" for modern-day regulations, 142 S. Ct. at 2129, it embraced a comparative means-end analysis by directing us to look to "how" (the means) and "why" (the end) historical "regulations burden a law-abiding citizen's right to armed self-defense" and then to consider whether

By way of background, before the Fourteenth Amendment was ratified in 1868, a number of states treated 21 as the age of majority[14] and effectively prevented, or at least hindered, "minors" from even obtaining firearms. *See, e.g.*, 1856 Ala. Laws 17; 1859 Ky. Acts 245, § 23; 1856 Tenn. Pub. Acts 92. Other states adopted similar regulations in the years immediately after ratification, *see, e.g.*, 1875 Ind. Acts 59; 1879 Mo. Rev. Stat. § 1274; 1878 Miss. Laws 175–76,[15] signaling that the generation that incorporated the Second Amendment against the states did not understand it to limit their ability to pass such regulations, *see Bruen*, 142 S. Ct. at 2136–37 (acknowledging that historical examples from the years immediately following ratification can, in some cases, provide evidence about the public understanding of an Amendment). Indeed, a 19th century treatise written by "the most famous" voice on the Second Amendment at the time, *Heller*, 554 U.S. at 616, explained that states "may prohibit the sale of arms to minors," Thomas M. Cooley, *Treatise on Constitutional Limitations* 740 n.4 (5th ed. 1883).

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the "modern ... regulation[ ] impose[s] a comparable burden ... [that] is comparably justified," *id.* at 2133.

[14] *See, e.g., Vincent v. Rogers*, 30 Ala. 471, 473 (1857) (describing a minor as an individual "under twenty-one years of age"); *Warwick v. Cooper*, 37 Tenn. (5 Sneed) 659, 660–61 (1858) (referring to 21 as the age of majority); *Newland v. Gentry*, 57 Ky. (18 B. Mon.) 666, 671 (1857) (referring to 21 as the age of majority); 1879 Mo. Rev. Stat. § 2559 (explaining that a male is a minor until he turns 21, and a female is a minor until she turns 18).

[15] *See also Jones v. Bonta*, 34 F.4th 704, 740 (9th Cir. 2022) (collecting statutes), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022).

By broadly criminalizing any attempt to convey a firearm to those under the age of 21, these statutes effectively prevented young citizens not just from carrying publicly in times of emergency, but from possessing firearms at all. Thus, as to "how" these prohibitions burdened the right to bear arms, the 18th-century laws were far more onerous than Pennsylvania's, which prohibits such youth only from carrying publicly during statewide emergencies, *see* 18 Pa. Cons. Stat. §§ 6106, 6107, 6109. If the generation that incorporated the Bill of Rights against the states believed that states could constitutionally impose *more burdensome* gun regulations on this age group, *a fortiori* it would have viewed Pennsylvania's more limited prohibition as constitutional.

In terms of "why" the statutes were enacted, these Reconstruction-era laws again are comparable to Pennsylvania's statutory scheme—certainly more so than the Founding-era militia statutes on which the panel majority relied. As I discuss in greater detail in Section D, *infra*, interpersonal gun violence "was not a problem in the Founding era that warranted much attention," in large part because the firearms that our Founders possessed simply lacked the capacity of those today to inflict mass casualties in a matter of seconds.[16] By the late 19th century, however, "gun violence had emerged as a serious problem in American life."[17] This

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[16] Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L. J. 1695, 1713 (2012).

[17] Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit*

development was fueled by the mass production of firearms that began during the wave of American industrialization in the mid-19th century,[18] and it was accompanied by renewed efforts to market gun ownership to the average American consumer.[19] It was also driven by "the trauma of the [Civil War] and the enormous increase in the production of guns necessary to supply two opposing armies," which "intensified the problem posed by firearms violence and gave a new impetus to regulation."[20]

In this changed America, "interpersonal gun violence and the collective terrorist violence perpetuated by groups such as the Ku Klux Klan" replaced the "ancient fears of tyrannical Stuart monarchs and standing armies" that preoccupied the Founding generation.[21] Those same concerns about public safety apply to today's America, where increasingly deadly firearms are mass-produced at an

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Schemes in Post-Civil War America, 55 U.C. Davis L. Rev. Online 65, 69 (2021).

[18] James B. Jacobs and Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 Law & Contemp. Probs. 129, 137–38 (2017); *see also* David Yamane, *The Sociology of U.S. Gun Culture*, 11 Sociology Compass 1, 2 (2017) ("The 19th century shift from craft to industrial production, from hand-made unique parts to machine-made interchangeable parts, dramatically increased manufacturing capacities, and gun manufacturing played a central role in this development.").

[19] *See* Pamela Haag, *The Gunning of America: Business and the Making of American Gun Culture* xvii–xxi (2016) (explaining how gun manufacturers employed new marketing strategies to create a civilian market for firearms in the 19th century).

[20] Cornell (2021), *supra* note 17, at 69.

[21] *Id.*

unprecedented rate,[22] and have motivated states like Pennsylvania to regulate the ability of still-maturing young people to carry firearms.[23]

In short, both the "how" and the "why" of Pennsylvania's statute track those of its Reconstruction-era analogues, so *en banc* rehearing would allow us not just to correct the panel's mistaken methodology, but also its mistaken result.

C. *En Banc* Rehearing Is Also Necessary for Proper Consideration of Founding-Era Sources.

Even if we were to follow the majority's approach and "set aside the Commissioner's catalogue of statutes from the mid-to-late nineteenth century," *Lara*, 91 F.4th at 134, *en banc* rehearing is warranted because Pennsylvania's statutory scheme has support in Founding-era history to which we look for a "match ... in principle, not with precision." *Range*, 69 F.4th at 117 (Krause, J., dissenting).

It is by now well established that, as then-Judge Barrett put it, "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety." *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by*

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[22] Glenn Thrush, *U.S. Gun Production Triples Since 2000, Fueled by Handgun Purchases*, The N.Y. Times (Updated June 8, 2022), https://www.nytimes.com/2022/05/17/us/politics/gun-manufacturing-atf.html.

[23] *See, e.g.*, Brief for Illinois, et al. as Amici Curiae Supporting Appellee's Petition for Rehearing, *Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122 (3d Cir. 2024).

Bruen, 142 S. Ct. 2111 (2022). And it was the legislatures of the Founding generation that determined—consistent with the Second Amendment—which groups posed sufficient risk to justify categorical disarmament. *See Range*, 69 F.4th at 115 (Shwartz, J., dissenting) ("[U]nder *Bruen*, the relevant inquiry is why a given regulation, such as a ban based on one's status, was enacted and how that regulation was implemented."); *id.* at 119–128 (Krause, J., dissenting) (cataloguing the historical disarmament of groups that legislatures judged untrustworthy to follow the law).

Pennsylvania exercised such legislative judgment when it decided that those under 21 categorically pose a danger to public safety during times of emergency, and its judgment is entitled to deference—at least where, as here, it is supported by evidence. Modern crime statistics, of which we can take judicial notice,[24] confirm that youth under 21 commit violent gun crimes at a far disproportionate rate. In 2019, for example, although 18-to 20-year-olds made up less than 4% of the U.S. population, they accounted for more than 15% of all homicide and manslaughter arrests.[25] National data collected by the Federal

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[24] Several of the sources that follow are drawn from the District Court record, while others may be considered under Federal Rule of Evidence 201. *See, e.g., Clark v. Governor of N.J.*, 53 F.4th 769, 774 (3d Cir. 2022) (taking judicial notice of publicly available statistics); *Stone v. High Mountain Mining Co., LLC*, 89 F.4th 1246, 1261 n.7 (10th Cir. 2024) (same); *United States v. United Bhd. of Carpenters and Joiners of America, Loc. 169*, 457 F.2d 210, 214 n.7 (7th Cir. 1972) (taking judicial notice of statistics from United States Bureau of Census Reports).

[25] *See* U.S. Dep't of Just., Crime in the United States, Arrests, by Age, 2019, at Table 38, https://ucr.fbi.gov/crime-in-the-

Bureau of Investigation (FBI) also confirms that homicide rates peak between the ages of 18 and 20.[26] Indeed, that age group commits gun homicides at a rate three times higher than adults aged 21 or older.[27] And "[a]dditional studies show that at least one in eight victims of mass shootings from 1992 to 2018 were killed by an 18 to 20-year-old[.]"[28]

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u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-38; U.S. Census Bureau, Age and Sex Composition in the United States: 2019, at Table 1, National Population by Characteristics: 2010-2019, https://www.census.gov/data/tables/2019/demo/age-and-sex/2019-age-sex-composition.html.

[26] *See* Daniel W. Webster et al., *The Case for Gun Policy Reforms in America*, Johns Hopkins Ctr. for Gun Policy & Research 5 (last updated Feb. 5, 2014), http://web.archive.org/web/20160325061021/http:/www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper020514_CaseforGunPolicyReforms.pdf.

[27] Everytown Research & Policy, Everytown for Gun Safety (last updated Mar. 1, 2022), https://everytownresearch.org/stat/eighteen-to-20-year-olds-commit-gun-homicides-at-a-rate-triple-the-rate-of-those-21-and-years-older/; *see also Jones v. Bonta*, 34 F.4th 704, 760 (9th Cir. 2022) (Stein, J., dissenting in part) (noting that 18-to 20-year-olds "commit gun homicides at a rate three times higher than adults above the age of 21"), *vacated on reh'g*, 47 F.4th 1124 (9th Cir. 2022); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 478 (4th Cir. 2021) (Wynn, J., dissenting) (noting that "from 2013 to 2017, young adults aged 18 to 20 committed gun homicides at a rate *nearly four times higher* than adults 21 and older") (alteration in original) (internal citations and quotation marks omitted), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

[28] *Jones*, 34 F.4th at 760 (Stein, J., dissenting in part) (citing Joshua D. Brown and Amie J. Goodin, *Mass Casualty Shooting*

Our understanding of *why* youth commit violent crimes has also evolved dramatically in recent decades, further reinforcing Pennsylvania's legislative judgment that young people pose a particular danger in carrying firearms during states of emergency. We now understand, for example, that those under 21 are uniquely predisposed to impulsive, reckless behavior because their brains have not yet fully developed.[29] Specifically, the prefrontal cortex, which is responsible for impulse control and judgment, is the last part of the brain to fully mature and continues to develop until a person is in their mid-20s.[30] By contrast, the limbic system, which controls emotions like fear, anger, and pleasure, develops far earlier, and young people generally rely heavily on this region of their brains to guide their decision-making.[31]

Venues, Types of Firearms, and Age of Perpetrators in the United States, 1982–2018, 108 Am. J. Pub. Health 1385, 1386 (2018)).

[29] *See also Nat'l Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 210 n. 21 (5th Cir. 2012) ("[M]odern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over."), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111; *Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015) ("The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.") (citation omitted).

[30] *See, e.g.*, Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 453, 456 (2013); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859, 859–60 (1999).

[31] Arain, *supra* note 30, at 453.

As a result, young adults are both uniquely prone to negative emotional states[32] *and* uniquely unable to moderate their emotional impulses. Indeed, while "a 19-year-old might possess a brain that looks 'adult-like' and that supports mature cognitive performance under calm or 'neutral' conditions, that same brain tends to look much more like that of a younger kid when evocative emotions are triggered, resulting in significantly weaker cognitive performance."[33] Unsurprisingly, this combination makes young adults especially prone to reckless and violent behavior.[34]

While the scarcity and limited lethality of their weapons gave our Founding generation little reason to fear the danger of youth gun violence, today's legislatures have good reason to do so. And because that group is especially prone to impulsive, violent behavior, Pennsylvania's legislature reasonably

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[32] Leah H. Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain and Cognition 124, 125 (2010).

[33] *Hirschfeld*, 5 F.4th at 476 (Wynn, J., dissenting) (quoting Jason Chein, *Adolescent Brain Immaturity Makes Pending Execution Inappropriate*, Bloomberg Law (Sept. 17, 2020 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBBCKGKK000000).

[34] Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 Developmental Neuroscience 220, 220 (2014) ("Adolescents commit more crimes per capita than children or adults in the United States and in nearly all industrialized cultures. Their proclivity toward ... risk taking has been suggested to underlie the inflection in criminal activity observed during this time.").

decided that allowing them to carry firearms in public during statewide emergencies, when emotions already run high and violence may be widespread, would pose a particular danger to public safety. That judgment reflects precisely the type of determination that led our Founders to categorically disarm other groups they deemed to be dangerous and puts Pennsylvania's statute comfortably within the Nation's historical tradition even at the "First Founding."

D. Without rehearing, the Majority's Approach Will Leave States Powerless to Address One of Society's Most Pressing Social Concerns.

Interpersonal gun violence, historians agree, was simply not a major concern for the Founding generation.[35] Because the "black powder, muzzle-loading weapons" in that era were "too unreliable and took too long to load," firearms "were not the weapon of choice for those with evil intent[.]"[36] And when we consider that these were "tight-knit" rural communities where "[e]veryone knew everyone else," "word-of-mouth spread quickly," and the population "knew and agreed on what acts were ... permitted and forbidden,"[37] it is not surprising that gun violence "simply was not a problem in the Founding era that warranted much attention and therefore produced no

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[35] Cornell (2012), *supra* note 16, at 1713.

[36] *See* Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 Fordham Urb. L. J. 25, 38 (2023).

[37] *Range v. Att'y Gen.*, 69 F.4th 96, 117 (3d Cir. 2023) (Krause, J., dissenting).

legislation."[38]

In today's America, by contrast—where firearms include automatic assault rifles and high-capacity magazines and our population is mobile, diverse, and largely urban—nearly 50,000 people die from gun-related injuries each year, and over 80% of murders involve a firearm.[39] Horrific mass shootings have also become a daily occurrence, with over 600 such shootings in 2023 alone,[40] and 82 so far in the first three months of 2024.[41] And as I have explained in Section C, *supra*, the phenomenon of gun violence among those between 18 and 20 presents a particularly troubling new social concern that our Founders had no reason to contemplate.

The Supreme Court anticipated this situation when it recognized in *Bruen* that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868," and it

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[38] Cornell (2012), *supra* note 16, at 1713.

[39] *See, e.g.*, John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW Research Ctr. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.

[40] *See* Molly Bohannon and Ana Faguy, *U.S. Faces Second-Worst Year On Record for Mass Shootings—Nearly 650 Incidents*, Forbes (Dec. 25, 2023 9:22 AM), https://www.forbes.com/sites/mollybohannon/2023/12/25/us-mass-shootings-near-650-this-year-second-worst-total-on-record/?sh=1ef8729669e8.

[41] *See Mass Shootings in 2024*, Gun Violence Archive (last viewed Mar. 22, 2024), https://www.gunviolencearchive.org/reports/mass-shooting.

directed that state laws "implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." 142 S. Ct. at 2132. The panel majority did not heed that counsel, so considerations of federalism and comity also compel *en banc* rehearing.

* * *

The Second Amendment was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," *id.* at 2132 (citation omitted), not to force on modern-day legislatures the fiction that we live in 1791 or to preclude reasonable responses to problems of gun violence that were unfathomable when the Bill of Rights was ratified. And both we and the Supreme Court have held the states' understanding of the Second Amendment when they incorporated it through the Fourteenth Amendment to be relevant and part of "the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. The panel majority decreed the opposite in a decision that violated 3d Cir. I.O.P. 9.1, created a split with our sister circuits, and contravened Supreme Court precedent. Our refusal to grant rehearing *en banc* in this circumstance is all the more perplexing in light of the Supreme Court's imminent opinion in *Rahimi*, which will necessarily bear on the panel's reasoning and may well abrogate it even as the panel's mandate issues.

For all of these reasons, I respectfully dissent from the Court's denial of *en banc* rehearing and, as we are declining to correct our own error, urge the Supreme Court to do so if presented the opportunity.

APPENDIX G

U.S. Const. Amend II provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. Amend XIV provides:

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

18 Pa.C.S. § 6106 provides:

§ 6106. Firearms not to be carried without a license.

(a) Offense defined.--

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

(2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

(b) Exceptions.--The provisions of subsection (a) shall not apply to:

(1) Constables, sheriffs, prison or jail wardens, or their deputies, policemen of this Commonwealth or its political subdivisions, or other law-enforcement officers.

(2) Members of the army, navy, marine corps, air force or coast guard of the

United States or of the National Guard or organized reserves when on duty.

(3) The regularly enrolled members of any organization duly organized to purchase or receive such firearms from the United States or from this Commonwealth.

(4) Any persons engaged in target shooting with a firearm, if such persons are at or are going to or from their places of assembly or target practice and if, while going to or from their places of assembly or target practice, the firearm is not loaded.

(5) Officers or employees of the United States duly authorized to carry a concealed firearm.

(6) Agents, messengers and other employees of common carriers, banks, or business firms, whose duties require them to protect moneys, valuables and other property in the discharge of such duties.

(7) Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person, having in his possession, using or carrying a firearm in the usual or ordinary course of such business.

(8) Any person while carrying a firearm which is not loaded and is in a secure wrapper from the place of purchase to his home or place of business, or to a place of repair, sale or appraisal or back to his home or place of business, or in moving from one place of abode or business to another or from his home to a vacation or recreational home or dwelling or back, or to recover stolen property under section 6111.1(b)(4) (relating to Pennsylvania State Police), or to a place of instruction intended to teach the safe handling, use or maintenance of firearms or back or to a location to which the person has been directed to relinquish firearms under 23 Pa.C.S. § 6108 (relating to relief) or back upon return of the relinquished firearm or to a licensed dealer's place of business for relinquishment pursuant to 23 Pa.C.S. § 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or back upon return of the relinquished firearm or to a location for safekeeping pursuant to 23 Pa.C.S. § 6108.3 (relating to relinquishment to third party for safekeeping) or back upon return of the relinquished firearm.

(9) Persons licensed to hunt, take furbearers or fish in this Commonwealth, if such persons are actually hunting, taking furbearers or fishing as permitted by such license, or are going to the places where they desire to hunt, take furbearers or fish or returning from such places.

(10) Persons training dogs, if such persons are actually training dogs during the regular training season.

(11) Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

(12) A person who has a lawfully issued license to carry a firearm pursuant to section 6109 (relating to licenses) and that said license expired within six months prior to the date of arrest and that the individual is otherwise eligible for renewal of the license.

(13) Any person who is otherwise eligible to possess a firearm under this chapter and who is operating a motor vehicle which is registered in the person's name or the name of a spouse or parent and which contains a firearm for which a valid license has been issued pursuant to section 6109 to the spouse or parent owning the firearm.

(14) A person lawfully engaged in the interstate transportation of a firearm as defined under 18 U.S.C. § 921(a)(3) (relating to definitions) in compliance with 18 U.S.C. § 926A (relating to interstate transportation of firearms).

(15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:

(i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.

(ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.

(16) Any person holding a license in accordance with section 6109(f)(3).

(c) Sportsman's firearm permit.--

(1) Before any exception shall be granted under paragraph (b)(9) or (10) of this section to any person 18 years of age or older licensed to hunt, trap or fish or who has been issued a permit relating to hunting dogs, such person shall, at the time of securing his hunting, furtaking or fishing license or any time after such license has been issued, secure a sportsman's firearm permit from the county treasurer. The sportsman's firearm permit shall be issued immediately and be valid throughout this Commonwealth for a period of five years

from the date of issue for any legal firearm, when carried in conjunction with a valid hunting, furtaking or fishing license or permit relating to hunting dogs. The sportsman's firearm permit shall be in triplicate on a form to be furnished by the Pennsylvania State Police. The original permit shall be delivered to the person, and the first copy thereof, within seven days, shall be forwarded to the Commissioner of the Pennsylvania State Police by the county treasurer. The second copy shall be retained by the county treasurer for a period of two years from the date of expiration. The county treasurer shall be entitled to collect a fee of not more than $6 for each such permit issued, which shall include the cost of any official form. The Pennsylvania State Police may recover from the county treasurer the cost of any such form, but may not charge more than $1 for each official permit form furnished to the county treasurer.

(2) Any person who sells or attempts to sell a sportsman's firearm permit for a fee in excess of that amount fixed under this subsection commits a summary offense.

(d) Revocation of registration.--Any registration of a firearm under subsection (c) of this section may be revoked by the county treasurer who issued it, upon written notice to the holder thereof.

(e) Definitions.--

(1) For purposes of subsection (b)(3), (4), (5), (7) and (8), the term "firearm" shall include any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of the weapon.

(2) As used in this section, the phrase "place of instruction" shall include any hunting club, rifle club, rifle range, pistol range, shooting range, the premises of a licensed firearms dealer or a lawful gun show or meet.

18 Pa.C.S. § 6107 provides:

§ 6107. Prohibited conduct during emergency.

(a) General rule.--No 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 that person is:

(1) Actively engaged in a defense of that person's life or property from peril or threat.

(2) Licensed to carry firearms under section 6109 (relating to licenses) or is exempt from licensing under section 6106(b) (relating to firearms not to be carried without a license).

(b) Seizure, taking and confiscation.--Except as otherwise provided under subsection (a) and notwithstanding the provisions of 35 Pa.C.S. Ch. 73

(relating to Commonwealth services) or any other provision of law to the contrary, no firearm, accessory or ammunition may be seized, taken or confiscated during an emergency unless the seizure, taking or confiscation would be authorized absent the emergency.

(c) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

> "Accessory." Any scope, sight, bipod, sling, light, magazine, clip or other related item that is attached to or necessary for the operation of a firearm.
>
> "Firearm." The term includes any weapon that is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any weapon.

18 Pa.C.S. § 6109 provides:

§ 6109. Licenses.
(a) Purpose of license.--A license to carry a firearm shall be for the purpose of carrying a firearm concealed on or about one's person or in a vehicle throughout this Commonwealth.

(b) Place of application.--An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm concealed on or about his person or in a vehicle within this Commonwealth. If the applicant is a resident of this Commonwealth, he shall make application with the sheriff of the county in

which he resides or, if a resident of a city of the first class, with the chief of police of that city.

(c) Form of application and content.–The application for a license to carry a firearm shall be uniform throughout this Commonwealth and shall be on a form prescribed by the Pennsylvania State Police. The form may contain provisions, not exceeding one page, to assure compliance with this section. Issuing authorities shall use only the application form prescribed by the Pennsylvania State Police. One of the following reasons for obtaining a firearm license shall be set forth in the application: self-defense, employment, hunting and fishing, target shooting, gun collecting or another proper reason. The application form shall be dated and signed by the applicant and shall contain the following statement:

I have never been convicted of a crime that prohibits me from possessing or acquiring a firearm under Federal or State law. I am of sound mind and have never been committed to a mental institution. I hereby certify that the statements contained herein are true and correct to the best of my knowledge and belief. I understand that, if I knowingly make any false statements herein, I am subject to penalties prescribed by law. I authorize the sheriff, or his designee, or, in the case of first class cities, the chief or head of the police department, or his designee, to inspect only those records or documents relevant to information required for this application. If I am issued a license and knowingly become ineligible to legally possess or acquire firearms, I will promptly notify the sheriff of the county in which I reside or, if I reside in a city of the first class, the chief of police of that city.

(d) Sheriff to conduct investigation.--The sheriff to whom the application is made shall:

(1) investigate the applicant's record of criminal conviction;

(2) investigate whether or not the applicant is under indictment for or has ever been convicted of a crime punishable by imprisonment exceeding one year;

(3) investigate whether the applicant's character and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;

(4) investigate whether the applicant would be precluded from receiving a license under subsection (e)(1) or section 6105(h) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms); and

(5) conduct a criminal background, juvenile delinquency and mental health check following the procedures set forth in section 6111 (relating to sale or transfer of firearms), receive a unique approval number for that inquiry and record the date and number on the application.

(e) Issuance of license.--

(1) A license to carry a firearm shall be for the purpose of carrying a firearm concealed on or about one's person or in a vehicle and shall be issued if, after an investigation not to exceed 45 days, it

appears that the applicant is an individual concerning whom no good cause exists to deny the license. A license shall not be issued to any of the following:

(i) An individual whose character and reputation is such that the individual would be likely to act in a manner dangerous to public safety.

(ii) An individual who has been convicted of an offense under the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

(iii) An individual convicted of a crime enumerated in section 6105.

(iv) An individual who, within the past ten years, has been adjudicated delinquent for a crime enumerated in section 6105 or for an offense under The Controlled Substance, Drug, Device and Cosmetic Act.

(v) An individual who is not of sound mind or who has ever been committed to a mental institution.

(vi) An individual who is addicted to or is an unlawful user of marijuana or a stimulant, depressant or narcotic drug.

(vii) An individual who is a habitual drunkard.

(viii) An individual who is charged with or has been convicted of a crime punishable by imprisonment for a term exceeding one year except as provided for in section 6123 (relating to waiver of disability or pardons).

(ix) A resident of another state who does not possess a current license or permit or similar document to carry a firearm issued by that state if a license is provided for by the laws of that state, as published annually in the Federal Register by the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury under 18 U.S.C. § 921(a)(19) (relating to definitions).

(x) An alien who is illegally in the United States.

(xi) An individual who has been discharged from the armed forces of the United States under dishonorable conditions.

(xii) An individual who is a fugitive from justice. This subparagraph does not apply to an individual whose fugitive status is based upon nonmoving or moving summary offense under Title 75 (relating to vehicles).

(xiii) An individual who is otherwise prohibited from possessing, using, manufacturing, controlling, purchasing, selling or transferring a firearm as provided by section 6105.

(xiv) An individual who is prohibited from possessing or acquiring a firearm under the statutes of the United States.

(2) (Deleted by amendment).

(3) The license to carry a firearm shall be designed to be uniform throughout this Commonwealth and shall be in a form prescribed by the Pennsylvania State Police. The license shall bear the following:

(i) The name, address, date of birth, race, sex, citizenship, height, weight, color of hair, color of eyes and signature of the licensee.

(ii) The signature of the sheriff issuing the license.

(iii) A license number of which the first two numbers shall be a county location code followed by numbers issued in numerical sequence.

(iv) The point-of-contact telephone number designated by the Pennsylvania State Police under

subsection (l).

(v) The reason for issuance.

(vi) The period of validation.

(4) The sheriff shall require a photograph of the licensee on the license. The photograph shall be in a form compatible with the Commonwealth Photo Imaging Network.

(5) The original license shall be issued to the applicant. The first copy of the license shall be forwarded to the Pennsylvania State Police within seven days of the date of issue. The second copy shall be retained by the issuing authority for a period of seven years. Except pursuant to court order, both copies and the application shall, at the end of the seven-year period, be destroyed unless the license has been renewed within the seven-year period.

(f) Term of license.–

(1) A license to carry a firearm issued under subsection (e) shall be valid throughout this Commonwealth for a period of five years unless extended under paragraph (3) or sooner revoked.

(2) At least 60 days prior to the expiration of each license, the issuing sheriff shall send to the licensee an application for renewal of license. Failure to receive a renewal application shall not relieve a

licensee from the responsibility to renew the license.

(3) Notwithstanding paragraph (1) or any other provision of law to the contrary, a license to carry a firearm that is held by a member of the United States Armed Forces or the Pennsylvania National Guard on Federal active duty and deployed overseas that is scheduled to expire during the period of deployment shall be extended until 90 days after the end of the deployment.

(4) Possession of a license, together with a copy of the person's military orders showing the dates of overseas deployment, including the date that the overseas deployment ends, shall constitute, during the extension period specified in paragraph (3), a defense to any charge filed pursuant to section 6106 (relating to firearms not to be carried without a license) or 6108 (relating to carrying firearms on public streets or public property in Philadelphia).

(g) Grant or denial of license.--Upon the receipt of an application for a license to carry a firearm, the sheriff shall, within 45 days, issue or refuse to issue a license on the basis of the investigation under subsection (d) and the accuracy of the information contained in the application. If the sheriff refuses to issue a license, the sheriff shall notify the applicant in

writing of the refusal and the specific reasons. The notice shall be sent by certified mail to the applicant at the address set forth in the application.

(h) Fee.--

(1) In addition to fees described in paragraphs (2)(ii) and (3), the fee for a license to carry a firearm is $19. This includes all of the following:

(i) A renewal notice processing fee of $1.50.

(ii) An administrative fee of $5 under section 14(2) of the act of July 6, 1984 (P.L.614, No.127), known as the Sheriff Fee Act.

(2) (Expired).

(3) An additional fee of $1 shall be paid by the applicant for a license to carry a firearm and shall be remitted by the sheriff to the Firearms License Validation System Account, which is hereby established as a special restricted receipt account within the General Fund of the State Treasury. The account shall be used for purposes under subsection (l). Moneys credited to the account and any investment income accrued are hereby appropriated on a continuing basis to the Pennsylvania State Police.

(4) No fee other than that provided by this subsection or the Sheriff Fee Act may be

assessed by the sheriff for the performance of any background check made pursuant to this act.

(5) The fee is payable to the sheriff to whom the application is submitted and is payable at the time of application for the license.

(6) Except for the administrative fee of $5 under section 14(2) of the Sheriff Fee Act, all other fees shall be refunded if the application is denied but shall not be refunded if a license is issued and subsequently revoked.

(7) A person who sells or attempts to sell a license to carry a firearm for a fee in excess of the amounts fixed under this subsection commits a summary offense.

(i) Revocation.--A license to carry firearms may be revoked by the issuing authority for good cause. A license to carry firearms shall be revoked by the issuing authority for any reason stated in subsection (e)(1) which occurs during the term of the permit. Notice of revocation shall be in writing and shall state the specific reason for revocation. Notice shall be sent by certified mail to the individual whose license is revoked, and, at that time, notice shall also be provided to the Pennsylvania State Police by electronic means, including e-mail or facsimile transmission, that the license is no longer valid. An individual whose license is revoked shall surrender the license to the issuing authority within five days of receipt of the notice. An individual whose license is revoked may appeal to the

court of common pleas for the judicial district in which the individual resides. An individual who violates this section commits a summary offense.

(i.1) Notice to sheriff.--Notwithstanding any statute to the contrary:

(1) Upon conviction of a person for a crime specified in section 6105(a) or (b) or upon conviction of a person for a crime punishable by imprisonment exceeding one year or upon a determination that the conduct of a person meets the criteria specified in section 6105(c)(1), (2), (3), (5), (6) or (9), the court shall determine if the defendant has a license to carry firearms issued pursuant to this section. If the defendant has such a license, the court shall notify the sheriff of the county in which that person resides, on a form developed by the Pennsylvania State Police, of the identity of the person and the nature of the crime or conduct which resulted in the notification. The notification shall be transmitted by the judge within seven days of the conviction or determination.

(2) Upon adjudication that a person is incompetent or upon the involuntary commitment of a person to a mental institution for inpatient care and treatment under the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, or upon involuntary treatment of a person as described under section 6105(c)(4), the

judge of the court of common pleas, mental health review officer or county mental health and mental retardation administrator shall notify the sheriff of the county in which that person resides, on a form developed by the Pennsylvania State Police, of the identity of the person who has been adjudicated, committed or treated and the nature of the adjudication, commitment or treatment. The notification shall be transmitted by the judge, mental health review officer or county mental health and mental retardation administrator within seven days of the adjudication, commitment or treatment.

(j) Immunity.--A sheriff who complies in good faith with this section shall be immune from liability resulting or arising from the action or misconduct with a firearm committed by any individual to whom a license to carry a firearm has been issued.

(k) Reciprocity.--

(1) The Attorney General shall have the power and duty to enter into reciprocity agreements with other states providing for the mutual recognition of a license to carry a firearm issued by the Commonwealth and a license or permit to carry a firearm issued by the other state. To carry out this duty, the Attorney General is authorized to negotiate reciprocity agreements and grant recognition of a license or permit to carry a firearm issued by another state.

(2) The Attorney General shall report to the General Assembly within 180 days of the effective date of this paragraph and annually thereafter concerning the agreements which have been consummated under this subsection.

(l) Firearms License Validation System.--

(1) The Pennsylvania State Police shall establish a nationwide toll-free telephone number, known as the Firearms License Validation System, which shall be operational seven days a week, 24 hours per day, for the purpose of responding to law enforcement inquiries regarding the validity of any Pennsylvania license to carry a firearm.

(2) Notwithstanding any other law regarding the confidentiality of information, inquiries to the Firearms License Validation System regarding the validity of any Pennsylvania license to carry a firearm may only be made by law enforcement personnel acting within the scope of their official duties.

(3) Law enforcement personnel outside this Commonwealth shall provide their originating agency identifier number and the license number of the license to carry a firearm which is the subject of the inquiry.

(4) Responses to inquiries by law enforcement personnel outside this Commonwealth shall be limited to the name of the licensee, the validity of the license and any information which may be provided to a criminal justice agency pursuant to Chapter 91 (relating to criminal history record information).

(m) Inquiries.--

(1) The Attorney General shall, not later than one year after the effective date of this subsection and not less than once annually, contact in writing the appropriate authorities in any other state which does not have a current reciprocity agreement with the Commonwealth to determine if:

(i) the state will negotiate a reciprocity agreement;

(ii) a licensee may carry a concealed firearm in the state; or

(iii) a licensee may apply for a license or permit to carry a firearm issued by the state.

(2) The Attorney General shall maintain a current list of those states which have a reciprocity agreement with the Commonwealth, those states which allow licensees to carry a concealed firearm and those states which allow licensees to apply for a license or permit to carry a firearm. This list shall be posted on the

Internet, provided to the Pennsylvania State Police and made available to the public upon request.

(m.1) Temporary emergency licenses.--

(1) A person seeking a temporary emergency license to carry a concealed firearm shall submit to the sheriff of the county in which the person resides all of the following:

(i) Evidence of imminent danger to the person or the person's minor child. For purposes of this subparagraph, the term "minor" shall have the same meaning as provided in 1 Pa.C.S. § 1991 (relating to definitions).

(ii) A sworn affidavit that contains the information required on an application for a license to carry a firearm and attesting that the person is 21 years of age or older, is not prohibited from owning firearms under section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms) or any other Federal or State law and is not currently subject to a protection from abuse order or a protection order issued by a court of another state.

(iii) In addition to the provisions of subsection (h), a temporary

emergency license fee established by the Commissioner of the Pennsylvania State Police for an amount that does not exceed the actual cost of conducting the criminal background check or $10, whichever is less.

(iv) An application for a license to carry a firearm on the form prescribed pursuant to subsection (c).

(2) Upon receipt of the items required under paragraph (1), the sheriff immediately shall conduct a criminal history, juvenile delinquency and mental health record check of the applicant pursuant to section 6105. Immediately upon receipt of the results of the records check, the sheriff shall review the information and shall determine whether the applicant meets the criteria set forth in this subsection. If the sheriff determines that the applicant has met all of the criteria, the sheriff shall immediately issue the applicant a temporary emergency license to carry a concealed firearm.

(3) If the sheriff refuses to issue a temporary emergency license, the sheriff shall specify the grounds for the denial in a written notice to the applicant. The applicant may appeal the denial or challenge criminal records check results

that were the basis of the denial, if applicable, in the same manner as a denial of a license to carry a firearm under this section.

(4) A temporary emergency license issued under this subsection shall be valid for 45 days and may not be renewed. A person who has been issued a temporary emergency license under this subsection shall not be issued another temporary emergency license unless at least five years have expired since the issuance of the prior temporary emergency license. During the 45 days the temporary emergency license is valid, the sheriff shall conduct an additional investigation of the person for the purposes of determining whether the person may be issued a license pursuant to this section. If, during the course of this investigation, the sheriff discovers any information that would have prohibited the issuance of a license pursuant to this section, the sheriff shall be authorized to revoke the temporary emergency license as provided in subsection (i).

(5) The temporary emergency license issued pursuant to this section shall be consistent with the form prescribed in subsection (e)(3), (4) and (5). In addition to the information provided in those paragraphs, the temporary emergency license shall be clearly marked "Temporary."

(6) A person who holds a temporary emergency license to carry a firearm shall have the same rights to carry a firearm as a person issued a license to carry a firearm under this section. A licensee under this subsection shall be subject to all other duties, restrictions and penalties under this section, including revocation pursuant to subsection (i).

(7) A sheriff who issues a temporary emergency license to carry a firearm shall retain, for the entire period during which the temporary emergency license is in effect, the evidence of imminent danger that the applicant submitted to the sheriff that was the basis for the license, or a copy of the evidence, as appropriate.

(8) A person applying for a temporary emergency license shall complete the application required pursuant to subsection (c) and shall provide at the time of application the information required in paragraph (1).

(9) Prior to the expiration of a temporary emergency license, if the sheriff has determined pursuant to investigation that the person issued a temporary emergency license is not disqualified and if the temporary emergency license has not been revoked pursuant to subsection (i), the sheriff shall issue a license pursuant to this section that is effective

for the balance of the five-year period from the date of the issuance of the temporary emergency license. Records and all other information, duties and obligations regarding such licenses shall be applicable as otherwise provided in this section.

(10) As used in this subsection, the term "evidence of imminent danger" means:

(i) a written document prepared by the Attorney General, a district attorney, a chief law enforcement officer, judicial officer or their designees describing the facts that give a person reasonable cause to fear a criminal attack upon the person or the person's minor child. For the purposes of this subparagraph, the term "chief law enforcement officer" shall have the same meaning as provided in 42 Pa.C.S. § 8951 (relating to definitions) and "judicial officer" shall have the same meaning as provided in 42 Pa.C.S. § 102 (relating to definitions).

(ii) a police report.

(m.2) Inconsistent provisions.--Notwithstanding the provisions of section 7506 (relating to violation of rules regarding conduct on Commonwealth property), 75 Pa.C.S. § 7727 (relating to additional limitations on operation) or the act of June 28, 1995 (P.L.89, No.18), known as the Conservation and Natural Resources Act,

and regulations promulgated under that act, a firearm may be carried as provided in subsection (a) by:

(1) a law enforcement officer whose current identification as a law enforcement officer shall be construed as a valid license to carry a firearm; or

(2) any licensee.

(m.3) Construction.--Nothing in this section shall be construed to:

(1) Permit the hunting or harvesting of any wildlife with a firearm or ammunition not otherwise permitted by 34 Pa.C.S. (relating to game).

(2) Authorize any Commonwealth agency to regulate the possession of firearms in any manner inconsistent with the provisions of this title.

(n) Definition.--As used in this section, the term "licensee" means an individual who is licensed to carry a firearm under this section.